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Mel Trimble Real Estate v. Monte Vista Ranch, Inc.,
Wallace Ohran, Ray E. Nelson, Howard D.
Sherwood, Joyce, Rice, and Neldon Williams : Brief
of Appellant

Utah Court of Appeals

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M. Dayle Jeffs; Jeffs & Jeffs; Attorneys for Respondent.

David M. Jorgensen; Robert J. DeBry; Robert J. DeBry & Associates; Attorneys for Appellant.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 860135-CA

IN THE SUPREME COURT

STATE OF UTAH

MEL TRIMBLE REAL ESTATE,

Appellant,

vs.

MONTE VISTA RANCH, INC. and
WALLACE OHRAN, RAY E. NELSON
HOWARD D. SHERWOOD, JOYCE,
RICE, AND NELDON WILLIAMS,

Respondents.

Case No. 20769

860135-CA

APPELLANT'S BRIEF

Appeal from the Summary Judgment of the
Fourth Judicial District Court, Utah County
Honorable David Sam

M. Dayle Jeffs
JEFFS & JEFFS
Attorneys for Respondent
Monte Vista Ranch, Inc.
90 North 100 East
P. O. Box 683
Provo, Utah 84603

David M. Jorgensen
Robert J. DeBry
ROBERT J. DEBY & ASSOCIATES
Attorneys for Appellant
965 East 4800 South, Suite 2
Salt Lake City, Utah 84117

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Clerk, Supreme Court, Utah

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ISSUES PRESENTED FOR REVIEW

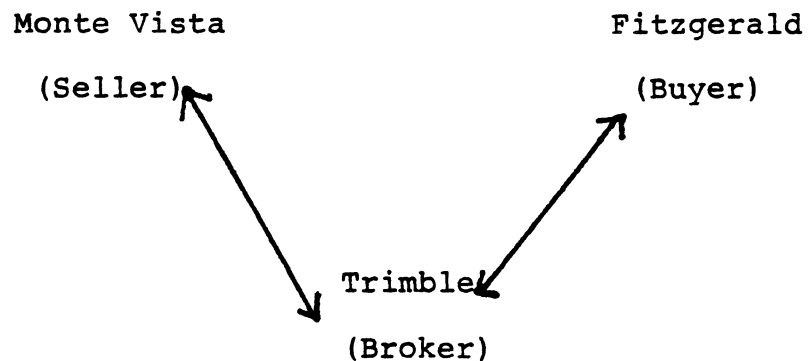
1. Could the trial court even rule on the issues of res judicata and collateral estoppel without having before it at least copies of the Orders (or supposed orders) that it relied upon to make its ruling?

2. Did the trial court properly apply the principle of res judicata?

3. If not, are plaintiff's claims barred by collateral estoppel arising out of a decision adverse to plaintiff in a prior action against a different part?

STATEMENT OF THE CASE

Plaintiff-appellant (Trimble) is a real estate broker. Defendants-respondents (Monte Vista) owned a large ranch. The ranch was sold to one Fitzgerald. In graphic terms the parties are as follows:



In an earlier trial, Trimble (broker) sued Fitzgerald (buyer) for a real estate commission. The jury ruled against Trimble (broker), and this Court affirmed Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (Utah 1981).

In the same prior action, Fitzgerald (buyer) filed a third-party complaint against Monte Vista's former shareholders. That third-party action, which alleged that the former shareholders would have to indemnify the buyer (Fitzgerald) for any judgment which plaintiff might obtain against him, was dismissed by the Court as a matter of law. Plaintiff did not join in that third-party complaint.

After losing the first trial, Trimble (broker) brought this second lawsuit. In this second lawsuit, Trimble (broker) sued the seller (Monte Vista) for a real estate commission. In other words, the first lawsuit was by the broker against the buyer. This second lawsuit is by the broker against the seller.

In this action, Monte Vista moved for summary judgment. The Fourth District Court granted the motion ruling that plaintiff's claims were barred by res judicata and collateral estoppel.

FACTS

The Parties. Plaintiff-appellant is a real estate broker who had a listing agreement to sell ranch property ("the Ranch") located in Cedar Valley, Utah and owned by

defendant Monte Vista Ranch, Inc. ("Monte Vista, [R 1-4, 153])). Defendants Wallace Ohran, Ray Nelson, Howard Sherwood, Joyce Rice, and Neldon Williams (hereinafter "Monte Vista's" former shareholders) were the stockholders of Monte Vista (R. 182-195) before they sold their stock to the buyer plaintiff found. Wallace Ohren was Monte Vista's president. (R. 2.)

Leland Fitzgerald, who is not a party to this action but who was the purchaser in the sale which is the subject of this action, was the defendant in a prior action brought by plaintiff for his commission.

The Sale of the Ranch. Sometime before December 1977, Ohran engaged plaintiff to sell the Ranch and orally agreed to pay plaintiff a six percent (6%) commission. After working on the sale for several years, plaintiff found a buyer, Leland Fitzgerald. (R. 2, 153-159.) Protracted negotiations followed. Eventually, Monte Vista offered to sell the Ranch to Fitzgerald for \$2,000,000 and to pay plaintiff's commission. (R. 153-154.) Monte Vista then agreed to reduce the price to \$1,875,000 on the condition that Fitzgerald would pay plaintiff's commission. (R. 153-154). Fitzgerald accepted.

Monte Vista and Fitzgerald memorialized their agreement in an Earnest Money Agreement dated December 7, 1977. (R. 19, a copy of which is attached as Exhibit "A".) Among other things, the Earnest Money stated that Buyer (Fitzgerald) was "to be responsible for all real estate

commissions". (Id.) Plaintiff was not a party to the Earnest Money (Id.), though he was present when it was signed.

The Ranch was Monte Vista's major asset and for tax reasons, the parties to the Earnest Money decided to transfer ownership of the corporate stock instead of transferring title to the property itself. Accordingly, Monte Vista's former shareholders entered into a Stock Sale Agreement dated May 18, 1978, with Fitzgerald under which their stock was sold to Fitzgerald. (R. 182-185, a copy of which is attached as Exhibit "B".) The Stock Sale Agreement contained an integration clause which explicitly stated that this subsequent agreement "constitutes the entire agreement among the parties" and "supersedes all prior agreements." (R. 191.) With respect to plaintiff's commissions, the parties to the Stock Sale Agreement represented and warranted to each other that they had "incurred no obligation for real estate or other brokerage commissions." (R. 189.) The Stock Sale Agreement did not contain the provision found in the Earnest Money Agreement which required Fitzgerald to take care of any commissions.

Plaintiff was not a party to the Stock Sale Agreement. (R. 182-195.) He was not present at its execution. (R. 197-198.) He did not even learn about the agreement's existence until long after its execution, and did not read a copy of it until August 15, 1984, more than six (6) years after it had been written. (Id.)

The Suit Against Fitzgerald. The December 1977 Earnest Money Agreement did not specify on its face how much plaintiff was to be paid or the terms of payment. (R. 19.) Plaintiff negotiated at least some of these items with Fitzgerald, but their respective understanding of their discussions are unclear, disputed and sharply in conflict. (R. 154-155.) In his memorandum in the present case, Judge Sam observed that "the Utah Supreme Court was unable to determine from the record the exact nature of the dealings between Florence (the plaintiff's proprietor) and Fitzgerald." (R. 253.) Judge Sam felt that "Fitzgerald and the plaintiff were still negotiating as to their possible joint purchase of the assets of Monte Vista when the Earnest Money was signed." (Id.). Indeed, it was Fitzgerald's contention in the prior action that he never agreed to pay plaintiff a money commission and that he only agreed to allow plaintiff to buy part of the Ranch but that plaintiff did not keep up his end of the bargain. (Fitzgerald's responding brief in Mel Trimble Real Estate v. Fitzgerald, 62 P.2d 453 (Utah 1981) (No. 16746), page 2, reproduced in relevant part as Exhibit "C".)

Fitzgerald did pay \$5,000 towards plaintiff's commissions but refused to pay any more. (R. 1-4.) Plaintiff sued Fitzgerald asserting that he was a third-party beneficiary of that part of the December 1977 Earnest Money which specified that Fitzgerald was to take care of the real estate commissions. (R. 153-155.) Amid all the conflicting testimony concerning what Fitzgerald's

arrangement with plaintiff was, a jury held that Fitzgerald did not owe anything to plaintiff, and the Utah Supreme Court upheld their decision. Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (Utah 1981).

Plaintiff did not file any claims against Monte Vista itself or against its former shareholders in that prior action. (R. 17.)

One of the defenses asserted by Fitzgerald in the prior action was that the Sales Purchase Agreement which was executed after the Earnest Money Agreement and which explicitly disclaimed any responsibility for paying plaintiff's commission (R. 187) revoked the obligation to pay plaintiff. (See R. 59-61.) In the prior action, the Court ruled as a matter of law that this was not the case and that Fitzgerald was responsible to plaintiff as a result of the Earnest Money Agreement (R. 155).

Fitzgerald's Third-Party Complaint. In the prior action, Fitzgerald filed a Third-Party Complaint against Monte Vista's former shareholders for indemnification of any amount which he might have to pay plaintiff (R. 17). Monte Vista itself was not made a party of any kind, and plaintiff did not assert any kind of claim against it or its former shareholders. (Id.).

In that prior action, the trial court held as a matter of law that Monte Vista did not have to indemnify Fitzgerald for any judgment which might be entered against him and in favor of the plaintiff. (R. 155.)

The Present Action. Following the conclusion of the litigation against Fitzgerald, plaintiff filed the present action against Monte Vista and its former shareholders alleging breach of contract and the right to recover the balance of his still unpaid commissions under quantum meruit. (R. 1-4.)

The Court wondered why the case could not be determined on the basis of res judicata. (R. 95.) When defendants briefed the Court on the issue, they highlighted a part of a jury instruction quoted in the Supreme Court's opinion from a prior case which read as follows:

. . . The Court has ruled as a matter of law that the agreement of December 7, 1977 imposed upon defendant [Fitzgerald] the liability for the real estate commission, if any, owed plaintiff upon this transaction. (R. 147.)

Defendants then, without giving the Court copies of the actual ruling that the jury instruction refers to, asserted that:

"Thus, the Trial Court in that proceeding, had ruled that if any commission was owed, it was owed by the defendant, Leland Fitzgerald."
(R. 147.)

Not realizing that the jury instruction was given in the context of a situation where Fitzgerald had contended that the December 7, 1977 Earnest Money had been superseded by a subsequent Stock Purchase Agreement which relieved him of all responsibility to pay plaintiff and in the context of Fitzgerald's Third-Party Complaint for indemnification, (R. 59-61), the District Court Judge concluded that there was

some kind of order in the prior case which found "that Fitzgerald was solely liable for any real estate commissions" (R. 251 [emphasis added]) and granted summary judgment against plaintiff on the basis of res judicata and collateral estoppel. (R. 251-254.)

The record in the prior case contains no order saying "plaintiff could look only to Fitzgerald." The jury instruction relied upon says that Fitzgerald was responsible to plaintiff under the December 7, 1977 Earnest Money. It does not say that Fitzgerald was the "only" one responsible or that he was "solely" responsible. (R. 155.) In fact, there could have been no determination made on that issue because plaintiff did not assert claims against Monte Vista and its former shareholders in the prior action. (R. 17.) The issue of Monte Vista's liability to plaintiff was not litigated in the prior action, and the jury instruction language can only refer to the ruling that the trial court made on Fitzgerald's assertion that his obligations to plaintiff had been eliminated by the subsequent Stock Purchase Agreement or to the dismissal of Fitzgerald's Third-Party Complaint (see page 19 of Fitzgerald's responding brief filed in Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 [Ut. 1981] No. 16746 relevant pages of which are reproduced as Exhibit "C"; see also, the copy of the third-party complaint and the minute entry dismissing it attached as Exhibit "D".)

The Fourth District Court did not have before it the record of the prior case as the prior case was filed in Salt Lake rather than Utah County. (R. 17.) There is no evidence in the present case's Record showing that the issue of whether plaintiff agreed or accepted Fitzgerald's promise to be responsible for plaintiff's commission as a release of Monte Vista's obligation to him was actually either litigated or adjudicated. Of course, that issue was not and could not have been litigated and decided because Monte Vista and its shareholders were not even sued by plaintiff in the prior action against Fitzgerald. (R. 17.)

SUMMARY OF ARGUMENT

For res judicata to apply, both the prior and the subsequent actions must involve the same parties or their privies and must also involve the same cause of action. For collateral estoppel to apply, the precise issue to be precluded in the second action must be exactly the same as that which was fully litigated in the first action. In addition to these two (2) requirements, there must be a final judgment on the issue for which preclusion is sought, and the party against whom preclusion is sought must have been a party or in privity with a party in the prior action. When the actual decisions made in the prior case are carefully analyzed, it becomes readily apparent that neither the doctrine of res judicata nor the related concept of collateral estoppel are applicable.

The Court's ruling in the present case is based upon its conclusion that one of the matters litigated in the prior case was these defendants' liability to plaintiff. This was not the case, and one of the problems with the trial court's decision was that it did not have the record of the prior case before it. This precluded it from determining exactly what was and what was not litigated.

The admitted fact is that plaintiff did not file any claims against the defendants to this action in the prior case. Any issues actually involving these present defendants were litigated in the context of a third-party complaint filed by Fitzgerald for indemnification in the event that plaintiff recovered from Fitzgerald. Those issues involved different documents and different facts than what is involved in the present case. Because of this fact and because plaintiff was most certainly not in privity with Fitzgerald whom he was suing, neither res judicata nor collateral estoppel can apply.

The only determinations adverse to plaintiff in the prior action came on plaintiff's claim against Fitzgerald and involved issues which are not relevant to the present action. Plaintiff's action against Fitzgerald determined that whatever plaintiff's arrangement with Fitzgerald was, it fell through or was otherwise such that Fitzgerald no longer owed plaintiff anything. The action against Fitzgerald did not conclude that plaintiff's commission had been fully paid. Nor did it conclude that plaintiff could not

look to someone else for the unpaid balance. It simply held that under the specific arrangement which plaintiff had with Fitzgerald, Fitzgerald was no longer obligated to pay plaintiff anything.

It is hornbook law that a debtor cannot contract with a third-party to pay his debts and have the debtor released from any obligation to his creditor without the creditor's agreement to release the debtor from his responsibility. When a third-party undertakes the responsibility to pay another's debt, the creditor may accept the third-party obligation as additional security or, he may agree that the third-party's agreement to pay the debt discharges the debtor. But a debtor cannot simply tell a third-party to pay a debt and leave the creditor to make whatever deal he can with the third-party.

The crucial issue of whether plaintiff agreed to release the defendants to this action from all responsibility to pay his commission simply was not determined against plaintiff in the prior action.

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT EXAMINING THE ACTUAL
RECORD OF THE PRIOR ACTION.

The prior action which defendants rely on was filed in Salt Lake County (R. 17). The present action is a Utah County case. The Court did not have the prior record before it when it made its determination.

To be sure, the Court was presented with bits and pieces from the prior case. (R. 49-80, Plaintiff's Trial Brief; R. 81-87, a short excerpt from the prior trial; and, R. 153-155, the Supreme Court opinion in the prior case.) However, those pieces are extremely incomplete, and they do not even mention the issue of whether plaintiff intended to release defendants by agreeing to accept payment from Fitzgerald. Nor do they mention the third-party complaint filed by Fitzgerald. (Id.)

These omissions are crucial. It was only in conjunction with the third-party complaint by Fitzgerald against Monte Vista's former shareholders that all of the decisions in favor of those particular defendants were rendered. That third-party action involved completely different issues from plaintiff's underlying claim against Fitzgerald, and plaintiff was not a party to that action.

This unfamiliarity with the underlying action led the Trial Court to err. In particular, the Trial Court concluded that the previous decision determined as a matter of final judgment that Fitzgerald was solely responsible to plaintiff for plaintiff's commission. That determination could not possibly have been made because those defendants were not involved in any claims by plaintiff. (R. 17.) The issue of whether plaintiff's looking to Fitzgerald for payment constituted a novation which released defendants from their responsibility was not litigated and could not be litigated because plaintiff did not sue defendants in the

prior action (R. 17). The only final judgment in favor of defendants in the final action was on Fitzgerald's third-party claim for indemnification which, as will be discussed later, involved different issues.

The Trial Court relied on a jury instruction given in connection with plaintiff's claim against Fitzgerald to reach its conclusion. The instruction which the Court used as the basis for defendants' summary judgment motion in this case reads, in relevant part, as follows:

"The Court has ruled that as a matter of law that the agreement of December 7, 1977 imposed upon defendant the liability for the real estate commission, if any, owed plaintiff on this transaction."

Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453, 455 (Utah 1981) (See also R. 147.)

That instruction, however, does not refer to any decision stating that these defendant would not be liable to plaintiff, for there was no such decision. The reference to the ruling as a matter of law can only have reference either to the dismissal of Fitzgerald's Third-Party Complaint or to the arguments made in the prior case that the Stock Purchase Agreement subsequently entered into by Fitzgerald and Monte Vista's former shareholders abrogated Fitzgerald's responsibility to pay plaintiff's commission as outlined in the December 7, 1977 Earnest Money. (See R. 59-61.) (See also pages 17-19 of Fitzgerald's Responding Brief in Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 450 (Utah 1981) No. 16746, copies of which are attached as Exhibit "C".)

There simply is no reference in the present case to any actual order of the Trial Court in the prior case stating that Fitzgerald was the only one who could be liable to plaintiff. There was no such order.

There is no evidence presented to the Trial Court upon which it could base its collateral estoppel and res judicata decisions, and Utah law on the subject is clear.

"The mere fact that there was a record of another action on file in the clerk's office did not place these records in evidence. . . .since the record of a prior action was not before the Trial Court, there is no basis to sustain the determination that plaintiff's claim was barred by the doctrine of res judicata."

Parish v. Layton City Corporation,
452 P.2d 1086, 1087 (Utah 1975).

In res judicata and collateral estoppel situations, the Court cannot rely upon counsel's memoranda containing references to the previous litigation. The necessary documents must be "examined independently by the Trial Court." Searle Bros. v. Searle, 588 P.2d 689, 692 (Utah 1978).

II. RES JUDICATA IS CLEARLY INAPPLICABLE.

For res judicata to apply, both suits must involve the same parties or the privies, and both suits must involve the same cause of action. Schaer v. State, 657 P.2d 1337 (Utah 1982); Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978). Neither of these two requirements is satisfied in the present case.

A. The Two Causes of Action Relied Upon for Res
Judicata are not the Same.

The claim against these defendants in the prior action was asserted by Fitzgerald, not plaintiff, and was for indemnification in the event that plaintiff was able to obtain a judgment against Fitzgerald. (R. 17.) Plaintiff's present claim is that Monte Vista and its former shareholders must pay him his commission either under contract or quasi-contract theories. Manifestly, the causes of action are not the same. Fitzgerald's third-party complaint rested upon the circular language of the Stock Purchase Agreement (R. 189). The Stock Purchase Agreement was between Fitzgerald and Monte Vista's former shareholders (R. 182-195). Plaintiff was not a party to that agreement (Id.). Plaintiff did not even learn about the Stock Purchase Agreement until after it had been executed. (R. 197-198.)

Plaintiff's claims, which must be accepted as true at this stage of the litigation, arose out of an oral agreement which plaintiff had with Monte Vista's president and out of principles of unjust enrichment. (R. 1-4.) As a result, Fitzgerald's third-party complaint in the prior action and plaintiff's present claims involve different rights of different parties arising at different times and involving different individuals. It cannot possibly be maintained that the cause of action in Fitzgerald's third-party complaint and plaintiff's present claims are the same. Under such circumstances, the doctrine of res judicata does not apply. Schear v. State, 657 P.2d 1337 (Utah 1983).

B. Neither was Plaintiff in Privity with Fitzgerald.

The claim between Fitzgerald and Monte Vista's former shareholders was personal Fitzgerald. (R. 182-195.) Plaintiff had no property right in that claim or any kind of an ownership interest in it. Plaintiff's claims against Fitzgerald were in no way dependent upon Fitzgerald's claim against Monte Vista's former shareholders as the fact that plaintiff's claim against Fitzgerald was allowed to proceed while the indemnification claim had been dismissed illustrates.

A person in privity with another is "a person so identified in interest with one another that he represents the same legal right." Searle Bros. v. Searle, 588 P.2d, 689, 692 (Utah 1978). Privity is not established simply because various actions involve the consideration of the same or similar facts. Owens v. Kuro, 354 P.2d 696 (Wash. 1960); Sodak Distributing Co. v. Wayne, 93 N.W.2d 791 (S.D. 1958). For all practical purposes, privity requires that there be "mutual or successive rights in property." Searle Bros. v. Searle, 588 P.2d at 692.

Plaintiff did not have any interest in Fitzgerald's third-party action and certainly has no interest in it now. Plaintiff's claim against Fitzgerald and plaintiff's present claims against the defendants to this action arise out of separate circumstances.

III. THE REQUIREMENTS OF COLLATERAL ESTOPPEL HAVE NOT BEEN MET.

Two basic requirements of collateral estoppel are that the precise issue to be precluded in the second action must be exactly the same as one which was fully litigated in the first action. Schear v. State, 657 P.2d 1337 (Utah 1983); Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978); Wilde v. Mid Century Insurance Co., 635 P.2d 417 (Utah 1981). Although the underlying facts may be the same or similar, what is controlling is that "the issue that was actually litigated in the first suit was essential to the resolution of that suit and is the same factual issue as that raised in the second suit." Robertson v. Campbell, 674 P.2d 1226, 1230 (Utah 1983). Collateral estoppel also requires that there be a final judgment on the merits against the party against whom collateral estoppel is asserted or against someone in privity with such a party. Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978).

The facts and circumstances which were mentioned in connection with the argument on res judicata are of equal applicability to collateral estoppel. The only claims which were litigated against Monte Vista's former shareholders in the prior action were litigated by Fitzgerald. Fitzgerald's claims involved different factual circumstances and arose out of different actions. There is no evidence in the record in this case which demonstrates that the critical issue of whether plaintiff's decision to attempt to collect

from Fitzgerald meant that it also released Monte Vista and its former shareholders was actually litigated or that a final decision was reached on that issue.

It is, of course, an elementary rule of law that an obligee cannot be deprived of recourse against the obligor by a substitution of debtors without the obligee's consent to release the original obligor from responsibility. Gambles v. Purdue, 572 P.2d 1241 (Mont. 1977); Dahl v. Brunswick Corp., 356 A.2d 221 (Maryland 1976); Tidewater Oil Co. v. Murphy Motors, Inc., 227 A.2d 443 (Conn. Ap. Div. 1967); J. Shlainsey, Inc. v. Aitken, 21 A.2d 764 (N.J. 1941); 6, Corbin on Contracts, §1297. Similarly, "a creditor's mere acceptance of the obligation of a third person without an agreement or intention to release the original debtor or extinguish the original debt does not amount to a novation" which discharges the original obligor. Taylor v. Poulson, 552 P.2d 1274, 1275 (Utah 1976).

An obligee can accept the obligation of a third party to pay the original debtor's debt either as additional security or as a release of the original obligor's responsibilities. Taylor, supra. at 1275; First National Bank in Evanston v. Sims, 301 P.2d 1103 (Id. 1956); Davenport v. Dickson, 507 P.2d 301 (Kan. 1973); 6, Corbin on Contracts, §1297. The original obligor has to prove not only that the obligee accepted a third party's performance or agreement to perform but also that he accepted such performance or agreement to perform as a release of recourse

against the original obligee. "A creditor's assent to hold a new debtor liable is ineffective to constitute a novation unless there is assent to give up the original debtor." Davenport v. Dickson, 507 P.2d 301 (Kan. 1973).

The burden of proof as to a novation which will release the original obligor rests upon the party who asserts it. Taylor, supra.; Davenport v. Dickson, supra. An intention to effect a novation which will release the original obligee is never presumed, and must be proved. (Id.) The mere fact that a creditor consents to a third party performing and even accepts payments from the third party does not create a presumption that the original debtor is released. Davenport v. Dickson, supra.; Jewell Co. of America v. George, 373 A.2d 1200 (R.I. 1977). In fact, it will be presumed that the new obligation will be accepted merely as additional or collateral security, or conditionally, subject to full performance. Taylor v. Poulson, supra.

In order to sustain a defense of novation, a defendant must prove that the plaintiff in accepting the third party's promise to discharge the obligation "unequivocally agreed to release and discharged defendant from liability." Jewell Co. of America, Inc. v. George, 373 A.2d 1260, 1262 (R.I. 1977). The determination of whether a novation has occurred which has discharged the original obligor is a question of fact. Davenport v. Dickson, supra.; Dahl v. Brunswick Corp, 356 A.2d 221 (Maryland 1976); Tidewater Oil Co. v. Murphy Motors, Inc., 227 A.2d 443 (Conn. Cir. 1966).

Additionally, a novation is an affirmative defense and must be specifically plead. New England Doll & Novelty Co. v. J. Del Dio, 187 A.2d 781 (R.I. 1963).

There is no evidence that any of these issues were actually litigated in the prior action. There is no evidence that any of these issues were plead in the prior action. There is no evidence that any judgment on these issues was reached in the prior action. In fact, the issues surrounding the question of novation were never determined in the prior litigation because the defendants to this action were not defendants to any action by plaintiff in the prior action.

IV. PLAINTIFF'S CLAIMS AGAINST FITZGERALD ALSO INVOLVED DIFFERENT ISSUES.

The Trial Court's ruling appears to be based upon its erroneous reading of the jury instruction quoted in the reported decision in Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (1981) and does not appear to be based upon the adverse decision against plaintiff entered on plaintiff's claim against Fitzgerald. (R. 251-254.) If any part of the ruling were based upon such a decision, it would be in error because the Trial Court did not have the record of the prior case before it from which to make a judgment and because the issues which plaintiff litigated against Fitzgerald were different from those in the present case.

Plaintiff claims entitlement to recover from the defendants based upon an oral contract to pay a specific percentage. (R. 2.) At trial in the prior action, Fitzgerald insisted that he never agreed to pay a money commission and that the arrangement he had with plaintiff was for a joint purchase of the Ranch which fell through because plaintiff did not keep up his end of the bargain. (See Fitzgerald's Responding Brief, pages 1-3, filed in Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (Utah 1981) No. 16746 attached in relevant part as Exhibit "C" hereto.) The Trial Court's observation that "Fitzgerald and plaintiff were still negotiating as to their possible joint purchase of the assets of Monte Vista" (R. 253) is an accurate statement of Fitzgerald's defense of the prior action. Fitzgerald did not contend that plaintiff's commission had been paid, and his legal argument that plaintiff was owed no commission because of an alleged lack of a written instrument was not ruled upon by the Court (R. 153-155). All that the jury decided in the prior case was that under whatever arrangement plaintiff had with Fitzgerald, Fitzgerald was not obligated to pay the plaintiff any more.

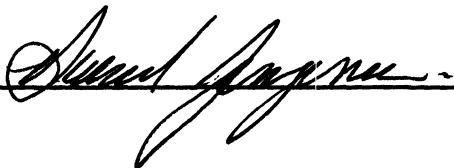
Plaintiff's arrangements and claims against the defendants in this action though related, arise as a result of different circumstances.

CONCLUSION

The Fourth District Court's decision should be reversed and the case remanded for further proceedings. Because it did not have the record of the prior litigation before it, there was not sufficient evidence in the record to support the Court's decision. Moreover, the issues actually decided in the prior action were different from the issues present here. This fact alone precludes use of either res judicata or collateral estoppel. Additionally, when it is realized that the issues relevant to the present defendants were determined in connection with Fitzgerald's third-party complaint against Monte Vista's shareholders and not in the context of a complaint by plaintiff against them, there is also a lack of privity.

DATED this 15th day of October, 1985.

ROBERT J. DEBRY & ASSOCIATES

By: 

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing APPELLANT'S BRIEF (Appeal from the Summary Judgment of the Fourth Judicial District Court, Utah County, Honorable David Sam) (Trimble v. Monte Vista Ranch, Inc., et al.), was mailed this 15th day of October, 1985, to the following:

M. Dayle Jeffs
JEFFS & JEFFS
Attorneys for Defendants
90 North 100 East
P. O. Box 683
Provo, Utah 84603

A handwritten signature in cursive script, appearing to read "Samuel Jaramila", is written over a horizontal line.

"ADDENDUM"

Exhibit A



This may be a legally binding form, if not understood seek other advice

1 To: _____

American Fork Utah December 7, 1977

2 IN CONSIDERATION OF your agreement to use your efforts to present this offer to the seller, I, Leland A. Fitzgerald
3 hereby deposit with you as earnest money the sum of \$ 25,000 , Twenty-five Thousand Dollars DOLLARS
4 in the form of personal check

5 to secure and apply on the purchase of the property situated at: All that property sold by Co-operative Securities
6 Corporation to Wallace Ohren more commonly known as the Cedar Valley Ranch,
7 including all improvements, water rights, sprinkling systems, and equipment.
8 This offer excludes the South 1/4 of Section 26, Range 2 West sold on Uniform Real Estate
9 contract to Blue Grass Turf Farms, Inc., David Pennington, President.

10 City Utah County, State of Utah
11 including any of the following items, if at present attached to the premises: Plumbing and heating fixtures and equipment including stoves and oil tanks, water heaters, and burners, electric
12 light fixtures excluding bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, window blinds, window and door screens, linoleum, all shrubs and trees, and any other fixtures
13 except: no exceptions

14 The following personal property shall also be included as part of the property purchased: none

15
16 The total purchase price of \$ 1,875,000 , One Million Eight Hundred seventy-Five Thousand DOLLARS

17 shall be payable as follows: \$ 25,000 which represents net to seller and is hereby acknowledged by you:

18 \$ 475,000 XXXXXXXXXXXX \$ _____ on delivery of deed or final contract

19 sale which shall be in or before January 15 , 1978 and \$ _____ equal annual installments over XXXXXXXXXXXX

20 a period of ten years from date of sale

21 Buyer to be responsible for all real estate commissions.

22 Sellers agree that acreage will be released to buyer after existing obligations to

23 Co-Operative Security Corp. has been satisfied, upon payment of \$1,250.00 per acre

24 principal payment for irrigated acreage and/or \$200.00 per acre principal payment

25 for dry land acreage.

26 until the balance of \$ 1,375,000 together with interest is paid, provided, however, that buyer has the option, at any time, to pay amounts in excess of the monthly

27 payments upon the unpaid balance. Subject to the limitations of any mortgage or contract by the buyer herein assumed, interest at 8 % per annum on the unpaid balance of

28 purchase price to be included in the prescribed payments and shall begin as of date of possession which shall be in or before Jan. 15 , 1978. All risk of loss and destruction

29 of contents, and expenses of insurance shall be borne by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the property shall

30 be paid as of date of possession. All other taxes and all assessments, mortgages, chattel loans and other liens encumbering the property of any nature shall be paid

31 by the seller except: real estate taxes to be apportioned

32 The following special improvements are included in this sale: Sewer ☐ Connected ☐ Septic Tank and/or Cesspool ☐ Sidewalk ☐ Curb and Gutter ☐ Special Street Pa

33 ☐ Special Street Lighting ☐ Culinary Water (City) ☐ Other Community System ☐ Connected ☐ Private ☐ (If owned Yes (X) No ())

34 Contract of Sale or Instrument of conveyance to be made on the approved form of the Utah Dept. of Business Regulation in the name of

35 to be determined prior to closing date

36 This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within 45 days from date hereof, and unless

37 approved the return of the money herein received shall cancel this offer without damage to the undersigned agent

38 In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller

39 be retained as liquidated and agreed damages

40 It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made

41 anyone relative to this transaction shall be construed to be a part of the transaction unless incorporated in writing herein. It is further agreed that execution of the final contract by

42 the seller shall constitute the final contract and shall supersede this Receipt and Offer to Purchase

43 We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract brought to date or at least

44 within a period of title insurance in the name of the purchaser and to make final conveyance by warranty deed or

45 in the event of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails to do so, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

46 The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of _____

47 In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

48
49 Dec 7, 1977 Monte Vista Ranch Inc Leland A. Fitzgerald

50 Dec 7, 1977 by Wallace Ohren Pres. Buyer

51 Edward Sherwood, Sec.

Exhibit B

STOCK SALE AGREEMENT

(Monte Vista Ranch, Inc.)

THIS AGREEMENT, made and entered into as of the day of _____, 1978, by and between WALLACE OHMAN, RAY L. NELSON, HOWARD D. SHERWOOD, JOYCE T. RICE and NELDON WILLIAMS (the "Sellers") and LELAND A. FITZGERALD (the "Buyer").

WITNESSETH:

A. Sellers are the legal and equitable owners and holders of all the issued and outstanding shares of the capital stock of Monte Vista Ranch, Inc., a Utah corporation (the "Corporation").

B. The Corporation is the equitable owner of the entire right, title and interest in and to certain real property located in Utah County, State of Utah, the legal description of which is attached hereto as Exhibit "A" (the "Property").

C. Buyer desires to acquire from Sellers and Sellers are willing to sell to Buyer, upon the terms and conditions and for the consideration herein reserved to be paid, kept and performed, all of the issued and outstanding shares of the capital stock of the Corporation.

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Sellers' Representations and Warranties. The Sellers hereby warrant and represent (but not jointly and severally) as follows:

(a) The Corporation is, as of the date hereof, and, on the Closing Date (as hereinafter defined in Section 5), will be, a corporation, duly organized, validly existing and in good standing under and by virtue of the laws of the State of Utah. The entire authorized capital stock of the Corporation consists, as of the date of this Agreement, of THREE HUNDRED THOUSAND (300,000) shares of common stock having a par value of \$1.00 per share, of which authorized shares 295,500 shares are and on the Closing Date will be issued and outstanding. Sellers, as of the date of this Agreement own and will also on the Closing Date own the following number of shares:

<u>SHAREHOLDER</u>	<u>NUMBER OF SHARES</u>
Wallace Ohman	116,667
Ray E. Nelson	116,66
Howard D. Sherwood	22,222
Joyce T. Rice	20,000
Neldon Williams	20,000

As of the date hereof, there are not authorized or in existence, nor on the Closing Date will there be authorized or in existence, any subscription rights, options, warrants or other rights to the issuance, sale or purchase of additional shares of the capital stock of the Corporation. All issued and outstanding shares are fully paid and non-assessable.

(b) The Corporation is duly qualified and entitled to own, lease or otherwise deal with all of its properties and assets and to conduct its businesses in all of the jurisdictions where such properties are, as of the date hereof, and on the Closing Date, will be, owned or leased or such businesses conducted.

(c) As to the shares of the Corporation referred to in subsection (a) above, each Seller represents and warrants, but only with respect to his shares that he has full right, title and interest in his respective shares as set forth in subsection (a), that such shares are subject to no options or similar right of purchase nor to any liens, encumbrances or security interest, of any type whatsoever nor has the Seller agreed to subject such shares to any security interest, and that it has the full, unconditional and unrestricted right, power and authority to enter into this Agreement and to sell and deliver all such shares in accordance with the terms of this Agreement.

(d) Copies of the originals of the following documents for the Corporation are attached hereto as Exhibit "B ". Each such document is valid, genuine and is, in all respects, what it purports to be:

(i) The Articles or Certificate of Incorporation and all amendments thereto (certified within thirty (30) days prior to this Agreement by the appropriate official of the State of Utah),

(ii) The bylaws, if any, of the Corporation, as amended to date, and

(iii) The complete minutes of the Corporation.

(e) The balance sheet dated March 31, 1978, which is attached hereto as Exhibit "C." The Corporation will, on the Closing Date, own the assets set forth on such balance sheet subject only to the liabilities set forth thereon.

(f) Attached hereto marked Exhibit "D" is a schedule which fairly and correctly reflects all items of personal property and equipment owned or leased by the Corporation, subject only to the loan and lease obligations which are more particularly identified and described on said Exhibit "D." The Schedule is a true and correct schedule of all significant personal property and equipment owned by the Corporation and all such property and assets are free and clear of any liens or encumbrances not disclosed in such Schedule. Prior to the Closing, Buyer will have inspected such personal property and by such inspection will be deemed to have accepted such personal property in its existing condition.

(g) The Corporation is, as of the date of this Agreement, and will be, as of the Closing Date, the sole equitable owner, under a real estate contract, and in possession of all of the legal and beneficial right, title and interest in and to the Property, including, without limitation, all buildings, structures and other improvements situated thereon, all easements over adjoining real property or real properties, any and all appurtenances in any way appertaining thereto and the Sellers' entire right, title and interest in and to any land lying in the bed of any street, road or avenue (whether open, closed or proposed) adjoining the Property and the Sellers' entire right, title and interest in and to any award made or to be made in lieu thereof and in and to any unpaid award made or to be made in lieu thereof and in and to any unpaid award or damages to the Property by reason of the change to any street or a condemnation or taking for public use. A copy of the real estate contract pursuant to which the Corporation is purchasing the Property is attached hereto as Exhibit "E."

(h) Reference is made to the real estate contract attached hereto as Exhibit "E." As of the Closing, the Corporation shall not be in default or breach of and has performed all of its obligations and duties under the contract.

(i) No adverse or unpaid judgments are outstanding against the Sellers or the Corporation which could or would adversely affect the terms, conditions or warranties set forth in this Agreement or the ability or capacity of the Sellers to perform hereunder.

2. Sellers' Agreement to Sell and Capital Stock to be Sold. Sellers agree to sell and, on the Closing Date (as defined in Section 4), will transfer and deliver to Buyer, free and clear of all liens, encumbrances, claims or outstanding interests whatsoever, certificates endorsed in blank or with appropriate stock powers, with signature guarantees, representing all of the issued and outstanding shares of the capital stock of the Corporation (the "Stock").

By acquisition of such Stock, Buyer shall acquire ownership of the entity owning the properties, assets, rights, privileges and interests related to the Corporation including, without limitation, the Property, plus any such items as have been acquired subsequent to this date and minus any such items as have been disposed of subsequent to this date (but only to the extent permitted by the terms of this Agreement or approved by Buyer). The items to be owned by the Corporation include, but are not necessarily limited to, all fixed or tangible assets, accounts receivable, equipment, furniture, fixtures, supplies, contracts, leases, licenses, consents, franchises, permits, prepaid expenses, books and records, names, trademarks, trade names insurance policies, choses in action, claims and any and all other properties, whether real or personal, tangible or intangible, except any items specifically excluded by the terms of this Agreement; provided that Buyer understands that the Corporation will have no cash or bank accounts on the Closing Date.

Although the Sellers are selling stock rather than real property, they hereby agree to provide, at their cost and expense, a standard owner's form policy of title insurance in the sum of \$1,400,000.00, showing title to the Property to be vested in the Corporation or its assignee; provided that such obligation shall not arise until the real estate contract referred to in Section 1(g) is discharged.

3. Agreement to Purchase.

(a) Buyer agrees to purchase, upon the terms and subject to the conditions of this Agreement, the Stock described in Section 2 and will pay for the same as hereinafter set forth.

(b) The aggregate purchase price to be paid by Buyer for the Stock shall be \$1,400,802.95 (the "Purchase Price") and shall be paid as follows:

(i) \$400,000.00 shall be paid in cash at the Closing.

(ii) Interest only at the rate of eight percent (8%) per annum from the Closing Date to be paid on May 1, 1980.

(iii) The balance together with interest computed on the unpaid balance outstanding from time to time computed at the rate of eight percent (8%) per annum shall be due and payable in ten (10) equal annual installments of principal and interest commencing on the third (3rd) anniversary of the Closing and on each anniversary thereafter.

At the election of Sellers, each Seller may receive a separated promissory note for his pro-rata portion of the deferred Purchase Price.

(c) Buyer shall execute and deliver to Sellers promissory notes (the "Notes") in the principal amount of the balance of the Purchase Price described in subsection (b)(ii). The Notes shall be in the form attached hereto as Exhibit "F." The Notes shall permit unlimited prepayment of interest and/or principal without penalty after January 2, 1979.

(d) As security for payment, the Buyer will execute and deliver a pledge agreement (the "Pledge Agreement") in the form attached hereto as Exhibit "G" and a deed of trust (the "Deed of Trust") in the form attached hereto as Exhibit "H."

4. The Closing and the Closing Date. The consummation of the purchase of the Stock shall constitute the "Closing" and the date upon which such consummation takes place shall be the "Closing Date," as such terms are respectively used in this Agreement. The Closing Date shall be no earlier than April 15, 1978, nor any later than May 31, 1978, on such regular business day, at such time during regular business hours and at such place within Utah County, State of Utah as is specified in written notice by Buyer to Sellers given at least ten (10) days prior to the date set for Closing. If Buyer fails to give notice to Sellers of the date, time and place of Closing by the date which is ten (10) days prior to the final Closing Date as permitted hereunder, or as the same may be extended by mutual agreement of the parties, then Sellers may fix the date, time and place of Closing by written notice to Buyer in the manner herein provided and, in the absence of written notice by either party to the other, the Closing shall occur on the final date permitted therefor by the terms of this Agreement in the offices of Howard D. Sherwood, 562 West State Street, American Fork, Utah, commencing at 10:00 a.m.

5. Documents, Certificates, Opinions, Etc., to be Delivered at the Closing.

(a) At the Closing, Sellers shall deliver to Buyer the following:

(i) Certificates endorsed in blank or with appropriate stock powers, with signature guarantees by a national bank and with revenue stamps affixed, if required, representing all of the issued and outstanding shares of capital stock of the Corporation.

(ii) The corporate minutes books, Articles of Incorporation, Bylaws, stock transfer books, corporate seals, books of accounts and other financial records, tax returns, and all franchises, deeds, bills of

sale, insurance policies, contracts, mortgages, leases and all other documents pertaining to any property owned or used by the Corporation.

(iii) A written resignation of each of the officers and directors of the Corporation.

(b) At the Closing, Buyer shall deliver to Sellers the following:

(i) The payment required by Section 3(b)(i) hereof.

(ii) The Notes required by Section 3(c) hereof.

(iii) The Pledge Agreement and Deed of Trust required by Section 3(d) hereof.

6. Conditions Precedent to Buyer's Obligation to Consummate This Transaction. The obligations of Buyer to close hereunder are, at the option of Buyer, subject to compliance by Sellers with, at or prior to the Closing Date, each of the following conditions precedent

(a) Sellers shall have tendered all of the certificates evidencing the shares being sold hereunder, together with the endorsements and guarantees as provided for in Section 5, and

(b) Sellers shall have performed and complied with all conditions required by this Agreement to be performed or complied with by Sellers prior to or at the Closing.

7. Investigation by Buyer. During the period from the date of this Agreement to the Closing Date, Sellers shall cause Buyer to be given free access to the offices, records, files, stock books, minute books, books of account and copies of tax returns of the Corporation, insofar as the same relate to assets being acquired hereunder, for the purpose of conducting an investigation of all matters relating to the business, properties and assets of the Corporation. If this Agreement is not consummated as provided herein, Buyer and its representatives shall treat all information obtained hereunder, not otherwise known to Buyer or already in the public domain, as confidential and shall upon request return to Sellers copies made by Buyer and its representatives of material belonging to the Corporation.

8. Conduct of Business Pending Closing. During the period from the date hereof to and including the Closing Date, Sellers shall cause the Corporation to conduct its operations in the ordinary and usual course of business and to maintain its records and books of account in accordance with generally accepted accounting principles consistently applied and in a manner which fairly and correctly reflects its income, expenses and

liabilities. Sellers agree that during such period the Corporation shall not, without the written consent of Buyer:

(a) Pay or incur any obligation or liability, absolute or contingent, other than current liabilities incurred in the ordinary and usual course of business;

(b) Incur any indebtedness for borrowed money (except for endorsement, for collection or for deposit, of negotiable instruments received in the ordinary and usual course of business), assume, guarantee, endorse or otherwise as accommodation become responsible for obligations of any other individual, firm or corporation, or make any loans or advances to any individual, firm or corporation;

(c) Declare or pay any dividends or make any payment or distribution to stockholders as such, issue any capital stock or purchase or otherwise acquire for value any of its outstanding capital stock or grant options, warrants or rights to purchase any shares of its capital stock;

(d) Mortgage, pledge or subject to lien or other encumbrance any of its properties or assets;

(e) Sell or transfer any of its properties or assets or cancel, release or assign any indebtedness owed to it or any claims held by it;

(f) Make any investment of a capital nature either by the purchase of stock or securities, contributions to capital, property transfers or otherwise, or by the purchase of any property or assets of any other individual, firm or corporation;

(g) Make any material change in its insurance or enter into:

(i) Any agency agreement;

(ii) Any contract for the purchase or sale of any materials, products, services or supplies other than such contracts incurred in the ordinary and usual course of business;

(iii) Any contract for the purchase or sale of any materials, products, services or supplies, the total contract price of which exceeds \$500.00 or which contains an escalator, renegotiation or redetermination clause or which provides for a fixed term,

(iv) Any management or consultation agreement;

(v) Any lease, license, royalty or union agreement, or

(vi) Any other agreement not in the ordinary and usual course of business,

(h) Pay or contract to pay, in any manner compensation to any of its officers or employees, or pay or agree to pay any pension or retirement allowance to any such officers or employees, or commit itself to any pension, retirement or profit sharing plan or agreement or employment agreement with or for the benefit of any officer, employee or other person or

(i) Take any action which would interfere with or prevent performance of this Agreement

9. Indemnification by Sellers The Sellers shall indemnify the Buyer, defend and hold it harmless, with respect to all liabilities of the Corporation known to Sellers, whether accrued, absolute, contingent or otherwise existing at the Closing Date to the extent not disclosed. The foregoing notwithstanding, the liability of each Seller shall be limited to an amount calculated by multiplying the total liability by the number of shares owned by such Seller and dividing the product by 295,556

10. Possession, Risk of Loss. The Buyer shall enter into possession of the Stock and Property and the other assets purchased hereunder as of the Closing Date, at which time benefits and burdens of ownership shall be transferred to the Buyer. All risk of loss prior to the Closing Date shall be upon the Seller.

11. Real Estate Commissions Each party represents and warrants that it has incurred no obligation for real estate or other brokerage commissions in connection with the transaction contemplated hereby and each party agrees to indemnify and hold the other party harmless from and against any such liability arising from the former party's conduct or activities

12. Execution of Documents. Both parties hereto agree to execute, acknowledge and deliver to the other party such agreements of sale, deeds, assignments and other instruments as may be reasonably necessary or appropriate to carry out the terms and intent of this Agreement.

13. General Conditions; Miscellaneous Provisions.

13.1 Notice. As used in this Agreement, notice includes but is not limited to the communication of notice, request, approval, statement, report, acceptance, consent, waiver and appointment. No notice of the exercise of any option or election is required unless the provision giving the election or option expressly requires notice. All notices must be in writing; provided that no writing other than the check or other instrument representing a payment itself need accompany a payment. Except when actual receipt is expressly required by the terms hereof, notice is considered given either (a) when delivered in person to the recipient named as below, or (b) three (3) days after deposit in the United States mail in a sealed envelope or container, either registered or certified mail, return receipt requested, postage and postal charges prepaid, addressed by name and address to the party or person intended as follows:

TO SELLERS: c/o Howard D. Sherwood
562 West State Street
American Fork, Utah 84003

TO BUYER: Leland A. Fitzgerald

Either party may, by notice given at any time or from time to time, require subsequent notices to be given to another individual person, whether a party or an officer or representative, or to a difference address, or both. Notices given before actual receipt of notice of change shall not be invalidated by the change. Such recipient named must be an individual person. If more than one recipient is named, delivery of notice to any one such recipient is sufficient. If none of the recipients named in the latest designation of recipient is available for delivery in person, and if the notice addressed by mail to each recipient named in the latest designation of recipient is returned to the sender undelivered, notice shall be sufficient if sent by mail as above to the party as named in this Agreement, unless the name or identity of the party has changed as permitted in this lease and proper notice of the change has been given, in which event the notice shall be sufficient if sent by mail as above to the party named in the latest notice designating the party, and the notice is considered given when the first attempt to give notice was properly made.

13.2 Titles and Captions. The table of contents, if any, and all Part or Section titles or captions to this Agreement are for convenience only and shall not be deemed part of this Agreement and in no way define, limit, augment, extend or describe the scope, content or intent of any part or parts of this Agreement.

13.3 Pronouns and Plurals. Whenever the context may require, any pronoun used herein shall include the corresponding masculine, feminine or neuter forms and the singular form of nouns, pronouns and verbs shall include the plural and vice

versa. Each of the foregoing geners and plurals is understood to refer to a corporation, partnership or other legal entity when the context so requires.

13.4 Further Action. The parties shall execute and deliver all documents, provide all information and take or forebear from all such action as may be necessary or appropriate to achieve the purposes of this Agreement.

13.5 Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Utah, except its choice of law rules.

13.6 Binding Effect Upon Successors. This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, successors, legal representatives and assigns; provided that this provision shall not be construed as permitting assignment, substitution, delegation or other transfer of rights or obligations except strictly in accordance with the provisions of the other Sections of this Agreement.

13.7 Integration. This Agreement constitutes the entire agreement among the parties pertaining to the subject matter hereof, and supersedes all prior agreements and understandings pertaining thereto. No covenant, representation or condition not expressed in this Agreement shall affect or be deemed to interpret, change or restrict the express provisions hereof. The failure of either party to inspect the documents referred to herein constitutes a waiver of any objection, contention or claim that may be based upon such an inspection.

13.8 Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or of such or any other covenant, agreement, term or condition. Any party may, by notice delivered in the manner provided in this Agreement, but shall be under no obligation to, waive any of his rights or any conditions to his obligations hereunder, or any duty, obligation or covenant of any other party. No waiver shall affect or alter the remainder of this Agreement but each and every other covenant, agreement, term and condition hereof shall continue in full force and effect with respect to any other then existing or subsequently occurring breach.

13.9 Rights and Remedies. The rights and remedies of any of the parties hereto shall not be mutually exclusive, and the exercise of one or more of the provisions of this Agreement shall not preclude the exercise of any other provisions. Each of the parties confirms that damages at law may be an inadequate remedy for a breach or threatened breach of any provisions hereof. The respective rights and obligations hereunder shall be enforceable by specific performance, injunction or other equitable remedy, but nothing herein contained is intended to or shall limit or affect any rights at law or by statute or otherwise of any party aggrieved as against the other parties for

a breach or threatened breach of any provision hereof, it being the intention by this Section to make clear the agreement of the parties that the respective rights and obligations of the parties hereunder shall be enforceable in equity as well as at law or otherwise.

13.10 Severability. In the event that any condition, covenant or other provisions herein contained is held to be invalid or void by any court of competent jurisdiction, the same shall be deemed severable from the remainder of this Agreement and shall in no way affect any other covenant or condition herein contained. If such condition, covenant or other provision shall be deemed invalid due to its scope or breadth, such provision shall be deemed valid to the extent of the scope or breadth permitted by law.

13.11 Attorneys' Fees. In the event either party hereto fails to carry out its obligation hereunder, the party in default shall pay all costs and expenses, including attorneys' fees (including any incurred in connection with any appeal), incurred by the other party in enforcing its rights or in obtaining redress for the breach.

13.12 Exhibits. All Exhibits annexed to this Agreement and the documents to be delivered at or prior to the Closing are expressly made a part of this Agreement as fully as though completely set forth in it. All references to this Agreement, either in the Agreement itself or in any of such writings, shall deem to refer to and include this Agreement and all such Exhibits and writings. Any breach of or default under any provisions of any of such writings shall, for all purposes, constitute a breach or default under this Agreement and all other such writings.

13.13 Authorization. Each individual executing this Agreement does thereby represent and warrant to each other person so signing (and each other entity for which another person may be signing) that he has been duly authorized to deliver this Agreement in the capacity and for the entity set forth where he signs.

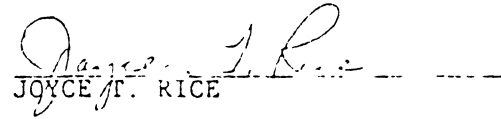
IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first set forth above.

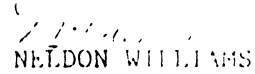
SELLERS:

Wallace Ohran
WALLACE OHRAH

Ray E. Nelson
RAY E. NELSON


HOWARD D. SHERWOOD.


JOYCE F. RICE


NELDON WILLIAMS

BUYER:

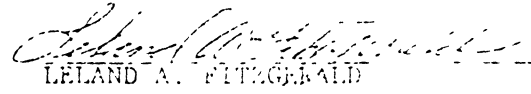

LELAND A. FITZGERALD

EXHIBIT "A"

PARCEL 1: Commencing at the Southeast corner of Section 7, Township 6 South, Range 1 West, Salt Lake Meridian, thence North 21.50 chains; thence West 40 chains; thence North 841.5 feet; thence East 40 chains; thence North 25.75 chains, thence West 80 chains; thence South 60 chains; thence East 80 chains to beginning.

PARCEL 2: Southeast quarter of the Southwest quarter of Section 8, Township 6 South, Range 1 West, Salt Lake Meridian.

PARCEL 3: Northwest quarter; West half of the Southwest quarter; Lots 2,3,6,7,8,9 of Section 17, Township 6 South, Range 1 West, Salt Lake Meridian.

PARCEL 4: All of Section 18, Township 6 South, Range 1 West, Salt Lake Meridian.

PARCEL 5: Lots 4,9,10,11, Northwest quarter of Southwest quarter of Section 20, Township 6 South, Range 1 West, Salt Lake Meridian. also Lots 2 and 3; Northwest quarter of Northwest quarter of Section 20.

PARCEL 6: North 1/2 and the Southwest 1/4 of Section 15, Township 6 South, Range 2 West, Salt Lake Meridian

PARCEL 7: The South half of Section 24, Township 6 South, Range 2 West, Salt Lake Meridian.

PARCEL 8: Lots 2,3,4 and the East half of Southwest quarter, Southeast quarter of Southwest quarter and Southwest quarter of Northeast quarter of Section 28, Township 6 South, Range 1 West, Salt Lake Meridian.

PARCEL 9: Lots 3,4 and 8, Section 29, Township 6 South, Range 1 West, Salt Lake Meridian.

PARCEL 10: Southeast quarter; East half of Southwest quarter; Southeast quarter of Northwest quarter and Southwest quarter of Northeast quarter of Section 30, Township 6 South, Range 1 West, Salt Lake Meridian. Also Northeast quarter of Northeast quarter of said Section 30.

PARCEL 11: West 3/4 of Section 25, Township 6 South. Range 2 West, Salt Lake Meridian.

PARCEL 14: Northeast quarter of Section 35, Township 6 South, Range 2 West, Salt Lake Meridian.

PARCEL 15: All of Section 36, Township 6 South, Range 2 West, Salt Lake Meridian.

Exhibit C

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-appellant brought this suit to collect a real estate commission in money from the buyer.

DISPOSITION IN THE LOWER COURT OF THE CASE

After a four day trial, the jury found for defendant and the court entered a judgment of "no cause of action" on that verdict in favor of defendant Fitzgerald.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the verdict and judgment entered thereon.

STATEMENT OF FACTS

Defendant agrees with plaintiff's statement of facts except in the following particulars: The seller of the ranch in the Earnest Money Agreement was not Wallace Ohran, but Monte Vista Ranch, Inc., a Utah corporation, of which Ohran was a minority (39%) stockholder and its president. Ohran did not have the authority to give and did not give plaintiff an oral or written listing. (R. 616, 523, 40, 45) Ohran simply let Florence, like many other real estate men, bring him offers. If he liked one, he'd submit it to the other stockholders.

There was a dispute in the evidence as to whether the purchase price was lowered from 2 million dollars to \$1,875,000 upon the promise of defendant Fitzgerald to pay a commission to plaintiff. Florence claimed this, but Fitzgerald denied it. The fair import of the testimony of Ohran and Sherwood (Monte Vista's secretary) was that they left plaintiff and defendant alone to work out Florence's participation in the purchase of the ranch. They were really never concerned about it. See Point I (c) for more details on this question.

Florence sought in his Second Amended Complaint a commission payable in money in the sum of \$125,000. (He did not seek any alternative relief) Plaintiff referred to his claim throughout the trial as a 6% commission which would only be \$120,000, something he never explained. Defendant denied ever promising to pay him a commission in money but did agree to allow him to participate in the purchase of part of the irrigated land which had the farm house on it, together with one-half of the machinery. (This is similar to Florence's original claim in his first complaint) However, Florence could never come up with the funds to participate in the purchase. (R. 743,63) He intended to sell the land, or part of it, to some California interests and realize a profit.

Defendant also wants to point out that the Earnest Mc

Agreement upon which plaintiff bases his claim for a commission was mutually terminated by the seller and buyer. Much later, a stock sales agreement with different parties, terms and subject matter was drawn and performed. Defendant admits and agrees that this change in agreement did not affect Florio's right to compensation. See Point IV of the argument of brief.

POINT IV.

ASSUMING THERE WAS ERROR IN THE TRIAL BELOW, THE VERDICT CAN BE SUSTAINED BECAUSE THE PLAINTIFF'S CLAIM WAS EXTINGUISHED WHEN THE SELLER AND BUYER MUTUALLY TERMINATED THE EARNEST MONEY AGREEMENT.

In the Dec. 7th Earnest Money (Exh. 1-P) the seller was Monte Vista Ranch, Inc. and the buyer was Leland Fitzgerald. It was a contract to buy and sell land. That contract was never performed but was mutually terminated by the parties thereto. Subsequently, a completely different agreement was entered into but between different parties and on different subject matter. Many new terms were added. This new agreement was Exh. 3-P entitled, Stock Sale Agreement. The five stockholders were the sellers. The buyer remained the same. The subject matter was not land, but stock of Monte Vista Corp. Other differences are that the down payment was reduced from \$500,000 to \$400,000; one half of the mineral rights were reserved by sellers (exh. 10-D). Fitzgerald had to assume the debts of the corporation and the purchase price accordingly reduced. No provision was made for the payment of any commission. Instead, Paragraph 11 was inserted providing

"Each party represents and warrants that it has incurred no obligation for real estate or other broker's commissions in connection with the transaction contemplated hereby and each party agrees to indemnify and hold the other party harmless from and against any liability arising from the former party's conduct or activities."

Because of the foregoing provision, Fitzgerald when sued by Florence for a commission brought the stockholder into the action as third party defendants. The trial court dismissed them out before the case went to the jury.

The point to be made here is that because the Earnest Money Agreement was mutually terminated by seller and buyer no rights in favor of plaintiff can arise from that dead instrument. The parties had every right to mutually terminate it. When that happened the rights of any third party beneficiaries were also terminated. The rule is well stated in statement of Contracts, Sec. 143, as follows:

"A discharge of the promisor by the promisee in a contract or a variation thereof by them is effective against a creditor beneficiary if:

(a) the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon before he knows of the discharge or variation, and

(b) the promisee's action is not a fraud on creditors."

Corbin on Contracts, Vol. 4, Sec. 815, approves the statement rule and states it is "not out of harmony with existing decisions". (footnote, pg. 259)

The plaintiff learned of the termination of the Earnest Money near Jan. 15, 1978. (R. 619, 621, 764) He did not bring suit until months later, Aug. 7, 1978. He presents evidence that he had changed his position in reliance upon alleged promise of Fitzgerald to pay him a commission.

still had all the rights he ever had against Monte Vista and Ohran. Under the foregoing statement of the law from the Restatement, Florence cannot legally complain that the Earnest Money agreement was terminated and his right to a commission based thereon was likewise terminated. He had not brought suit; he had not changed his position materially in reliance thereon; it was not a fraud on creditors since it was done for tax reasons. The trial court should have granted defendant's motion for a directed verdict made on this ground (R.693) or at least submitted the question to the jury to ascertain the pertinent facts relating to that defense. See Defendant's Requested Instr. No. 1 (R. 202)

CONCLUSION

This case was tried before a jury at the request of the plaintiff. The jury listened to the evidence and arguments for four days and then returned a verdict in favor of the defendant. The jury was properly and adequately instructed on plaintiff's theory of the case. (Inst. No. 3) Counsel for plaintiff in his closing argument to the jury fully argued the third party beneficiary theory. R. 866,67. They were not misled in any manner. They just did not buy plaintiff's theory but instead apparently chose to believe Fitzgerald's testi-

Exhibit D

Exhibit D

Exhibit D

FILED
THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE - STATE OF UTAH

FILE NO. C-18-4944

<p>TITLE (✓ PARTIES PRESENT)</p> <p><u>Cal Florence et al.</u></p> <p style="text-align: center;"><u>vs</u></p> <p><u>Edward G. Fitzgerald</u></p>	<p>COUNSEL (✓ COUNSEL PRESENT)</p> <p><u>R. L. Briggs v. Huntington</u></p> <p><u>Richard G. Howe</u></p>
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<p><u>Susan L. Sundberg</u> <small>CLERK</small></p> <p><u>Dorothy Dupon</u> <small>REPORTER</small></p> <p><u>Laverne Brady</u> <small>BAILIFF</small></p>	<p>HON. <u>Bryant N. Craft</u> <small>JUDGE</small></p> <p>DATE. <u>September 17, 1979</u></p>
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The trial of the above-entitled case having been continued to this date, the jury foreperson appeared, all necessary and proper persons being present and ready, further trial is now resumed.

Come now the court and orders that the 2nd party complaint is hereby dismissed.

The jury is instructed orally and is meeting by the court. The case is then argued to the court and jury by respective counsel and submitted. The jury retires at the hour of 12:38 pm to consider its verdict and subsequently returns into court at 2:08 pm and says by its foreman as follows, to wit:

"We, the jurors impaneled in the above case, find the issues in favor of the defendant and against the plaintiff. No Cause of Action"

September 17, 1979 James M. Mockridge, Foreman

The jury is polled, and all answer in the affirmative except Juror #5 (Fryman) and #8 (McLain)

Whereupon the jury is discharged from further consideration of this case - excused, subject to call.

FILMED

RICHARD C. HOWE
Attorney for Defendant
and Third Party Plaintiff
5055 South State St.
Murray, Utah 84107
Telephone: 262-2989

Richard C. Howe
1978

IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

-----ooOoo-----

MEL TRIMBLE REAL ESTATE
and CAL FLORENCE,

Plaintiffs,

vs.

LELAND A. FITZGERALD

THIRD PARTY COMPLAINT

Defendant and
Third party Plaintiff

No. C 78-4944

vs.

WALLACE OHRAN, RAY E. NELSON,
HOWARD D. SHERWOOD, JOYCE T. RICE,
and NELDON WILLIAMS,

Third Party
Defendants.

-----ooOoo-----

Third party plaintiff complains against third party
defendants as follows:

1. Plaintiffs, MEL TRIMBLE REAL ESTATE and CAL FLORENCE, have filed against the defendant a Second Amended Complaint, a copy of which is hereto attached as exhibit A.
2. The third party defendants, as sellers, and the third party plaintiff, LELAND A. FITZGERALD, as buyer, entered into a Stock Sale Agreement wherein the sellers sold to the buyer all of the stock of Monte Vista Ranch Inc. a Utah Corporation and as a part of that written agreement agreed in paragraph 11 that they had incurred no obligation for any real estate or other brokerage commissions in connection with the sale and agreed to indemnify and hold the buyer harmless from and against any such liability arising from sellers conduct

or activities.

3. In their Second Amended Complaint plaintiffs allege that third party defendants, or some of them orally agreed to pay plaintiffs a real estate commission of 6 per cent and seek to recover that amount from defendant.

4. Under the terms of the Stock sale agreement third party defendants are liable to defendant for any amount of commission which plaintiffs recover from defendant in this action and defendant is entitled to a judgment over and against them for such amounts.

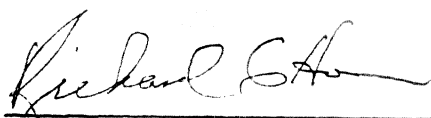
WHEREFORE, defendant and third party plaintiff prays that he be awarded a judgment over and against the third party defendants for all amounts he is adjudged to owe plaintiffs in this action, for all costs incurred by him in defending this action including a reasonable attorney's fee and costs of court and for such other relief as may seem proper to the court.

Dated this 30th day of March, 1979.



RICHARD C. HOWE
Attorney for Defendant
and Third Party Plaintiff

Mailed a copy of the foregoing THIRD PARTY COMPLAINT to Robert J. DeBry, attorney for plaintiff, 2040 East 4800 South, Suite 203, Salt Lake City, Utah 84117, this 30th day of March, 1979.



RICHARD C. HOWE

STATE OF UTAH

COUNTY OF SALT LAKE

ss. C-78-4944

Mel Trimble Real Estate and
Cal Florence

vs.

Leland A. Fitzgerald vs.

Wallace Ohran, et al

I, H. DIXON HINDLEY, Clerk in and for the County of Salt Lake and Ex-Officio
Clerk of the District Court of the Third Judicial District in and for Salt Lake County, State of
Utah, do hereby certify that the foregoing is a full, true and correct copy of the original _____

-----Third Party Complaint-----

-----Minute Entry from Sept. 17th, 1979-----

as appears of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand
and affixed my official seal, this 10th

day of October, A.D. 19 85

H. Dixon Hindley Clerk

By Mark Fairclough Deputy Clerk