

1980

Taylor National, Inc v. Jensen Brothers Construction Company, A Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

TAYLOR NATIONAL, INC.,)
Plaintiff and Appellant,)

vs.)

Civil No. 17074

JENSEN BROTHERS CONSTRUCTION)
COMPANY, a Corporation,)
Defendant, Third Party)
Plaintiff and Respondent,)

et al,)

BRIEF OF APPELLANT

Appeal From Judgment of the Fourth
Judicial District Court, Utah County,
State of Utah
The Honorable J. Robert Bullick, Judge

R. WILLIAM BRADFORD
1200 Beneficial Life Tower
Salt Lake City, Utah 84111
Attorney for Appellant

JACKSON HOWARD
120 East 300 North
Provo, Utah 84601
Attorney for Plaintiff-appellant

A. Dennis Norton
700 Continental Bank Building
Salt Lake City, Utah 84101
Attorney for Defendant-Respondent

FILED

DEC 10 1990

IN THE SUPREME COURT OF THE STATE OF UTAH

TAYLOR NATIONAL, INC.,
Plaintiff and Appellant,
vs.

JENSEN BROTHERS CONSTRUCTION
COMPANY, a Corporation,
Defendant, Third Party
Plaintiff, and Respondent
vs.

JESSE R. HARRISON and WILLIAM
J. SOULE, d/b/a VALUE REALTY,
and LEON HARWARD and JUDITH A.
HARWARD,

Civil No. 17074

Third Party Defendants,
Third Party Plaintiffs,
Counterclaimants, and
Appellants,
vs.

PAUL H. TAYLOR, JOHN DOES I
through IV, whose true names
are unknown, agents of JENSEN
BROTHERS CONSTRUCTION COMPANY,
a Corporation,

Third Party Defendants,
and Respondents,

LEON HARWARD,
Third Party Defendant,
Third Party Plaintiff,
and Appellant,

vs.

TAYLOR NATIONAL, INC.,
Plaintiff, Third Party
Defendant, and Appellant.

BRIEF OF APPELLANT

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NATURE OF THE CASE

Appellant Taylor National, Inc., which was the plaintiff below, brought an action in the District Court for Utah County to recover a real estate sales commission from Defendant-Respondent Jensen Brothers Construction Co. Jensen Brothers filed a counterclaim seeking to have the alleged real estate listing agreement declared void or, in the alternative, to recover damages from Taylor National for its breach. In a third-party complaint, Jensen Brothers sought to recover the amount of the commission from the purchaser of the real estate, Leon Harward. Harward, in return, sought rescission or reformation of the contract of sale of the property and damages from Taylor National and Jensen Brothers resulting from fraud in the sale of the real estate, from breach of the implied warranty of habitability, and for breach of the contract of sale. Harward, who was third-party-plaintiff and defendant below is also an appellant here. The district court, Judge J. Robert Bullock, sitting without a jury, granted recovery to Taylor National through Jensen Brothers against Harward. The court found no cause of action by Harward against Jensen Brothers or Taylor National, and granted Jensen Brothers leave to notice a trustee's sale of the property. Appellant Harward seeks from this Court an order reversing the verdict of the District Court, or in the alternative, an order granting a new trial.

QUESTIONS PRESENTED

Appellant Harward is the purchaser of property referred to hereafter as the Barrington House. Taylor National, Inc. is a real estate broker, alleging to hold a valid real estate listing agreement on the Barrington House, executed by the builder-vendor, Jensen Brothers Construction Co. The questions presented by the appeal are the following:

1. Is the real estate broker, Taylor National, Inc., entitled to a real estate sales commission resulting from the sale of the Barrington House?

2. If Taylor National, Inc. is entitled to a commission, is the purchaser of the Barrington House, Leon Harward, liable for payment of this commission either directly to Taylor National, Inc. or to Taylor National through any other party?

3. Does the evidence establish the fact that Harward has proven a cause of action against Jensen Brothers Construction Co. for damages resulting from breach of the implied warranty of habitability in the construction of the Barrington House?

4. Does the evidence establish that Harward has proven a cause of action against Jensen Brothers Construction Co. for damages resulting from fraud in failing to disclose that the subdivision improvements in which the Barrington House is located had not been accepted by the City of Orem, and were substandard?

5. Is Jensen Brothers Construction Co. equitably estopped to deny that it agreed to take land from Harward in exchange for its equity in the Barrington House?

6. Did the trial court err in failing to reform the contract between Harward and Jensen Brothers Construction Co. to reflect their agreement to trade land for Jensen Brothers' equity in the Barrington House?

STATUTES INVOLVED

The following statute is involved in this proceeding:

Utah Code Annotated, § 25-5-4:

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

- * * * * *
- (5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

STATEMENT OF FACTS

In the first months of 1977, Paul Taylor, then President of Taylor National, Inc., (Taylor National), contacted representatives of Jensen Brothers Construction Co. (Jensen Bros.) to arrange for the construction of a home to be displayed in the Utah County Parade of Homes. (Record at 11-13.) The agreement ultimately reached by the parties provided that Jensen Bros. would own the property and build the home, while

Taylor National would be the selling broker. (Record at 13-14.) Taylor National's share of the profits upon the sale of the property would be provided for in a six percent real estate broker's commission. (Record at 13.) Jensen Bros. executed a real estate listing agreement on a form provided and prepared by Taylor National. (Exhibit 9, Record at 17-18.) The Barrington House was listed at a selling price of \$140,000.00 (Exhibit 9, Exhibit 19.) Because the listing agreement is not dated, it is impossible to determine when that listing agreement was executed. However, Marvin Jensen, who signed the writing on behalf of Jensen Brothers, kept the carbon copy of the agreement. (Exhibit 19.) His copy differs markedly from the writing relied upon by Taylor National. (Exhibit 9, Exhibit 19, Record at 18-20.) The writing was not signed by representatives of Taylor National until after it had filed this suit. (Record at 20-21.)

During the home show, in August 1977, the home, known as the Barrington House, was manned by sales people from Taylor National. (Record at 22, 28-29.) During the period of the home show, Taylor National received no offers to purchase the Barrington House. (Record at 79.) However, after the show, it was presented with offers which were rejected by the seller. (Record at 30-32.)

Early in September 1977, Leon Jensen of Jensen Bros. received a call from Harward in which he expressed an interest in buying the home. (Record at 98, 259.) Leon Jensen told

Harward that he would instruct Taylor National to contact him. (Record at 98-99.) He then phoned Paul Taylor of Taylor National, gave Taylor Harward's telephone number, and asked him to contact Harward. (Record at 32,99.) Taylor attempted to call Harward once, but without success. He then left town for a ten-day trip to Hawaii. (Record at 32, 33.) Because Leon Jensen was concerned when representatives of Taylor National had not contacted Harward, he called them approximately a week after his first call. (Record at 99.) At this time he again asked someone from Taylor National to contact Harward. (Record at 99.) After nothing came of the first two phone calls, Leon Jensen again called Taylor National, but was told that Paul Taylor was in Hawaii. He asked to speak to Bryce Taylor, who was the sales manager, but was told that he was not in. He left his name with Taylor National, but was not contacted again. (Record at 100.) While Paul Taylor was in Hawaii, no representative of Taylor National made any attempt to contact Harward. (Record at 90.)

Due to his frustrations in failing to get Taylor National to contact Harward, and only after it was obvious to him that Taylor National would not help with the sale, Leon Jensen got together with Harward to arrange a sale. (Record at 102.) At this point, approximately three to four weeks had passed since Harward had first contacted Jensen. Upon Paul Taylor's return from Hawaii, Leon Jensen informed him that he had arranged a sale to Harward. (Record at 33, 34.)

Paul Taylor informed Jensen at that time that unless Harward, who was a real estate agent, contacted Taylor National for an arrangement on the commission, it would charge Jensen Bros. one hundred per cent of the commission. (Record at 34. Representatives of Taylor National did not take part in the closing, and took the position that it was Harward's duty to contact them concerning the sale of the house and a split on the commission. (Record at 49-51, 59, 89, 91-93.)

Jensen Bros. accepted a written offer for purchase from Leon Harward and his wife, Judith, on October 19, 1977. The closing took place on December 9, 1977. At that time, Jensen Bros. accepted net proceeds of \$131,600.00. (Exhibit 36.) This selling price was \$8,400.00 lower than the asking price, a difference represented by the six per cent broker's commission.

From the beginning of negotiations, it was proposed by Harward, and agreed to by Jensen Bros., that Jensen Bros. would accept a trade of equity in land for their equity in the Barrington House. This is evident from Harward's first proposed Earnest Money offer (Exhibit 60), Letters from Jensen Bros. to the mortgage company prior to the closing, (Exhibit 37), and the American Home Mortgage, Inc. Disclosure Settlement Statement (Exhibit 36). Furthermore, representatives of Jensen Bros. travelled with Harward on numerous occasions to view various parcels of land both in Utah County and Salt Lake County. (Record at 265, 72, 297, 304, 388-89.)

Harward continued to show land to representatives of Jensen Bros. from October 1977 until the spring of 1979. (Record at 269-72, 388-89.) Jensen Bros. even entered into an Earnest Money Agreement on one of these parcels procured by Harward, (the Williamson 25 acres), and a letter from Marvin Jensen to Leon Harward dated December 1, 1978 indicates that land would be acceptable in trade for equity in the Barrington House. (Exhibit 55.) At the December 9, 1977 closing, no written transaction had been consummated to effect a trade of equities, so Harward executed and delivered a trust deed note to Jensen Bros. in the amount of \$45,600.00 with an accompanying trust deed. (Exhibit 59.) Jensen Bros. later reneged on its agreement to trade equities and caused Security Title and Abstract Co., the trustee under the trust deed, to serve a "Notice of Default" on Harward around July 13, 1978. (Exhibit 63.)

When Harward first moved into the Barrington House, the subdivision in which it is located had not been approved or accepted by the Orem City Council. (Record at 226-27.) Because the gutters, sidewalks, and roads were not properly installed, they deteriorated greatly, making it difficult to drive in and out of the subdivision at times. (Record at 254.) In addition to problems with the subdivision, the Barrington House began to settle after Harward moved into it. This caused large cracks to appear in the walls and the garage floor, the fireplace began to pull away from the wall,

and doors did not properly fit their frames. (Record at 231-235, Exhibits 44A-44K.) None of these problems were disclosed to Harward before he moved into the Barrington House. (Record at 421.) As a result, the value of the Barrington House was greatly depressed, and it became impossible to resell the house.

This action was instituted around June 7, 1978 by Taylor National to recover its alleged commission on the sale of the Barrington House from Jensen Bros. Jensen Bros. counterclaimed against Taylor National and filed a third-party claim against Harward on approximately July 20, 1978.

Taylor National's Position at the Trial

Taylor National took the position that it held a valid real estate listing agreement, signed by the party to be charged thereunder, and in writing. Taylor National claimed that it had proven its right to a real estate sales commission of \$8,400.00 plus interest and attorney's fees.

Jensen Brothers' Position at the Trial

Jensen Bros. contended that Taylor National was not entitled to a commission because it failed to prove a valid contract of agency. The contract alleged by Taylor National was not signed by both parties according to its terms and it omitted material matters, such as the duration of the agreement. Furthermore, Taylor National had failed to use

reasonable efforts to procure a purchaser and had breached the contract by placing the property under the multiple listing service.

Jensen Bros. took the position that Harward acted as a real estate agent when he purchased the Barrington House. As a result, Jensen Bros. paid him a commission rather than discounting the price of the house by the amount of the broker's commission. Jensen Bros. claimed that this suit was a fight between two realtors over a commission. Jensen Bros., having paid one commission, should not be held to pay another to Taylor National.

Jensen Bros. contended that the evidence showed that it never agreed to accept land in exchange for its equity in the Barrington House. Consequently, the remedy of reformation of the contract of sale was not available to Harward because there had been no agreement of such nature on which the court could base a reformation.

Finally, Jensen Bros. alleged that there was no evidence either of fraud or that the Barrington House was uninhabitable. If there was a duty on the part of Jensen Bros. at all, that duty was to build the home in a reasonably workmanlike manner. However, if there was no negligence on the part of the builder, Jensen Bros. alleged, then there was no duty to pay damages to the buyer. The only remedy available upon breach of the duty was rescission of the contract.

Harward's Position at the Trial

Harward contended that Taylor National was not entitled to a commission because it had failed to prove a valid contract of agency on which it could base a commission. Taylor National had further failed to meet its fiduciary duties to the seller and had abandoned its listing agreement.

Harward contended that, as purchaser of the Barrington House, he was not acting as a real estate salesman, but as an individual purchasing property for his own use. For this reason, he was not liable for the broker's commission. Nevertheless, Harward tendered forty percent of the broker's commission to Taylor National, but it was rejected.

Harward contended that the evidence showed that Jensen Bros. had agreed to take land in exchange for its equity in the house from the very beginning of negotiations. Jensen Bros. was equitably estopped by its acts, statements, and other conduct to deny this. Harward contended that these facts were the basis for reforming the contract in accordance with the original agreement.

Finally, Harward contended that the evidence demonstrated substantial and material defects in the Barrington House. He claimed damages resulting from the breach of the implied warranty of habitability and alleged that Jensen Bros. had committed fraud by failing to disclose the condition of the subdivision. Consequently, the value and marketability of

his home was greatly diminished, all to his injury.

The Trial Court's Decision in this Case

The trial court found as follows:

1. Taylor National was entitled to \$8,400 plus six percent interest, or the amount of its broker's commission. But judgment was limited in equity when the court prohibited execution of judgment against Jensen Bros. and specified that the judgment did not constitute a lien on the real property owned by Jensen Bros. Instead, Taylor National was required to pursue the judgment in behalf of Jensen Bros. against Harward, Harrison, & Soule, dba Value Realty & Continental Value Realty. Proceeds from any recovery were to be applied toward Taylor National's judgment against Jensen Bros.

2. Jensen Bros. was awarded judgment in the amount of \$8,400 plus six percent interest and attorney's fees against Harward, Harrison and Soule.

3. No cause of action was shown in Jensen Bros.' counterclaim against Taylor National.

4. No cause of action was found in Harward's counterclaim, crossclaim, and third-party complaint against Jensen Bros., Taylor National, and Paul Taylor.

5. The Court found that the trust deed and trust deed note of October 28, 1977 evidencing indebtedness of \$45,600.00, plus interest, were valid instruments enforceable by their

terms against Harward. The Court found the trust deed note in default and notice of default having been recorded on July 14, 1978, more than three months having elapsed since that time. The preliminary injunction previously issued against Jensen Bros. was terminated and removed, and Jensen Bros. was free to instruct the trustee to notice a trustee's sale of the premises.

6. Jensen Bros. was granted leave to file a supplemental complaint against Harward for any amounts owed on the bond after the trustee's sale, upon application to the court and notice to Merrill Harward.

7. Jensen Bros. was given leave to seek a deficiency judgment against Harward upon supplemental complaint after damages were determined upon the trustee's sale of the premises.

ARGUMENT

I

THIS IS A CASE IN EQUITY,
IN WHICH THE SUPREME COURT HAS A DUTY
TO REVIEW THE FACTS,
AS WELL AS THE LAW.

Utah law provides that an appeal from the decision of a district court in an equitable action may be upon questions of both law and fact.

From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below and under such regulations as may be provided by law. In equity cases the appeal may be on questions of both law and fact:...UTAH CONST. Art. VIII, § 9.

Like the Utah Constitution, the Utah Rules of Civil Procedure provide for appellate review of both the law and facts in equitable actions. "In equity cases the appeal may be on questions of both law and fact." UTAH R. CIV. P. 72.

The language of the Constitution has been interpreted to impose a duty upon the Supreme Court to review both the facts and the law in equity cases. Crockett v. Nish, 147 P.2d 853, 854 (Utah 1944), Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974). As the Court said in Mitchell,

Under Article VIII, Section 9, Constitution of Utah, it is both the duty and prerogative of this court in an equitable action to review the law and facts and make its own findings and substitute its judgment for that of the trial court. Mitchell v. Mitchell, supra at 1360.

In the present action, appellant Harward seeks reformation of a contract for the sale of land. This is an equitable action. 66 AM. JUR. 2d, Reformation of Instruments, §§ 1, 2 (1979). Therefore, in accordance with Utah law, this Court has a duty to review both the law and facts in this case. Furthermore, the Court has a duty to overturn the findings of the trial court if they are found to be against the weight of the evidence. Tanner v. Provo Reservoir Co., 99 Utah 139, 98 P.2d 695 (1940), McBride v. McBride, 581 P.2d 996, 997 (Utah 1978), Olivero v. Eleganti, 214 P. 313, 315 (Utah 1923),

Metropolitan Investment Co. v. Sine, 14 Utah 2d 36, 376 P.2d 940, 943 (1962).

II

IN THIS SUIT FOR A BROKER'S COMMISSION,

TAYLOR NATIONAL IS NOT ENTITLED

TO RECOVER AGAINST THE BUYER, LEON HARWARD

Before he may recover in an action for a real estate sales commission, a broker must prove that he acted pursuant to an express contract of agency. Case v. Ralph, 56 Utah 243, 188 P. 640 (1920), Smith Realty Co. v. Dipietro, 292 P. 915 (Utah 1930), Olson v. Neale, 116 Ariz. 522, 570 P.2d 209 (Ariz. App. 1977). The broker's right to a commission is measured by the terms of his contract. Watson v. Odell, 58 Utah 276, 198 P. 772 (1921), Eastern Okla. Land & Cattle Co. v. Dorris, 549 P.2d 78 (Okla. 1976), Throm v. Reid, 534 P.2d 330 (Colo. Ct. App. 1975), Firkins v. Affolter, 504 P.2d 365 (Colo. Ct. App. 1972), Watson v. United Farm Agency, Inc., 439 P.2d 738 (Colo. 1968), Ridgway v. Chase, 265 P.2d 603 (Calif. Dist. Ct. App. 1954), Scott v. Huntzinger, 365 P.2d 692 (Colo. 1961), Gleichenhaus v. Pratt, 190 Kan. 1, 372 P.2d 273 (1962), Blank v. Borden, 115 Cal. Rptr. 31, 524 P.2d 127 (1974), Dale v. Raines, 252 P.2d 22 (Dist. Ct. App. Calif. 1953), Ridgway v. Chase, 265 P.2d 603 (Dist. Ct. App. Calif. 1954), Uhlmann v. North Whittier Highlands, Inc., 334 P.2d 1022 (1957), Ford v. Palisades Corp. 225 P.2d 545 (Dist. Ct.

App. Calif. 1951), Aetna Life Ins. Co. v. Home, 145 P.2d 189 (Okla. 1944), Denbo v. Weston Inv. Co., 245 P.2d 650 (Calif. Dist. Ct. App. 1952). Furthermore, the Utah Statute of Frauds requires that contract to be in writing. Smith Realty Co. v. Dipietro, 292 P. 915, Case v. Ralph, 188 P. 640.

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

* * * * *

(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

UTAH CODE ANN. § 25-5-4.

As the Court said in Blank v. Borden,

(A)ny right to compensation asserted by a real estate broker must be found within the four corners of his employment contract,...In short it is the contract which governs the agent's compensation, and that contract is strictly enforced according to its lawful terms. Blank v. Borden, 524 P.2d at 129-30.

Because he must rest his right to a commission on his contract of employment, a broker must look to his employer for compensation and cannot recover a commission from those who did not directly employ him. 12 AM. JUR. 2d Brokers §§ 163-4, 12 C.J.S. Brokers § 82, 3 AM. JUR. 2d Agency § 247, C. Buck Bush Realty Co. v. Whetstone, 266 So.2d 135 (Miss. 1972). A broker can recover only in accordance with the terms of his employment. Ford v. Palisades Corp., 225 P.2d 545 (Calif. Dist. Ct. App. 1951). This means that the seller, and not the buyer, is solely liable for the broker's commission. Moss v. Sperry, 191 So. 531 (Fla. 1939), Steinberg v. Buchman, 167 P.2d 207 (Calif. Dist. Ct. App. 1946), McDaniel v. McCauley

371 P.2d 486 (Okla. 1962), Keyes Co. v. Island Fox Motel, Inc.
260 So.2d 894 (Fla. Dist. Ct. App. 1972), Webster v. Hochberg,
105 Ill. App. 2d 466, 245 N.E. 2d 529 (1969).

Ordinarily, and in the absence of some understanding or agreement to the contrary, the vendor alone is liable for the payment of the commission due a broker employed by him to sell the property, or to find a purchaser ready, able, and willing to purchase, and the purchaser's only liability is to pay to the owner the agreed purchase price. Moss v. Sperry, 191 So. at 537.

Therefore, before he can recover in an action for a real estate sales commission, the broker must show that there is a contractual relation between himself and the person against whom he seeks to recover the commission. Chambers v. Shivers, 497 P.2d 327 (Colo. Ct. App. 1972), Johns v. Ambrose-Williams & Co., 136 Colo. 390, 317 P.2d 897 (1957).

In the present case Taylor National bases its right to recover in this action on a writing purporting to be a real estate listing agreement, and introduced at the trial as Exhibit 9. (Record at 17, lines 27-30 to 18, lines 1-5.) Nowhere in that writing, however, is there evidence of a contractual relationship between Taylor National and Leon Harward, the buyer. If a contract exists at all, it is between Taylor National and Jensen Brothers. Harward was not a party to the writing on which Taylor National bases its right to a commission, and Taylor National may not recover a real estate sales commission from him, which the Amended Judgment of April 15, 1980 purports to allow.

Taylor National has neither alleged nor proven a contract granting it the right to recover against Harward for the sale of the Barrington House -- Harward was the purchaser of the house, and was not Taylor National's employer. Taylor National's right to a recovery rests against Jensen Brothers, if it rests against anyone.

While Harward is a real estate broker by profession, he purchased the Barrington House for use as his own personal residence. He was acting as a buyer, not a broker, when he contacted Jensen Bros., and he represented no party other than himself. In other words, he was a buyer just like any other. Because Harward was a broker, and could handle the closing of the sale on his own, Jensen Bros. was willing to reduce the price of sale on the home by the amount of the commission it normally would have paid had it been represented by a broker. And, as the owner of the house, Jensen Bros. was free to sell the home for any price it saw fit.

There are no known cases denying a broker the rights enjoyed by other buyers in general solely on the basis of his employment as a real estate broker. Rather, the cases indicate that a broker purchasing property for himself does not act as broker. In Blocklinger v. Schlegel, 58 Ill. App. 3d 324, 374 N.E. 2d 491 (1978), a real estate broker who had purchased property for himself brought suit for specific performance of the real estate sales contract. The court found that there was no fiduciary duty between the broker-

purchaser and the sellers, nor was there contractual privity resulting from a multiple listing agreement which the sellers had entered into with their realtor which required the realtor to relist the property with other members of the county board of realtors listing service. The court observed:

In Fish v. Teninga, (1928) 330 Ill. 160, 161 N.E. 515, it was quite properly stated that the business of being a realtor is not one containing an element of public interest so as to require him to deal as a fiduciary with everyone. Before a fiduciary duty arises it must be proven that a realtor has been employed by someone and that he is therefore an agent for them. Blocklinger v. Schlegel, 374 N.E. 2d at 493.

In Case v. Business Centers, Inc., 48 Ohio App. 2d 267, 357 N.E. 2d 47 (1976), the sellers sued a broker-buyer for breach of fiduciary duty. In denying recovery against the buyer, the court held that a broker-buyer which purchased property for its own use through the seller's broker was under no duty to disclose to the sellers that it had obtained a portion of the sales commission under an agreement with the listing broker. In other words, the broker-buyer owed no fiduciary duty to the seller when the seller did not employ him. The broker had the same rights in purchasing property for himself as does the public in general.

In purchasing property for himself, a broker is entitled to contract freely with the seller just as other buyers do. And, as with buyers in general, the broker who purchases property for himself does not become liable to the owner's broker for a commission. The law places all liability for

payment of such a commission on the owner. Steinberg v. Buchman, 167 P.2d 207, Keyes Co. v. Island Fox Motel, Inc., 260 So.2d 894, Moss v. Sperry, 191 So. 531, Webster v. Hochberg, 245 N.E. 2d 529, McDaniel v. McCauley, 371 P.2d 486, 12 AM. JUR. 2d Brokers §§ 163-4, 12 C.J.S. Brokers § 82, 3 AM. JUR. 2d Agency § 247. If a commission is due Taylor National on the sale of the Barrington House, it must look solely to Jensen Bros. for its recovery.

In purchasing the Barrington House, Harward did not subject himself to liability for Taylor National's commission in any other way. In early September 1977 Harward contacted a representative of the owner, Leon Jensen, when he became interested in the house. (Record at 32, lines 17-19; 98, lines 8-20.) He was told by Leon Jensen that Jensen Bros.' broker would contact him about arranging negotiations. (Record at 98, lines 16-20; 261, lines 9-13.) Leon Jensen then made repeated attempts to have the broker, Taylor National, contact Harward. It failed to do so. Instead, Taylor National's president left town for a ten day visit to Hawaii, no other representative of Taylor National contacted Harward, (Record at 90), and Taylor National ultimately took the position that Harward would have to contact Taylor National to arrange a purchase. (Record at 49-51, 59, 89, 91-93.) Only after Jensen Bros. became frustrated over Taylor National's refusal to contact Harward did Jensen Bros. and Harward begin to talk together about the actual terms for the purchase of the

Barrington House. (Record at 100, lines 13-23; 263, lines 8-18.) This was 3 weeks to a month after Jensen Bros. had first requested Taylor National to contact Harward! (Record at 33, line 8; 88, lines 10-27; 263, lines 19-22.)

As the buyer, Harward had no legal duty to contact the listing broker. Rather, as shall be established hereafter, it was Taylor National's duty to contact the prospective purchaser. It failed to do so. Any right to a commission asserted by Taylor National must be asserted against Jensen Brothers, and the judgment of the lower court granting Taylor National the right to recover the amount of its broker's fees through Jensen Bros. and against Harward, Harrison, and Soule should be reversed.

III

TAYLOR NATIONAL IS NOT ENTITLED TO A COMMISSION RESULTING FROM THE SALE OF THE BARRINGTON HOUSE

A. TAYLOR NATIONAL HAS THE BURDEN OF PROVING THAT IT IS ENTITLED TO A REAL ESTATE SALES COMMISSION.

In an action for the recovery of a real estate sales commission, the burden of proving that he is entitled to a commission rests with the real estate broker. 12 AM. JUR. 2d Brokers § 248 (1979). To sustain this burden, the broker must first prove that he was authorized to act as the agent

for the seller. Fistell v. Thomas, 355 P.2d 105 (Colo. 1960),
Pattee v. Moody, 166 Kan. 198, 199 P.2d 798 (1948), 12 AM.
JUR. 2d Brokers § 248, 12 C.J.S. Brokers § 15 (1979). And he
can do so only by proving the existence of an express con-
tract of agency. Smith Realty Co. v. Dipietro, 292 P. 915
(Utah 1930), Case v. Ralph, 56 Utah 243, 188 P. 640 (1920),
Gleichenhaus v. Pratt, 190 Kan. 1, 372 P.2d 273 (1962). In
addition, the broker must prove that he acted pursuant to
the contract, and that it was not entered into after his per-
formance.

...(I)t is not enough to merely allege an agreement or
promise to pay the broker for services already rendered
whether made directly to the broker or to some third
person, but before a broker can recover he must allege
and prove an express contract of employment in pursuance
of which services were rendered which entitle him to
recover the commission agreed upon. Smith Realty Co.
v. Dipietro, 292 P. at 917.

In many jurisdictions, the broker has the additional burden
of proving that the agency contract meets the requirements
of the Statute of Frauds. Beazell v. Schrader, 59 Cal. 2d
577, 30 Cal. Rptr. 534, 381 P.2d 390 (1963), Reilly v. Maw,
146 Mont. 145, 405 P.2d 440 (1965), Record Realty, Inc. v.
Hull, 15 Wash. App. 826, 552 P.2d 191 (1976), 12 C.J.S.
Brokers § 15. In Utah, however, where an express contract
is alleged, it will be "presumed to be in writing until the
contrary is made to appear." Case v. Ralph, 188 P. at 643.

Once he has proven an express contract of agency, the
broker must show the performance of his undertaking. Porter

v. Hunter, 207 P. 153 (Utah 1922), 12 AM. JUR. 2d Brokers § 248. He must prove that he acted in accordance with the terms of his contract. Patterson v. Blair, 257 P.2d 944 (Utah 1953). The broker cannot recover a commission as a volunteer; he must show a contract of agency broad enough to cover the particular transaction on which he seeks to base his commission. Gleichenhaus v. Pratt, 372 P.2d 273, 12 C.J.S. Brokers § 60.

To recover a commission, then, the broker must prove that he has fulfilled all the conditions precedent to the duty of the seller to pay. Record Realty, Inc. v. Hull, 552 P.2d 191. Ordinarily, this means that the broker is required to prove that he produced a buyer who was ready, willing and able to purchase on terms acceptable to the seller. Fistell v. Thomas, 355 P.2d 105 (Colo. 1960), Campbell v. Fowler, 214 Kan. 491, 520 P.2d 1285 (1974), Winkelman v. Allen, 214 Kan. 22, 519 P.2d 1377 (1974), Record Realty v. Hull, 552 P.2d 191. And he must prove further that he was the efficient, or procuring, cause of the sale. Link v. Patrick, 367 P.2d 157 (Alaska 1961), Campbell v. Fowler, 214 Kan. 491, 520 P.2d 1285 (1974), Winkelman v. Allen, 519 P.2d 1377, Fistell v. Thomas, 355 P.2d 105, Hiniger v. Judy, 194 Kan. 155, 398 P.2d 305 (1965), 12 AM. JUR. 2d Brokers § 248.

Before a real estate broker is entitled to a commission it is necessary for him to establish not only that he was authorized to act as defendant's agent, but also that he produced a purchaser ready, willing and able to buy on the terms prescribed by the owner, and that

he was the efficient agent or procuring cause of the sale. Fistell v. Thomas, 355 P.2d at 107.

The broker must sustain his burden of proof by a preponderance of the evidence. 12 AM. JUR. 2d Brokers § 248, C.J.S. Brokers § 15.

In this action, Taylor National seeks recovery of a real estate sales commission. (Record at 17, lines 19-30 to 18, lines 1-5.) In order to recover that commission, however, Taylor National must prove that it was authorized to act as agent for the seller, Jensen Brothers Construction Co., Fistell v. Thomas, 355 P.2d 105, Pattee v. Moody, 199 P.2d 798, under an express contract of agency. Smith Realty Co. v. Dipietro, 292 P. 915, Case v. Ralph, 188 P. 640. Gleichenhaus v. Pratt, 372 P.2d 273. Taylor National must further prove that the actions which entitle it to a commission were performed pursuant to that contract, and that the contract was entered into before the commission was due. Smith Realty Co. v. Dipietro, 292 P. 915. It must prove that its actions were in accordance with the terms of the contract. Record Realty, Inc. v. Hull, 552 P.2d 191. Taylor National must further prove, absent a contract to the contrary, that it produced a buyer who was ready, willing and able to purchase on terms acceptable to the seller, Link v. Patrick, 367 P.2d 157, Fistell v. Thomas, 355 P.2d 105, Winkelman v. Allen, 519 P.2d 1377, Hiniger v. Judy, 398 P.2d 305, Campbell v. Fowler, 520 P.2d 1285. Taylor National has not sustained this burden

by the required preponderance of the evidence, as will be demonstrated hereafter.

B. TAYLOR NATIONAL HAS NOT PROVEN THE EXISTENCE OF AN EXPRESS CONTRACT OF AGENCY ON WHICH A BROKER IS REQUIRED TO BASE HIS COMMISSION.

1. THE LISTING AGREEMENT INTRODUCED AT THE TRIAL AS EXHIBIT 19 CONTAINS THE TERMS AND CONDITIONS OF THE OFFER MADE BY JENSEN BROTHERS TO TAYLOR NATIONAL.

Before he may recover in an action for a real estate sales commission, a broker must prove that he acted pursuant to an express contract of agency. (For citations, see p.4.) The broker's right to a commission is measured by the terms of his contract. (For citations, see p. 4.) And that contract must be in writing. UTAH CODE ANN. § 25-5-4, Smith Realty Co. v. Dipietro, 292 P. 915, Case v. Ralph, 188 P. 640.

Taylor National has failed to carry its burden of proving the existence of a valid contract of agency entitling it to recover a commission upon the sale of the Barrington House. It bases its right to a recovery in this action on a writing introduced at the trial as Exhibit 9. (Record at 17, lines 27-30 to 18, lines 1-5.) This instrument, however, does not represent the terms offered to Taylor National by Jensen Brothers Construction Co.

The offer made by Jensen Bros. is more accurately reflected in the listing agreement introduced at the trial as Exhibit 19. Exhibit 19 is the carbon copy which was attached to Exhibit 9 when Marvin Jensen signed it on behalf of Jensen

Bros. The circumstances surrounding the preparation of the listing agreement and Marvin Jensen's signing it were explained at the trial by Paul Taylor, formerly President of Taylor National, as follows:

Q Okay. And I'll show you Exhibit Nine and ask you if you can identify that?

A Yes, sir.

Q What is that?

A That's a Utah County Board of Realtor's form for single residential listing.

Q And is that the Listing Agreement under which you claim a real estate commission?

A Yes, sir.

Q Now, do you -- strike that. Tell the Court the circumstances under which that was executed and how it came to your possession.

A The Listing Agreement was prepared in writing in the presence of the Jensen Brothers. We felt that we wanted to have it typed. So we took it back to our office and had our secretary type it.

Q You wrote it out in pencil first?

A Right.

Q Okay. Then went back to your office and had your secretary type it?

A Right.

Q Then what happened?

A Then we delivered it to the Jensen Brothers for their signature. And either the Jensen Brothers delivered the final executed copy to us, or someone from our staff picked it up. I'm not sure of which.

(Record at 17, lines 27-30 to 18, lines 1-22.)

After signing the instrument, Marvin Jensen returned the top

copy and kept the carbon, Exhibit 19. (Record at 129, lines 21-29.) Since Exhibit 19 is a carbon of the writing signed by Marvin Jensen, the impressions of any handwritten notations made on the top copy (Exhibit 9) should show through on the carbon -- unless they were added after the copies were separated.

But there are handwritten notations on Taylor National's copy, (Exhibit 9), which do not appear on the carbon (Exhibit 19). On the top of the page the words "Not on multiple" and "Office Exclusive" have been added to Exhibit 9. In addition, the blank next to the "Date Listed" has been filled in with either the numbers "6-1-77" or "7-1-77." And the blank next to the "Date Expired" has been filled in with the numbers "12-1-77." Under the blank for "salesman" the names "Bryce & Paul Taylor" have been added. Finally, it was stipulated by counsel for Taylor National at trial that the writing had been signed at the bottom by a representative of Taylor National after this suit was filed. (Record at 20-21). Because these handwritten terms are not present on the carbon copy, (Exhibit 19), it may be inferred that they were not present on the writing when Marvin Jensen signed it. But, in addition, Paul Taylor testified that at least one of the terms was added by a secretary at Taylor National, (Record at 18, lines 23-27, 19, lines 15-18), and he presumed that other additions were made by the secretary also. (Record at 19, lines 3-5). Since Taylor National wanted to have the

document typed before Jensen Bros. signed it, it is not likely that the secretary would fill in most of the blanks with the typewriter and then fill in the others by hand before delivering the instrument to Jensen Bros. After all, Taylor National did not want a handwritten listing agreement; that was the reason for having it typed in the first place. (Record at 18, lines 9-11.)

The handwritten additions which appear only on Exhibit 9 were added after Marvin Jensen returned the writing to Taylor National. Exhibit 9, therefore, does not reflect the terms and conditions of the offer made by Jensen Bros. to Taylor National. Those terms and conditions are set forth in Exhibit 19. And Exhibit 19 is the contract on which Taylor National must rest its right to a commission.

This fact has ramifications which prevent Taylor National from claiming a commission in this action. For an addition of a term to an instrument, such as here alleged, may constitute a material alteration. WILLISTON ON CONTRACTS § 1902. And "(t)he intentional or material alteration of a written contract, by a party entitled to any benefit under it destroys the integrity of the instrument and extinguishes all executory obligations of the contract in his favor." Bishop v. Rainholdt, 79 Cal. App. 2d 568, 180 P.2d 416, 419 (Calif. Dist. Ct. App. 1947), WILLISTON ON CONTRACTS § 1902. The test of materiality is whether the instrument will have the same legal effect after the alteration as it did before. WILLISTON

ON CONTRACTS § 1902, Briggs v. Sarkeys, Inc., 418 P.2d 620, 624 (Okla. 1966).

In the present case, the additions are material -- especially the additions of the listing and expiration dates of the contract. For these dates define the time for performance of the contract. They establish the duration of Jensen Brothers' liability to Taylor National for a commission on the sale of the house and set the date upon which Jensen Bros. is free to sell the property without liability to Taylor National. Without an expiration date, a listing agreement lasts, at most, for a reasonable time. The addition of the expiration date to the writing, however, may cause the agreement to endure for more than a reasonable time. This makes all the difference to Taylor National if a sale of the property is made after a reasonable amount of time has elapsed, but before the expiration date which was added to the writing. Were the expiration date not added to the writing, Taylor National would not be entitled to a commission. Without that expiration date specified in the writing, the passage of a reasonable time for performance does not operate to deny Taylor National its commission.

A listing agreement which does not contain a listing date and an expiration date lacks the definite terms necessary to create a contract. Without those terms, the writing is so vague that it cannot be enforced. When those dates are present on a listing agreement, it is apparent that the parties

came to a meeting of the minds over the time for performance.

In the present case, the additions of the terms "Office Exclusive" and "Not on multiple" create ambiguities in the contract which affect the broker's right to a commission. For, as discussed later, a broker's listing agreement must grant an exclusive agency or an exclusive right to sell unambiguously within the four corners of the writing. Foltz v. Begnoche, 222 Kan. 383, 565 P.2d 592 (1977). Wilkins v. W.B. Tilton Real Estate and Ins., Inc., 257 So.2d 573, 575 (Fla. Dist. Ct. App. 1971). When the additions are read in connection with the terms of the listing agreement in the present case, it is difficult to ascertain whether the listing agreement grants an exclusive right to sell, an exclusive agency, or an open listing to Taylor National. Consequently, the additions materially alter the legal affect of the instrument.

After Marvin Jensen signed the listing agreement on behalf of Jensen Bros., he returned it to Taylor National, who had possession of it until this suit was filed. The additions were made to the writing after it was delivered to Taylor National. Further, Paul Taylor stated his presumption that the additions were made by the secretary to Taylor National. Because the alterations in the writing are material, and because the evidence establishes that employees of Taylor National made them, Taylor National is not entitled to recover under the listing agreement introduced at trial as

Exhibit 9. All executory obligations in favor of Taylor National were extinguished by the alterations.

There are further reasons for finding that Exhibit 19 contained the terms and conditions which were offered by Jensen Bros. For the listing agreement specifies that, by signing, the owner acknowledges receipt of a copy of the agreement. (Exhibit 9, Exhibit 19.) In addition, Utah law imposes a duty on the broker to provide the owner with copies of all listings and agreements of sale contracts. UTAH CODE ANN. § 61-2-11. Neither Leon nor Marvin Jensen ever saw Exhibit 9 after it was signed by Marvin Jensen. (Record at 97,124, 130.) The only copy of the listing agreement which Jensen Bros. had was Exhibit 19. Therefore by the terms of the listing agreement which it prepared, Taylor National is estopped to deny that the copy of the listing which Jensen Bros. retained was a valid copy of the agreement. Any listing agreement which does not conform to the terms set out in Exhibit 19, therefore, is invalid. Because it differs in several material aspects from the offer made by Jensen Bros., Exhibit 9 may not be asserted by Taylor National as the contract of agency.

2. TAYLOR NATIONAL FAILED TO ACCEPT THE OFFER MADE BY JENSEN BROS., CONSEQUENTLY, THERE IS NO CONTRACT OF AGENCY ON WHICH TAYLOR NATIONAL MAY BASE A RIGHT TO A COMMISSION.

Before a contract can be said to exist, the parties must come to a meeting of the minds. Pingree v. Continental Group of Utah, 558 P.2d 1317 (Utah 1976), Morgan v. Bd. of State

Lands, 549 P.2d 695 (Utah 1976), Bunnell v. Bills, 13 Utah 2d 83, 368, P.2d 597 (1962), Valcarce v. Bitters, 12 Utah 2d 61, 362 P.2d 427 (1961), E.B. Wicks v. Moyle, 137 P.2d 342 (Utah 1943), Candland v. Oldroyd, 248 P. 1101 (Utah 1926). Consequently, an acceptance containing terms which vary from those of the original offer does not lead to a binding contract. Instead, it is said to be both a rejection of the original offer and a counteroffer. Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co., 119 U.S. 149 (1886), C.H. Leavell & Co. v. Grafe & Assoc., Inc., 90 Ida. 502, 414 P.2d 873 (1966), RESTATEMENT (SECOND) OF CONTRACTS § 58.

In the present case, Taylor National alleges a right to a commission based on the writing introduced as Exhibit 9. (Record at 17-18.) As previously established, Exhibit 9 does not contain the terms and conditions of the offer made by Jensen Bros. (Exhibit 19). Accordingly, the parties never came to a meeting of the minds and no contract can be said to exist. Taylor National's additions to the terms of the offer made by Jensen Bros. operated as both a rejection and a counteroffer to Jensen Bros.' offer. There is no evidence to indicate that Jensen Bros. ever accepted this counteroffer. In fact, representatives of Jensen Bros. were not aware that changes had been made in the listing agreement until the time of the trial. (Record at 97, 124, 130.) Furthermore, because a broker must base his right to a commission on a written contract, Smith Realty Co. v. Dipietro,

292 P. 915, Case v. Ralph, 188 P. 640, Taylor National may not claim a meeting of the minds to some contract other than Exhibit 9 or 19 which was not in writing.

No contract ever came into being between Taylor National and Jensen Bros. because there was never a meeting of the minds between the two parties. Therefore, Taylor National may not recover in this action to collect a real estate sales commission because it has not proven the existence of a valid contract on which a broker is required to base his commission.

Even if Exhibit 9 (Taylor National's copy of the listing agreement) were found to be a valid contract of agency, there would still be no contract because Taylor National failed to accept the offer made by Jensen Bros. Acceptance of an offer may be made in several different ways. 17 C.J.S. Contracts § 41. And signing a document constitutes an acceptance of its provisions. 17 C.J.S. Contracts § 41. "In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses. RESTATEMENT (SECOND) CONTRACTS § 31.

In the present case there is little doubt as to the method of acceptance contemplated by Jensen Bros.' offer. The listing agreement provides a space for the signatures of both the listing owner and the broker. It requires each party to sign in consideration of the signature of the other --

each party promises in consideration of the other party's promise, and a bilateral contract arises. This listing agreement was provided by Taylor National, which did nothing to contradict the expectations raised by the instrument -- that each party would indicate its promise to be bound by its signature. As a result, Jensen Bros. expected Taylor National to indicate its assent to the terms of the instrument by signing it. (Record at 130, lines 17-20.) But Taylor National never gave its promise in exchange for the promise made by Jensen Bros. In the first place, Jensen Bros. was never given a copy of the listing agreement signed by Taylor National, and there is no evidence to indicate that Taylor National ever gave its promise to perform at any time prior to the beginning of this suit. In the second place, any attempted acceptance which Taylor National made by signing the listing agreement was ineffective because it was signed after the occurrence of the event allegedly giving rise to a commission.

Utah law does not prevent an owner and broker from entering into a special contract which provides for a broker's commission on the happening of a certain event. Watson v. Odell, 58 Utah 276, 198 P. 772 (1921), Patterson, v. Blair, 257 P.2d 944 (Utah 1953). And in this case, Taylor National does not allege that it procured the ultimate purchaser of the Barrington House, which is the ordinary method of earning a commission. Consequently, it must base its claim to a

commission on special terms in the listing agreement. Taylor National alleges that the event giving rise to its right to a commission is the sale by any party, of the Barrington House. The terms of the listing agreement provide:

...if said property or any part thereof is sold, leased or exchanged during said term by myself or any other party, I agree to pay you a commission of 6% for such sale, lease or exchange. (Exhibits 9 & 19, paragraph 2.)

But Taylor National must prove that its contract was in force at the time that event occurred in order to be entitled to commission. Smith Realty Co. v. DiPietro, 292 P. 915. In Smith Realty, the court indicated that a broker is not entitled to a commission on a contract entered into after the happening of the event.

If, as indicated by Mr. Justice Frick in Case v. Ralph, Supra, it was there necessary to allege an express contract of employment, so here, the complaint to be sufficient must contain such an allegation. It follows that it is not enough to merely allege an agreement or promise to pay the broker for services already rendered whether made directly to the broker or to some third person, but before a broker can recover he must allege and prove an express contract of employment in pursuance of which services were rendered which entitle him to recover the commission agreed upon. 292 P. at 917. (Emphasis added.)

To be entitled to a commission on the sale of the Barrington House, then, Taylor National must show that it accepted Jensen Bros.' offer before the sale of the house. It has not proven this fact. For the Barrington House was sold in late 1977, while Taylor National did not sign the listing agreement until after June 7, 1978. (Record at 20, lines

29-30 to 21, lines 1-3.) Taylor National entered into the contract of agency by signing the listing agreement after any right to a commission was due. Consequently, it may not recover in this action. Smith Realty Co. v. Di Pietro., 292 P. 915.

In any event, Taylor National's power of acceptance had been terminated before it accepted the listing agreement by signing it. For as shall be demonstrated hereafter, Jensen Bros.' offer had been revoked or had lapsed, having been extended for more than a reasonable time. And either of these occurrences operate to terminate an offeree's power of acceptance. RESTATEMENT (SECOND) CONTRACTS § 35(1).

Having failed to show that it accepted Jensen Bros.' offer by signing the contract, Taylor National must demonstrate that it accepted by performing according to the terms of the offer. RESTATEMENT (SECOND) CONTRACTS § 31. Taylor National has failed to demonstrate this.

Ordinarily, a broker's listing agreement, whether it grants the broker an exclusive right to sell, an exclusive agency, or merely an open listing, is viewed as an offer for a unilateral contract. Tetrick v. Sloan, 339 P.2d 613 (Calif. Dist. Ct. App. 1959), Baumgartner v. Meek, 272 P.2d 552 (Calif. Dist. Ct. App. 1954), C. Forsman Real Estate Co. v. Hatch, 97 Idaho 511, 547 P.2d 1116 (1976), 12 AM. JUR. 2d Brokers § 32. This unilateral view of the agency contract is acknowledged by the Utah Statute of Frauds, which requires

only the signature of the owner on the writing. A writing is sufficient under the statute if it is "subscribed by the party to be charged therewith." UTAH CODE ANN. § 25-5-4.

Acceptance of the unilateral offer made in a broker's listing agreement may be only by full performance. Barnard v. Hardy, 293 P. 12 (Utah 1930), Porter v. Hunter, 207 P. 153 (Utah 1922), Clements v. Rankin, 189 P.2d 725 (Calif. Dist. Ct. App. 1948), C. Forsman Real Estate Co. v. Hatch, 547 P.2d 1116, Wilkins, v. Tilton, 257 So.2d 573 (Fla. Dist. Ct. App. 1971), Craib v. Committee on National Missions, 62 Mich. App. 617, 233 N.W. 2d 674 (1975).

It is clear that a real estate broker's employment contract is usually a unilateral agreement which the broker may accept only by full performance. C. Forsman Real Estate Co. v. Hatch, 547 P.2d at 1120.

A broker is not entitled to compensation until he has performed the undertaking assumed by him. Roscow v. Bara, 135 P.2d 364 (Mont. 1943). He must accomplish what he undertook to do in his contract of employment -- nothing short of that will entitle him to compensation. Spartz v. Rimnac, 208 N.W. 2d 764 (Minn. 1973), Libowitz v. Lake Nursing Home, Inc., 35 Wis. 2d 74, 150 N.W. 2d 439 (1967), Fenton v. Bancroft Hotel Assoc., Inc. 265 So. 2d 67. A broker is not entitled to compensation for unsuccessful efforts. Id., Diehl & Assoc., Inc. v. Houtchens, 567 P. 2d 931 (Mont. 1977).

Full performance means that the broker has performed the act required of him, the procuring of a buyer ready, willing

and able to purchase on the owner's terms. A broker may not recover for time and money expended in unsuccessful attempts because the broker is hired for his skill in arranging a sale of the property. The owner is not hiring merely an advertising agent, but the object of the broker's employment is to bring buyer and seller together and consummate a sale of the property. The broker's efforts in advertising the property and showing it to likely prospects are merely supplementary to the main object of his employment. Until an opportunity to sell on the owner's terms is presented, the broker has not performed the object of his employment. Not having performed, he cannot be said to have accepted an offer for a unilateral contract. In the instant case, Taylor National, in order to accept the terms of the listing agreement and be entitled to a commission, must have fully performed the terms of its contract. And that portion of the contract upon which the right to a commission is premised reads:

During the life of this contract, if you find a party who is ready, able and willing to buy, lease or exchange said property or any part thereof, at said price and terms, or any other price or terms, to which I may agree in writing, or if said property or any part thereof is sold, leased or exchanged during said term by myself or any other party, I agree to pay you a commission of 6% for such sale, lease or exchange. (Exhibits 9 & 19.)

The performance required by Taylor National under the contract is no different from that in most other listing agreements. The broker must procure a buyer who is ready, willing and able to purchase, or otherwise exchange the property, on

the terms agreed to by the seller. Taylor National has failed to prove that it ever fully performed under the contract. While it presented offers to the owner, it did not present anyone who was ready to purchase on the terms specified by the owner, either in the listing agreement or through further negotiation. (Record at 51-2.)

Because Taylor National never fully performed under the listing agreement, it cannot be said to have accepted by performance, the offer for a unilateral contract made by Jensen Bros. And, as previously established, Taylor National failed in any other way to accept the terms and conditions offered by Jensen Bros. Having failed to accept the terms of the contract, Taylor National may not now benefit by its exclusive right to sell provisions to gain a commission.

3. THE OFFER MADE BY JENSEN BROS. DID NOT CONTAIN THE TERMS AND CONDITIONS REQUIRED BY THE STATUTE OF FRAUDS, AND WAS NOT A VALID CONTRACT OF AGENCY.

A valid contractual offer must contain definite and certain terms. Case v. Ralph, 188 P. 640, RESTATEMENT (SECOND) OF CONTRACTS § 32. The Utah Statute of Frauds requires that these terms be in writing when the contract employs a broker to purchase or sell real estate for compensation. UTAH CODE ANN. § 25-5-4, Smith Realty Co. v. Dipietro, 292 P. 915, Case v. Ralph 188 P. 640.

The court interpreted the Statute of Frauds to require that the writing contained the terms and conditions of the

broker's employment.

The statute is in force in a number of the states of the Union, and has by the courts of last resort in those states frequently been applied. The courts generally hold that under such a statute a real estate broker or agent cannot recover commission for services rendered in either selling or procuring a purchaser for real property unless it appears: (1) that there is an express contract or agreement of authority in which the terms and conditions of his employment, if any, and the amount of his commission, etc., are stated; (2) that such contract be in writing... Case v. Ralph, 188 P. at 642. (Emphasis added.)

As the Court said in Fritsch v. Hess, 49 Utah 75, 162 P. 70, 71, "It is well settled that no particular form of words is necessary to comply with this statute, and that almost any kind of writing will be sufficient if it be signed by the party sought to be charged and contains the essential terms of a contract." (Emphasis added.) The Court in Smith Realty Co. v. Dipietro, 292 P. at 917, denied recovery of a broker's action for a commission. The Court observed that the alleged contract was insufficient because, among other things, nothing was said in the writing "as to terms, conditions, time or description of the property."

It is generally accepted that an offer to contract, to be sufficient, must contain specific terms and conditions. RESTATEMENT (SECOND) CONTRACTS § 32. More specifically, the courts have held that a broker's contract should state the name of the broker, Smith v. Dipietro, 292 P. at 917, the time for performance, Id., particularly the expiration date, Olson v. Neale, 116 Ariz. 522, 570 P.2d 209 (Ariz. App.

1977), and show, unequivocally, the employment of the broker, Maricopa Realty & Trust Co. v. V.R.D. Farms, Inc., 10 Ariz. App. 524, 460 P.2d 195, Sanstrum v. Gonser, 140 Cal. App. 2d 732, 295 P.2d 532, Lathrop v. Gauger, 127 Cal. App. 2d 754, 274 P.2d 730.

In the instant case, the listing agreement does not contain "the essential terms of a contract." Fritsch v. Hess, 162 P. 71. For as previously established, the writing relied on by Taylor National is not the offer made by Jensen Bros. And the writing which Jensen Bros. offered to Taylor National does not contain the terms and conditions required either by the Statute of Frauds or principles applicable to contracts in general. The terms missing here include the time, or duration, of performance (particularly the expiration date), and the unequivocal employment of the broker.

Where the duration of the contractual relationship has not been specified, the law generally implies that it will last for a reasonable time (after which it will be terminable at will by either party). Consolidated Theatres v. Theatrical Employees Union, 69 Cal. 2d 713. Employment contracts, however, do not last for a reasonable time, but are generally terminable at will by either party. Atchison Topeka & Santa Fe Ry. Co. v. Andrews, 211 F.2d 264.

Such is not the case where real estate broker's employment contracts are concerned, however. Several state statutes require that the duration of the listing agreement be stated

explicitly in the writing. Bangle v. Holland Realty Inv. Co., 80 Nev. 331, 393 P.2d 138 (1964), Saye v. Paradise Memorial Gardens, Inc., 92 Nev. 526, 554 P.2d 274 (1976), Summers v. Freeman, 128 Cal. App. 2d 828, 276 P.2d 131, and where no such statute exists, the courts have required the writing to contain an expiration date.

Taken together, it seems to us that the public policy of this state is that brokers, in order to collect a commission, must have a written listing, that the listing must contain a definite expiration date, and the listing agreement shall be deemed to cancel automatically on that date. Olson v. Neale, 570 P.2d at 209.

The policy of the Utah Statute of Frauds, likewise, requires that the dates of commencement and termination of the listing agreement be stated explicitly. Broker's listing agreements have been included within the Statute of Frauds in order to protect landowners from fraud and unfounded claims of brokers. Fowler v. Taylor, 554 P.2d 205 (Utah 1976), Featherman v. Kennedy, 122 Mont. 256, 200 P.2d 243 (1921), Roseberry v. Heckler, 84 Ariz. 247, 326 P.2d 365, Lathrop v. Gauger, 127 Cal. App. 2d 754, 274 P.2d 730. A contract which does not specify its duration is too indefinite for the parties to enforce among themselves; what is a reasonable time to the owner may not be reasonable to the broker who has yet to procure a buyer. Where the law requires that the duration of the broker's contract be stated explicitly, it reduces the likelihood of disputes over the issue of what constitutes a reasonable time for the duration of the listing,

and it should be observed that the real issue in such disputes is whether the owner is liable any longer to the broker for a commission. Where the duration of a broker's employment has been specified in his listing agreement, he is less likely to be successful in bringing an unfounded claim against the listing owner. Both broker and owner will have the same expectations as to the termination date of the contract. This is especially valuable where a contract purports to grant the exclusive right to sell or an exclusive agency, or where the broker is entitled to a commission on a sale consummated months after the contract's termination to any prospect procured originally by the broker.

In all of these instances, the owner gives up certain rights to sell his property without liability to another. An exclusive right to sell prevents the owner from selling the property on his own without incurring liability to the listing broker. Wilkins v. W.B.Tilton Real Estate & Ins., Inc. 257 So.2d 573 (Fla. Dist. Ct. App. 1971). And an exclusive agency prevents the owner from listing his property with any other broker. Id. But the right to sell one's own property is an inherent right which can only be surrendered in explicit language. Lambert v. Haskins, 263 P.2d 433 (Colo. 1953), Foltz v. Begnoche, 565 P.2d 592, Wilkins v. W.B. Tilton Real Estate & Ins. Inc., 257 So. 2d 573. And a contract which does not specify the duration for which the owner relinquishes such rights is more indefinite than explicit. Utah law should

require that a real estate broker's listing agreement state explicitly the duration of the contract. Having failed to prove an express contract of agency which complies with the Statute of Frauds, Taylor National may not recover in quantum meruit or under an implied contract. Case v. Ralph, 188 P. 640, Diggins v. Johnson, 513 P.2d 660 (Alaska 1973), Robertson v. Hansen, 89 Idaho 107, 403 P.2d 585 (1965), Isaguirre v. Echevarria, 96 Idaho 641, 534 P.2d 471 (1975), Baugh v. Darley, 184 P.2d 335 (Utah 1947), Watson v. Odell, 58 Utah 276, 198 P. 772, 41 A.L.R. 2d 905. The Court in Case v. Ralph stated:

...in the absence of such an express contract no recovery can be had for the reasonable value of the services rendered as upon a quantum meruit, nor for money and time expended for the use and benefit of the owner of the property. It is also held that performance or part performance of a parol agreement is unavailing. 188 P. at 642.

And the Court said in Watson v. Odell, 198 P. at 775, "Under our statute, the plaintiff could recover a commission only by virtue of a contract. He could not recover as upon a quantum meruit."

- C. IF TAYLOR NATIONAL HAD A CONTRACT OF AGENCY, IT LAPSED BEFORE THE OCCURANCE OF THE EVENT GIVING RISE TO A COMMISSION, HAVING ENDURED FOR A REASONABLE TIME.

Where the duration of a broker's agency is not specified in the listing agreement, it does not last indefinitely. The broker must perform according to the terms of the listing

within reasonable time. 24 ALR 1540, 1547, Robertson v. Wilson, 121 Wash. 358, 209 P. 841 (1922), Parkey v. Lawrence, 284 S.W. 283 (Tex. Ct. Civ. App. 1926), Cocquyt v. Shower, 189 P. 606 (Colo. 1920), 12 CJS Brokers § 88, Harris v. McPherson, 97 Conn. 164. 115 A. 723, 24 ALR 1530 (1922), 12 AM. JUR. 2d Brokers §54, Martyn v. First Federal Savings & Loan Assoc. of West Palm Beach, 257, So. 2d 576 (Fla. Dist. Ct. App. 1972), Clark v. King, 209 Mo. App. 309, 238 S.W. 825 (1922), Reitz v. Oglebay, 251 S.W. 771 (Mo. App. 1923), Boggs v. McMickle, 206 P.2d 824 (Colo. 1949). Whether a broker has performed according to his contract within a reasonable time is a question of fact, Vidler v. DeBell, 270 P.2d 120 (Calif. Dist. Ct. App. 1954), which depends on the particular circumstances of each case. 12 CJS Brokers § 88, 12 AM. JUR. 2d Brokers § 54, Boggs v. McMickle, 206 P.2d 824, Clark v. King, 238 S.W. 825, Reitz v. Oglebay, 251 S.W. 771. Among the facts to be considered are the nature and character of the service, the magnitude of the undertaking, the intention of the parties, and all other pertinent facts and circumstances. 12 CJS Brokers § 88. The burden rests with the broker to prove that he performed within a reasonable time. 24 ALR 1548.

As previously established, Taylor National's contract of agency failed to specify an expiration date. (Exhibit 19.) If the Court finds that the expiration date is not required by the Statute of Frauds on a contract purporting to grant an exclusive right to sell or an exclusive agency, Taylor National

has still failed to prove that it performed within a reasonable time.

When given the name of a prospective purchaser -- in fact, the ultimate purchaser -- Taylor National failed to contact him to even begin negotiations for the sale of the house. After prodding Taylor National for three or four weeks, Jensen Bros. concluded the sale on its own. Leon Jensen of Jensen Bros. first asked Paul Taylor of Taylor National to call Harward in early September 1977. (Record at 32, lines 5-28; 98, lines 28-30; 99, lines 1-5.) He made one unsuccessful attempt, then left for Hawaii. For three to four weeks, Leon Jensen repeatedly asked Taylor National to contact Harward. (Record at 99, lines 8-30; 100, lines 1-12.) Rather than contact Harward, however, Taylor National took the position that Harward should contact it. (Record at 49-51, 59, 89-93.) Jensen Bros. and Harward ultimately concluded the sale on their own only after Taylor National had repeatedly refused to contact Harward. (Record at 100-102.) Before Leon Jensen told Paul Taylor of Harward's interest in the Barrington House, Taylor National had failed to procure any prospects who were willing to meet Jensen Bros.' terms. (Record at 30-32, 51-52.) If the house had been listed in July 1977, as Taylor National alleges, (Exhibit 9), three months had elapsed without one offer which met the owner's terms -- and this after exposure in the home show. A broker's failure to attempt to contact a prospect within

three to four weeks in any case is unreasonable. Under the instant circumstances, it was all the more unreasonable. A broker who is given the name and telephone number of a likely prospect and who fails to make a good faith attempt to contact him within a period of three weeks, has not performed what his contract requires of him within a reasonable time. Consequently, he may not assert that he performed under the terms of his contract before it lapsed. In the present case, Taylor National failed to perform under the contract within a reasonable time, and has failed to earn a commission on the sale of the Barrington House.

- D. EVEN IF TAYLOR NATIONAL HAD PROVEN A VALID CONTRACT OF AGENCY, IT IS NOT ENTITLED TO A COMMISSION BECAUSE ITS AUTHORITY HAD BEEN TERMINATED BEFORE IT PROCURED A BUYER READY, WILLING, AND ABLE TO PURCHASE ON JENSEN BROTHERS' TERMS.

To be entitled to a real estate sales commission, a broker must ordinarily be the procuring cause of a sale before his authority has been terminated. 12 C.J.S. Brokers § 88. The owner may terminate the broker's authority any time before a sale as long as the contract of agency is not supported by consideration and the owner has not terminated in bad faith, that is, to avoid paying a commission on a sale to a buyer originally procured by the broker. Flinders v. Hunter, 60 Utah 314, 208 P. 526, 530 (1922), 12 AM. JUR. 2d Brokers §§ 55, 222. 12 C.J.S. Brokers § 66. While some jurisdictions hold that the owner cannot revoke where the

agency is exclusive, 12 AM. JUR. 2d Brokers § 58, or where the contract is to last for a definite time period, 12 AM. JUR. 2d Brokers, § 56, this is not the case in Utah.

In Flinders v. Hunter, 208 P. 530, the Utah court set out the conditions under which an owner could terminate a broker's contract of agency.

It will thus be seen that where, as here, the appointment is not supported by any consideration, although the authority to sell is in terms exclusive and a fixed period of time is named, yet the owner can terminate the authority at any time before a sale is effected by the broker, and the broker has no claim against the owner for commission or otherwise unless the broker alleges and proves that the authority was terminated in bad faith and for the purpose of selling to one of his customers by the owner himself to avoid the payment of a commission. 208 P. at 530.

In the present case, because Jensen Bros. terminated its authority, Taylor National has no claim for a "commission or otherwise." Id. Taylor National has failed to show that the listing agreement here was supported by consideration. It bases its claim for a recovery in this action solely on the listing agreement introduced at the trial as Exhibit 9. (Record at 18.) Nowhere in that writing is there a reference to the consideration furnished by the broker. And in connection with the termination of a broker's authority, the acts required of him under the contract are not the kind of consideration contemplated by the law. 28 A.L.R. 893.

An owner may terminate his broker's authority as long as he does so in good faith and does not do so to avoid paying a commission on a sale to a buyer previously procured by the

broker. Flinders v. Hunter, 208 P. 530. It has been said that the test of bad faith is whether the owner's purpose in terminating the broker's agency is to avoid payment of a commission. Snyder v. Schram, 282 Or. 273, 577 P.2d 935 (1978). And the burden of proving bad faith rests with the broker. Flinders v. Hunter 208 P. 530. Jensen Bros. did not terminate Taylor National's authority so that it could sell the property on its own to a buyer procured by the broker and thus avoid liability for a commission. Rather, Jensen Bros. sold the Barrington House to Harward, a purchaser procured solely by Jensen Bros. Representatives of Taylor National were given repeated instructions to contact Harward, but failed to do so and ultimately took the position that if he wanted to purchase, Harward would have to contact them. (Record at 49-51, 58-9, 62, 60, 79, 89, 91-3.) It was only after Jensen had failed to get Taylor National to do anything about contacting its prospect that Jensen and Harward began negotiations, independent of Taylor National, for the sale of the Barrington House. (Record at 149, 98-102.) At no time did Taylor National present Jensen Bros. with a ready, willing and able buyer who had been procured by them. (Record at 51-2, 86-7.)

In the face of his own worries about Harward's desire to purchase "in a hurry" or look elsewhere, (Record at 103-4, 125.), Jensen gave Taylor National more than a reasonable time to negotiate a sale. Jensen Bros. exhibited the utmost good

faith in terminating Taylor National's authority. Having been given the name and phone number of a ready, willing, able, and waiting purchaser, Taylor National's failure to procure him as a purchaser, thus earning a right to a commission, can be attributed solely to Taylor National's inaction, neglect, and intransigence. Taylor National has failed to prove bad faith on the part of Jensen Bros. as required by Flinders. Thus it may not claim that its authority was wrongfully terminated, nor claim a right to recover against Jensen or Harward.

An owner may revoke the broker's authority by express notification or the revocation can be implied from the acts of the parties. 12 AM. JUR. 2d Brokers § 60. In the instant case, Jensen Bros. notified Taylor National in September of 1977 that it had contracted to sell the Barrington House to Harward. (Record at 33-34.) In light of the prior dealings between Jensen Bros. and Taylor National -- the numerous attempts by Jensen Bros. to have Taylor National contact Harward -- and Taylor National's position that Harward would have to contact it, if there was to be a sale -- the sale by Jensen Bros. on its own indicated to Taylor National that its services were no longer being used. But further, it has been held that the sale of the property by the owner constitutes an implied revocation. Harris v. McPherson, 115 A. 723 (Conn. 1922), Walsh v. Grant, 152 N.E. 884, 885 (Mass. 1926), Kennedy & Kennedy v. Vance, 202 P.2d 214, 215 (Okla. 1949),

Trimmer v. Ludtke, 105 Ariz. 260, 462 P.2d 809, 811 (1969),
Roberts v. Gardner, Clarke & Sullivan, 275 P.2d 245, 247
(Okla. 1954). Some of these cases grant the right to terminate by sale only in nonexclusive situations. However, Flinders indicates that the exclusivity of the broker's listing agreement has no effect on the owner's power to revoke in Utah. Jensen Bros. informed Taylor National of the sale, and the authority to sell was revoked at that time.

Further justification for Jensen Bros.' termination of Taylor National's authority lies in the fact that Taylor National did not make reasonable efforts to sell the Barrington House. The court in Fischer v. Patterson, 86 A.2d 851, 852 (N.H. 1952) indicated that a broker's failure to use reasonable efforts to sell is a breach of duty, which may justify rescission of the contract of agency. And in Harris v. Crocker, 86 A.2d 853 (N.H. 1952) the court held that an owner's termination of a broker's listing agreement was justified where the broker breached his duty to use reasonable efforts to make a sale. Finally, in Dixon v. Gustav, 318 P.2d 965 (Wash. 1957), the court held that an owner was justified in terminating a listing agreement where a broker holding an exclusive listing made no effort to sell. As has been discussed, Taylor National first neglected, then refused, to contact a known prospect. Taylor National not only failed to make reasonable efforts to sell, it took no effort to sell. Rather it indicated to Jensen Bros. that the

buyer would have to make the efforts to effect a sale. Consequently, Jensen Bros. could have terminated Taylor National's listing for its failure to contact Harward. A broker whose authority is, in good faith, terminated before he has effected a sale is not entitled to a commission, even though he may have devoted time and labor and expended his money. E.B. Wicks Co. v. Moyle, 137 P.2d 342.

In the present case, Taylor National's authority was terminated by Jensen Bros. before it performed under the contract by procuring a purchaser ready, willing and able to buy on the owner's terms. Accordingly, Taylor National was not entitled to a commission on the sale of the Barrington House.

E. EVEN IF TAYLOR NATIONAL HAD PROVEN A VALID CONTRACT OF AGENCY, JENSEN BROS. WAS FREE TO SELL THE HOUSE ON ITS OWN WITHOUT INCURRING LIABILITY FOR A REAL ESTATE SALES COMMISSION.

The right of an owner to sell his own property is inherent, and is retained when a real estate broker is employed unless the contract of agency provides otherwise by clear and unequivocal terms. Dorman Realty & Ins. Co., Inc., v. Stalvey, 212 S.E. 2d 591 (S.C. 1975). An owner impliedly retains the right to sell his own property without liability to the broker unless such right is explicitly waived. Wright v. Vernon, 183 P.2d 908 (Calif. Dist. Ct. App. 1947), Lambert v. Haskins, 263 P.2d 433 (Colo. 1953), J.L. Lemmon Co. v. Oppenheimer, 8 P.2d 679 (Okla. 1932). As the court said in Peeler Ins. &

Realty, Inc. v. Harmon, 20 N.C. App. 78, 200 S.E. 2d 443, 445 (1973), "Since the right of alienation has become such an integral part of property, it is only proper that the contract expressly negative this right before it is lost."

The owner's right to sell without incurring liability to the listing broker may be waived by granting the broker an exclusive agency or an exclusive right to sell. Under an exclusive right to sell, the owner may not sell his property either by himself or through another broker without incurring liability for a commission to the listing broker. Tetrick v. Sloan, 339 P.2d 613 (Calif. Dist. Ct. App. 1959), E.A. Strout Western Realty Agency, Inc. v. Gregoire, 225 P.2d 585 (Calif. Dist. Ct. App. 1951), Foltz v. Begnoche, 222 Kan. 383, 565 P.2d 592 (1977), Dorman Realty & Ins. Co. Inc. v. Stalvey, 212 S.E. 2d 591, Zifcak v. Monroe, 249 A.2d 893 (R.I. 1969). Under an exclusive agency, the owner may not list his property with other brokers during the life of the contract. However, he is not precluded from selling the property to a buyer procured on his own, and such a sale does not subject him to liability to the broker for a commission. Tetrick v. Sloan, 339 P.2d 613, Foltz v. Begnoche, 565 P.2d 592, Zifcak v. Monroe, 249 A.2d 893, Dorman Realty & Ins. Co., Inc. v. Stalvey, 212 S.E. 2d 591, Bourgoin v. Fortier, 310 A.2d 618 (Me. 1973).

In the present case, Jensen Bros. procured the buyer of the Barrington House on its own. In order to recover a commission, then, Taylor National must prove that its alleged

listing agreement granted it an exclusive right to sell. For Jensen Bros. did not list the property with another broker. And under an exclusive agency contract, the owner may sell on his own without paying a commission as long as he does not list the property with another broker. Under an open listing contract, the owner may sell to anyone not procured by his broker. Nash v. Goor, 94 Ariz. 316, 383 P.2d 871 (1963).

An exclusive right to sell may be created only by clear, unambiguous language within the four corners of the written contract. Foltz v. Begnoche, 565 P.2d 592, J.L. Lemmon Co. v. Oppenheimer, 8 P.2d 679. The exclusive right to sell exists only where it is unequivocally granted in the broker's contract. Dixson v. Kattel, 311 So.2d 827 (Fla. Dist. Ct. App. 1975), Wilkins v. W.B. Tilton Real Estate & Ins., Inc. 257 So.2d 573, 575 (Fla. Dist. Ct. App. 1971), Dorman Realty & Ins. Co., Inc. v. Stalvey 212 S.E. 2d 591. And use of the term "Exclusive right" or "Exclusive Listing Contract," by itself, does not determine whether the written listing agreement grants the broker the exclusive right to sell. Peeler Ins. & Realty, Inc. v. Harmon, 200 S.E. 2d 443, Dorman Realty & Ins. Co., Inc. v. Stalvey, 212 S.E. 2d 591, Suddereth v. Putty, 446 S.W. 2d 929 (Tex. Ct. Civ. App. 1969), Foltz v. Begnoche, 565 P.2d 592.

The listing agreement upon which Taylor National seeks to recover a commission (Exhibit 9) does not grant an exclusive

right to sell. Nowhere in the writing is there a clear, unequivocal, and unambiguous grant of such a right. While the second paragraph of the listing agreement, standing alone, seems to grant the exclusive right to sell, it is given only for the "life of this contract." (Exhibit 9, 19) And it has been established that Jensen Bros. failed to specify an expiration date or a listing date when it executed the agreement. Consequently, the life of the contract cannot be determined and the exclusive right to sell is not clearly and unequivocally granted by the terms of the listing agreement.

Even if Marvin Jensen had been the party who provided the listing and expiration dates on the instrument, there would still be an ambiguity present. For while Paul Taylor testified that the dates which appear at the top of the listing read "7-1-77" and "12-1-77", (Record at 45), the listing date could just as easily be read as "6-1-77." The party who wrote the numbers in the blank for the "listing Date" appears to have superimposed the numbers six and seven in designating the month the listing was to begin. It is not clear whether it begins in June or July. The date on which the listing is to begin is ambiguous, causing the "life of the contract" to be ambiguous also.

In the first paragraph of the main body of the listing agreement, a blank left unfilled creates further ambiguities regarding the exclusive right to sell.

In consideration of your agreement to list the property described herein and to use reasonable efforts to find a purchaser or tenant therefor, I hereby grant you for the period of _____ months from date hereof the exclusive right to sell, lease or exchange said property or any part thereof, at the price and terms stated hereon, or at such other price or terms to which I may agree in writing. (Exhibit 9, 19, paragraph 1.)

On its face, the paragraph appears to grant the exclusive right to sell. However, that right has been given for a period of "no months." In a similar case, the Washington Supreme Court held that an unfilled blank space where the commission should have been created no promise to pay a commission. Black v. Milliken, 143 Wash. 204, 255 P. 101 (1927). A similar reading of this listing agreement would lead to the conclusion that Jensen Bros. intended to give no exclusive right of sale in this listing agreement. Had Jensen Bros. intended to grant the exclusive right to sell the property it would have specified the duration of that right in the listing agreement. It did not, however, and this fact, taken together with the wording in paragraph two creates ambiguities. For the wording in paragraph two appears to grant an exclusive right to sell by creating the right to a commission if the property is sold by Jensen Bros. "or any other party." (Exhibit 9, 19.) The meaning of the two paragraphs appear to conflict. As a result, it cannot be said that they grant the exclusive right to sell clearly, unequivocally, and unambiguously.

Adding to the ambiguity is the handwritten term at the

top of Exhibit 9: "Office Exclusive." Representatives of Taylor National, which had the burden of proving a valid contract of agency, failed to explain the meaning of this term at the trial. But even if they had, it would still create ambiguities in the writing itself. For an exclusive right to sell must be granted clearly and unambiguously within the four corners of the written contract. Foltz v. Begnoche, 565 P.2d 592. And the term "Office Exclusive" seems to indicate that Taylor National was intended to be the exclusive realty office to handle the sale of the Barrington House. If such were the case, Taylor National would have an exclusive agency, and not an exclusive right to sell. For an exclusive agency prevents the owner from listing his property with other brokers for sale. Tetrick v. Sloan, 339 P.2d 613, Foltz v. Begnoche, 565 P.2d 592, Zifcak v. Monroe, 249 A.2d 893, Dorman Realty & Ins. Co., Inc. v. Stalvey, 212 S.E. 2d 591, Bourgoin v. Fortier, 310 A.2d 618. And had Taylor National desired a more restrictive condition in the listing agreement it would have had "Exclusive Right to Sell" written there. Taken together with the other terms of the contract, the handwritten term "Office Exclusive" creates ambiguities regarding the exclusive right to sell provisions of the contract. Consequently, that right has not been granted within the four corners of the listing agreement.

Where ambiguities are found in a broker's contract of agency, they are to be construed against him, especially where

he prepared the contract of agency. Olsen v. Kidman, 235 P.2d 510 (Utah 1951), Bob Secolo Realty, Inv. v. Dunnigan, 36 Or. App. 11, 583 P.2d 1154 (Ore. Ct. App. 1978), Foltz v. Begnoche, 565 P.2d 592, E.A. Strout Western Realty Agency, Inc. v. Gregoire, 225 P.2d 585, 12 AM. JUR. 2d Brokers §§ 33, 157, 227. Where ambiguities exist, they will be construed to protect the owner. 12 AM. JUR. 2d Brokers § 227. In the instant case, representatives of Taylor National testified that they had the contract of agency typed at their office and delivered it to Marvin Jensen for his signature. (Record at 18, 45-46, 129-32.) Since Taylor National prepared the listing agreement, the ambiguities present there should be construed against Taylor National. Accordingly, no exclusive right to sell can be said to have been granted in the listing agreement. In addition, it has already been seen that the exclusive right to sell was not granted clearly, unequivocally, and unambiguously within the four corners of the writing. Consequently, Taylor National was not entitled to a commission when Jensen Bros. sold the property to a buyer which it procured on its own.

Even assuming that Taylor National had an exclusive right to sell, it would still not be entitled to a commission on the Barrington House. For as previously pointed out, representatives of Taylor National failed to contact the ultimate buyer after having been instructed to do so by Jensen Bros. Taylor National took the position that the

buyer should contact the broker to effect a sale. Yet in Schoenmann v. Whitt, 136 Wis. 332, 117 N.W. 851, the court held that the owner could sell his land without incurring liability to the broker under a listing agreement granting an exclusive right to sell because the broker had not accepted the implied obligations of the instrument by using ordinary diligence to make a sale of the property. Here, Taylor National did not use ordinary diligence in arranging for a sale with Harward. Furthermore, in Huchting v. Rahn, 179 Wis. 50, 190 N.W. 847, the court held that under an exclusive right to sell, "the broker cannot remain idle and expect a commission upon a sale effected through the efforts of the owner."

The evidence establishes that Taylor National was not given an exclusive right to sell the Barrington House. But even if it was given such a right, it failed to meet its obligations of diligence and Jensen Bros. was free to sell the property, in any case, without incurring liability for a broker's commission.

F. TAYLOR NATIONAL MAY NOT RECOVER A COMMISSION BECAUSE IT WAS NOT THE PROCURING CAUSE OF THE SALE OF THE BARRINGTON HOME.

Unless his contract of employment is to the contrary, a real estate broker must be the procuring cause of a sale or transaction in order to be entitled to a commission.

Frederick May & Co. v. Dunn, 13 Utah 2d. 40, 368 P.2d 266 (1962)

Essres Realty & Ins., Inc. v. Zeff, 512 P.2d 650 (Colo. Ct.

App. 1973), Kern v. Lewis, 472 P.2d 713 (Colo. Ct. App. 1970), Hiniger v. Judy, 194 Kan. 155, 398 P.2d 305 (1965), Bartsas Realty, Inc. v. Leverton, 409 P.2d 627 (Nev. 1966), Bonanza Real Estate, Inc. v. Crouch, 10 Wash. App. 380, 517 P.2d 1371 (1974), 12 AM. JUR. 2d Brokers § 189, 12 C.J.S. Brokers § 91a. Ordinarily, the broker becomes entitled to a commission when his principal accepts the party procured by him and the two of them enter into a binding contract. Mattingly-Lusky Realty Co. v. Camper, 15 S.W. 2d 240, 241 (Ky. Ct. App. 1929), Bonanza Real Estate, Inc. v. Crouch, 517 P.2d at 1375. As the court said in Kern v. Lewis,

Before a broker can be said to have earned his commission, he must produce a purchaser ready, willing and able to buy on the owner's terms, and he must be the efficient agent or procuring cause of the sale. Kern v. Lewis, 472 P.2d at 714.

Whether a broker has been the procuring cause of a sale depends upon the facts and circumstances of the case. Frederick May & Co. v. Dunn, 13 Utah 2d 40, 368 P.2d 266, 269 (1962), 12 AM. JUR. 2d Brokers § 190. However, several guiding principles have been outlined by the courts.

The term "procuring cause" as used in describing a broker's activity refers to a cause originating a series of events which, without break in their continuity, result in accomplishment of the prime objective of employment of the broker, producing a purchaser ready, willing, and able to buy real estate on the owner's terms. Clark v. Ellsworth, 66 Ariz. 119, 184 P.2d 821, 822 (1947).

The Utah Court has set down the following guidelines to determine whether a broker has been the procuring cause in a

sale of real estate:

It is undoubtedly true that a broker employed to negotiate a sale of real estate may recover compensation for his services when a customer has been procured by him who is able, willing, and ready to purchase upon the terms named by the seller, even though the sale is not completed; for in such case, the service is performed, the parties brought together, and the opportunity to sell is presented to the owner of the property. But in order that it may be said that a customer has been "procured," it certainly is necessary that the seller and the buyer be, in some way, brought together so that the seller has the opportunity to sell, the opportunity to do which is, after all, the purpose of the employment between the owner and the broker. This has not been accomplished, that is, the opportunity to sell has not been presented to the owner, unless the broker has either made such a contract with the purchaser, in case the purchaser's identity be not disclosed, following the terms fixed by the owner, as will bind the purchaser to the payment of damages in case of breach by the purchaser, or the seller and the buyer are brought together so that the seller can deal directly with the buyer. If neither of these conditions exist, then no opportunity to sell has been brought to the owner, and the proposed customer has not been "procured" in the sense in which that word is used in a broker's contract. Fritsch v. Hess, 162 P. at 71-72.

Taylor National has failed to prove that it was the procuring cause of the sale of the Barrington House. It was certainly not the "cause originating a series of events" which resulted in the sale of the house. For while representatives of Taylor National manned the house during the home show, (Record at 22, lines 13-23; 28, lines 9-27; 29, lines 7-22), no evidence was presented to show that Taylor National showed the home to Harward, (recorded at 350-351), or opened negotiations with him for purchase of the house. Harward contacted Jensen on his own some time after the home show had ended to arrange to purchase the house. (Record at 98, lines

8-14.) Rather than attempting to bring Harward and Jensen Bros. to an agreement on the sale of the home, representatives of Taylor National took the position that it was the buyer's responsibility to contact the broker to arrange a sale. (Record at 49-51, 59, 89, 91-93.)

Taylor National did nothing to play an active role in bringing the parties together to conclude a sale. After informing Taylor National that Harward was interested in purchasing the Barrington House, Jensen instructed Taylor National representatives to contact Harward. They failed to do this. (Record at 31, lines 28-30; 32, lines 1-26.) Instead, Paul Taylor made one unsuccessful attempt to contact Harward and left for Hawaii. Upon his return, he still failed to bring Harward and Jensen Bros. together.

Q When you returned from Hawaii, why didn't you attempt to complete the transaction with Leon Jensen -- or with Leon Harward? I'm sorry.

A You've heard my testimony on that, Counsel.

Q Weren't you in control?

A I was not.

Q As the listing agent, wasn't it your responsibility to handle the closing?

A It should have been, according to procedure. I would like to have been in control. That's my great concern is that I lost control.

Q Did you make any attempt to contact Leon Harward to handle the transaction?

A No.
(Record at 49, lines 16-29.)

But even if Taylor National had first shown the property to Harward or had opened negotiations with him, this alone would not be sufficient to constitute the procuring cause. For a broker who merely introduces the parties to the transaction to each other, without further action on his part cannot be said to be the procuring cause of a sale which is later consummated without him. Hurley v. Kallof, 2 Ariz. App. 446, 409 P.2d 730, 733 (1966), Rohs v. Hickam, 473 P.2d 732 (Colo. Ct. App. 1970), Kern v. Lewis, 472 P.2d 713 (Colo. Ct. App. 1970), Mattingly-Lusky Realty Co. v. Camper, 15 S.W. 2d 241. And where the broker merely mentions to the prospective purchaser that the property is for sale, his actions are not sufficient to constitute procuring cause. Patterson v. Blair, 123 Utah 216, 257 P.2d 944 (1953), Hiniger v. Judy, 398 P.2d at 315. The broker must keep the lines of communication open between himself and the prospective buyer. Hurley v. Kallof, 409 P.2d 733.

Because Taylor National was not the procuring cause of the sale of the Barrington House, it is not entitled to recover a commission in this action.

G. TAYLOR NATIONAL IS NOT ENTITLED TO A COMMISSION ON THE SALE OF THE BARRINGTON HOUSE BECAUSE IT BREACHED THE FIDUCIARY DUTIES WHICH IT OWED TO JENSEN BROS.

A broker must represent the interests of his employer with good faith, and must discharge his duties with reasonable skill and diligence. Reich v. Christopoulos, 256 P.2d 238,

240 (Utah 1953), Reese v. Harper, 8 Utah 2d 119, 329 P.2d 410, 412 (1958), Shatz Realty Co. v. King, 10 S.W. 2d 456, 458 (Ky. Ct. App. 1928), 12 C.J.S. Brokers §§ 23, 26, McMenamin v. Bishop, 6 Wash. App. 455, 493 P.2d 1016 (1972), Vivian Arnold Realty Co. v. McCormick, 19 Ariz. App. 289, 506 P.2d 1074 (1973), Geise v. Tarp, 92 Idaho 243, 440 P.2d 521 (1968), RESTATEMENT (SECOND) AGENCY § 401. A fiduciary relationship exists between the broker and principal. Reese v. Harper, 329 P.2d 412, and he is under a duty to follow the instructions of his principal. E.A. Strout Realty Agency v. Wooster, 99 A.2d 689 (Vt. 1953), Lowrance v. Swaffield, 123 So. Car. 331, 116 S.E. 278 (1923), Shatz Realty Co. v. King, 225 Ky, 846, 10 S.W. 2d 456, 60 A.L.R. 1374 (1928), 12 C.J.S. Brokers § 25. "Unless otherwise agreed, an agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he is contracted to perform." RESTATEMENT (SECOND) AGENCY § 385 (1958). It is the principal's judgment, not the agent's, that is to control. E.A. Strout v. Wooster, 99 A.2d at 692.

Furthermore, a broker must make reasonable efforts to sell the property. 94 ALR 2d 468, 473 § 5, Fitzpatrick v. Federer Realty Co., 351 S.W. 2d 673 (Mo. 1961), Fischer v. Patterson, 97 N.H. 318, 86 A.2d 851 (1952), Siegel v. Rosenzweig, 129 App. Div. 547, 114 NYS 179 (1908), Hayes v. Clark, 111 A. 781 (Conn. 1920). His failure to do so may be grounds for revocation of his contract of agency and loss of his opportunity

to earn a commission. Fischer v. Patterson, 86 A.2d 851, 852. And a broker's efforts should be greater where he holds an exclusive agency, because the owner is more dependent on that one broker for the sale of the property, Id.

A broker's failure to discharge his duties in good faith and with reasonable skill and diligence precludes his recovery for the service he purports to be rendering. Reese v. Harper, 329 P.2d 412, Reich v. Christopoulos, 256 P.2d 240, 12 AM JUR 2d Brokers § 96. The broker is not entitled to a commission if he breaches his fiduciary duties. Mason v. Bulleri, 25 Ariz. App. 357, 543 P.2d 478 (1975).

In the instant case, Taylor National is not entitled to a commission because it has failed to discharge its duties in good faith, with reasonable skill and diligence, and because it has breached its fiduciary duties. First, Taylor National failed to follow the instructions of its principal, Jensen Bros. Construction. When Jensen Bros. learned that Harward was interested in purchasing the Barrington House, he contacted Paul Taylor at Taylor National, gave him Harward's telephone number, and instructed him to contact Harward. (Record at 31-2, 98-99). After one unsuccessful attempt to call Harward, Paul Taylor left town for Hawaii. (Record at 31-32). While he was out of town, Bryce Taylor did nothing to contact Harward. (Record at 90.) Rather than following Jensen Bros.' instructions, Taylor National instructed Jensen Bros. that it was Harward's duty to contact it. (Record at

49-50, 51, 59, 91-93, 89). Taylor National did not follow the instructions of Jensen Bros., but rather, told Jensen Bros. that it would not follow those instructions. Leon Jensen's instructions were reasonable, in that he only asked Taylor National to call Harward on the phone to begin negotiations. In fact, Jensen was providing the way for Taylor National to begin earning its commission. Taylor National had a duty to follow Jensen's instructions and contact Harward. Its failure to do so after Jensen had repeatedly requested such represents a breach of its fiduciary duty and precludes recovery of a commission.

It should be noted that there were no valid reasons for Taylor National's refusal to contact Harward after being instructed to do so by its principal, Jensen Bros. For while representatives of Taylor National claim that they did not have a duty to contact Harward because he was a real estate broker, they never ascertained this fact for a reasonable certainty. Thus, at the trial, held over a year after the transactions in question, representatives of Taylor National had still not determined whether or not Harward was a real estate agent and were still referring to him as "the alleged broker." (Record at 92, lines 6-20.) Whether he was a broker or not, however, was irrelevant because he was not arranging to sell to another, but really was just another buyer. On the other hand, Taylor National representatives did know that Harward was a prospective buyer. And when they failed

to contact him, they breached their duties of diligence to Jensen Bros.

Taylor National did not take reasonable efforts to sell the property. This too, precludes its recovery on the contract. Representatives of Taylor National were given a known prospect -- Harward. They never contacted him. All Taylor National was asked to do was contact Harward to ask if he was willing to purchase on Jensen's terms. Once having determined that he was, Taylor National could have brought the two parties together and a sale could have been consummated. Rather, Taylor National chose to do nothing -- it sat back waiting for Harward to call. (Record at 44-51, 59, 89, 91-93.) These are certainly not reasonable efforts from a broker who wishes to earn a commission by selling a house, and are not reasonable actions under these circumstances.

Taylor National had been neither reasonably diligent nor skilled in its handling of the sale of the Barrington House. It is, therefore, by reason of its breach of its fiduciary duty owed to the owner, not entitled to a commission when Jensen and Harward ultimately negotiated the sale themselves.

H. TAYLOR NATIONAL IS NOT ENTITLED TO RECOVER A COMMISSION ON THE SALE OF THE BARRINGTON HOME BECAUSE IT ABANDONED ITS AGENCY.

A real estate broker is not entitled to a commission on a sale which is consummated after he abandoned his agency. Vincent v. Weber, 13 Ohio Misc. 280, 232, N.W. 2d 671 (Ohio

Mun. 1965), Bonanza Real Estate, Inc. v. Crouch, 10 Wash. App. 380, 517 P.2d 1371 (1974), 12 AM. JUR. 2d Brokers § 223 (1979), 12 C.J.S. Brokers § 65. He will be denied a commission even if he brought the parties together, or opened negotiations, but later abandoned further efforts to conclude a sale and it was concluded by another. Essres Realty & Ins., Inc. v. Zeff, 512 P.2d 650 (Colo. Ct. App. 1973), Parrish v. Ragsdale Realty Co., 135 Ga. App. 491, 218 S.W. 2d 164 (1975), Baird v. Madsen, 57 Cal. App. 2d 465, 134 P.2d 885 (Calif. Dist. Ct. App. 1943), Hurley v. Kallof, 2 Ariz. App. 446, 409 P.2d 730 (1966), 12 AM.JUR. 2d Brokers § 223. A broker will be found to have abandoned his agency whenever he has ceased his efforts to accomplish the purpose of his employment. Mattingly-Lusky Realty Co. v. Camper, 15 S.W. 2d, 240, 241 (Ky. Ct. App. 1929).

Whether a broker has abandoned his agency is a question of intent, Lathem v. Coleman, 134 S.W. 2d 703 (Tex. Civ. App. 1940), Trinity Gravel Co. v. Cranke, 282 S.W. 798 modifying Cranke v. Trinity Gravel Co., 272 S.W. 604, Bradley v. Blandin, 94 Vt. 243, 110 A. 309 (1920), 12 C.J.S. Brokers § 65, and is dependent upon the facts and circumstances of each particular case. E.A. Strout Realty Agency, Inc. v. Wooster, 99 A.2d 689 (Vt. 1953), Bradley v. Blandin, 110 A. 309, MacWilliams v. Bright, 273 Md. 632, 331 A.2d 303 (1975), 12 AM. JUR. 2d Brokers § 223.

In the instant case, Taylor National was instructed several times to contact Harward to arrange a sale of the

Barrington House. (Record at 98-100). At no time did representatives of Taylor National contact Harward, however. Paul Taylor even testified that he neglected the matter.

Q ...In September of 1977, did you have any contact with people at Jensen Brothers concerning a prospective sale to Harward?

A Yes, sir.

Q And what was the first contact you had in that respect?

A Leon Jensen called me, and he called me to indicate that he wasn't too happy with the quantity of advertising that was being done, in the process informed me that he had a buyer for the home who was a licensed real estate salesman.

Q And did he tell you who it was?

A Yes, sir.

Q And who did he say it was?

A Leon Harward.

Q And what were you do to, in respect to your company?

A He gave me Mr. Harward's telephone number and suggested that I call him.

Q Do you remember the approximate date of that telephone call?

A That would be early in September.

Q Did you call Mr. Harward?

A I attempted, once.

Q And did you reach him?

A No.

Q What happened next?

A I was involved in a trip to Hawaii and the call was, I forgot it, neglected it.

(Testimony of Paul Taylor, Record at 31, lines 29-30;

32, lines 1-26.)

Taylor National has abandoned its agency by failing to follow a known lead at the specific instructions of its principal. By so doing, Taylor National ceased its efforts to accomplish the purpose of its employment. Mattingly-Lusky Realty Co. v. Camper, 15 S.W. 2d 240, 241. Accordingly, when the Barrington House was sold, Taylor National was not entitled to a commission, having already abandoned its agency.

IV

JENSEN BROS. IS LIABLE TO HARWARD FOR DAMAGES
FLOWING FROM THE BREACH OF AN IMPLIED
WARRANTY THAT THE HOUSE WOULD BE BUILT IN A WORKMANLIKE
MANNER AND WOULD BE SUITABLE FOR HABITATION.

The rule of caveat emptor, applied at one time to the purchase of new homes, no longer meets the needs and realities of modern home buying. As a result, an increasing number of courts have been unwilling to apply the rule.

The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work. Jeanguneat v. Jackie Hames Construction Co., 576 P.2d 761, 763 (Okla. 1978), [quoting Humber v. Morton, 426 S.W. 2d 544, 562 (Tex. 1968).]

In place of the rule of caveat emptor, courts have imposed an implied warranty of quality in the sale of new homes. Pollard v. Saxe & Yolles Development Co., 115 Cal. Rptr. 648, 525 P.2d 88 (1974). The court in Pollard discussed the reasons for the imposition of such a rule.

In the setting of the marketplace, the builder or seller of new construction -- not unlike the manufacturer or merchandiser of personalty -- makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building. On the other hand, the purchaser does not usually possess the knowledge of the builder and is unable to fully examine a completed house and its components without disturbing the finished product. Further, unlike the purchaser of an older building, he has no opportunity to observe how the building has withstood the passage of time. Thus he generally relies on those in a position to know the quality of the work to be sold, and his reliance is surely evident to the construction industry. Pollard v. Saxe & Yolles Development Co., 525 P.2d at 91.

The court concluded that "builders and sellers of new construction should be held to what is impliedly represented -- that the completed structure was designed and constructed in a reasonably workmanlike manner." Id. The implied warranty that a home is built in a reasonably workmanlike manner and is suitable for habitation has recently been applied in several jurisdictions surrounding Utah. Belt v. Spencer, 585 P.2d 922 (Colo. Ct. App. 1978), Mulhern v. Hederich, 430 P.2d 469 (Colo. 1967), Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964), Duncan v. Schuster-Graham Homes, Inc., 578 P.2d 637 (Colo. 1978), Jeanguneat v. Jackie Hames Construction Co., 576 P.2d 761, Yepsen v. Burgess, 525 P.2d 1019 (Ore.1974), Gay v. Cornwall, 6 Wash. App. 595, 494 P.2d 1371 (Wash. Ct. App. 1972).

This warranty is a form of strict liability, Chandler v. Bunick, 279 Or. 353, 569 P.2d 1037 (1977), Gay v. Cornwall, 494 P.2d 1371, and the builder may be liable for damages for

breach of the warranty, Belt v. Spencer, 585 P.2d 922, even where he has exercised reasonable care, or even all possible care. Chandler v. Bunick, 569 P.2d at 1039. Consequently, he is liable for the cost of remedying the defects. Gay v. Cornwall, 494 P.2d 1371.

The measure of damages for a breach of the warranty is the difference between the actual value of the property at the time it was sold and its value if it had been as warranted. Glisan v. Smolenske, 387 P.2d 260, 263 (Colo. 1963). However, where the buyer has retained and used the property, he may make reasonable expenditures to put the property into conformity with the warranty. Id. Where he does so, the cost of such expenditures may represent his measure of damages. Id.

In the case aptly titled House v. Thornton, 457 P.2d 199 (Wash. 1969), Mr. and Mrs. House purchased a new house from a builder-vendor. After a short period of time, cracks started to appear in the walls and the doors didn't fit their frames because the foundation was slipping. The Houses brought suit for rescission of the contract of sale. In holding for the Houses, the Court observed that there was nothing more vital to a house than a stable foundation. And the court held that it didn't matter whether the defect in the foundation was a result of the ground itself or the foundation's design. The court concluded:

We apprehend it to be the rule that, when a vendor-builder sells a new house to its first intended occupant, he impliedly warrants that the foundations

supporting it are firm and secure and that the house is structurally safe for the buyer's intended purpose of living in it. House v. Thornton, 457 P.2d at 204.

In numerous other cases, the courts have given relief to the purchasers of new homes for unstable foundations which gave rise to cracked walls, warped floors, and doors which did not properly fit their frames. Duncan v. Schuster-Graham Homes, Inc. 578 P.2d 637, Belt v. Spencer, 585 P.2d 922, Mulhern v. Hederich, 430 P.2d 469, Carpenter v. Donohoe, 388 P.2d 399, Glisan v. Smolenske, 387 P.2d 260.

The evidence in this case indicates that Jensen Bros. breached the implied warranty of habitability in connection with the Barrington House. Jensen Bros. was the builder and seller of the Barrington House, and the home was new when purchased by Harward -- he is its first and only occupant.

The testimony at trial indicated that the outside foundation of the Barrington House is settling at a faster rate than the center foundation. (Record at 231-232.) This has caused large cracks in the brick and inside walls, movement in the walls, cracks in the concrete floor of the garage, and doors that no longer fit their frames properly. (Record at 231-235, 376, 409-410.) (Exhibits 44A-44K.) These damages are very similar to those on which recovery was granted in the case of House v. Thornton, 457 P.2d 199, Duncan v. Schuster-Graham Homes, Inc., 578 P.2d 637, Belt v. Spencer, 585 P.2d 922, Mulhern v. Hederich, 430 P.2d 469, Carpenter v. Donohoe, 388 P.2d 399, and Glisan v. Smolenske, 387 P.2d 260.

At the trial, a general contractor specializing in building construction repair (Record at 231, 374) testified as to the extent and measure of damage to the Barrington House. After a careful and detailed examination of the home, he set forth the needed repairs in particular, and estimated the cost to make such repairs at \$5,602.31. (Record at 377.) Representatives of Jensen Bros. even admit to these damages, although they contest the cost of repairing them. (Record at 408-410.) Nevertheless, the foundation of the Barrington House is not "firm and secure", House v. Thornton, 457 P.2d at 204, and the resulting damages are substantial. Jensen Bros. is liable for those damages even if it had proven that it exercised all possible care in constructing the Barrington House. Belt v. Spencer, 585 P.2d 922, Chandler v. Bunick, 569 P.2d at 1039, Gay v. Cornwall, 494 P.2d 1371, House v. Thornton, 457 P.2d 199.

Harward is entitled to recover from Jensen Bros. either the difference in value between the house if it had been as warranted and as it now is, or the cost of reasonable expenditures in putting the house into conformity with the warranty. Glisan v. Smolenske, 387 P.2d 260. Consequently, the holding of the lower court, that there was no cause of action against Jensen Bros., should be reversed and damages in the amount of \$5,602.31 should be awarded to Harward for repair to the Barrington House to put it into conformity with the warranty.

JENSEN BROS. COMMITTED FRAUD IN FAILING TO DISCLOSE
TO HARWARD THAT THE IMPROVEMENTS FOR
THE SUBDIVISION HAD NOT BEEN APPROVED AND THAT
THE SUBDIVISION HAD, THEREFORE, NOT BEEN ACCEPTED
BY THE OREM CITY COUNCIL.

An allegation of fraud ordinarily will not lie unless each element thereof has been proven by the aggrieved party. Dugan v. Jones, No. 16334 (Utah filed July 23, 1980), Cheever v. Schramm, 577 P.2d 951, 954 (Utah 1978), Pace v. Parrish 122 Utah 141, 247 P.2d 273 (1952), Stuck v. Delta Land & Water Co., 227 P.791, 795 (Utah 1924).

It may be stated generally that the elements of actual fraud exists of: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; (9) his consequent and proximate injury. Stuck v. Delta Land & Water Co., 227 P. 795 (quoting 26 C.J. 1062).

Fraud may exist in the suppression of the truth as well as in the representation or suggestion of falsehood, however, Elder v. Clawson, 14 Utah 2d 379, 384 P.2d 802, 804 (1963). Thus, silence, where there is a duty to communicate material matters known by one party, may become actionable fraud. Id., Griffith v. Byers Constr. Co. of Kansas, Inc., 212 Kan. 65, 510 P.2d 198 (1973).

One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to

disclose the matter in question. RESTATEMENT (SECOND) TORTS.

This duty to disclose material facts arises when the parties to a transaction share a confidential or fiduciary relationship. RESTATEMENT (SECOND) TORTS § 551 (2) (a), Blodgett v. Martsch, 590 P.2d 298 (Utah 1978).

The breach of a duty by the dominant party in a confidential relationship may be regarded as constructive fraud. It is unnecessary for the plaintiff to show an intent to defraud; constructive fraud is an equitable doctrine employed by the courts to rectify injury resulting from breach of the obligation implicit in the relationship. Blodgett v. Martsch, 590 P.2d at 302.

A duty to disclose may also exist where a relationship of trust exists between the parties or where there is inequality of condition and knowledge. Elder v. Clawson, 384 P.2d 802.

A party to a transaction who has sole knowledge or access to material facts and knows that such facts are not known or reasonably discoverable by the other party is also under a duty to disclose them. Goodman v. Kennedy, 134 Cal. Rptr. 375, 556 P.2d 737 (1976).

Knowledge that the other party to a contemplated transaction is acting under a mistaken belief as to certain facts is a factor in determining that a duty of disclosure is owing. There is abundant authority to the effect that if one party to a contract or transaction has superior knowledge or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak, and his silence constitutes fraud, especially when the other party relies upon him to communicate to him the true state of facts to enable him to judge of the expediency of the bargain or transaction. 37 AM. JUR. 2d Fraud and Deceit § 148.

Whether there is a duty to disclose must ultimately be determined by "reference to all existing circumstances and by

comparing the facts not disclosed with the object and end in view by the contracting parties." Elder v. Clawson 384 P.2d 802, (quoting 23 AM. JUR. 856 Fraud & Deceit §78), 37 AM. JUR. 2d Fraud & Deceit § 148.

When the law imposes the duty on a party to disclose matters material to a transaction, he must disclose those facts which are known to him or those which could reasonably have been known through exercise of reasonable care. Stepanov v. Gavrilovich, 594 P.2d 30 (Alaska 1979). And a fact is material when a reasonable person would attach importance to it in determining his choice of action in the transaction in question. Timi v. Prescott State Bank, 220 Kan. 377, 553 P.2d 315 (1976), Griffith v. Byers Construction Co. of Kansas, Inc., 510 P.2d 198.

A party proving fraud may rescind the contract and render back what he has received under it, at the same time suing for what he has parted with, or he may affirm the transaction and maintain an action in deceit. Mecham v. Benson 590 P.2d 304 (Utah 1979). In determining the measure of damages, Utah follows the "benefit of the bargain" rule; the aggrieved party is entitled to the difference between the actual value of what he received and the value if it had been as represented. Lamb v. Bangart, 525 P.2d 602 (Utah 1974), Dilworth v. Lauritzen, 18 Utah 2d 386, 424 P.2d 136 (1967).

Harward's claim of fraud against Jensen Bros. arises out of the failure by Jensen Bros. to disclose that the

improvements for the subdivision in which the Barrington House was located had not been accepted by the Orem City Council. (Record at 226, lines 16-30 to 227, lines 1-3.) As explained at trial by the Orem City Director of Public Works, "The street improvements are not accepted until such time as they are all installed properly and the final inspections are made." (Record at 226, lines 25-27.)

The improvements in the subdivision where the Barrington House is located were not ultimately installed properly and accepted until October 15, 1979. (Record at 226, lines 29-30 to 227, lines 1-3). But after their initial installation, the roads, gutters and sidewalks began to deteriorate badly. The situation was described by a resident of the subdivision who lived three blocks from Harward:

A ...So just recently things have really looked a lot better. But before that, it looked like a war zone.

Q What do you mean by that?

A Nothing but decaying streets. A lot of places there was no asphalt. Just, it looked like some places the streets had never even been put in before they were fixed.

(Record at 253, lines 11-19.)

Q And the street out front of your house is, you've described it as "a war zone," that's the worst in the whole subdivision, isn't it?

A No, I described that it was "a war zone" until things were fixed. Now it's a normal street.

Q Okay. But the problems for the street in front of your house were worse than the rest of the subdivision?

A No. In fact ours was probably one of the better spots in the subdivision.

Q Whoever put the streets in had problems in putting the streets in all over the subdivision, then?

A I would say, correct.

(Record at 254, lines 9-20.)

At times a four wheel drive vehicle was required to get in and out of the subdivision. (Record at 376.) Furthermore, the sidewalks and gutters needed repairing. (Record at 254, lines 28-30.)

Of the twelve homes on the street where the Barrington House is located, seven were for sale at the time of the trial. (Record at 307-308.) Yet in the two years prior to the trial, only one home on the street had been sold by its original owners. (Record at 308.) Harward himself has been trying, unsuccessfully at this point, to sell the Barrington House since the summer of 1978. (Record at 307, lines 10-17.) Largely because of the poor condition of the streets, it had been impossible to sell the house prior to October 1979. (Record at 367, lines 17-19.) (The slipping foundation makes the home almost impossible to sell at the present time.)

The failure, by Jensen Bros., to disclose that the subdivision improvements had not been accepted was a material fact. A buyer who knew that the roads, sidewalks, and gutters had not been accepted would have been put on notice that they might have contained defects. This fact would surely have raised questions about the future property values in the subdivision and the wisdom of investing in the Barrington House. It is self-evident that one seeking to purchase a

home will take future property values into account in his decision; a home is the largest and most important investment most people ever make. They are not likely to make such an investment knowing that the road leading to the home is sub-standard, a possibility for future problems, and a liability in future attempts to sell the home.

The nonacceptance of the subdivision's improvements by the City of Orem is a fact to which any reasonable person would attach importance in determining whether or not to purchase the Barrington House. Consequently, it is a material fact. Timi v. Prescott State Bank, 553 P.2d 315, Griffith v. Byers Construction Co. of Kansas, Inc., 510 P.2d 198.

That the improvements for the subdivision had not been accepted by the Orem City Council is a fact which could have been known to Jensen Bros. by the exercise of reasonable care. Stepanov v. Gavrilovich, 594 P.2d 30. It was the builder of the house and the party which had to go through the preliminary paperwork, such as obtaining building permits, prior to construction. Furthermore, Jensen Bros. was connected with the Barrington House from the very beginning until its sale to Harward. Harward, on the other hand, came upon the scene after the home had been completed in a subdivision of other homes. In spite of its superior knowledge, Jensen Bros. never informed Harward that the subdivision's improvements had not been accepted. (Record at 421, lines 3-15.) Because Jensen Bros. knew, or could have known by the

exercise of reasonable care, that the improvements had not been accepted it could have disclosed this fact to Harward.

Jensen Bros. had a duty to disclose the non-acceptance of the subdivision's improvements because of its superior knowledge and because of the inequality of condition between the two parties. While Jensen Bros. knew or should have known that the subdivision had not been accepted, this fact was not reasonably discoverable by Harward. From first outward appearances, Harward saw what appeared to be a completed subdivision. In fact, representatives of Taylor National came to this same conclusion when they first saw the property and did not feel the need to make any further investigations regarding the matter. (Record at 66-69.) Furthermore, the defect in the subdivision was not patent to the ordinary purchaser. Neither Harward, nor any other buyer, would have seen anything to put him on notice that the improvements were defective, and had not been accepted. Furthermore, the acceptance of an entire subdivision is beyond the normal purview of a single individual buying only one house. Jensen Bros., on the other hand, had representatives associated with the house through the entire period of its planning and construction. It was familiar with the subdivision and, as a major builder and developer, was familiar with the procedures necessary for obtaining approval of the improvements in the subdivision. This superiority of knowledge placed a duty on Jensen Bros. to disclose to Harward that the subdivision's improvements had not been installed properly,

and as a result had not been approved by the Orem City Council.
Elder v. Clawson, 384 P.2d 802, Goodman v. Kennedy, 556 P.2d
737, 37 AM. JUR. 2d Fraud & Deceit § 148.

It is obvious that Jensen Bros. withheld information about the subdivision's improvements in order to induce the sale. Had Harward, or any other buyer, known that the roads, sidewalks and gutters had not been installed to the satisfaction of the City of Orem, he would not have purchased. Jensen Bros. had not had any offers for the house which met its expectations before Harward expressed interest, and Jensen Bros. was anxious to sell. That the nondisclosure of the information about the improvements had the effect of inducing the sale is evident by the fact that Harward purchased.

Harward has been injured as a result of Jensen Bros.' nondisclosure of material information. The house that cost him \$140,000 is now worth essentially nothing.

Prior to the time that the foundation's slippage became readily apparent, (and was not a discouragement to buyers nor of great concern to Harward), the conditions of the streets and sidewalks made the home unapproachable. Had the home been without its present defects, it would still have been impossible to sell. Now that the problems in the roads have been remedied, Harward's house has slipped to a degree that it has caused cracks to be obvious to even the casual observer. The improper improvements in front of his house caused Harward to lose his chance to sell the Barrington

House before its other deficiencies became apparent to the degree that they made the house undesirable. Because of this, he has been injured to the extent of \$140,000, or the difference in the actual value of the Barrington House and the value of the house if it had been as it was represented. Lamb v. Bangart, 525 P.2d 602, Dilworth v. Lauritzen, 424 P.2d 136.

After an examination of all the facts and circumstances, it is apparent that Jensen Bros. committed fraud when it failed to disclose to Harward that the improvements in the subdivision had not been approved by the Orem City Council. This case is analogous in many respects to the situation in Elder v. Clawson, 384 P.2d 802. There, the seller failed to disclose the existence of, and economic effect upon the operation of the land, of a quarantine due to a noxious weed. As a result, Plaintiff, who purchased the land, was prevented from using the farm to any material economic advantage. Although the buyers knew of the existence of the weed on the land, they did not know of the quarantine imposed upon the property. As the court said, "There was no occasion for them to make an independent investigation of a quarantine of which they knew nothing." Id. at 804.

In the present case, Harward had no reason to know that the roads and sidewalks surrounding the Barrington House had not been approved by the property city authorities. Consequently, there was no occasion for him to make an independent

investigation of the matter. But, their subsequent deterioration caused him to lose the economic benefit of his property -- it appears to be impossible to sell the house at the present time. The deteriorated roads, like the quarantine on the farmland, prevented Harward from realizing the benefit of his economic investment. And as in Elder, the party in this case with superior knowledge withheld it. The court in Elder found that the seller had a duty to disclose the information about the quarantine. Likewise, in this case, the seller has a duty to disclose what amounts to an economic quarantine. Jensen Bros. fraudulently and intentionally withheld the facts relating to the nonacceptance of the subdivision's improvements, which were facts known to it and not to Harward. This information was withheld, in spite of a duty to the contrary, for the purpose of inducing the sale of the Barrington House and had that effect. Consequently, Jensen Bros. is liable to Harward for his resulting loss. The ruling of the trial court, that Harward had no cause of action against Jensen Bros., is in error and should be reversed with an appropriate award of damages to Harward.

VI

JENSEN BROS. IS ESTOPPED TO DENY THAT IT AGREED TO
ACCEPT LAND FROM HARWARD IN EXCHANGE FOR EQUITY
IN THE BARRINGTON HOUSE, AND MAY NOT SEEK TO
ENFORCE THE TRUST DEED NOTE THROUGH A TRUSTEE'S SALE.

From the beginning of negotiations over the Barrington House, Leon Harward proposed -- and Jensen Bros. accepted --

an offer to exchange ground for Harward's equity in the house. Specifically, the trust deed executed and dated October 28, 1977 (Exhibit 59) in the amount of \$45,600 was to be reduced by a trade for other property. At the trial, Jensen Bros. claimed that it never agreed to such an arrangement. Rather, it sought an order from the court allowing it to enforce the terms of the note through a trustee's sale of the Barrington House. The court's amended judgment grants Jensen Bros. leave to enforce the trust deed note on the grounds that it is in default. This judgment is in error and Jensen Bros. should be prevented from alleging that it did not agree to accept land in exchange for equity in the Barrington House. For "...one may by his acts or conduct away from the court prevent himself from denying in court the effect or result of those acts." Grover v. Garn, 23 Utah 2d 441, 464 P.2d 598, 602 (1970). And the conduct of Jensen Bros. prior to the trial indicates that it agreed to accept land in exchange for equity. Thus, under the doctrine of equitable estoppel, Jensen Bros. is precluded from seeking to enforce the trust deed note through a trustee's sale of the Barrington House.

The doctrine of equitable estoppel is intended to prevent injustice by protecting the individual from loss which he could not escape if it were not for the estoppel. Cleveland Trust Co. v. State, 555 P.2d 594 (Okla. 1976). "Estoppel is a doctrine of equity purposed to rescue from loss a party who has, without fault, been deluded into a course of action

by the wrong or neglect of another." Morgan v. Bd. of State Lands, 549 P.2d 695, 697 (Utah 1976). In the present case, Harward was lead to believe that Jensen Bros. had agreed to accept a trade of land for equity in the Barrington House. Consequently, he spent much time and effort in showing various parcels of land to Jensen Bros. Acting under this belief, he also failed to pay any money on the trust deed note of October 28, 1977. The doctrine of equitable estoppel must be applied in this case to prevent Harward from loss due to conduct induced by Jensen Bros.

The elements of equitable estoppel were recently stated by the Utah Court in Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689 (Utah 1979).

The elements essential to invoke the doctrine of estoppel are: (1) an admission, statement or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. 602 P.2d at 694.

In accord with Celebrity Club are Morgan v. Bd. of State Lands, 549 P.2d 695, J.P. Koch, Inc. v. J.C. Penney, Inc., 534 P.2d 903 (Utah 1975), Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977), Irwin v. Pacific American Life Ins. Co., 10 Ariz. App. 196, 457 P.2d 736 (1969), Clawson v. Garrison, 3 Kan. App. 2d 188, 592 P.2d 117 (1979), Rel v. Douglas City Civil Serv. Commission, 20 Wash. App. 764, 581 P.2d 1090 (1978), City of Mercer Island v. Steinmann, 9 Wash. App. 479, 513 P.2d 80 (1973).

In the instant case, the nature of Harward's injury has already been established by the trial court; the trust deed note, having been found in default, may be enforced through a trustee's sale of the Harward's home. Furthermore, Jensen Bros. is granted leave to seek a deficiency judgment against Harward for the amount not recovered in the trustee's sale. (Amended Judgment, April 15, 1980, at 3-5.)

That Harward relied on the statements and acts of Jensen Bros. is evident. In the first place, he failed to pay any money on the trust deed note. Secondly, he expended much effort and time in seeking parcels of ground suitable to Jensen Bros. He had no reason to do so other than to obtain a parcel of land to exchange for the Jensen Bros.' equity. in the Barrington House.

At the trial, Jensen Bros. rejected the assertion that it had agreed to accept land in exchange for equity. (Record at 386.) This claim is inconsistent with the actions prior to the trial of the principals of Jensen Bros., however. For representatives of Jensen Bros. indicated their willingness to accept land as a part of the bargain from the beginning. (Record at 264, 387, 390-91.) The disclosure/settlement statement of December 9, 1977, for instance, provides for a "Land Trade-in." (Exhibit 36.) On the faith of these representations, Harward arranged to meet all the principals of Jensen Bros. in early October 1977 in order to show them several parcels of ground. (Record at 265.) On that day, he

showed them at least three parcels of ground. (Record at 265-269.) And Harward then spent much time with Leon Jensen looking at parcels of land from that October until the spring of 1979. (Record at 269-272, 288-89.) Marvin Jensen, too, was shown various parcels of land. (Record at 297, 304.) Yet there is no evidence to indicate that at any time while they were being shown land representatives of Jensen Bros. indicated to Harward that they would not accept such land in exchange for equity in the Barrington House. In fact, the record indicates that representatives of Jensen Bros., through express statements, lead Harward to just the opposite conclusion.

Leon Jensen and Harward discussed various parcels of ground, the needs of Jensen Bros., and the kinds of projects in which they intended to be involved until as late as March 1979. (Record at 278.) Furthermore, in March 1979 Harward and Leon Jensen discussed an earlier conversation had between Harward and Marvin Jensen regarding equity in the house. Harward stated that he thought Jensen Bros. still intended to buy ground. Leon Jensen responded that he was of that same opinion. (Record at 305.) And in June or July of 1978, Marvin and Leon Jensen indicated that, while they had never refused money for the property, they would be willing to take ground. Harward described the conversation:

I said, "Well, I thought you were going to take ground."
They said, "Well, we've never refused to take money.
We take money and/or ground." And I said, "Well, it

was my understanding you were to take ground."
(Record at 334, lines 10-13.)

A letter written by Leon Jensen to American Home Mortgage, Inc. in November 1977 further indicates that Jensen Bros. had agreed to accept land in exchange for their equity in the house. (Exhibit 37.) In pertinent part, that letter reads:

This letter will inform you as to the status of the downpayment ...

We have taken this downpayment as equity in land which Mr. Harward owns on which we intend to begin development work and building in spring of 1978. We are satisfied with this arrangement and feel it will turn out profitable for us. (Exhibit 37.)

Statements made at the trial by representatives of Jensen Bros. further indicate the agreement of Jensen Bros. to accept ground in exchange for equity. Leon Jensen testified:

A After May of 1978 was there a reason why you -- were there reasons why you allowed him to show you property?

A Yes. It was obvious to us and he, I think, very, well, I think it was very soon after the Note became due he told me that he just did not have the funds to pay the Note off. And the reason why we still considered property in exchange is to collect somehow on the Note. (Record at 393, lines 25-30; to 394, line 1.) (Emphasis added.)

Jensen Bros. could not still consider property unless it had already intended to accept it. And the testimony here indicates that, while it was willing to take money on the trust deed note, it had always agreed to accept ground, too.

Marvin Jensen's testimony also indicates the intention by Jensen Bros. to accept land.

Q Did you not agree for Jensen Brothers by signing Exhibit 38 to accept land for Jensen Brothers' equity in the Barrington House?

A Yes, we did.

(Record at 413, lines 12-15.)

Finally, in November 1978, Jensen Bros. entered into an earnest money agreement on a parcel procured by Harward. The actions and statements of Jensen Bros.' representatives regarding the sale of that piece of property (the Williamson 25 acres) are further evidence that Jensen Bros. agreed to accept land. The circumstances surrounding this transaction were described by Michael Memmott, who along with Peter Johnson, held an option on the property.

A Well, Leon Harward had come to us with -- had got a hold of us indicating to us that he had some clients who would be interested in buying some property which we had optioned. At that time they had made offers to us on two different pieces that were in close proximity of each other. They first offered on some property 65 acres which we ultimately didn't accept, and later offered on 25 acres with which we had an option.

Q Did this dealing have anything to do with Mr. Leon Harward's purchase of what is known as Barrington House?

A Yes. That's right. The offer that was made to us and accepted is that we accept the trust deed for something like \$45,000 as part of the settlement that the -- or as part of the purchase price; that the Harwards would be paying us for the property.

(Record at 196, lines 4-18.)

The earnest money agreement in this sale was introduced at the trial as Exhibit 38. Shortly after the execution of this instrument, Marvin Jensen sent a letter to Harward

outlining the transaction. (Exhibit 55.) That letter confirms the fact that Jensen Bros. had agreed to accept land in trade for equity and reads in pertinent part:

According to our earnest money agreement for the south 25 acres from Williamsons, and per our several verbal agreements, your note to us of \$46,500.00 will be assumed by Johnson and Memmott and become our equity down payment in the property.

* * * * *

The arrangements to include your note in this deal on Williamson's property should be of benefit to both of us. It is, as you know, because of these negotiations that we have held off on our foreclosure of your home. (Exhibit 55.)

The application of the doctrine of equitable estoppel is determined by an objective test, according to what a reasonable person might have concluded under the circumstances. Big Butte Ranch, Inc. v. Holm 570 P.2d 690 (Utah 1977). As the court said in Corporation Nine v. Taylor, 30 Utah 2d 417, 513 P.2d 417 (1973),

The determination of such an issue is not dependent on the asserted subjective content of the mind of the person claiming he was misled. The test to be applied is an objective one as to what a reasonable and prudent person in the circumstances might conclude... 513 P.2d at 420.

A reasonably prudent person in Harward's situation would have come to the same conclusion he did: Jensen Bros. lead him to believe that it would accept land in exchange for equity by participating in the search for property. Representatives of Jensen Bros. were aware that he was committed to finding property in exchange for the equity in the house. Rather than telling him that they would not accept property,

they traveled to various sites to view proposed property and discussed the possibility of purchasing property for over a year. A reasonable person would conclude that these actions were motivated by an intent to accept the agreement to exchange land for equity.

By its conduct and assertions, Jensen Bros. knowingly lead Harward to seek land rather than pay money in exchange for equity in the property. Harward's actions were reasonable and will result in injury or detriment to him if Jensen Bros. is allowed to repudiate or deny its conduct. These facts have been established by clear and convincing evidence. Accordingly, Jensen Bros. is equitably estopped from seeking a trustee's sale on the trust deed note, and the judgment of the lower court is in error and should be overturned.

VII

THE TRIAL COURT ERRED IN FAILING TO REFORM THE TRUST
DEED NOTE BETWEEN HARWARD AND JENSEN BROS. TO CONFORM
TO THEIR AGREEMENT TO TRADE LAND
WORTH \$45,600 IN EXCHANGE FOR JENSEN BROS.' EQUITY
IN THE BARRINGTON HOUSE.

Harward seeks reformation of the trust deed note in this case to reflect the terms of the agreement entered into between himself and Jensen Bros.

Reformation is an equitable remedy. Kesler v. Rogers,
542 P.2d 355 (Utah 1975).

The province of reformation is to make a writing express the bargain which the parties desired to put in writing. Reformation of a writing is justified when the parties have come to a complete mutual understanding

of all the essential terms of their bargain, but by reason of mutual mistake, or its equivalent, the written agreement is not in conformity with such understanding in a material matter. Durkee v. Busk, 355 P.2d 588, 591 (Alaska 1960).

Before a contract can be reformed, then, there must have been a prior meeting of the minds as to the terms of the writing. Mawhinney v. Jensen, 232 P.2d 769 (Utah 1951).

The conditions which must be established in order to reform a written contract were set out by the court in Jensen v. Miller, 280 Or. 225, 570 P.2d 375 (1977).

The parties seeking reformation of a written contract must establish, by the appropriate quantum of proof, (1) that there was an antecedent agreement to which the contract can be reformed; (2) that there was a mutual mistake or a unilateral mistake on the part of the party seeking reformation and inequitable conduct on the part of the other party; and (3) that the party seeking reformation was not guilty of gross negligence. 570 P.2d at 377.

Mutual mistake occurs when "both parties to a contract have an identical intention as to the terms to be embodied in the proposed contract, and the writing executed by them is materially at variance with such intention." Keesling v. Pehling, 214 P.2d 506 (Wash. 1950). The fault sought to be corrected by reformation is that the executed written instrument does not reflect the true understanding of the parties. Voyta v. Clonts, 328 P.2d 655 (Mont. 1958).

In the instant case, there is either mutual mistake in reducing the agreement between Harward and Jensen Bros. to writing, or unilateral mistake by Harward accompanied by inequitable conduct on the part of Jensen Bros. For as previously established, Jensen Bros. represented that it would

take ground in exchange for its equity in the Barrington House. This was also the understanding of Harward. However, the writing does not clearly establish this fact. If the parties mutually agreed to this term, then the writing was materially at variance with their intention. And if Jensen Bros. secretly harbored an intention not to perform according to this term of the contract, then it is guilty of inequitable conduct in encouraging Harward to proceed under the false apprehension that he need not pay money, but could proceed to expend time and effort in procuring land for Jensen Bros. Harward cannot be said to be guilty of gross negligence. He was in continual communication with representatives of Jensen Bros. and remained under the impression that they would accept land because of their repeated representations and conduct. He is, therefore, entitled to reformation of the trust deed note to reflect the terms of the agreement as entered into with Jensen Bros. The trial court erred when it failed to reform the writing to reflect the original intent of the parties.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed or in the alternative,

a new trial should be granted.

Respectfully submitted,

R. William Bradford

Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing Brief to Mr. Jackson Howard, Esq., Howard, Lewis & Petersen, 120 East 300 North, Provo, Utah 84601, attorney for plaintiff-appellant, and to Mr. A. Dennis Norton, Esq., 700 Continental Bank Building, Salt Lake City, Utah 84101, attorney for defendant-respondent, this _____ day of October, 1980.

R. William Bradford