Some Recent (and Not so Recent) Trends in American Real Estate Law Affecting the Right to a Brokerage Commission

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SOME RECENT (AND NOT SO RECENT) TRENDS IN AMERICAN REAL ESTATE LAW AFFECTING THE RIGHT TO A BROKERAGE COMMISSION

PETER G. DILLON*

I. THE INTRODUCTION: A SOCIO-ECONOMIC GLANCE

A striking feature of the United States common law system is its seemingly conflicting ability, with respect to a given legal field, to maintain a set of decisional precepts of constancy, while at the same time to permit appreciable growth in their content in the face of developing social and economic realities.

American real estate brokerage law offers a fine illustration of this jurisprudential paradox. Most of its basic tenets are judge-made, having been fashioned over the last one hundred years or so.1 For much of that time, their enduring and imminently serviceable quality has been quite extraordinary. Nevertheless, within the past two decades a judicial restiveness with certain of these principles has been gathering sufficiently to indicate that a reordering of this area of the law is taking place.

From its very beginnings real estate brokerage law has sought as a major end to balance the rights and duties of certain key participants involved in the sale of land, usually the selling landowner and his broker.2 Courts have attempted, in

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defining the functional reciprocity of their relation of agency, to take into account the needs, expectations, interests, and vulnerability of each party.\(^3\)

Since the advent of the nineteenth and into the middle of the twentieth centuries the portrait of the typical real estate broker reveals a person engaged in a somewhat hazardous and remarkably speculative enterprise. The risks and pitfalls inherent in such an economic endeavor are numerous. Traditionally, the broker listing agreement has been termed a *nudum pactum*—a promissory offer looking to a unilateral contract which may be revoked at the will of the principal until the offer is accepted by, and mutual consideration supplied through, the agent's performance of the requested act.\(^4\) Stated less technically, a landowner desiring to place his real property on the market agrees to pay his real estate broker a fee when the broker produces a bona fide purchaser.

While this appears on its surface to pose an innocuous enough set of circumstances, the internal reality is far more complicated. The performance demanded of the broker is in a very fundamental sense an all-or-nothing proposition. In most instances his efforts, no matter how expansive, count for naught unless they yield the intended result. And the intended result is not just procurement of any purchaser, but of one who is ready, willing, and able to take title to the real estate on the terms and conditions specified by the landowner.\(^5\) Unquestionably, there are exceptions to this general proposition, but the rule still predominates.

In addition, the fact that the broker's undertaking is controlled significantly by the terms and conditions of the seller further regulates the broker's activity and in equal measure qualifies the possibility of a successful outcome.

Into this blend must also be worked the historical background of brokers having to function in a marketplace unquestionably favorable to their principals, where sales are relatively few and far between and where selling prices (upon which basis the broker's fee by one formulation or another has invariably

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3. See authorities cited note 2 supra.


5. 12 AM. JUR. 2d *Brokers* § 183 (1964).
been calculated) were modest.\textsuperscript{6} Consideration of the preceding cannot help but invite the inquiry why anyone would seek employment as a real estate agent. Virtually without exception, the risks and burdens appear to be weighted upon the broker.

It is, therefore, small wonder that American courts, when confronted with reality brokerage fact patterns, have been willing, and occasionally even eager, to prefer the broker in their appreciation of such cases.\textsuperscript{7}

But the passage of time is relentless, inevitably bringing with it evolving social and economic conditions. Proving to be not immune to this evolutionary flow are the factors which comprise the relationship, particularly the bargaining positions, of the broker and his land-owning principal. Thus, by the late 1970's the nature of the real estate market and the broker's place in it can be seen as dramatically altered. The volume of land sales in this country has multiplied as the average American has become more mobile.\textsuperscript{8} Not only are more people selling their residences, but they are also selling their residences more than once in a lifetime.\textsuperscript{9} Moreover, the phenomenon of a family owning a second living space for recreational purposes has steadily increased.\textsuperscript{10} Needless to say, commercial transactions

\textsuperscript{6} Between the years 1900 and 1970, the American population grew from 76 million persons to 203.2 million persons. During that same period the total number of occupied housing units, both rental and owned, increased from 15,964,000 to 63,450,000. H.U.D., 1973 \textit{Statistical Yearbook} 303, 317. Additionally, the per capita disposable income for Americans has shown equivalent growth from $317 in 1925 to $3,119 in 1969. \textit{Housing \& Home Financing Agency, 1947 Annual Report} \textit{3}; U.S. Dep't of Commerce, \textit{Statistical Abstract of the United States} \textit{§ 13}, at 387 (1974).


\textsuperscript{8} A concerted search through a variety of potential resource materials has yielded virtually no hard statistical information on the growth of American land sales in the first three-quarters of this century. Nevertheless, common sense dictates acceptance of the fact that such growth not only has occurred but has been impressive. For a statistical analysis of the heightened mobility of persons residing in the United States during the first three-quarters of the present century, see U.S. Bur. of Census, \textit{Historical Statistics of the United States, Colonial Times to 1970, Part I, 87-88, 93-96} (Bicentennial ed. 1975).

\textsuperscript{9} As to the availability of statistical information concerning the growth of residential land sales in this country between 1900 and the late 1970's, see note 8 supra.

\textsuperscript{10} A sense of the growth of second, recreational-type home ownership in this country can be gained by first examining U.S. Dep't of Commerce, \textit{Statistical Abstract of the United States} No. 1047, at 767 (1960), which indicates that in 1940, 678,000 seasonal dwellings (unoccupied units and units temporarily occupied by non-resident persons whose usual residences were elsewhere) were owned, while in 1950 that
involving real property have similarly burgeoned in economic times that permit persons to own more than one home.\textsuperscript{11} Selling prices, too, have amazingly kept pace with this ever-expanding volume—an indication that although more units per acre of property are being supplied, the demand of those ready, willing, and able to purchase has been growing even more rapidly.\textsuperscript{12}

Amidst this propitious state of economic affairs, the brokerage business has grown enormously, both in its membership\textsuperscript{13} and in the sense that it may properly be characterized as a profession. State after American state has recognized this development by promulgating, pursuant to its police power, legislation which imposes material limitations on the conduct of the real estate profession.\textsuperscript{14} Commensurately, those engaged in the business of brokering have attained a heightened level of occupational sophistication. Individually, the members of the profession manifest an increased degree of knowledge, expertise, and specialization in matters pertinent to the sale and purchase of land.\textsuperscript{15} They have banded together, forming associations for their mutual benefit that have considerable economic and political influence.\textsuperscript{16} Evidence of this newly-acquired position of power can be readily found in the fact that customarily the agency listing agreement is contained in a form prepared under the auspices of the local realtor organization.

\textsuperscript{11} As to the availability of statistical information concerning the growth of commercial land sales in this country between 1900 and the late 1970's, see note 8 supra.


\textsuperscript{14} 12 AM. Jur. 2d Brokers § 7 (1964).

\textsuperscript{15} See Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843, 856 (1967).

and supplied by the broker to the principal (again, usually the seller).\textsuperscript{17}

What of the seller? How has his position been affected by the lapse of the last century? We know that he is selling more frequently and realizing more handsome returns in each transaction than in any other period of the economic history of this country.\textsuperscript{18} But in several critical references his lot has remained impressively unchanged. While the overall knowledge and awareness of the typical landowner have no doubt improved correlatively with the educational advancements made by the general public during this span of time, it is debatable whether his understanding of real estate transactions has improved appreciably. Nor can it be seriously entertained that his comprehension of the increasingly complex nature of such transactions, much less his experience and expertise with regard to them, is on a par with most real estate agents. Specifically, on the subjects of zoning requirements, land values, marketability of types of real property, and the availability of financing, is there any real question as to which of these two parties is more knowledgeable?

With such thoughts in mind, there would appear to be little cause to imagine that the outlook and expectations of a vendor interested in conveying his real property have changed much since the late 1800's. In all probability he continues now as then to take for granted that an actual sale is the operative event which will obligate him to compensate the broker for services rendered.\textsuperscript{19}

Irresistible, consequently, is the supposition that interests and requirements deemed deserving of judicial protection, have metamorphosed. And in the spoor of this transition can be seen the need to reassess the value of certain legal rules which have perpetuated rights and duties formerly apportioned between principal and realty agent according to their circumstances in an earlier era.

The foregoing having been said, it would now appear appropriate to begin the task of detailing the relevant propositions of law which have arisen in the course of the decisional history of this subject area.

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\textsuperscript{17} See Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d at 856-57.

\textsuperscript{18} See notes 8-13 supra.

\textsuperscript{19} See, e.g., Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d at 852-53.
Since Oklahoma real estate brokerage law so nicely epitomizes the view of things adopted by the vast number of American jurisdictions. 20 Oklahoma law has been selected as one primary point of reference for this article. Oklahoma cases (and statutes where pertinent) will serve here in a two-fold capacity: providing concrete examples of majority-view rules and standing as a foil against which the challenges of a rapidly emerging minority position will be tested. The legal stance of the states forming this minority, Colorado, Kansas, Louisiana, Massachusetts, New Jersey, Nebraska, Oregon, and Rhode Island, will designate a second, significant point of reference.

II. THE OKLAHOMA PERSPECTIVE AS REPRESENTATIVE OF THE OVERWHELMING NUMBER OF AMERICAN STATES

Before exploring the tension existent between these two views there must first be sketched a legal background against which the seller-real estate agent relationship may be more nearly sighted. As noted, the law of Oklahoma shall provide the medium of expression.

The bond connecting the landowner and his realty broker is essentially contractual. 21 The kind and degree of activity properly exercisable by the agent must be traced to an expression of authority. 22 Unlike many majority view jurisdictions, Oklahoma has not seen fit to mandate that this expression be written. 23 Yet existence of the statement of authority, whether


As suggested in the text, there is no unanimity among majority-view jurisdictions as to whether contracts of this type should be in writing. Numerous states have promulgated a special Statute of Frauds governing the realty brokerage agreement. Wallace, Promissory Liability, supra note 4, at 364 n.60; Note, Real Estate Brokers Contracts in South Carolina, 18 S.C.L.Q. 819, 821 n.13 (1966). But several others, in addition to Oklahoma, have apparently not felt the need to enact such legislation. These states include South Carolina, id. at 821; Illinois, see Comment, In General: Licenses, Regulation and Employment of Brokers, 41 CHI.-KENT L. REV. 41, 46 (1964); Arkansas, see Comment, Real Estate Brokers in Arkansas, 17 ARK. L. REV. 57, 58 (1962); Ohio, see Comment, Real Estate Brokers' Commissions in Ohio, 38 U. CINC.
formally drawn or not, is critical since it demonstrates that the principal has accepted the broker’s acts as his own and as well sets out the terms and conditions of employment with which both parties must live. The broker’s engagement is a “special” agency, and hence the empowering language is strictly controlling. Thus, in the absence of fraud or waiver on the part of the landowner, the broker must perform in substantial conformance with the listing agreement and must do so within the stipulated time limit in order that his efforts may properly be deemed compensable.

It should also be noted in passing that Oklahoma requires a showing that the broker was licensed pursuant to pertinent statutory provisions at the time his services were rendered.

The contractual nexus between the vendor and his agent is generally categorized as either an “open” listing or an “exclusive” one. The identifying terminology is largely descriptive of the differences between the two. An open listing indicates a circumstance where two or more brokers and the owner


24. Acknowledgement of the broker’s efforts as being incident to an agency relationship is likewise vital to the broker’s right to compensation. Should the seller not make this acknowledgement, either initially or in ratification of the agent’s acts, the broker may well be regarded under the law as a volunteer, and hence without a supportable claim for his fee. Kirk v. Exell, 136 Okla. 290, 277 P. 939 (1929); Fay v. Sullens, 15 Okla. 171, 81 P. 426 (1905).


The Commission may, upon its own motion, and shall, upon written complaint filed by any person, investigate the business transactions of any real estate broker or real estate sales associate, and may suspend or revoke any license obtained by false or fraudulent representation, or may suspend or revoke the license of any licensee for cause, which shall be established upon the showing that any licensee if performing or attempting to perform any of the following acts, or is guilty of: . . . (11) Placing a sign on any real estate offering it for sale or for rent without the consent of the owner or his authorized agent.


himself are all trying to conclude a sale of a parcel of land.\textsuperscript{30} Under this arrangement the commission is earned in Oklahoma by the first broker to locate a purchaser ready, willing, and able to buy on the vendor's terms.\textsuperscript{31} Typically, an executed contract of sale signifies that the search is over and that the activities of all others were unavailing.\textsuperscript{32} However, if the seller perfects his own conveyance before one of the brokers has so performed, no brokerage commission is earned.\textsuperscript{33}

In contrast, the exclusive listing contemplates that the named broker shall be the sole, authorized real estate representative of the owner.\textsuperscript{34} Where, moreover, the seller consents to forfeit his personal right to find a suitable buying prospect, the agent is said to have an exclusive right to sell.\textsuperscript{35} If the seller is unwilling to grant so dear a concession, the agent is said to possess an exclusive agency.\textsuperscript{36}

Such distinctions, even though they posit rights and duties of some significance, must nevertheless not be permitted to obscure our understanding of the obligations which stand at the heart of a real estate listing agreement. These are a promise to pay a commission in consideration for the presentment of a bona fide purchaser. But knowing just this is not enough. For, importantly, there still remains the question of what precisely is the requisite act or acts which constitute presentment of such a buyer. In American law, the well-settled response has been formulated variously,\textsuperscript{37} but perhaps never as compactly and lucidly as by the Supreme Court of Texas when it announced:

There are three instances in which, or three methods by which, a broker may earn a commission under an agency contract for the sale or exchange of real estate: (1) by procuring from a purchaser a valid, enforceable contract for the sale or exchange of the properties listed, on the terms proposed by the vendor; (2) by producing a purchaser to whom a sale or

\begin{itemize}
\item \textsuperscript{30} Kennedy & Kennedy v. Vance, 201 Okla. 80, 202 P.2d 214 (1949); Menten v. Richards, 54 Okla. 418, 153 P. 1177 (1915).
\item \textsuperscript{31} See cases cited note 30 supra.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Shorten v. Mueller, 206 Okla. 62, 241 P.2d 187 (1952).
\item \textsuperscript{35} Roberts v. Markham, 26 Okla. 387, 109 P. 127 (1910).
\item \textsuperscript{36} 12 Am. Jur. 2d Brokers § 226 (1964).
\item \textsuperscript{37} See Restatement (Second) of Agency § 445, Comments c-e and § 448, Comments a-d (1958); 12 Am. Jur. 2d Brokers §§ 183, 190, 192 (1964); 12 C.J.S. Brokers §§ 84, 85, 86(b), 91 (1938).
\end{itemize}
exchange is in fact made on terms satisfactory to the vendor; (3) by producing a purchaser ready, able, and willing to buy or exchange on terms specified in the contract of employment, and who offers to do so. 38

Implicit in this pronouncement of the three rules is the idea that, while introduction of a person ready, willing, and able to purchase on the terms stated in the listing is the overall guiding tenet here, the broker, to receive his commission, need not in every case satisfy punctiliously the command of that tenet. Plainly, two other options are afforded the broker, to his distinct advantage.

Inducing accord between the owner and buying prospect as evidenced by a binding, valid contract of sale has regularly been deemed in Oklahoma to entitle the broker to his commission. 39 The particulars of that agreement are of no consequence; that they differ from the agent's authorized instructions will not, without more, interfere with the earning of his fee. 40 The underlying rationale is that the execution of such an agreement by the selling principal in effect ratifies the agent's efforts. 41 For a signed writing enforceable between the buyer and seller is said to establish objectively that the agent has duly performed all things normally expected of him, absent special contractual provisions to the contrary. 42 The seller's act of acceptance operates, moreover, to waive as between principal and agent any objections regarding the qualifications of the buyer which the seller may later raise. 43 Thus, the existence of

38. Radford v. McNeny, 129 Tex. 568, 104 S.W.2d 472, 475 (1937). Oklahoma law, it seems, does not offer as neatly composite a statement of this three-pronged doctrine in a single case. Its decisions, however, have adopted piecemeal each of the three alternative theories of broker recovery. Concerning method (1) delineated in Radford, that is, procuring a contract, see Roberts v. Gardner, Clarke, & Sullivan, 275 P.2d 245 (Okla. 1954); Scott v. Kennedy, 152 Okla. 165, 3 P.2d 907 (1931). Concerning theory (2), that is, presenting a buyer to whom a sale is made, see Debolt v. Pointer, 204 Okla. 167, 228 P.2d 182 (1951); Pitts v. Pitts, 63 Okla. 185, 164 P. 105 (1917). Concerning theory (3), see Wickersham v. Harris, 313 F.2d 468 (10th Cir. 1963); Eastern Okla. Land & Cattle Co. v. Dorris, 549 P.2d 78 (Okla. 1976).


41. Wesson v. Clymer, 112 Okla. 59, 240 P. 314 (1925); McCartney v. Shores, 77 Okla. 273, 188 P. 663 (1920),

42. See cases cited note 41 supra.

a contract of sale fairly arrived at charges the vendor with all
knowledge of his purchasing counterpart's readiness, willingness, and ability which a reasonable investigation would have
produced, whether or not the vendor in fact makes any such
investigative probe. 44

However, such principles do not subsist in Oklahoma law
without limitation. The broker's right to his fee, when founded
on the act of securing an agreement of sale, need only be con-
ceded where the agreement reached has been firmly and finally
settled in all of its material respects. Option contracts, 45 tenta-
itive proposals of negotiation, 46 and circumstances under which
the minds of the seller and potential purchaser have met on
some, but not every, important term of the transaction 47 do not
in the main signify satisfactory performances by the broker.

Another reasonably self-evident exception to the binding
agreement principle is indicated if the contract entered into by
the vendor and buyer imposes illegal obligations on one or both
of them. 48

Since the presence of an enforceable contract is the undeni-
able sine qua non under this first theory, it is also imperative
that the Statute of Frauds, insofar as it requires proper written
evidence of the obligations of the purchaser, be observed. 49 The
agent's dereliction in attending to such details may cause his
services to go unrewarded. 50 However, it should be mentioned
that the failure of the seller to sign a sale agreement which is
otherwise correct and binding on the customer will not defeat
the agent's claim to compensation where owner bad faith and
misconduct are evinced. 51

Suggested in the last sentence is the second avenue open

44. Shorten v. Mueller, 206 Okla. 62, 241 P.2d 187 (1952); Abraham v. Wasaff,
    111 Okla. 165, 239 P. 138 (1925); see 30 OHIO ST. L.J. 600, 601-02 (1969); 13 VILL. L.
    REV. 681, 682 (1968).
    218, 232 P. 31 (1924).
46. Bunnell v. Frederick, 123 Okla. 222, 253 P. 56 (1926); Bateman v. Richard,
    105 Okla. 272, 232 P. 443 (1925).
    (1907).
    Okla. 563, 129 P. 8 (1912).
50. See cases cited note 49 supra.
to the broker for demonstrating competent execution of his agency. If a real property agent is declared the procuring cause of a sale ultimately perfected by his principal during the life of the listing, this too would provide an ample legal basis for demanding a brokerage fee.\textsuperscript{52} Notions of equity and fair dealings pervade this theoretical alternative; justice will simply not tolerate undue machinations by the owner designed to circumvent the broker's right to payment.\textsuperscript{53} Consequently, if the broker has produced a prospect willing to earnestly negotiate with the selling principal but the principal chooses to handle the bargaining directly and a deal is reached, the agent may exact his commission anyway.\textsuperscript{54} The fact that (1) the terms of the agreement so made do not conform precisely to those originally specified by the seller,\textsuperscript{55} or (2) the broker did not himself supervise the negotiations between the seller and purchaser,\textsuperscript{56} or (3) the broker was not present at the closing,\textsuperscript{57} or (4) the seller was not conscious, due to lack of communication between the agent and himself, of the agent's role vis-a-vis the buyer, will not alone preclude a broker recovery.\textsuperscript{58}

Finally, we must consider the third concept in this connection, namely, the doctrine of "ready, willing, and able." In doing so, it is important to reiterate that this catchline encapsulates the fundamental obligation of brokerage service and that the variants of securing an enforceable contract and of being the procuring cause are not only supplemental to it but

\textsuperscript{52} Graham v. Bishop, 428 P.2d 223 (Okla. 1967); Yarborough v. Richardson, 38 Okla. 11, 131 P. 680 (1913). The phrase "procuring cause" has been given the following definition in Oklahoma:

If, after the property is placed in the agent's hands, the sale is brought about or procured by his advertisement and exertions, he will be entitled to his commissions; or if the agent introduces the purchaser, or discloses his name to the seller, and through such introduction or disclosure negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions, though the sale may be made by the owner.

Roberts v. Markham, 26 Okla. at 387, 109 P. at 127.


\textsuperscript{54} Wickersham v. Harris, 313 F.2d 468 (10th Cir. 1963); Roberts v. Markham, 26 Okla. 387, 109 P. 127 (1910).

\textsuperscript{55} Combs v. Langston Inv. Co., 100 Okla. 21, 227 P. 94 (1924); Schlegel v. Fuller, 48 Okla. 134, 149 P. 1118 (1915).

\textsuperscript{56} Wickersham v. Harris, 313 F.2d 468 (10th Cir. 1963); Shelton v. Tapley, 329 P.2d 672 (Okla. 1958).

\textsuperscript{57} 12 C.J.S. Brokers §§ 91, 93 (1938).

\textsuperscript{58} Lasoya Oil Co. v. Jarvis, 191 Okla. 213, 127 P.2d 142 (1942).
also derive their essential relevance from it.

A classic restatement of this doctrine may be gleaned from a recent Oklahoma decision:

In the absence of a stipulation to the contrary between the broker and the vendor, it is the general rule that the broker is entitled to his commission if, acting in good faith, he procures a purchaser willing, able, and ready to take the property upon the terms offered by the vendor. This is so even if the contract is rescinded or the sale otherwise fails because of a defect in landowners' title.59

Continuing in this vein of thought, another Oklahoma decision has the following significant corollary to add:

Where a broker, instead of procuring a person who is ready, able, and willing to accept the terms the principal authorized him to offer at the time of his employment, procures one who makes a counter offer more or less at variance with that of his employer, the latter is at perfect liberty either to accept the proposed party upon the altered terms or to decline to do so. If he accepts, he is legally obligated to compensate the broker for services rendered . . . . But, if he refuses, he incurs no liability whatever for, if he does not see fit to modify his original proposals, the broker can lay no claim to his commissions until he produces a person who is ready, able, and willing to accept the exact terms of his principal. This is true no matter how slight the variance may be between the contract tendered by the broker and that authorized by his employer.60

These excerpts contain the legal norm to which American courts most frequently turn when resolving whether a realty broker's right to receive and his selling principal's duty to pay the agreed commission have mutually arisen. Something else, however, which may not be as obvious from a reading of the above quotations, is that the juristic formula they propound also furnishes the "when" of the accrual of that right and the imposition of that duty. Hence, the standard of "ready, willing, and able" not only functions as a quality check on the broker's actions, but also denotes the distinct moment his fee may legally be declared earned.61

Indeed, in their application of the standard’s time element, majority-view courts have often been stringent. For example, even though a specific agreement has attempted expressly to condition the agent’s compensation upon completion of a sale (as distinguished from production of a purchaser ready, willing, and able to contract on the owner’s terms), the Oklahoma judiciary has shown a marked reluctance to enforce the letter of such conditional language in every case. Its opinions have instead determined, on more than one occasion, that contractual clauses to this effect merely indicate the time when payment was due, rather than when liability was incurred, for the commission. On the other hand, the same court system has elsewhere interpreted documents with similar phrasing to create conditions precedent to liability. One can only surmise that state supreme courts, like the Oklahoma one, regard this as an area prone to ambiguity, the resolution of which is to be accomplished on a case-by-case basis employing the so-called “time versus condition” distinction as an interpretive device. Inherent in these tribunals’ concern is their seeming desire to afford the realty agent a substantial degree of protection against the capriciousness of his principal.

With reliance on the test of “ready, willing, and able” being so paramount, one might imagine that the task of defining these three words of art in Oklahoma jurisprudence has given rise to incisive judicial comment. Unfortunately, the legal forums of this state have not proven to be paradigms of clarity in this reference. They have, nevertheless, shed some light on the subject. While purchaser inability has been found to arise from a failure to possess unencumbered title to real estate in the case of an exchange of properties, Oklahoma

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62. See Nunn v. Barber, 207 Okla. 393, 249 P. 2d 999 (1952); McCartney v. Shores, 77 Okla. 273, 188 P. 663 (1920). Wording which called for a “sale or trade” of defendant landowner’s property was read in these cases to mean that the agency fee was owed simply upon execution by defendant of an agreement with a broker-produced buying candidate.


64. See generally Wallace, Brokers’ Commissions, supra note 2; Wallace, Broker’s Undertaking, supra note 7, at 677-85, 695-97, for a detailed consideration of this problem area.


judges have more frequently understood the term “able” to refer to financial fitness.\textsuperscript{67} This latter construction was attached by the Oklahoma Supreme Court more than fifty years ago when it announced, “‘Able’, within the rule that to be entitled to commissions the broker must produce a customer able, etc., means that he must have the money at the time for the cash payment, and not merely property on which he could raise it.”\textsuperscript{68} However, according to American Oil & Refining Co. \textit{v. Clements}, it is not imperative, when gauging a potential buyer’s monetary capacity, that he have the total sale price in hand on the date of the contract of conveyance so long as he is in a position to proffer whatever payment is then due under its terms.\textsuperscript{69}

Beyond this, the Oklahoma decisions on point are trouble-somely silent.\textsuperscript{70} Although opportunities have been plentiful, there seemingly has been little desire to explore further the definitional bounds of “able,” much less to consider in the first instance “ready” and “willing.”

Connected intimately with the issue of whether a broker has brought forth a suitable buying prospect is the second matter of how Oklahoma courts treat a land transaction left unconsummated. Reflecting back to the passage in \textit{Radford \textit{v. McNeny}} quoted above,\textsuperscript{71} it is clear that the broker, provided his efforts comply with at least one of the three alternatives outlined there, and provided further, that he is not at fault for the failure of a transaction, is entitled to his commission irrespective of such failure.\textsuperscript{72} The seller cannot seek to avoid this liability by pleading that he never received the selling price of, and the purchaser never acquired title to, the parcel of land.

This set of legal conclusions is of course quite proper where a realty sale is aborted by the owner’s willful misconduct, either with or without the complicity of the buyer. Examples of such malfeasance would include the owner’s refusal to enter


\textsuperscript{68} Bateman \textit{v. Richard}, 105 Okla. at 275, 232 P. at 445.

\textsuperscript{69} 99 Okla. 204, 205, 225 P. 349, 350 (1923).

\textsuperscript{70} Insofar as this author’s reasonably thorough research has proceeded.

\textsuperscript{71} See text accompanying note 38 supra.

\textsuperscript{72} Nunn \textit{v. Barber}, 207 Okla. 393, 249 P.2d 999 (1952); McCartney \textit{v. Shores}, 79 Okla. 273, 188 P. 663 (1920).
into a contract of sale or conclude the transaction on the terms stipulated in an existent sale agreement. Oklahoma courts have conventionally found such activity to be in bad faith and have refused to allow it to defeat the broker's right to payment where the latter has become otherwise entitled to it. Handled similarly are misrepresentations or other fraudulent behavior by the seller designed to defeat a prospective deal with a qualified buyer. An identical result is reached if the vendor renders himself incapable of completing obligations incurred under a contract of sale. Decided as well by this train of juridical thought is the situation of a mutual rescission of the instrument for purchase and sale. Absent some act of broker misfeasance, waiver, or consent, the joint cancellation by the selling owner and buyer of the instrument cannot deprive the realty agent of his commission. Nor is the sum owed the broker less than that originally fixed in the listing simply because the seller in this situation elects to receive no moneys or only a portion of the sales price as liquidated damages.

However, judicial opinion in Oklahoma has seen fit to extend this rule well beyond the scope suggested by the preceding comments. Accordingly, it has long been the law that if a defect in the vendor's title defeats a real property sale, the vendor must pay the broker's commission. The distinction between

75. Valberg v. Callaway, 202 Okla. 504, 215 P.2d 543 (1950); Ward v. McKenney, 151 Okla. 242, 4 P.2d 108 (1931). In fact, Oklahoma precedents go so far as to announce that if the broker presents a prospect who is ready, willing, and able to buy on the vendor’s terms, it is unnecessary in order to claim a commission for the agent to physically tender to his principal an enforceable sales agreement signed by the prospect where vendor impropriety has rendered this act a meaningless ceremony. Anderson v. Hill, 196 Okla. 304, 164 P.2d 623 (1945); Equitable Life Assurance Soc'y of United States v. Home, 184 Okla. 542, 88 P.2d 887 (1939).
79. Id.
80. Id.
knowledge and the absence thereof or between intentional fault or negligence on the part of the owner has been judicially ignored.\textsuperscript{82} True, the rule as applied to title cases admits to exceptions.\textsuperscript{83} But, in the final analysis, it can be safely generalized that the agent’s right to a fee, once perfected by accomplishment of the requisite services, remains intact regardless of the status of the owner’s title.\textsuperscript{84} The theory indulged by Oklahoma tribunals to justify this outcome is that the owner by listing his property with a broker impliedly warrants the merchantability of its title to that broker.\textsuperscript{85} In view of the strong likelihood of an owner being unaware of the exact nature of his title and in view of the many, often highly technical deficiencies which may cloud title, the unjustice of this logic—verging, as it does, on strict liability—is dramatic in instances of owner non-culpability.

When, moreover, similar logic encourages application of this precept so that payment of the agency fee is compelled even when a broker-arranged transaction is disappointed by the actions of a third party and without fault on the part of the selling principal, it must \textit{a fortiori} be condemned as singularly inequitable. Nevertheless, that is the current view of Oklahoma law when a prospective buyer of real estate fails or is unable to perform the duties imposed upon him by his agreement to purchase with the owner. The vendor incurs liability notwithstanding his innocence.\textsuperscript{86} Again, the thinking is that the seller, once an agreement with the buyer has been made, assumes the risk as to whether the purchaser will ultimately perform in accordance with that contract.\textsuperscript{87}

One final phase of Oklahoma realty law remains impor-


\textsuperscript{84} \textit{See} cases cited notes 79 & 83 \textit{supra}.


\textsuperscript{86} McCartney v. Shores, 77 Okla. 273, 188 P. 663 (1920).

\textsuperscript{87} \textit{Id.}
tantly in need of exposition. Discernible from the discussion thus far is that the legal relationship between the real estate agent and his principal must be recognized to have exceptional legal, economic, and social implications. The principal initially contacts the broker as one possessing, or at least holding himself out as possessing, certain professional skills and knowledge germane to his calling. His advice is sought and to a greater or lesser degree relied upon once given. He acquires in his course of dealing considerable confidential information concerning the business affairs of his principal. The success of the latter’s venture depends in large measure on the broker’s ability and eagerness to procure the most advantageous bargain.

Quite without amazement, the Oklahoma judicature has long appreciated these attributes of the vendor-broker relation, and has as a consequence made particular declarations on the subject. Specifically, they have determined that the broker has affirmative duties to exercise the utmost good faith on behalf of his seller; to disclose to the latter all known, material information affecting a given transaction; to obtain the highest sales price possible even if it should exceed the listing price term; to avoid uttering false representations in reckless disregard of the truth relative to the financial ability of the purchaser, including those made in mistaken good faith; and finally not to promote his own interests or interests of other persons adverse to those of the vendor. Failure by the real estate agent to abide conscientiously by these fiduciary obligations may result in the loss of his right to a commis-

92. Williams v. Seminole Oil & Gas Co., 171 Okla. 406, 43 P.2d 59 (1935); cf. OKLA. STAT. ANN. tit. 59, § 858-312(2) (West Supp. 1977-1978) (unlawful for a real estate broker to utter “substantial misrepresentation or false promises in the conduct of his business . . . which are intended to influence, persuade or induce others”).
94. W.R. Pickering Lumber Co. v. Sherrit, 105 Okla. 52, 233 P. 179 (1925); Self v. Gilbert, 105 Okla. 140, 231 P. 870 (1924); cf. OKLA. STAT. ANN. tit. 59, § 858-312(3) (West Supp. 1977-1978) (unlawful for a real estate broker to act “for more than one party in a transaction without the knowledge of all parties for whom he acts”).
sion otherwise due him\textsuperscript{95} or in his being held responsible for any damages incurred by his principal due to that failure.\textsuperscript{96}

The Oklahoma Legislature has also taken cognizance of the need for an exacting, businesslike standard of conduct for brokers. In keeping with the modern trend of many states,\textsuperscript{97} Oklahoma has promulgated a statute on the subject.\textsuperscript{98} Previously referenced were portions of this title which declare as a prerequisite to any claim for a commission that the real estate agent be licensed at the time his energies are expended.\textsuperscript{99} Certain other provisions concerning various activities which if engaged in would constitute grounds for suspension or revocation of a real brokerage or sales associate license have also been noted.\textsuperscript{100}

And, taken in its entirety, title 59, section 858-312 of the Oklahoma Statutes, of which the last mentioned provisions are but part, makes one final point here worthy of our attention. Its extensive enumeration of causes for disciplining real agency personnel contains an acknowledgement of the need and wisdom in striving to assure that such personnel behave responsibly toward not only their principals but also toward members of society at large. The very enactment of this title bespeaks an awareness, increasing nationwide in the last several decades, that the profession of real property brokerage materially affects the public interest and welfare in much the same way as medicine, law, and accounting.

III. Noteworthy Imperfections in the Majority View

Left until now has been a deliberation of the problem areas which can be identified in the traditional rules governing the affairs of the property owner and his broker in most American jurisdictions, including Oklahoma.

One extremely telling indicator that something has gone awry in the world of real estate agency is the widely accepted notion that brokerage commission disputes represent a major


\textsuperscript{96} Jones v. Spencer, 197 Okla. 608, 173 P.2d 745 (1946).

\textsuperscript{97} 12 AM. JUR. 2d Brokers § 7 (1964).


\textsuperscript{99} See note 29 supra and accompanying text.

\textsuperscript{100} See notes 27, 92 & 94 supra.
source of litigation in this country.\textsuperscript{101} Various opinions have been set forth to explain this phenomenon.\textsuperscript{102} It is not the plan of this paper to analytically synthesize those opinions or to come to any conclusions as to their persuasiveness. Rather, it is the author’s theme that much of the difficulty in this sphere can be ascribed to the indiscriminate manner with which the majority-view forums have applied the “ready, willing, and able” criterion.

Previously, it has been suggested that courts in this country have long pursued a course of actively shielding the broker—an attitude more than a little motivated by the sometimes unscrupulous and arbitrary ways of the principal.\textsuperscript{103} But the judicial concern shown has proven in many ways to be excessively solicitous. In their haste to aid the cause of the broker these tribunals have not stopped to see the highly significant distinction between a purchaser ready, willing, and able to enter into a sale agreement and one ready, willing, and able to consummate it.\textsuperscript{104} Thus they have stumbled, letting fall the standard of “ready, willing, and able” and thereby seriously impairing the development of American real brokerage law. The harm done can be seen in the following commonly quoted, majority-view passage which unwittingly depicts the atrophied form to which the “ready, willing, and able” rule has been reduced:

[I]t is generally well-recognized that where a real-estate broker procures a customer who is accepted by the principal, and a valid, binding, or enforceable contract is drawn between them, the broker is entitled to his commission, even though the customer fails or refuses to comply with the contract, at least in the absence of a provision making the commission conditional or contingent.\textsuperscript{105}

\textsuperscript{101} Note, Ellsworth Dobbs, Inc. v. Johnson: A Reexamination of the Broker-Buyer-Seller Relationship in New Jersey, 23 Rutgers L. Rev. 83, 83 & n.1 (1968) [hereinafter cited as A Reexamination].  
\textsuperscript{103} See note 7 supra and accompanying text.
\textsuperscript{104} See note 82 supra. See also 30 Ohio St. L.J. 600, 601 (1969).
\textsuperscript{105} Annot., 74 A.L.R.2d 437, 442 (1960) (footnote omitted).
In effect, the execution of an instrument for purchase and sale has displaced the broker's duty to produce a ready, willing, and able customer. At that moment the real estate broker may legally cease to concern himself with whether the transaction proceeds a step closer toward its natural conclusion. He is permitted to so act because his principal's contracting with a prospect generated by him operates legally as an "acceptance" of the prospect, thus relieving the broker of further obligation. In this way the seller becomes saddled with the risk for losses which would accrue if the prospect should later prove to be something other than ready, willing, and able to pay the full purchase price and take title. In the end, it is hard not to describe this all too frequent situation as an exchange of "something-for-nothing."

But why would the courts—reputed sources of justice—continue to perpetuate such anomalous law? The reasons conventionally given in reply are twofold: (1) that in reality the broker's duties normally cease upon the signing of an executory sale agreement since thereafter the signatory parties themselves, or their attorneys, handle whatever other subsequent details need attention and (2) that the earning of a brokerage fee should not be made dependent upon events or activities of persons beyond the broker's control. A third rationale may also be offered—that the owner is better able to bear the hardship of purchaser default since his livelihood is not imminently at stake and he can easily place his property back on the market, adjusting the price to recoup the amount of the commission paid by him in the prior aborted sale.

It is submitted that none of these points are meritorious when viewed from the relative circumstances of the typical seller and broker in the late 1970's.

The idea that nothing more is or ought to be expected from a realty agent in consideration for his fee than to obtain someone mentally and physically competent to sign a contract with the vendor is simply unacceptable. For one thing, this "warm body" approach renders the "ready, willing, and able" doctrine a hollow mockery, as majority-view case law has so unfortun-

106. See notes 42 & 43 supra.
108. See authorities cited note 107 supra.
109. An extrapolation developed by the author from reasons (1) and (2).
ately shown.\textsuperscript{110} Second, it ignores certain significant and almost universally held expectations of the seller.\textsuperscript{111} The seller's goal in listing his house or other property is to consummate its sale, hopefully realizing a fair return on his original investment.\textsuperscript{112} In the event the agent employed is instrumental in closing a transaction, the seller must, of course, remunerate such services.\textsuperscript{113} But typically, the vendor anticipates that the broker's commission will be paid out of the proceeds of the sale, since most vendors lack the funds to otherwise discharge this obligation.\textsuperscript{114}

Nor can it be maintained that the broker is unapprised of the set of expectations harbored by his principal.\textsuperscript{115} Such an argument, even on behalf of the least experienced real estate agent, must be rejected. Indeed, brokers regularly confirm such expectations by their own conduct of delaying until the closing before claiming their fee.\textsuperscript{116} Provisions in listing instruments, moreover, quite routinely state that "in the event said property is sold, [a specified percentage] of the sales price" will be paid to the broker.\textsuperscript{117} That majority-position judges have often interpreted these words to purport something other than what they apparently mean\textsuperscript{118} is entirely missed by the average layman who undertakes the obligations of a listing agreement in order to realize the sale of his real estate.

Another related line of challenge to the logic of reason (1) given above may be followed. Is there not, in so narrow a view of the broker's ambit of responsibility, the distinct potential for conflict of interest on his part? How can he properly embrace his fiduciary duties of utmost good faith, loyalty, and full disclosure if he fails to tell his principal that, regardless of what the listing literally states, liability for his agency fee is rarely premised upon a completed sale, and only then when specific, carefully drafted language is used?\textsuperscript{119} Furthermore, it seems

\textsuperscript{110} See \textit{Let the Buyer Beware}, supra note 102, at 62.
\textsuperscript{111} Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d at 852-53, 855.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} A \textit{Reexamination}, supra note 101, at 83-84.
\textsuperscript{117} 1A \textit{Vernon's Oklahoma Forms} § 973 (West 1971).
\textsuperscript{118} See notes 62-65 supra and accompanying text.
\textsuperscript{119} Comment, \textit{A Reexamination of the Real Estate Broker-Buyer-Seller Relationship}, 18 \textit{Wayne L. Rev.} 1343, 1344 (1972).
naive to imagine that a broker required by law merely to effect a binding sale agreement will still effectively dispatch his trust to obtain the most advantageous price for his principal's land from a financially able buyer.\textsuperscript{120} Presumably, an essential motive in imposing upon the realty broker a fiduciary's standard of behavior is to assure his expeditious and faithful handling of the business matters entrusted to him. If so, it would seem elementary that no real estate agency rule should be fashioned or utilized in contradiction of this objective. Notwithstanding, the law in the overwhelming number of American states may be criticized as encouraging, to a real degree, the agent's pursuit of interests which are at cross-purposes with those of his master.\textsuperscript{121} A broker in these jurisdictions can be seen as engaged in an enterprise, the goal of which does not necessarily coincide with what the vendor reasonably expects will be the end-product of that enterprise.\textsuperscript{122}

In exploring this first ground commonly relied upon to justify the majority position, one final thought should be pondered. Is it proper to assume that all, or even most, sellers and purchasers retain legal counsel when they become involved in real property dealings? Statistics relevant to this question may be impossible to gather, but one feels that even the most ardent champion of the real estate profession would concede that many do not. If this is allowed, it would seem quite appropriate to question a proposition of law which sanctions the premature withdrawal of the offices of the only other professional—the real estate broker—ordinarily associated with land transactions. Observance of this rule cannot but cause the disappointment of any number of land sales because, at least in theory, it would leave the critical closing phase thereof in the hands of the sellers and buyers who often are without expertise in such matters. In practice, however, an even more absurd state of affairs is visible. In the usual case a realty agent does not automatically retreat from a transaction as soon as an agreement of purchase and sale has been concluded.\textsuperscript{123} He instead remains

\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} If anything, the opposite is true. In the last 15 years a controversy has raged nationally as to whether and how much involvement by a realty broker, particularly in the counselling and documentation facets of a land sale, is permissible without
active, regularly attending, in the place of an attorney, to the many details, such as arrangement of title insurance, facilitation of financing, and document preparation, which contribute to and end with the closing of title. Yet curiously, majority-view precepts neither recognize this infrequency of representation by legal counsel nor compel this extensive involvement of the broker.

The second argument presented in justification of these brokerage rules is that a real estate agent’s right to his fee is vulnerable enough, being dependent upon the securing of an executed purpose agreement from one ready, willing, and able. To make that right generally contingent upon the passage of title or other future happenings would needlessly expose the right to even greater risk. Of course, a listing agreement can set this type of a condition precedent if it does so expressly and clearly. But at present such a contingency clause is deemed the exception and not the rule. Again, the reasoning prevails that to permit a contrary result is to unwisely subject the broker to the whims of his principal or the prospect he brings forth.

No truly valid attack on this reasoning can be sustained where the seller seeks incorrectly to deprive the agent of his rightful compensation. If a completed transaction does not take place due to the vendor’s misconduct, clearly he should not be heard to complain that the absence of a sale excuses his obligation to his agent.

Where, however, a sale of land fails for reasons not attributable to the owner, a markedly different circumstance is posed. To then hold the owner responsible for the brokerage commission is to render unjust an already unhappy situation.

violation of state laws regulating the practice of law. For a discussion of this interesting problem, see generally Spelman, Eight Years of “The Accord”, or All Is Sunshine and Light in the Land of the Broker/Lawyer, 64 ILL. B.J. 42 (1975); Note, Unauthorized Practice of Law by Real Estate Brokers in New Jersey: A Call for Compromise, 2 RUT.-CAM. L.J. 322 (1977); Comment, Unauthorized Practice of Law: Attorney v. Real Estate Broker, 7 SANTA CLARA LAW. 132 (1966).

124. See authorities cited note 123 supra.
125. See note 12 supra.
126. Id.
127. See notes 62-64 supra.
128. See generally Wallace, Brokers’ Commissions, supra note 2.
129. See note 12 supra.
130. See notes 73-77 supra.
For what majority-view judiciaries have accomplished by so holding is to find the seller liable in cases where he is in fact without legal fault. As well, this inordinate level of protection granted the broker has led to the singularly illogical extreme of compelling payment of an agent's fee even though nothing has been received by the payor in exchange. One wonders why. The two previously mentioned rationales alone do not seem adequately to justify, much less explain, this incredible but popular judicial stance. The explanation also cannot be found in the further suggested hypothesis that the seller, not his broker, is better able to carry the losses of purchaser default. This speaks more to the symptoms surrounding, rather than the causative factors behind, this decisional doctrine.

Nevertheless, such hypothesizing may offer a clue for understanding this somewhat dubious court behavior. With closer analysis, one senses the dilemma of an American judge in a lawsuit involving a real estate transaction that is frustrated by the actions of the buyer. These facts present the judge with an uncomfortable but predictably resolved choice: either hold an innocent owner liable or leave the equally innocent broker without legal recourse, since as a general rule the latter is not permitted to sue the breaching buyer directly. The absence of contractual privity between the broker and such purchaser is regularly cited as the missing link in any enduring chain of liability that may be welded on behalf of the broker. True, occasional judicial efforts have been made to avoid this quandary. For example, a third party creditor beneficiary theory and the tortious action of business interference have been considered. Yet these and other alternatives eventually revealed deficiencies which precluded their being relied upon as complete, consistently valuable solution models. Despite this predicament, the cases, once presented, demanded resolution. In the end, the courts have been left to opt between the seller or his broker. Knowing, as by now we must, the majority-view's protectionist attitude toward the broker, scant reflection is needed to conclude which of the two has been more frequently preferred.

131. See 30 Ohio State L.J. 600, 603 (1969); A Reexamination, supra note 101, at 103.
133. Id. at 1403-04, 1410-11.
134. Id. at 1397-99.
Hence real estate agency law in this country, replete with its many bothersome imperfections, languishes in this status quo. But as this law, premised on a priority of interests set down long ago when the brokerage profession was a mere hint of its current self, persists in the late 1970's; it raises more questions than it resolves.

Does the judicial favor accorded this profession continue to be just, or even socio-economically desirable? Does the real estate professional still merit this solicitude, or is he not now, in fact, better able than the average seller to bear the risks and burdens of purchaser default? With the collective skills, knowledge, and resources possessed by or readily available to the contemporary broker, how unreasonable is it to minimally require him to locate a customer whose readiness, willingness, and ability he can insure? 135 Should the seller be supposed to have equivalent facilities and expertise to acquire information concerning a buying prospect produced by the agent? 136 Who really is in a better situation to learn about the buyer's qualifications, particularly his financial capabilities? 137 Indeed, how many sellers even recognize the importance of securing something more than superficial data in this respect? Is it, therefore, warranted to charge the landowner constructively with this information, as the law in most states does, simply because he contracts with such purchaser?

But beyond the foregoing queries lies the more fundamental determination of when in the time continuum of a real property transfer the satisfactoriness of a likely buying candidate is most reliably ascertained. The majority view has apparently concluded the proper moment to be at the signing of a contract for sale. The flaws detected in that view, however, lead one to conjecture whether a better rule would employ a later time frame, one which would insist that the broker secure a customer who will both execute as well as complete the contract. 138 For it is indeed questionable if any prospective customer is appropriately "ready, willing, and able" if his performance amounts to anything less. Of equal doubt is whether brokerage service can ever be genuinely satisfactory when it

136. Id.
introduces a prospect who later proves unwilling or incapable of fully meeting the seller's required terms. It is submitted that use of contractual consummation as the critical testing point would vastly improve American real agency law. It would do so by restoring a long absent meaningfulness and vitality to the "ready, willing, and able" yardstick. Further, it would make the duties of a land broker commensurate with his modern, augmented professional status. 139 And, too, it would more closely align those duties with the correlative demands of his fiduciary standing. 140 Such a step is not very far from the rule now observed by most state tribunals, that an agent forfeits his fee, despite an agreement between his principal and a purchaser procured by him, where the agent knew prior to the agreement that the purchaser was financially or otherwise suspect. 141

IV. THE MINORITY VIEWS: PROMISES OF A BETTER SOLUTION MODEL

Actually, an understanding of the relation between a selling landowner and his real estate broker not unlike that just argued for above has long been held in several American states. 142

139. See A Reexamination, supra note 101, at 85-86.
140. Id.
142. In addition to the states discussed in the text there are at least two jurisdictions, the District of Columbia and Alabama, whose reported cases, while generally accepting the majority view, reveal a decision or two pronouncing rules incompatible with that view. Annot., 74 A.L.R.2d 437, 452 (1960).

In Moore v. Burke, 45 A.2d 285 (D.C. Mun. Ct. App. 1946), the court held that the broker earned no commission where the purchaser proved unable to secure the necessary financing to complete the agreement of purchase and sale executed by the seller and the buyer. The court was not called upon to consider arguments that execution of the contract legally amounted to acceptance of the buyer by the seller and that such acceptance operated to waive as between the broker and the seller any question of the buyer's suitability.

Taylor Real Estate & Ins. Co. v. Greene, 274 Ala. 694, 151 So. 2d 397 (1963), determined that the broker earned no commission where the prospect produced by him defaulted, notwithstanding the fact that a contract had been made by the prospect and the vendor. The court reached this conclusion for the reason that the provision in the contract dealing with the brokerage fee did not specifically state that the commission would be collected irrespective of consummation of sale. See also Walmore Inv. Co. v. Farrion-Jackson Realty Co., 218 Ala. 447, 118 So. 665 (1928), which was cited by the court in Greene to support the result announced.
Tracing back deeply into the legal origins\textsuperscript{143} of Colorado are two statutory prescriptions of interest here:

No real estate agent or broker is entitled to a commission for finding a purchaser who is ready, willing, and able to complete the purchase of real estate as proposed by the owner until the same is consummated or is defeated by the refusal or neglect of the owner to consummate the same as agreed upon.\textsuperscript{144}

No real estate agent or broker is entitled to a commission when a proposed purchaser fails or refuses to complete his contract of purchase because of defects in the title of the owner, unless such owner, within a reasonable time, has said defects corrected by legal proceedings or otherwise.\textsuperscript{145}

The Colorado Legislature has visibly determined that the perils of buyer default and of nonconsummation caused by title defects not easily remedied by the landowner are burdens best borne on the shoulders of the brokerage profession. Case law interpreting the first of these companion enactments establishes that, while owner misconduct is not a defense to brokerage commission liability,\textsuperscript{146} the unwillingness or inability of the customer to fully perform is.\textsuperscript{147} In addition, the courts of Colorado will not assume that a purchaser presented by a realty agent to the seller is necessarily "ready, willing, and able" within the meaning of this statute.\textsuperscript{148} The broker must demonstrate at trial the legal sufficiency of his prospect before he may be awarded his commission.\textsuperscript{149}

While a parallel construction relative to section 12-61-202 would appear in order, the decisional opportunity to announce such an interpretation has evidently not arisen.\textsuperscript{150} Colorado courts have concluded, however, without referring to the latter provision, that an owner of jointly held realty who rendered its

\textsuperscript{143} See Ginsberg v. Frankenbergl, 133 Colo. 382, 295 P.2d 1036 (1956).
\textsuperscript{145} Id. at § 12-61-202.
\textsuperscript{149} See cases cited note 148 supra.
\textsuperscript{150} At least insofar as the author's reasonably vigorous research has proceeded.
title unmerchantable by failing to get his wife's consent to a sale could not plead this title defect in defense to a claim for an agency fee where the agent was without knowledge of the joint ownership.\textsuperscript{151}

Contentions of the vulnerable position of the real estate broker and of the absence of direct legal recourse by the broker against a defaulting buyer have seemingly had little impact on either the Colorado Legislature or bench.

Nor has Colorado's minority stance in this aspect of the law been historically unique. Rhode Island, by a series of judicial opinions dating back to 1892,\textsuperscript{152} has maintained a comparable perception of the real estate agent's duty.

This constellation of cases, while acknowledging that a broker is entitled to his commission when he presents a customer ready, willing, and able to purchase on the seller's terms,\textsuperscript{153} has added a new dimension to the doctrine unrecognized in most American states. Accordingly, Rhode Island law presumes that when a broker produces a buying prospect he impliedly represents to his seller that the prospect is financially able, as well as ready and willing, to complete the transaction.\textsuperscript{154} Should the purchaser's subsequent conduct be other than as warranted, no commission has been earned.\textsuperscript{155} But, significantly, the presumption is rebuttable. Where the owner does not depend solely on his agent's representations concerning a potential buyer's credentials, but investigates personally those credentials prior to executing a sale agreement with the buyer, the broker may, by proof of that fact, rebut any averment by the owner that the brokerage fee should not be paid because the buyer defaulted.\textsuperscript{156} Naturally, the Rhode Island courts will not tolerate attempts by a selling principal to frustrate the right of his agent to compensation rightfully owed.\textsuperscript{157}

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\textsuperscript{151} Gray v. Blake, 128 Colo. 381, 262 P.2d 741 (1953).
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{157} Donahue v. Siegelman, 65 R.I. 252, 14 A.2d 653 (1940); Manfredi v. Boss, 50 R.I. 125, 145 A. 442 (1929). The Rhode Island Supreme Court, even though it has not
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On the other hand, they have seen the inconsistency in treating as if identical all cases of uncompleted realty dealings regardless of whose actions—the seller's or the buyer's—precipitated the failure.

A review of pertinent Louisiana law, both judge-made and statutory, yields further grist for the mill of the minority. Louisiana judges, too, categorically distinguish situations evincing seller bad faith from those of buyer inability or unwillingness to perform contractual obligations. Hence, the existence of a binding, valid agreement of conveyance is not a bar to judicial consideration of the suitability of the buyer produced. If the customer ceases or refuses to perform the material terms of the agreement, the vendor cannot be held responsible by his agent.

Louisiana has, furthermore, initiated several other measures in this regard which find no counterpart in either Colorado or Rhode Island. Its judiciary has resolved, in cases of nonperformance of a realty contract, that the party in breach, whether selling owner or purchaser, may be sued by the broker. In extending this relief to the real estate agent these courts have employed a novel theory. Even though the broker may have been initially hired by the vendor, the former becomes, upon procurement of a customer, the agent for both parties. As a result, a dual agency is often legally implied in land dealings involving a single real agent. Authority for this proposition emanates from the Louisiana Civil Code.

spoken frequently on this issue, seems inclined to follow an identical rationale in cases where the collapse of a transfer of land is occasioned by a cloud in the vendor's title. See Morrow v. Gledhill, 43 R.I. 277, 111 A. 712 (1920).

163. LA. CIV. CODE ANN. arts. 3016-3018 (West 1952). These articles operate to impose upon brokers generally the obligations of a so-called "mandatory," including that a broker "who is employed to negotiate a matter between two parties... is considered as the mandatory of both." See id. art. 3016. Defined by LA. CIV. CODE ANN. art. 2985 (West 1952) as one given "a mandate, procurement or letter of attorney" to transact one or more affairs in the name of a second person, this special legal capacity may be traced to France, among other civil law systems, from whence Louisiana
presumably received the concept. Yiannopoulos, Brokerage, Mandate and Agency in Louisiana: Civilian Tradition and Modern Practice, 19 LA. L. Rev. 777, 792 (1959). The language of articles 3016-3018 would appear to extend analogically the activities of a real estate broker. Indeed, the Court of Appeals for the Fourth Judicial Circuit has concluded as much in Treadway v. Piazza, 156 So. 2d 328 (La. Ct. App. 1963), where the following propositions of law were announced:

When a prospective vendor engages the services of a real estate broker, the legal relationship is that of principal and agent. However, once the broker finds a prospective vendee, the broker becomes an agent or mandatory of both parties.

A real estate broker is entitled to recover his commission from the purchaser if the latter fails to complete the agreement due to his lack of good faith in seeking the necessary loan stipulated in the agreement.

Id. at 330 (citation omitted).

There is not, however, total agreement in Louisiana jurisprudence on whether a real estate broker may be properly classified in all, or even most, events as a "mandatory" in the same sense that term is used in the above referenced Civil Code articles. The Yiannopoulos article cautions that ordinarily a "broker," whether of real property or otherwise, does not have the power to negotiate business in the name of his principal, nor bind the latter to a given commercial proposal. Yet, the author continues, such powers are the very hallmark of the mandatory relation. Thus, although occasionally a broker may exercise a mandate (where, for example, a special listing arrangement is drawn up to that effect), it should by no means be assumed that such is the normal case. Yiannopoulos, supra note 163, at 779, 796.

Accepting the Yiannopoulos viewpoint more or less is a recent decision, Leggio v. Realty Mart, Inc., 303 So. 2d 920 (La. Ct. App. 1974), cert. denied, 307 So. 2d 629 (La. 1975), which pronounced:

We further note that a real estate broker, absent a special agreement, has no authority to bind his principal, or to negotiate on his behalf. The real estate broker renders a service by advertising and showing properties which are for sale, and by giving advice or recommendations to his client. We do not believe that the relationship thereby created brings the real estate broker within the purview of the mandate articles of the Civil Code and that his duties are limited to those which can be analogically drawn from L.R.S. 37:1454 and from the customs and practices of real estate brokers in general.

Id. at 923-24.

LA. REV. STAT. ANN. § 37:1454 (West 1974), referenced by the Leggio court, enumerates the "[c]lauses for suspension or revocation of (a) real estate brokerage license," which include:

(2) Acting for more than one party in a transaction without the knowledge and consent of all the parties thereto; or . . . (8) Demanding or accepting a commission as a broker without the knowledge or consent of all parties, when at the same time representing another party in the same transaction in a different capacity for valuable consideration.

Quite obviously, this contradicts the basic assumption in the Treadway opinion that articles 3016-3018 offer conceptual analogues pertinent to resolving real brokerage disputes. The significance of Leggio is, moreover, heightened by virtue of its having been affirmed by memorandum decision of the Louisiana Supreme Court which denied a writ of certiorari with this curt sentence: "On the facts found, the results reached in the judgment of the Court of Appeals is [sic] correct." 307 So. 2d at 629.

An analysis of the facts in these cases would thus appear necessary to see if Leggio in any way impairs the integrity of the Treadway court's assumption relative to articles 3016-3018 upon which it grounded its dual agency rationale. The respective fact patterns turn out to be almost as disparate as the views of the two courts on the applicabil-
Perhaps the most fascinating rule to be found in the Louisiana decisions in point may be summarized as follows: Since a realty brokerage fee can vest only when the agent obtains a customer ready, willing, and able to purchase on the terms stated in the agency listing agreement, a provision in the listing calling for payment of the commission upon execution of a contract of sale is unconscionable where to enforce such provision would call for compensating the agent notwithstanding a default by the purchaser. Viewing this formulation compositely with the other Louisiana principles already catalogued, it seems plain that a broker there cannot lawfully look to the vendor for (or attempt to elicit from the vendor a promise to nevertheless pay) his commission should the transaction go un consummated by reason of the buyer's actions. The broker may, of course, claim what is rightfully his from the actual wrongdoer.

Impressively, the minority stance chosen by Louisiana has enabled it to circumvent an undeniable deficiency in the majority view, that of holding an innocent seller liable to his agent
for the collapse of a real estate sale caused by the buyer, while allowing the real wrongdoer to remain immune from any claim of the injured agent. In its avoidance of this remarkable flaw, the Louisiana legal system has also successfully resisted the temptation to equate the signing of a contract of sale with the procuring of a buyer "ready, willing, and able." That legal system has thus preserved unemasculated the classic standard of purchaser suitability and has guaranteed, in the process, its use as a device for fairness alone.

Very recently five other jurisdictions have come to see the advisability of a position analogous to that of Louisiana. These states, Kansas, New Jersey, Massachusetts, Nebraska, and Oregon, may be perceived as a unity because the law they have so newly adopted in this area is essentially derived from the landmark 1968 New Jersey Supreme Court decision, Ellsworth Dobbs, Inc. v. Johnson. 167 While the New Jersey court did not, in support of its holding, transport en masse pertinent segments of Louisiana jurisprudence, the parallels between the so-called Dobbs rule and Louisiana law are striking. 168 In particular, the points of judicial emphasis revealed in each—liability of the seller and buyer upon buyer default; the appreciation of when a buyer can permissibly be deemed "ready, willing, and able"; and the designation of certain types of listing contract clauses as unconscionable—are importantly alike. Of even greater moment is the uniformity of results achieved decisionally in the two states. 169

The Dobbs facts depict a scenario of owner-broker-purchaser interplay commonly seen in brokerage commission lawsuits. The real property in dispute was placed on the market and listed with plaintiff realtor firm under an open agreement by the owners. The firm eventually produced a prospect


who, after several false starts due to his financial circumstances, executed a contract of sale with the owners. It was alleged by the sellers that, due to the somewhat inauspicious beginnings of their negotiations with this potential buyer, they had sought and received, before finally signing the contract, assurances from the broker that the buyer was solvent.

Against a total purchase price of $250,000, a down payment of $2500 was paid by the purchaser. Under the sale instrument there was to be paid by the sellers a real estate agent's fee equalling "six (6)% on the purchase price . . . , said commission to be paid in consideration of services rendered in consummating this sale." The owners agreed to pay this commission in accordance with an installment schedule tied directly to the terms of the purchase money mortgage given them by the prospective purchaser. At trial, the prospect conceded his awareness of the broker's expectation to be paid a service fee by the vendors if a sale between them and himself was induced by the broker.

Thereafter, the buyer, encountering still further financial problems, asked for an extension of the closing date to which the owners reluctantly agreed. The appointed day to close arrived, but a dispute over the exact amount of money owed by the buyer aborted the transfer. The purported customer sued the sellers for specific performance of the contract of sale and they responded in kind by counterclaim as a defensive gesture against the chance of their being found in breach. The owners also counterclaimed for the disputed sums. A motion by them for summary judgment was granted, with the New Jersey court of first instance issuing a decree for specific performance on or before a date certain. Again, no closing took place; this time the purchaser admitted he was without proper funding.

Coming to the realization that the court decree was an empty victory and their only real choice was to put the property back on the market as soon as possible, the landowners elected to settle with the defaulting party. The lawsuit was dismissed and mutual releases were executed. The owners' right to retain all sums made in downpayment was acknowledged, conditional upon certain future events. As well, they were to receive all technical plans and materials developed by the buyer for his

171. Id. at 849.
proposed subdivision of the land. Finally, the defaulter stipulated to save and hold the selling owners harmless from any legal action commenced by the real estate agency for its compensation. The firm was not a signatory to the settlement documents.

The broker promptly sued the owners for breach of the listing agreement and the failed customer for breach of an implied promise to complete the transaction.\footnote{172}

Up until 1967, it was axiomatic that New Jersey law was consistent with the position adopted by the majority of American jurisdictions.\footnote{173} Thus as the Dobbs case wound its way up through the state’s judicial hierarchy, the lower courts concentrated steadfastly on the fact that an executed contract of purchase and sale was in evidence.\footnote{174} In considering the listing language that controlled payment of the commission, the trial judge regarded it as merely setting the time to which such payment, in its several parts, was postponed.\footnote{175} The judge was satisfied that liability for the brokerage fee was not contingent upon the ability of the customer to secure appropriate financial backing and to complete the sale.\footnote{176} The intermediate court reversed. But it did so on the ground that the trial court had improperly resorted to the plain meaning doctrine for decision of the contractual interpretation questions presented in the case. As a result the court was held to have erred in excluding testimony \textit{aliunde} the agency agreement on the intention and circumstances of the parties relative to the payment of the realtor fee.\footnote{177}

At length, the matter reached the highest New Jersey

\footnote{172. The plaintiff realty company in Dobbs, when it sued directly the defaulting buyer despite the absence of a contractual nexus between them, was evidently relying on the case of Tanner Associates Inc. v. Ciraldo, 33 N.J. 51, 161 A.2d 725 (1960). There the court acknowledged the sufficiency of such a claim by a broker against two defaulting purchasers who neither were his principals nor had agreed to pay his commission. The defendants in Tanner, to further their intention of undertaking several sizeable residential development projects, repeatedly encouraged the broker to locate likely properties for this purpose, but later reneged on a sale agreement arranged by the broker.}


\footnote{175. 223 A.2d at 203.}

\footnote{176. \textit{Id.}}

\footnote{177. \textit{Id.}}
court. What followed was a comprehensive juristic tour de force, climaxing in a wholesale redefinition of New Jersey land brokerage law.

The Dobbs opinion's reevaluation of relevant prior state precedents was advanced under two major headings: (1) "The Seller's Liability to the Broker" and (2) "The Buyer's Liability to the Broker."

The supreme court commenced its analysis of the seller-broker relation by reviewing the historical growth of the term "able" in the context of the "ready, willing, and able" doctrine. It discovered New Jersey case law had practically nothing to contribute to its study of this word. It was nevertheless convinced by a variety of out-of-state sources that financial capacity of the broker-produced purchaser was the chief element of "able."178

The court then launched into a substantial exposition of seller expectations and brokerage practices in these more modern times—both from the perspectives of what "is" as well as what "ought to be." Calling for a "more realistic approach," it concluded that the average seller is reasonable in his anticipation that the prospect produced by a broker will perform fully all promises made and that the broker will be remunerated out of the proceeds of the consummated sale.179 To state as much, said the court, is "entirely consistent with what should be the expectation of a conscientious broker as to the kind of ready, willing, and able purchaser his engagement calls upon him to render."180

The Dobbs court criticized, for placing "the burden on the wrong shoulders," the majority-view precept that accepts an executory contract of sale as the legal equivalent of production of a customer "ready, willing and able."181 It commended a different solutional tack: one which has the agent impliedly warranting to his principal the fitness of a prospect, and which thereby makes an "incident of the broker's business" the duty of establishing affirmatively the prospect's qualification to fulfill all terms of sale.182 Persuasive authority for this portion of

179. Id. at 852.
180. Id. at 852-53.
181. Id. at 853.
182. Id.
its holding was drawn from both Rhode Island and English decisional law.\textsuperscript{183} Intertwined with such deliberations was this very telling statement:

In a practical world, the true test of a willing buyer is not met when he signs an agreement to purchase; it is demonstrated at the time of closing of title, and if he unjustifiably refuses or is unable financially to perform then, the broker has not produced a willing buyer.\textsuperscript{184}

Working from this altered theoretical foundation, the court proceeded to reconstruct the “ready, willing, and able” test with the following fresh visage:

When a broker is engaged by an owner of property to find a purchaser for it, the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract. If the contract is not consummated because of lack of financial ability of the buyer to perform or because of any other default of his, . . . there is no right to commission against the seller. On the other hand, if the failure of completion of the contract results from the wrongful act or interference of the seller, the broker’s claim is valid and must be paid.\textsuperscript{185}

Consummation of the agreement of purchase and sale thus became, in New Jersey, the operative event with regard to which the rights and duties of the parties normally associated with a real estate transaction would be determined.\textsuperscript{186} As a

\begin{footnotes}
\footnote{184}{Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d at 853 (emphasis in original).}
\footnote{185}{Id. at 855.}
\footnote{186}{72 Dick. L. Rev. 522, 525 (1968). The commentator raises a noteworthy problem pertinent to the \textit{Dobbs} court’s usage of the word “consummation.” When exactly is a transaction such as the one in \textit{Dobbs} which calls for the sale price to be paid incrementally, part at closing and the remainder thereafter in a series of mortgage payments, “consummated”? At the closing, upon the final mortgage installment, or perhaps at some interim stage? The answer to this query is of keen interest to a broker. This is especially true where, as again the \textit{Dobbs} facts illustrate, the seller agrees to pay the commission on a schedule tied to the receipt by him of mortgage installments. What if the purchaser closes title, makes a payment or two under the mortgage and then defaults? Is the deal sufficiently “consummated” at that point to justify a claim}
by the broker for his full fee? Or may the seller defend against this claim by arguing that the purchaser's default precludes recovery of anything beyond the moneys already received by the broker?

The New Jersey Supreme Court did not, on the facts in the 1967 case, have to deal with this problem area at all. However, in Kennedy v. Roach, 121 N.J. Super. 361, 300 A.2d 570 (Super. Ct. App. Div. 1973), the New Jersey Superior Court was called upon to decide at least some of the questions raised above. Kennedy involved a purchaser breach of a contract for the sale of a motel. The agreement of purchase called for a price of $300,000 to be paid, a certain amount down, a second amount on the date the buyers took possession and the residue in annual installments over a stipulated time span. The broker, who had brought the contracting parties together, was to receive his commission piecemeal, part on the date of possession by buyers and the balance when they made their first annual installment payment. Title to the motel was not to pass until this third payment. The purchasers, after depositing the earnest money and then proffering the sum due on their taking possession, moved on to the premises. They operated the motel for four months, but then defaulted on the third payment. The broker, who had already received the initial portion of his fee, sued the sellers for the remainder.

Affirming the trial court judgment, the appellate division permitted recovery of the entire brokerage commission. The court used Dobbs in a backhanded fashion to justify its determination by professing, "Dobbs did not deal with a situation such as is here involved, nor do we deem the factual complex of this case brings it within the comprehension of the holding therein." 300 A.2d at 571. Later in its discussion the appellate division returned to the 1967 decision (almost defensively, one suspects) and argued, "In our opinion, the 'crucial time' contemplated in Dobbs . . . for the vesting of commissions was May 9, 1970 [the day of purchasers' possession] and not September 15, 1972, when title was to be transferred, or September 15, 1970, when another $20,000 was to be paid by the buyers." Id. at 572.

A brief dissent was filed in Kennedy charging that its facts were emphatically within the purview of Dobbs, and correspondingly that "[i]nasmuch as the contract failed of consummation admittedly because of default by the buyer, the broker is entitled to no commission whatever against the seller." Id. at 572 (dissenting opinion).

Our interest in Kennedy is with the extreme, diametrically opposed positions taken by the majority and dissent on the question of whether the broker deserved his whole commission in spite of the purchasers' default. The majority chose to view the facts as demonstrating unequivocally that the motel sale had been "consummated" once the buyers had paid approximately 13% of the purchase price and had physically possessed the premises.

Their examination of the case, however, assumes a distinctly surreal aura when one takes into account other key factual data seemingly ignored by them. Conveniently minimized by the majority were the facts that when the breach occurred: eighty-seven percent of the purchase price remained owed; possession by the buyers lasted barely four months; the realty agent had agreed to receive the second half of his fee on the date (and, presumably, out of the proceeds) of the first annual installment which the buyers failed to pay the seller; and title to the real property had not passed.

After reading Kennedy, one can only think that some members of the New Jersey Appellate Division were not yet weaned, in 1973, of the predisposition toward brokers which American judges have traditionally exhibited in real estate litigation and which the Dobbs court criticized at length. For surely the majority in Kennedy had little, if any, empathy for the plight or expectations of the sellers. Their selective analysis tended throughout to gloss over facts helpful to the selling principals' case. Similarly disturbing was their apparent misapprehension of the central theme of Dobbs in its redefinition of the seller-broker relation.

But to say as much is by no means to champion the dissenting opinion. The
further consequence, it may be seen that the distinction, honored under the majority view and by both lower courts in Dobbs, between so-called “time” and “contingency” contractual clauses as to the payment of brokerage commissions was cast aside. New Jersey courts were, in the process, relieved of the need to deal with a most quarrelsome question of interpretation. In a literal sense all such clauses were made “contingent” by virtue of the holdings in this case; liability for the brokerage percentage was now, as a matter of law, conditional upon a closing.

Of equal significance was the result, also wrought by this decision, that a selling principal no longer must pay a realty commission when the sale remains uncompleted due wholly to

standpoint of the dissent, too, is unsatisfactory as a guide for the resolution of future disputes of this nature. All it could muster was an overly simplistic, “black or white”-kind of logic. Since the contract in suit called for the price of sale to be paid serially, the dissenting judge determined that it was not “consummated” until all payments in the series had been made. Kennedy v. Roach, 300 A.2d at 572 (dissenting opinion). Hence, no brokerage fee was owed by sellers before that moment. Id. No matter that before the purchasers defaulted: the parties had solemnized their agreement in writing; an amount totalling $40,000 had exchanged hands thereunder; the purchaser had actually operated the motel for a considerable period; and the event to which obligation for the first portion of the realty agent’s percentage was keyed had happened.

True, the severity of the dissent’s approach may be softened in many cases by the availability, reaffirmed in Dobbs, of a broker’s claim for breach of an implied promise against the mispliant buyer. See note 172 supra and accompanying text. Unfortunately, the agent in Kennedy sued just the sellers and might well have been barred from further legal action by the doctrine of res judicata if the dissent had won the day. Insinuated here, moreover, is another reason to cast a disapproving eye at the dissent and, for that matter, the majority. Neither seized the ready opportunity held out by Kennedy to clarify the confusion surrounding the broker’s election of whom properly to sue in a case of purchaser failure. As things now stand, the agent must either join both the seller and purchaser as defendants or risk being made the ball in a cruel, procedural “ping-pong” game whose outcome turns unpredicatably on how a given court chooses to define the verb “consummated.”

Where then does the answer lie? A second appeal in Kennedy, to the New Jersey Supreme Court, was regretfully not sought. Should, however, a comparable fact pattern ultimately reach that tribunal, a comment in the Dickinson Law Review provides food for judicial thought:

If a court were to apply the Dobbs rule strictly, it would have to hold the vendor obligated to pay the [whole] commission. If, however, the court looks to the reason for the rule—"that the owner will sell and the buyer will pay, and the broker will thus earn his commission out of the proceeds"—then it will undoubtedly find the vendor is liable to the broker for no more of the commission than has already been paid.

72 Dick. L. Rev. 522, 525 (1968).

187. See A Reexamination, supra note 101, at 84, 90-91.
188. Id. at 96, 97.
the buying prospect's breach. Like its counterpart in Louisiana, the highest court in New Jersey has renounced the anomalous majority-view tenet which enforces, in the situation of buyer default, an unnatural schism between fault and liability by its refusal to formally recognize the real defendant in such a case. 189

In innovating these decisional changes, the obligational balance among the seller, broker, and purchaser had to be adjusted. In arriving at the reapportionment achieved, the Dobbs rulings sought to assure that affected real agency principles continued to serve a major function of all law: that of accurately reflecting and maintaining a currency with the total circumstances, including the fair expectations, of the persons whose activities are regulated thereby. 190 Undeniably, the ambit of responsibility and with it the risks of the enterprise of realty brokering has been increased, but not, in the high court's understanding of present-day capabilities of that profession, unduly so. 191 By the same token, the court was extremely careful to leave intact its traditional law on vendor misconduct—the purpose of its recent modifications being purely to reset the dislocation of equities perceived as extant under prior New Jersey law. Bad faith behavior whereby a vendor signs but does not perform a contract with a purchaser brought forth by his broker continued to be regarded as baleful. 192

Similarly, the Dobbs decision does not appear to have eliminated altogether the rule that entitles the broker to his fee if he is proximately instrumental in bringing about a real property transfer between the principal and another. True, the day is gone forever in New Jersey when a broker may claim a commission on the basis of his being the "procuring cause" of a transaction that never advances beyond the contract-signing stage. But this allegation would arguably succeed under the

189. Id. at 103; 30 Ohio St. L.J. 600, 603 (1969).
190. 236 A.2d at 852-53.
191. Id. at 853-54. See also Comment, Right of a Broker to a Real Estate Commission, 8 Williamette L.J. 85, 91 (1972). In light of the heightened vulnerability of brokers mandated by Dobbs, one might well ponder whether protecting the broker only from intentional wrongdoing by his seller is sufficient. Should he not also be shielded from the negligence of his principal? For an interesting examination of and an affirmative reply to this question not considered in Dobbs, see A Reexamination, supra note 101, at 86-92.
192. 236 A.2d at 855.
Dobbs rationale where the agent’s efforts result in a deal that is actually concluded after being arranged surreptitiously by his vendor in order to avoid payment of the commission.\textsuperscript{193}

The supreme court’s examination of “The Seller’s Liability to the Broker” next addressed the peculiar nature of the modern real estate brokerage occupation. It was greatly struck by the fact that realtors, “through experience, specialization, licensure, economic strength or position, or membership in associations created for their mutual benefit and education, have acquired such expertise or monopolistic or practical control in the business transaction involved as to give them an undue advantage.”\textsuperscript{194}

Such superior bargaining position could too easily be manipulated by a real estate agent anxious to feather his own nest at the expense of his principal.\textsuperscript{195} This, the court noted, is precisely why both the New Jersey common law and its legislature have demanded from the agent demeanor approaching impec-
cability.\textsuperscript{196} The broker must at all times keep his master’s interests uppermost in mind and see to it, through services performed loyally and with utmost good faith, that those interests are reasonably promoted.\textsuperscript{197} That he keeps this trust, recon-

\textsuperscript{193} The theory of a realty agent as the “procuring cause” of a transaction was not pursued in the Dobbs opinion. As previously articulated, see notes 52-57 supra and accompanying text, this reasoning has been approved by many American judicatures in the spirit of justice (for the agent’s protection).

On the other hand, it should be acknowledged, in keeping with the general them-
atic drift of Dobbs, that this theory could, if taken to logical excess, inordinately impinge on real rights of the seller. Indeed, the “procuring cause” doctrine is fraught with difficult questions of fact and law. How much effort on a broker’s part is sufficient in any given case? When is broker complacency, as opposed to his abandonment of a particular enterprise, indicated? Assuming that genuine situations of independent negotiation can occur between an owner and a prospect initially contacted by the agent, where practically should the dividing line be drawn? And what policy of law is best served by requiring an owner to remunerate his agent for a sale personally con-
cluded by the owner and a customer with whom the broker has only inconclusively treated, and about whom the broker has said nothing?

Nor, unfortunately, can it be assumed that repeated judicial definition of “procuring cause” will perform supply adequate decisional guidance. Brokerage commission lawsuits in this reference seem to manifest an extraordinary degree of factual diffusiveness. Nonetheless, extending the logic of Dobbs, if extended to “procuring cause” fact patterns, would presumably tend, by its emphasis on the event of consum-
mation, to avert more effectively than the majority-view approach an imbalanced use of the doctrine.

\textsuperscript{194} 236 A.2d at 855.

\textsuperscript{195} Id.

\textsuperscript{196} Id.

\textsuperscript{197} Id.
firmed the Dobbs tribunal, is in the public interest of the state government licensing him. In furtherance of this public policy, therefore:

Whenever there is substantial inequality of bargaining power, position or advantage between the broker and the other party involved, any form of agreement designed to create liability on the part of the owner for commission upon the signing of a contract to sell to a prospective buyer, brought forward by the broker, even though consummation of the sale is frustrated by the inability or the unwillingness of the buyer to pay the purchase money and close the title, we regard as so contrary to the common understanding of men, and also so contrary to common fairness, as to require a court to condemn it as unconscionable.  

In particular, the supreme court let it be known that such provision in a standardized form agreement "prepared or presented or negotiated or procured by the broker" would be ipso facto suspect. To underscore the efficacy of its discussion concerning unconscionable contractual language, the court looked to Henningsen v. Bloomfield Motors, Inc., its almost

198. Id. Note the many similarities between the New Jersey decisions and statutes discussed by the Dobbs court on this point, and those of Oklahoma dealt with in the text accompanying notes 88 through 100 supra.

199. 236 A.2d at 857; see also the Louisiana cases cited note 164 supra.

200. 236 A.2d at 857-58. For a full appreciation of the breadth of the Dobbs holding here, it should be noted that the contract in evidence there was a written agreement negotiated on behalf of the owners by their attorneys. 72 Dick. L. Rev. 522, 527 n. 29 (1968). This has lead one comment writer to argue that the New Jersey Supreme Court's rulings on the matter of unconscionability were mere obiter dicta. A Reexamination, supra note 101, at 97-98.

This segment of the court's opinion has also incurred the wrath of a second writer for its alleged excessiveness. 72 Dick. L. Rev. 522, 526-28 (1968). In defense of the New Jersey court, it is submitted that this body had no real alternative but to protect against the foreseeable tactic of brokers utilizing their economic power to negotiate, without restraint, an "end run" of the Dobbs legal formulations. To have held otherwise would have afforded New Jersey realtors a so readily accessible avenue of escaping the freshly imposed higher standard of conduct as to call into serious question the motives of the court in considering this issue at all. However, it would be improper to construe Dobbs as utterly precluding the possibility of a real estate agent and his seller conditioning payment of commission upon an event less exacting than consummation. A careful reading of the opinion gives real sustenance to the view that the door has been left open, albeit slightly, for brokers and principals who stand on even footing to agree to do just that. The relevant analysis of whether a given contractual clause in this vein is unconscionable would include at least these four inquiries. Was the agreement standardized in format? If so, was the form supplied by the broker? Was there unfair surprise as to its contents? Lastly, was there an imbalance in the respective parties' bargaining positions? See A Reexamination, supra note 101, at 96-97.
legendary precedent interpreting Uniform Commercial Code section 2-302, for guidance.\textsuperscript{201} On the subject of unconscionability, too, Dobbs and the real estate brokerage law of Louisiana demonstrate a remarkable symmetry.

Before delving into the second prominent subject of its decision, "Liability of the Buyer to the Broker," the court digressed briefly for one final question germane to the seller-broker relationship. The broker in Dobbs had alleged that the owners were liable for its commission since they had enforced their agreement of sale against the broker's prospect by obtaining a judgment for specific performance.\textsuperscript{202} By virtue of that decree, the plaintiff's argument continued, the owners were able to extract a favorable settlement agreement with the failed customer, receiving certain benefits in liquidation of all outstanding claims.\textsuperscript{203} The New Jersey Supreme Court disapproved this theory, recalling that "no wrongful conduct of the [sellers] frustrated the closing of title," and then concluded that any benefits received by them out of the settlement could "only be regarded as salvage as distinguished from the substantial equivalent of performance."\textsuperscript{204} Nevertheless, it did take the opportunity created by these contentions to restate (albeit with some adjustment) certain apposite pre-Dobbs rules: (1) That in the event of a default by the purchaser, the seller is under no duty to sue him for damages or for specific performance; (2) that under such facts the seller may accept the purchaser's nonperformance, cancel mutually with him the contract of sale, and keep any downpayment or earnest money payment as "salvage" without incurring liability to the broker; and (3) that if, however, the seller opts to litigate and successfully recoups the "substantial equivalent of performance," then he must account to his agent.\textsuperscript{205}

\begin{itemize}
\item 201. 236 A.2d at 856.
\item 202. Id. at 858.
\item 203. Id.
\item 204. Id. at 858-59.
\item 205. The impact of Dobbs on older law in this respect may be best apprehended by comparing the conclusions of the New Jersey Supreme Court with certain apposite legal propositions observed in most other American states. Judicial opinion in those states concurs that a seller is under no duty to pursue litigation against a defaulting customer. Annot., 14 A.L.R.2d 437, 462, 493-97 (1960); 12 C.J.S. Brokers § 95(b)(1) (1938). But, irrespective of whether the vendor undertakes such proceedings and of the size of any recovery realized, a realtor practicing in Oklahoma or other majority-view locality will have earned his commission so long as his efforts lead to an agreement
\end{itemize}
At last, the court reached what is arguably the most venturesome thrust of the Dobbs opinion: its demarcation of rules governing the buyer-broker relation. In short, the problem confronted in this part of the decision was how best to apportion responsibility for the consequences of a purchaser default. The factor which had contributed most to making this question a persistently difficult one was the doctrine of privity of contract. As we have already seen, majority-view jurisdictions have, due to the limitations imposed by this doctrine, adopted a byzantine rule which separates fault and liability in holding a

between the selling principal and a prospect accepted by the principal as "ready, willing, and able." See cases collected in notes 37-60 supra and the accompanying text. Hence, normally speaking, distinctions between benefits realized by the seller from a settlement with the defaulter which amount to "salvage" and those which are the "substantial equivalent of performance" are irrelevant in these jurisdictions.

However, where the listing language expressly makes the brokerage fee conditional upon some other event, for example the closing of title, a different result might well obtain under the majority view depending on the interplay of various factors to be discussed below. Then the broker would be entitled to know if his principal was in receipt of any sums or other items of value from the breaching customer, and, if so, how substantial those sums or items were. 12 C.J.S. Brokers § 95(b)(1) (1938).

Frequently, this very situation is anticipated in "contingent" real estate instruments by the insertion of provisions such as:

It is understood and agreed that if earnest money paid on a property by a Purchaser shall be forfeited, one-half of the money so forfeited shall go to the realtor, unless said amount shall exceed the amount of the realtor's commission had the sale been completed, in which event the realtor shall receive only the amount of the commission.

1A VERNON'S OKLAHOMA FORMS ch. 17, § 972 (1971).

When interpreting contractual clauses of this kind, majority courts have often read them to vest in the seller definite options exercisable, at his discretion, upon default by the purchaser. Correspondingly, they have determined the rights of the broker in accordance with which option the seller prefers. In other words, the realty agent's right to remuneration in these circumstances is entirely dependent upon the course of action adopted by the seller. 12 C.J.S. Brokers § 95(b)(1) (1938). The seller, of course, need not do anything, as mentioned at the outset of this note. If this is the selling principal's choice, the broker's services would go uncompensated since his fee was premised upon an occurrence (consummation by the buyer) which failed to happen. Annot., 74 A.L.R.2d 437, 471-73 (1960); 12 C.J.S. Brokers § 95(b)(1) (1938). At the other extreme, the vendor could sue for damages, specific performance, or other appropriate relief. Should he succeed to judgment, the broker would deserve the full stipulated commission. See id. § 95(b)(1). As a third alternative, the seller might (and in all probability would) elect to settle with the defaulter by retaining the earnest money deposit as liquidated damages. In this case the agent would receive a share of any retained sum in whatever manner was provided for in the instrument of listing. Annot., 74 A.L.R.2d 437, 468-71 (1960). The agent would not, however, be able to claim additionally any amount in excess of such share. Id.

206. See, for example, the discussion in the text accompanying notes 125-131 supra.
blameless owner accountable for the misdeeds of a breaching buyer.

The Dobbs court demurred, rejecting as unreal and inequitable such a separation of fault and liability.207 Equally unimpressed with causes of action sounding in tortious business interference or third party creditor beneficiary contractual rights, the supreme court looked elsewhere. Perhaps it could have reached southward and borrowed the Louisiana concept of a dual agency implied in law.208 Rather, it determined to pursue a different, although analogous, path. Prefatory to its holding in this respect, the court took notice of the fact that "the ordinary prospective purchaser knows when he consults a broker that if he buys property through the efforts of the broker, customarily the broker will earn a commission on the sale to be paid by the owner-seller out of the purchase price."209

From judicially noticing this circumstance, it was but one comfortable stride for the court to adjudge that if a purchaser fails or is unable to perform in accordance with the agreement of sale, he should become personally liable for damages incurred by the broker.210 The high court founded this unusual theory on a legally implied promise to perform by any agent-presented prospect who is aware that the agent's services are compensable.211 Conveniently, the way here was paved by Tanner Associates v. Ciraldo,212 an earlier precedent which was paraphrased in Dobbs to the following effect:

[When a prospective buyer solicits a broker to find or to show him property which he might be interested in buying, and the broker finds property satisfactory to him which the owner agrees to sell at the price offered, and the buyer knows the broker will earn commission for the sale from the owner, the law will imply a promise on the part of the buyer to

207. 236 A.2d at 855.
208. See cases and statutes cited in notes 161-163 supra.
209. 236 A.2d at 859.
210. Id. at 859-60.
211. Id.
212. 33 N.J. 51, 161 A.2d 725 (1960). Presumably, the enthusiastic adoption of the Tanner principle by Dobbs represents a further battering of the doctrine of privity of contract which the New Jersey Supreme Court, among other courts, has so determinedly assaulted on other fronts in recent years. See Henningsen v. Bloomfield, 32 N.J. 358, 161 A.2d 69 (1960); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966); Prosser, Assault on the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960).
complete the transaction with the owner. If he fails or refuses to do so without valid reason, he thus prevents the broker from earning the commission from the owner, he becomes liable to the broker for breach of the implied promise. The damages chargeable to him will be measured by the amount of commission the broker would have earned from the owner. If no amount or percentage has been agreed upon, recovery will be based on quantum meruit and measured by the amount accepted as reasonable according to the usual custom in such brokerage business.\textsuperscript{213}

Seeing no cogent reason for a different result, the court in \textit{Dobbs} liberally read its previous holding and extended its applicability to the facts at bar.\textsuperscript{214} Realty agents employed by New Jersey sellers could now benefit from the \textit{Tanner} rationale. However, it left for remanded trial proceedings decision of the nature of the relationship of this broker and this customer and whether liability as between them could be shown.\textsuperscript{215}

With this final bold stroke a fully integrated approach for the treatment of real estate agency commission disputes in New Jersey had been perfected. In the initial phase of its decision the supreme court had carefully differentiated those cases of seller misconduct from those of purchaser failure. It realized that since in the second situation the vendor was the one who gained nothing (his land was not sold) and lost much more (he had to pay his broker's fee anyhow), the only sensible solution was to free the vendor from this oppressive state of affairs.\textsuperscript{216} But had it halted its decision-making at this turn, the court would have contrived a void in its law of obligations which, if unfilled, would have equally oppressed another more or less innocent party—the broker. Recognizing this, it neatly averted any such gap by its succeeding rulings on purchaser liability. Thereby, the broker was given the appropriate means to redress, directly against the person truly at fault, wrongs stemming from a buyer breach. The \textit{Dobbs} tribunal, in so doing, managed with both justice and logic to impose on all key participants in a land conveyance the requirement of good faith performance (combatting in the process still another oddity of

\textsuperscript{213} 236 A.2d at 959.
\textsuperscript{214} \textit{Id}. at 960.
\textsuperscript{215} \textit{Id}. at 861.
\textsuperscript{216} \textit{Id}. at 855.
majority-view law—its insistence on bona fide conduct from the seller and his broker, but not from the purchaser). 217

217. Has Dobbs' acceptance of this novel legal duty unreasonably exposed purchasers of real property in New Jersey to any potential hazards? See A Reexamination, supra note 101, at 101-02, for a review of certain trouble spots which are conceivable in this respect. At least one deserves recapitulation here. That note expresses concern that "there is no reason to believe that the average buyer is in any better bargaining position than the average vendor," id. at 101, when it comes to negotiating changes or additions to a form contract with the broker. Particularly referenced is the case of a buyer who wishes to condition his liability under the sale contract upon his securing adequate financing. On balance, that author is reluctant to demand immediate judicial intervention, but does call generally for a decisional temperment protective of the purchaser's interests. Id. at 102.

Perhaps heedful of this admonition, the New Jersey Appellate Division recently determined in Barbetta Agency v. Sciarfa, 135 N.J. Super. 488, 343 A.2d 770 (Super. Ct. App. Div. 1975), that, in an action by a broker against a buyer for breach of the buyer's implied promise to complete a written contract with a seller, the buyer is permitted to assert defenses that would not be available in an action between the seller and buyer on the contract because of the parol evidence rule. The court declared as reversible error the trial judge's refusal to accept into evidence testimony by counsel for the buyers that an executed copy of the purchase and sale contract delivered to the seller's attorney was made conditional, by a contemporaneous oral agreement of the parties, on the buyers obtaining necessary funding and that plaintiff-broker knew of and agreed, either expressly or impliedly, to this condition. 343 A.2d at 773-74. The appellate division summed up this salient facet of its holding in this manner: "The [trial judge] erred in assuming that . . . merely because, as between a seller and purchaser, there has been a breach of contract by the purchaser, . . . the purchaser is ipso facto liable for commissions to the broker involved. . . ." Id. at 773. For another case carefully delimiting the scope of the broker's right to sue a purchaser under the implied promise to fully perform theory, see McCann v. Biss, 65 N.J. 301, 322 A.2d 161 (1974).

In a related but somewhat different connection, see Atlas v. Silvan, 128 N.J. Super. 247, 319 A.2d 758 (Super. Ct. App. Div. 1974), for an attempt by the same appellate division to construe more closely the important Dobbs language, "If he [the purchaser] fails or refuses to do so [complete the transaction] without valid reason, and thus prevents the broker from earning the commission, he becomes liable to the broker for breach of the implied promise." Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d at 859. The Atlas court found these words to mean:

Under Dobbs liability is imposed on the buyer when he defaults in the performance of his contract. However, if there is a valid reason, that is, a reason which is legally sufficient or authorized by law for his nonperformance, the buyer would not be in default, and he would not be under any liability to the broker for the commission.

319 A.2d at 761.

Subsequent, additional refinement came in Rothman Realty Corp. v. Bereck, 140 N.J. Super. 72, 355 A.2d 201 (Super. Ct. App. Div. 1976). It announced that a sudden and substantial drop in the market value of certain shares of corporate stock, which buyers had intended selling to enable the land purchase in question, "did not constitute a valid reason for refusing to complete the transaction within the principles set forth in the Dobbs case." 355 A.2d at 203. Alluding to the American contract law doctrine which differentiates between objective and subjective instances of impossibility of performance, the Bereck opinion continued, "Defendants [the purchasers] were
Within three short years of Dobbs, the Oregon judiciary consented in Brown v. Grimm\(^{218}\) to review a trial judgment against a real estate agent who complained that her selling principals owed her a commission simply for having secured an earnest money agreement between them and a prospective buyer. Then, in 1974, 1975, and 1976, respectively, the highest courts of Kansas, Massachusetts, and Nebraska entertained appellate proceedings arising from largely parallel factual settings.\(^{219}\) Common to all four litigations was the evident desire of each of these tribunals to reevaluate its existent case law of realty brokerage from the hindsight perspective so nicely afforded by Dobbs.\(^{220}\) That the New Jersey holdings signalled the advent of a new era in this legal sphere was more than confirmed when these state courts imported verbatim portions of those holdings to conclude their own proceedings.\(^{221}\)

In the Oregon appeal the broker had agreed, via a finely printed form employment contract supplied by her and entered into with the sellers, to “find a buyer ready and willing to enter into a deal” for the sale of their land at a selling price of $20,000 “net”, with the terms of payment to be cash.\(^{222}\) In exchange the vendors promised to pay “in cash a commission equal in

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\(\text{not insolvent. When parties enter into a contract each assumes risk that he will have the financial ability to perform, and the mere fact that supervening events may deprive him of that ability does not discharge a party from performance of the contract.}^{\text{Id.}}\)

\(\text{The court found, as a result, defendants to be in default of the sale agreement with the seller, and in breach of their implied promise to the seller’s realty agent.}^{\text{Id.}}\)

\(\text{218. 257 Ore. 55, 481 P.2d 63 (1971).}\)


\(\text{220. Prior to these decisions, Oregon, Kansas, Massachusetts, and Nebraska were considered main-stream adherents of the majority view. See Annot., 74 A.L.R.2d 437 (1960).}\)


\(\text{222. Brown v. Grimm, 481 P.2d at 64.}\)
amount to 10% of said selling price." The listing contract was to expire on November 10, 1968, but a reasonable time thereafter was allowed for the agent to close any deal as to which earnest money had already been deposited. In time, a proposed purchaser, introduced by the realty agent, executed the earnest money agreement with the vendors. The contractual document called for the "[p]urchaser to pay cash at closing" and conditioned his performance thereunder on his "obtaining zone change, adequate financing and building permits and sewer permits on proposed new construction."

A promissory note for $1000, purportedly representing an earnest money deposit, was recited in the agreement as having been received from the prospect. At no time, however, was cash actually paid to the vendors. The evidence at trial tended to reveal that the earliest the buyer could have completed the contract was sometime in January 1969. Plaintiff broker, moreover declined to present evidence that her prospect did or could secure the necessary financial assistance, zoning changes, or construction permits. But extensive testimony was presented on behalf of defendant sellers to the combined effect: that they were unaccustomed to and did not really understand either of the instruments they signed; that the broker had prior to and during her tenure as agent for the owners, assisted the prospective buyer to locate land, including the subject real estate, for development by him; that the broker had failed to disclose to the sellers her involvement with the buyer; and that she had discouraged them from seeking legal counsel before execution of the two agreements.

On this record the trial judge held for the defendant landowners. The court found plaintiff had failed to demonstrate satisfactorily either that her relation with the sellers had given rise to a duty on their part, in fact breached, or that she had discharged faithfully her fiduciary responsibilities, owed as their agent, in a manner justifying recovery of her fee.

The Supreme Court of Oregon affirmed. In so ordering, it explicitly accepted the decisional direction offered by Dobbs.

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223. Id. at 64-65.
224. Id. at 65.
225. Id.
226. Id. at 65-66. By embracing this aspect of Dobbs, the Oregon Supreme Court made good in Brown an earlier promise extended by it in the earlier case of Setser v.
Pursuant to the rules there laid out, the Oregon forum adjudged the mere procuring of the executed earnest money agreement not to constitute brokerage service sufficiently worthy of compensation where the agreement went unperformed because the buyer "made no cash tender" of the sale price.\textsuperscript{227} The justices commented that this was especially true since the plaintiff had "offered no evidence of [the purchaser's] financial ability to pay or obtain firm financing."\textsuperscript{228} Consummation of a contract of sale by a fiscally sound customer was minimally required, and in \textit{Brown} such requirement was unmet.\textsuperscript{229}

Proceeding on to the other significant phase of its opinion, the \textit{Brown} court addressed the broker's conduct as a fiduciary. It pointed to the conflicting and undisclosed relation which the broker had maintained with the prospective buyer; the imbalance of knowledge and expertise between the sellers and their agent; the standardized nature of the two contracts which the broker had provided; and, finally, the testimony that the plaintiff had discouraged defendants from obtaining legal assistance relative to these contracts. "If believed, much of the testimony in this case . . . casts grave doubts on plaintiff's alleged good faith performance of her fiduciary duties toward defendants."\textsuperscript{230} Since the trial court had accepted the veracity of this evidence and the amount thereof was ample, the appellate body felt bound by the trial findings, which presented no clear error.\textsuperscript{231}

Oregon had thus become the first of the \textit{Dobbs} progeny. The inquiry might, however, be provoked: Exactly how much of the \textit{Dobbs ratio decidendi} was authoritatively adopted by the Oregon high tribunal? Admittedly, an obvious degree of

\textsuperscript{227} Brown v. Grimm, 481 P.2d at 66.
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.} at 67.
\textsuperscript{231} \textit{Id.}
factual variance is discernible between the two cases. For example, in Dobbs as contrasted with Brown, the promise to pay the broker was found in the purchase and sale agreement, not in a separate listing instrument. The New Jersey lawsuit also disclosed that the purchase price, and relatedly the agency commission, was to be paid in a series of installments due as well as after the planned closing. In the Oregon contest, on the other hand, both sums were to be made in single lump payments. The Dobbs sellers, moreover, had actually received a cash deposit from the buying prospect prior to his default, which was forfeited (albeit conditionally). In Brown no money actually changed hands. Finally, the Dobbs action witnessed the broker suing not only the sellers but also the breaching customer. The Oregon plaintiff named just her principals as defendants.

Then too, the Brown court made no pretense of striving for substantive coverage with the same aggressiveness as its New Jersey precursor. Its facts precluded contemplation of, among other topics dealt with in Dobbs, purchaser liability to the seller’s broker and the meaning of the phrase “substantial equivalent of performance.” Even as to the nature of the modern realtor profession and the unconscionability of standardized land contracts, points which could have been most thoroughly explored under the circumstances of the Oregon case, the Brown decision proved reticent.

Nevertheless, it would perhaps be foolhardy to overestimate the value of these or other identifiable distinguishing features. The Oregon opinion does not leave the impression that its authors wished to regard the Dobbs formulations with other than full enthusiasm. The adjective “cautious” might more aptly describe their attitude. It seems credible to argue that this state supreme court intends ultimately to introduce much, if not the whole, of Dobbs into its jurisprudence. A number of items provide adequate support for this proposition. First, one can cite the deliberate promotional use of an earlier decision, Setser v. Commonwealth, Inc., by the Oregon tribunal to induce appellate litigation such as was pursued in Brown. Next, it should be observed that the result in Brown was achieved notwithstanding wording in the agency contract

whereby the sellers promised to pay a commission if a purchaser "ready and willing to enter into a deal for said price and terms" were found. Additional proof is readily available in a line of precedents handed down by this supreme court since 1971, which reaffirms and augments the purview first blocked out in Brown. Therefore, from the standpoint of a legal practitioner counselling his client, one would do well to appreciate that this trend will in all probability continue.

In September 1970 a Kansas resident, desirous of selling his South Dakota ranch of some 9000 acres, listed that property with a Kansas real estate broker. That commonplace act set in motion a series of events which inexorably led the Supreme Court of Kansas, in Winkelman v. Allen, to join the Dobbs vanguard.

The agency agreement in question was oral, nonexclusive, called for a selling price of $356,800, and stipulated a five percent brokerage commission payable by the seller if the broker found "a qualified buyer, which meant someone able to handle it." As a result of the realty agent's efforts in furtherance of his listing, a buying prospect was brought forth for approval by the selling principal. The youthful customer was twenty-two years of age and had a net worth at that time of approximately $6000. The landowner was assured that, contrary appearances to one side, the customer was a member of "one of the most prominent farming families in southwest Kansas." The broker was hence given permission to show the ranch to the potential buyer.

After returning from South Dakota, the broker met again with the vendor. The latter consented to a second inspection of the ranchland, this time with the prospect and agent being

233. 481 P.2d at 65.
234. See Sipe v. Pearson, 276 Ore. 715, 556 P.2d 654 (1976) (recovery of a brokerage fee will only be granted if the [*481a*] plaintiff establishes that he found a buyer ready, willing, and able to completely satisfy the terms fixed by the landowner); Dean Vincent, Inc. v. Stearns, 276 Ore. 533, 555 P.2d 448 (1976); Woodworth v. Vranizan, 273 Ore. 111, 539 P.2d 1055 (1975) (holding the Dobbs-Setser-Brown rules applicable whether the agency employment language was contained in a separate listing contract or the agreement of purchase and sale); Red Carpet Real Estate of Aloha, Inc. v. Huygens, 270 Ore. 860, 530 P.2d 46 (1974) (applying Brown to situations of seller misconduct); Larkins v. Richardson, 263 Ore. 444, 502 P.2d 1156 (1972).
236. 519 P.2d at 1380.
237. Id.
accompanied by the prospect's brother and father. The broker claimed that the three were contemplating a joint undertaking in connection with the purchase of the seller's real estate.

On September 26, 1970, the prospect, his father, and the broker gathered with the seller at the seller's Kansas residence. This was the only time the seller and the buying candidate conferred directly with one another. The subject of that day's discussion was a counteroffer by the hopeful customer of $320,000, previously communicated to the broker but presented then to the owner for the first time. The broker had his attorney prepare a form contract of purchase and sale for the occasion. The contract was undated and contained no property description. It specified a downpayment of $20,000, of which $1000 as an earnest money deposit was acknowledged to have been already paid to the broker. The remaining $300,000 was payable in increments pursuant to the recited terms of a promissory note and mortgage. Finally, the document's signature lines identified the seller by his given name and the buyer as "BELLA FOURCHE RANCH, INC. (a corporation to be formed)."

During the September 26 conversation, however, it became clear to the landowner that previous speculation of a business venture among several members of the purchasing candidate's family was unfounded. The sole purchaser was to be the twenty-two year old son. Upon learning this, the seller openly doubted the financial capabilities of the youth. The candidate responded with a confident appraisal of his ability to perform under the contract and further negotiation ensued. Certain changes in the contractual provisions were mulled over, and concurrence apparently was had on at least one item. Still, final consensus was not reached on all, or even most, of the chief obligations dealt with in the agreement. Neither party signed it.

Persisting nevertheless, the broker returned to his lawyer

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238. Those terms were as follows: "$9,500.00 principal per year ($4,500 Ins. $5,000 [the seller]) plus int. of 6% on unpaid balance to Prudential Ins. Co. not to exceed 10 yrs. to (the seller), at which time entire balance to him to be paid and Ins. Co. loan to be assumed." Id. at 1381.

239. Id.

240. The seller stated that he would prefer to receive five percent, instead of six percent, of the unpaid balance of his equity per year plus interest. The prospective buyer happily conceded this change. Id. at 1382.
for a revision of the contract of purchase and sale which incorporated the one alteration agreed upon. Otherwise, the new draft looked essentially like its predecessor. The broker testified that he thereafter delivered this second agreement to the seller’s home. The seller denied ever having seen it.

In the weeks that followed, the broker contacted his principal at several intervals to inquire whether the contract as rewritten was acceptable. The agent claimed that the vendor responded to each of these inquiries by saying that he (the vendor) had not as yet had an opportunity to read it. In the midst of one of these conversations, according to testimony by the broker, the seller confirmed that the deal was still on. Eventually, the broker discovered on November 16, 1970, that the landowner had sold the ranch to a third party for $356,920 by agreement signed October 5, 1970. The broker immediately had his buying prospect execute the most current revision of the purchase agreement and draw a check for the balance of the downpayment therein required. The two then went to the seller’s residence and asked him to sign this contract. When the seller declined, the realtor brought suit against him for the unpaid commission.

At trial the jury was instructed:

In order for the Plaintiff to recover, the burden is upon him to prove that he obtained a customer who was ready, able and willing to meet the terms offered by the Defendant prior to the sale of the land to another, and so notified the Defendant of that fact . . . .

If you find that the Plaintiff produced a ready, willing and able purchaser upon terms acceptable to Defendant, then you must return a verdict in favor of the Plaintiff in the amount of commission agreed by the parties . . . . 241

The jury returned a verdict for the plaintiff-broker, awarding him damages in the amount of $15,000. 242 The trial judge entered judgment accordingly, and the seller perfected his appeal to the Kansas Supreme Court. 243

The appellate tribunal opened its deliberations with a statement of the Kansas law it deemed to control the case at bar. A realty agent, intoned the supreme court, is deserving of

241. Id. at 1383-84.
242. Id. at 1380.
243. Id. at 1377.
his fee (1) if he comes forth with a purchaser ready, willing, and able to buy on the proffered terms or, alternatively, upon those acceptable to his principal; and (2) if he is the efficient and procuring cause of a consummated deal.\textsuperscript{244} While both stated conditions must usually be met before the commission may be properly claimed, such is not the case when the seller has wrongfully interceded to prevent consummation.\textsuperscript{245} In this exceptional circumstance the commission is earned upon satisfaction of the initial condition alone.\textsuperscript{246}

With this enunciated, the court turned to examine the jury’s verdict that the seller had acted wrongfully when he refused to become a party to the agreement tendered by his broker and the prospect on November 18, 1970. In pressing this examination, it reached the deeper, subsidiary question of whether the customer so presented possessed the qualifications

\textsuperscript{244} Id. at 1383.

\textsuperscript{245} Id. Stated in this manner the two-pronged Kansas rule appears to require generally a completed transaction as a prerequisite to the brokerage fee. If such a reading is an accurate appraisal of the pre-Winkelman Kansas law on real estate agency, it might well be wondered whether this state ever in fact endorsed the majority position. That view, it should be remembered, finds the broker’s compensation contingent upon a consummated deal only when the listing agreement expressly and unambiguously imposes such a condition.

But Kansas was, prior to 1974, regarded as a member in good standing of the majority view. See note 220 supra. How then should we understand the Winkelman court’s summary of earlier Kansas law? A very simple explanation may be that the facts presented in Winkelman compelled the court to become immediately engrossed with the problems of the sufficiency of the broker’s services as the procuring cause and of the seller’s refusal to execute a sale agreement with the buying candidate of the broker. Accordingly, the cases referenced by it in the initial segment of its opinion, Hiniger v. Judy, 194 Kan. 155, 398 P.2d 305 (1965); Patee v. Moody, 166 Kan. 198, 199 P.2d 798 (1948); DeYoung v. Reiling, 165 Kan. 721, 199 P.2d 492 (1948), all focused on the rights of a broker who procures a realty conveyance that fails due to seller misbehavior.

However, it is the judicial treatment of a default by the purchaser which most tellingly indicates advocacy of majority-view agency principles. Significantly, neither the 1974 case nor the above-cited decisions involved a customer breach of an executed contract of sale arranged by a broker’s efforts. If they had, a second series of Kansas authorities holding that the agency fee is owed under such facts even though title never actually passes, would have come into play. See Collropy v. Stevenson, 125 Kan. 703, 265 P. 1098 (1928); Avery v. Howell, 91 Kan. 297, 137 P. 788 (1914); Hutton v. Stewart, 90 Kan. 602, 135 P. 681 (1913).

Consequently, whatever was meant by the Kansas Supreme Court’s expression “consummated deal” at the outset of Winkelman should not be allowed to belie the fact that the law of real brokerage in Kansas on the eve of the 1974 opinion was representative of most American jurisdictions.

\textsuperscript{246} Winkelman v. Allen, 519 P.2d at 1383.
of an earnest purchaser.247 Analyzed closely in this respect was the "able" element of the "ready, willing, and able" standard. As a fundamental assumption the Kansas tribunal reasoned the word must mean "more than mere mental competence to make a contract or physical ability to sign it."248 Beyond that, it suspected that "financial capacity was the primary ingredient."249 However, it could find no basis for this supposition in Kansas law.

Constrained to look further afield, the Winkelman forum appropriated a Minnesota Supreme Court decision250 which left little doubt but that the "ability to buy refers to the financial ability of the purchaser."251 Gleaned from that opinion was the following yardstick of a buyer's monetary capabilities:

Generally speaking, a purchaser is financially ready and able to buy: (1) if he has the needed cash in hand, or (2) if he is personally possessed of assets—which in part may consist of the property to be purchased—and a credit rating which enable him with reasonable certainty to command the requisite funds at the required time, or (3) if he has definitely arranged to raise the necessary money—or as much thereof as he is unable to supply personally—by obtaining a binding commitment for a loan to him for that purpose by a financially able third party, irrespective of whether such loan be secured in part by the property to be purchased . . . .252

With this measuring rod in hand, the Kansas court sought its application to the potential buyer at bar. Evaluating that party's financial credentials against the test's three-tiered criteria, the court concluded they passed muster under none.253 Yet to have resolved as much did not quite end this portion of the opinion. Since the seller had tried to defend his own conduct of not entering into an agreement with this monetarily unable customer, but had been hindered from doing so by several evidentiary rulings of the trial court, appellate scrutiny of those rulings was thought to be in order. Upon review, numer-

247. Id. at 1384.
248. Id.
249. Id.
251. Winkelman v. Allen, 519 P.2d at 1384.
252. Shell Oil Co. v. Kapler, 50 N.W.2d at 712 (emphasis in original).
ous reversible errors were found to have been committed by the lower court.254

At this juncture the Winkelman appeal shifted its focus to the plaintiff's assertion that regardless of the buying candidate's impecunious state the seller could not properly rely on such ground to justify an unwillingness to contract with the candidate. The landowner could not do so because in the September 26, 1970, bargaining session he had allegedly acted to "accept" the youthful prospect as a qualified purchaser. The absence of a written solemnization of their relation was of no consequence. The act of acceptance allegedly functioned as well as a waiver of any right the seller may have had to complain of inadequacies in the prospect's fiscal position.

The supreme court rejected the plaintiff's contention, remarking, in the first place, that he had proffered no authorities on which to uphold it.255 Furthermore, the whole thrust of the argument ran counter to certain recent and, in the court's view, valuable innovations in real estate brokerage law developed by sister-state judiciaries. Specifically mentioned was Ellsworth Dobbs, Inc. v. Johnson, from which the Kansas justices quoted exhaustively on the theme of a broker's obligation to present a buyer financially able to complete the transaction undertaken.256

But Winkelman did not simply rely on Dobbs as a convenient source for make-weight quotations. Much was also borrowed on the conceptual level.257 Translated into Kansas law was the following series of legal ideas announced previously in the New Jersey case: (1) "the broker's duty to the owner is to

254. Id. at 1386-87.
255. Id. at 1387. Plaintiff's contention seems to be a curious hybrid of selected aspects of the first and third propositions of the Radford v. McNeny principle. See text accompanying notes 38-44 and 59-60 supra. The Winkelman court's rejection of this theory represents sound decisional thinking. Plaintiff broker is in effect arguing that he is entitled to a commission where he has neither procured a valid, enforceable purchase agreement on the terms specified by the vendor nor produced a purchaser who was both ready, willing, and able to buy on these terms and offered to do so. Closely analyzed, the broker's right to compensation is premised solely on the fact that he arranged a conversation between a counteroffering, underfunded buying prospect and a seller who openly doubted the financial ability of the prospect, which conversation ended inconclusively and in no event led to a transaction between the parties. Such a set of circumstances has never been sanctioned by the majority view as properly occasioning a claim for a brokerage fee. See section II of this article.
257. Id. at 1390.
produce a prospective buyer who is financially able to pay the purchase price and take title;” (2) there is intrinsic “a right in the owner to assume such capacity when the broker presents his purchaser;” (3) therefore, “the obligation to inquire into the prospect’s financial status and to establish his adequacy to fulfill the monetary conditions of the purchase must be regarded logically and sensibly as resting with the broker;” and (4) the right of the seller to assume the fitness of any buyer so secured “ought not to be taken away from [the seller], nor should he be estopped to assert it, simply because he ‘accepted’ the buyer.”258

Significantly, the Kansas tribunal was not persuaded that the applicability of these precepts to a matter like Winkelman should somehow depend on whether the breach by a financially infirm customer occurred before or after a contract of sale had been formally executed. “[I]n either situation, the broker is obligated to produce a qualified purchaser before he is entitled to a commission.”259 The court thus determined that the seller should not have been estopped at trial from raising the affirmative defense of the purchaser’s monetary inability.260 And it concluded, as a matter of law, that the broker had failed in the performance of his obligation to present a suitable customer.261 Consequently, the lower court judgment was reversed and a direction was given to enter a new one in favor of the seller.262

The limited decisional radius of this case makes the question of further incorporation of the Dobbs holdings more speculative in Kansas than Oregon. Still, certain aspects of the Kansas decision point to just such a judicial direction. For one thing, the opinion recognized the flux in American real agency law since 1967 and accepted to some extent the legal change spawned by that flux. For another, it could have easily arrived at the Winkelman result by resort to traditional law since it concluded the buying prospect in question was financially unable ab initio. Instead, it daringly elected to adopt the Dobbs

258. Id. at 1389.
259. Id. at 1390.
260. Id.
261. Id. at 1391. Two of the Winkelman justices concurred in the reasoning of the supreme court, but favored remanding the case for a retrial on the issue of financial capability of the youthful potential customer.
262. Id.
stance. Moreover, the opinion spent nearly three pages tracking the Dobbs language on subjects not all of which were encompassed by the Winkelman facts. Then, to clarify its purpose in quoting so expansively, it stated: "We are persuaded by the cogent reasoning in [Dobbs] and adopt the rules stated in the above quoted portion thereof as the law in Kansas."  

On the other hand, the Kansas Supreme Court utilized, either judgmentally or in dicta, less than half of the key thoughts broached in Dobbs. The element of uncertainty raised by this fact must consequently temper our appreciation of Kansas law in the wake of Winkelman. Unfortunately, this clouded situation continues unalleviated due to a paucity of subsequent decisions on point.

In the spring of 1975, an even bolder incursion into Dobbs country was effected when the Supreme Judicial Court of Massachusetts declared:

[W]e adopt the following rules: "When a broker is engaged by an owner of property to find a purchaser for it, the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract. If the contract is not consummated because of lack of financial ability of the buyer to perform or because of any other default of his . . . there is no right to commission against the seller. On the other hand, if the failure of completion of the contract results from the wrongful act or interference of the seller, the broker's claim is valid and must be paid . . . ."

Accordingly, we hold that a real estate broker, under a brokerage agreement hereafter made, is entitled to a commission from the seller only if the requirements stated above are met.

263. Id. at 1388-90. For example, the Dobbs quotations appearing on these pages are principally occupied with buyer default after the execution of a contract of purchase and sale.

264. Id. at 1390.


266. Tristam's Landing, Inc. v. Wait, 327 N.E.2d at 731.
The setting for this pronouncement was the review of *Tristam's Landing, Inc. v. Wait*, which centered around yet another real property brokerage commission dispute. The plaintiff, a Massachusetts realtor firm, was authorized to be a selling agent of the landowner's vacation home located on Nantucket Island. A price of $110,000 was designated by the seller. The employment contract was nonexclusive and written. While no specific arrangement was initially made as to the amount and terms of payment of a brokerage compensation, the defendant vendor was aware that customary realty practice on Nantucket called for remuneration equaling five percent of the sale price.

More than one year after the agency had commenced, the plaintiff brought forth a prospective customer. After a round of negotiation handled by the brokerage firm, the parties reached a purchase and sale agreement which was reduced to writing. The document stipulated a purchase price of $105,000, a downpayment of ten percent payable at execution, and a closing date of October 1, 1973. A check for $10,500 was transmitted to the vendor through the broker. Also in the contract was a clause reciting: “It is understood that a broker’s commission of five (5) percent on the said sale is to be paid (the broker) by the said seller.”

The closing date passed without consummation, and eventually the transaction failed wholly when the buying prospect elected not to follow through. The seller did not seek legal recourse against the defaulter, but did retain the downpayment. In time the plaintiff presented its selling principal a bill for services rendered in the amount of $5250. The defendant refused to pay, replying that “[t]here has been no sale and consequently the 5% commission has not been earned.” The instant lawsuit was undertaken, and from a trial court judgment for the realtor firm the landowner appealed.

The supreme judicial court opened its discussion of the case by succinctly restating the pertinent Massachusetts law. This restatement amounted to a primer on majority-view rules of real estate agency. It spoke of the production of a customer ready, willing, and able to execute a contract of sale and of the

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268. 327 N.E.2d at 729.
269. Id. at 727.
realtor's fee being earned upon such event irrespective of whether the transaction actually closed. It talked also of "contingency" listing provisions which permit the seller to vary the normal rules by expressly premising his liability for that fee on an occurrence other than the mere signing of a sale contract, for example, on the actual passage of title or payment of the purchase price.

Bringing these principles to bear on the instant litigation, the Massachusetts tribunal adjudged:

In the application of these rules to the instant case, we believe that the broker here is not entitled to a commission. We cannot construe the purchase and sale agreement as an unconditional acceptance by the seller of the buyer, as the agreement itself contained conditional language. The purchase and sale agreement provided that the commission is to be paid "on the said sale," and we construe this language as requiring that the said sale be consummated before the commission is earned.

Since this language fully concluded the matter in dispute, the court could have rested there. But as is plain from the quotation which introduced this analysis of Wait, the court had much more on its mind when it certified this appeal than simply disposing of a routine brokerage commission fact pattern. Its grander design was frankly disclosed with the following choice of words:

Although what we have said to this point is determinative of the rights of the parties, we note that the relationship and obligations of real estate owners and brokers inter se has been the "subject of frequent litigation," . . . . In two of the more recent cases where we were faced with this issue, we declined to follow the developing trends in this area, holding that the cases presented were inappropriate for that purpose . . . . We believe, however, that it is both appropriate and necessary at this time to clarify the law, and we now join the growing minority of States who have adopted the rule of Ellsworth Dobbs, Inc. v. Johnson.

270. Id. at 729.
271. Id.
272. Id.
273. See note 266 supra and accompanying text.
274. 327 N.E.2d at 730 (citation omitted).
Massachusetts, too, had decided to close ranks with the growing number of American judiciaries which have embraced the Dobbs doctrine. Concededly, this was to be accomplished on a prospective basis;\footnote{275} the logic being that a pro futuro announcement was the fairest way to rearrange long-observed rights and duties importantly concerning so sizeable a cross section of the public. Nonetheless, in light of the language of Wait, the commitment appears profoundly firm.\footnote{278}

The newest recruit to enter this minority camp is Nebraska. The supreme court in that state accepted the wisdom of the New Jersey opinion while simultaneously eschewing the majority view in the process of hearing Cornett v. Nathan.\footnote{277}

In Cornett the plaintiff land broker held a listing on defendant vendors’ real estate which was offered at $349,700. The written agency agreement bound defendants to pay a seven percent commission for brokerage services rendered. Plaintiff located a purchasing candidate who in writing agreed to do

\footnote{275. See note 266 supra and accompanying text. Contrast the more careful procedural approach of Massachusetts and Oregon, note 226 supra, with that of New Jersey and Nebraska, infra, used to announce the severe rearrangement of prior, well-settled law effected by the Dobbs rules. The Kansas Supreme Court, for its part, opted consciously or otherwise for an odd middle ground. In adopting the Dobbs doctrine, the court declared its approval of more of the New Jersey holdings than it needed precisely to dispose of the Winkelman facts. By this indirect route the Kansas case may be seen as having incorporated Dobbs into local law, in part retroactively and in part prospectively.}

\footnote{276. The supreme judicial court’s anticipatory reception of Dobbs enveloped more than just the maxim that the closing of title, as the truer indicator of a “ready, willing, and able” customer, should be a precondition to collection of a realtor’s fee. In addition, it pointedly drew attention to the New Jersey Supreme Court’s remarks on the potential incidence of unconscionability in the contractual union between the broker and his landowning principal. 327 N.E.2d at 731. It is noteworthy that the Wait case revealed no standardized form of listing, but instead an oral agency relation (Massachusetts being one of a group of states which continue to allow the listing to be made verbally). See note 23 supra. The court, however, perceived that disparate levels of understanding and skill can exist between broker and vendor whether or not the employment contract is an “adhesive” writing. 327 N.E.2d at 731. Finally, this judicial body, while refraining for reasons of procedure from deciding the issue in Wait, acknowledged in passing the matter of the extent to which a broker may properly share in a forfeited deposit or other benefit realized by a seller in lieu of performance by the purchaser. Id.}

Being mindful of these several aspects of the Wait dicta and simultaneously recalling the necessary reciprocity of the main concepts in the Dobbs decision, it can be fairly speculated that the Massachusetts court, given the proper fact situation, will seriously consider adoption of the second significant tenet of the 1967 New Jersey case—recognition of a defaulting buyer’s liability to the seller’s broker.\footnote{277. 196 Neb. 277, 242 N.W.2d 855 (1976).}
business with the selling principals. This second instrument specified a reduced sale price of $251,800 and demanded from the proposed buyer a $5000 earnest money deposit. It also provided that the earnest money was subject to forfeit, as liquidated damages, should the purchaser not completely perform the transaction. The previously agreed upon rate of brokerage commission was reiterated in the purchase and sale document.

The potential customer dishonored his agreement with the landowners, pleading financial incapacity as the excuse. Defendants kept the $5000 and prepared to close their ledger on this regrettable affair. Plaintiff was most reluctant, however, to let things rest so simply and made overtures to defendants for payment of the fee. When rebuffed, he commenced these proceedings.

In the state district court summary judgment was awarded to the defendant landowners.278 This order was decreed after the pertinent contractual documents were construed to mean that the owners had intended to compensate the agent's efforts only if a sale actually transpired.279 Even though the literal expression of neither writing contained such contingency verbiage, the trial judge rejected plaintiff's averment that the right to his fee accrued at the moment his prospect and principals contracted.280 Displeased with this outcome, the agent sought appellate relief.

The Nebraska high court marked its appearance in the case with a telling scrutiny of the Cornett facts which demonstrated a clear grasp of the central irony of traditional American realty brokerage law:

The defendants' property was not sold, but the plaintiff still demands his $17,617.60 commission. This placed the defendants in the position where they were entitled to only $5000 in damages from the buyer, but owed the plaintiff over $17,000 in commission. Thus, the defendants would lose over $12,000 and still be in the same position as they were before the plaintiff presented the buyer.281

Not wanting to sanction this sort of patently absurd outcome, it launched into a brief but emphatically unorthodox

278. Id. at 856.
279. Id.
280. Id.
281. Id.
(when compared with traditional law) bit of decision-making. The departure in Cornett can be seen not so much in the principle employed. The opinion routinely recites the legal criterion that has long controlled the earning of brokerage commissions in this country: production of a customer ready, willing, and able to buy on terms satisfactory to the vendor. Rather its deviation is found in the incisive manner by which its authors wielded this test. With a penetrating directness, the Nebraska judges rejected as nonsensical the plaintiff broker’s contention that he had produced a purchaser “who was ‘ready’ and ‘able’ to buy” simply because his buying prospect had entered into a conveyancing agreement with defendants and notwithstanding that the prospect proved thereafter to be “financially unable to pay or consummate the sale at the agreed performance date.”

To accentuate the point and because existing Nebraska law was deemed to be mute in this respect, the Cornett court enlisted the aid of Dobbs. Decisively invoked was the New Jersey forum’s classic 1967 reformulation of “ready, willing and able” which requires presentation of a buyer who actually fulfills the terms of a purchase and sale contract as the correct standard for judging the performance of a real estate agent.

V. Conclusion

The light of Ellsworth Dobbs, Inc. v. Johnson and its first generation of offspring has shone nearly infra red in illuminating the flawed quality of certain key and age-old precepts of real estate brokerage law observed in the greater number of American states. The conclusion is irresistible that these rules have gradually become impaired as they have failed to keep pace with and to reflect accurately the dramatic social and economic changes witnessed in this country’s realty marketplace during the last one hundred years or so.

The failure of this law to maintain a currency with ongoing societal transformation may be best put into perspective if one reflects on the following description of the process which forms the very heart of our system of common law:

282. Id. at 857.
283. Id.
284. Id. at 857-58.
It appears that the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them. But this kind of reasoning is open to the charge that it is classifying things as equal when they are somewhat different, justifying the classification by rules made up as the reasoning or classification proceeds. In a sense all reasoning is of this type, but there is an additional requirement which compels the legal process to be this way. Not only do new situations arise, but in addition peoples' wants change. The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas.

Reasoning by example shows the decisive role which the common ideas of the society and the distinctions made by experts can have in shaping the law. The movement of common or expert concepts into the law may be followed. The concept is suggested in arguing difference or similarity in a brief, but it wins no approval from the court. The idea achieves standing in the society. It is suggested again to a court. The court this time reinterprets the prior case and in doing so adopts the rejected idea. In subsequent cases, the idea is given further definition and is tied to other ideas which have been accepted by courts. Ideas first rejected but which gradually have won acceptance now push what has become a legal category out of the system or convert it into something which may be its opposite. The process is one in which the ideas of the community and of the social sciences as they win acceptance in the community, control legal decisions. But reasoning by example will operate to change the idea after it has been adopted.285

With regard to the standard of "ready, willing, and able" the dynamism of this process has rendered obsolete the meaning given it in majority-view jurisdictions. Inevitably, continual redefinition has given rise to a newer, different, and arguably more socio-legally serviceable understanding of this phrase. The law of New Jersey, Oregon, Kansas, Massachusetts, and Nebraska (not to mention Louisiana, Rhode Island, and Colorado) stands in impressive testament to the evolution of this

285. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 3-4, 5-6 (1949) (footnotes omitted).
juristic concept. It is time, therefore, for the Supreme Court of Oklahoma and its judicial brethren of the majority persuasion to both appreciate this reality and entertain seriously the charting of a path akin to the one demarcated by *Dobbs*. 