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Melvin Spears, Sandy Spears, Freddie Martinez,  
Karen Martinez, Cliff Ruben, Tonja Ruben, Wayne  
D. Lewis, Miriam Lewis, Heidi Thomas, Wayne V.  
Reynolds v. Edward C. Warr, Hazel V. Warr : Reply  
Brief

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

MELVIN SPEARS, SANDY SPEARS,  
FREDDIE MARTINEZ, KAREN  
MARTINEZ, CLIFF RUBEN, TONJA  
RUBEN, WAYNE D. LEWIS, MIRIAM  
LEWIS, HEIDI THOMAS and WAYNE  
V. REYNOLDS,

Plaintiffs and Appellees,

vs.

EDWARD C. WARR and HAZEL V.  
WARR,

Defendants and  
Appellants.

Supreme Court No. 20000435-SC

Priority No. 15

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**REPLY BRIEF OF APPELLANTS**

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Appeal from the Ruling of the Third District Court, Tooele County, Judge David S. Young

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## INTRODUCTION

The major legal issues raised by this appeal are: (1) whether, under the doctrine of merger, the parties' written deeds extinguished any alleged oral contracts and rendered inadmissible plaintiffs' parol evidence of such contracts, (2) whether plaintiffs' claimed oral contracts are enforceable under the statute of frauds, and (3) whether plaintiffs' claims are barred by the four-year statute of limitations. A holding for the Warrs on any one of these issues is sufficient to bar plaintiffs' claims in their entirety and as a matter of law. Additional issues include (4) whether plaintiffs Wayne and Miriam Lewis have privity of contract with the Warrs, and (5) whether the trial court awarded plaintiffs excessive water rights.

The trial court determined that the parties entered into an oral contract for conveyance of the Warrs' Irrigation Water as part of the purchase of plaintiffs' lots. R. 955 at 146. In an effort to support this finding, plaintiffs have re-argued in their brief much of the parol evidence that they submitted to the trial court. The Court should not be distracted from the legal issues presented in this appeal by plaintiffs' discussion of factual questions that are not at issue here. While the Warrs continue to deny the existence of an oral contract, they have not challenged the trial court's factual findings in this appeal.<sup>1</sup> Rather, the Warrs maintain that the trial court never should have speculated on this factual question, because plaintiffs' claims are barred as a matter of law regardless of the existence or non-existence of any oral contract they might claim.

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<sup>1</sup> Because the Warrs do not challenge the trial court's findings of fact in this appeal, they are not required by Utah R. App. P. 24(a)(9) to marshal the evidence in support of those findings. *Peirce v. Peirce*, 2000 UT 7, ¶ 17 n.4, 994 P.2d 193 (“[T]he marshaling requirement applies only to challenges of factual findings, not to conclusions of law.”).



The trial court erred by attempting to reach back six to thirteen years to ascertain the terms of oral representations allegedly made prior to plaintiffs' purchase of lots, where the parties have subsequently reduced their agreement to written contracts and have executed and recorded written deeds in performance of their agreement. The doctrine of merger, the parole evidence rule, the statute of frauds, and the statute of limitations were specifically designed to prevent trial courts from jeopardizing litigants' real property rights upon doubtful factual determinations such as the one made by the trial court below. The courts and the Legislature have established these principles as a legal framework within which courts must resolve real property disputes without resorting to unreliable factual inquiries as to who said what at some time six to thirteen years in the past.

Unfortunately, the trial judge ignored this legal framework and instead ordered the distribution of the Warrs' water rights based on his own finding of oral contract and his own notion of the equities. As a matter of law, however, any oral contract found by the trial court is unenforceable without additional findings to take the contract out of the doctrine of merger, the parole evidence rule, the statute of frauds, and the statute of limitations. The trial court made none of these required findings, because there was no evidence to support such findings. The trial court nevertheless ordered specific performance of the oral contract it believed it had found. By ignoring the requirements of the law, the trial court's judgment does serious violence to the legal protections of property rights erected by this Court. There is nothing to distinguish this case from the Court's established precedents barring claims under the doctrine of merger, the parole evidence rule, the statute of frauds, and the statute of limitations. Therefore, any affirmance of the trial

court's judgment by this Court would work a radical and unjustified change in the law by weakening or eliminating these established legal protections, and placing property rights instead within the discretionary fact-finding powers of the State's trial judges. The Warrs by this appeal ask the Court to avoid this result and uphold the law.

## **ARGUMENT**

### **I. PLAINTIFFS' CLAIMED ORAL CONTRACTS ARE MERGED AND EXTINGUISHED IN THE PARTIES' WARRANTY DEEDS**

Plaintiffs seek to avoid the extinguishment of their claims under the doctrine of merger by arguing that this issue was not properly raised before the trial court and that their alleged oral terms for conveying title to the Irrigation Water were collateral to the conveyance of title in their deeds. Appellees' Br. at 22-25. However, the merger doctrine was raised before the trial court, which ruled on this issue and thereby preserved it for appeal. Further, the collateral rights exception does not apply to contract terms relating to title.

#### **A. The Doctrine of Merger Was Properly Preserved for Appellate Review**

The rule for preservation of an issue for appellate review, as recited by plaintiffs, is that "a trial court must be offered an opportunity to rule on an issue." *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998) *quoted in* Appellees' Br. at 22 n.8. In this case there can be no question that the trial court was afforded an opportunity to rule on the merger doctrine because in fact it did rule on this issue from the bench and again in its Judgment, holding (erroneously) that the merger doctrine did not apply because the parties did not intend their deeds to be an integration of their contracts. R. 955 at 147; R. 920.

Plaintiffs cite *Badger* for the proposition that an issue must be raised in a timely fashion, specifically raised, and supported by evidence or legal authority for a court to have

an opportunity to rule on it. Appellants' Br. at 22 n.8, *citing Badger*, 966 P.2d at 847. These requirements obviously apply in cases like *Badger* where a party is appealing an issue not ruled upon in the forum below, but there is no need to prove that the court had an opportunity to rule on an issue when the court has actually ruled on it. Moreover, the Warrs specifically raised the merger doctrine in connection with their timely and continuing objection to plaintiffs' introduction of parol evidence. R. 953 at 34. They discussed the doctrine again in their closing argument, and supported their argument by citation to authority.<sup>2</sup> R. 955 at 118-23 *citing Dubrowsky v. Isbell*, 740 P.2d 1325 (Utah 1987). Although this issue might have been more fully briefed at an earlier point in the litigation, this Court has repeatedly held that an issue is preserved for appeal, even if the issue was not raised until after the trial, where the trial court considers and rules on the merits of the issue. *See State v. Seale*, 853 P.2d 862, 870 (Utah 1993); *State v. Belgard*, 830 P.2d 264, 266 (Utah 1992); *State v. Johnson*, 821 P.2d 1150, 1161 (Utah 1991); *State v. Matsamas*, 808 P.2d 1048, 1053 (Utah 1991). Where the issue is raised at trial and ruled upon by the trial court there can be no question that it was adequately preserved.

**B. The Oral Terms Alleged by Plaintiffs Are Not Collateral to the Conveyance of Title**

Plaintiffs seek to avoid the extinguishment of their claims under the merger doctrine

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<sup>2</sup> The Warrs' also offered to provide the trial court with additional briefing on this issue, but the court refused this briefing and ruled on its own understanding of the merger doctrine. R. 955 at 119, 145-46. Further, as plaintiffs acknowledge, the substance of the merger doctrine was raised in connection with the parol evidence rule in the Warrs' pre-trial brief and opening arguments, where the Warrs argued that the deeds constituted the final agreement between the parties as a matter of law. R. 702-03; R. 953 at 6-7. Because the Warrs' argument under the merger doctrine is purely legal, there can have been no prejudice to the plaintiffs from the Court's consideration of the issue after the evidence was closed.

by arguing that conveyance of Irrigation Water was collateral to the conveyance of their lots in the written warranty deeds. *See* Appellees' Br. at 22-25. Plaintiffs' claim is inconsistent with their own argument, maintained throughout this litigation, that the lots and Irrigation Water were purchased together, and that the purchase price given as consideration for the warranty deeds was intended to pay for title to both the lots and the Irrigation Water. *See* R. 38-39, 150, 569, 682, 841, 935. Moreover, plaintiffs' claims do not fit within the collateral rights exception because the oral terms they allege relate to title and the parties' deeds directly address the subject of water rights. Plaintiffs distort the law of collateral terms in an attempt to make their claims fit within this exception.

**1. As a Matter of Law, Terms Relating to Title Are Not Collateral**

The collateral rights exception does not apply to contract terms relating to title because such terms are, as a matter of law, central to the conveyance of title in the deeds rather than collateral. *Maynard v. Wharton*, 912 P.2d 446, 450 (Utah Ct. App. 1996). The law is well-established in this regard:

“The question of whether a specific term is or is not collateral, and hence whether the term will or will not merge into the deed, is determined by the intent of the parties.” . . . However, Utah courts need not look to the parties' intent on issues relating to title and encumbrances because such issues “relate to the same subject matter as does the deed.”

*Id.* (emphasis added) (quoting *Secor v. Knight*, 716 P.2d 790, 793 (Utah 1986). Thus where a contested contract term “relates to conveyance of title, the parties' intent . . . is irrelevant after delivery and acceptance of the deed” and “the merger doctrine's collateral rights exception . . . does not apply.” *Id.* (emphasis added); *see also Dansie v. Hi-Country Estates Homeowners Ass'n*, 1999 UT 62, ¶ 21, 987 P.2d 30; *Embassy Group, Inc. v. Hatch*,

865 P.2d 1366, 1372 (Utah Ct. App. 1993); *Secor v. Knight*, 716 P.2d at 793. Because plaintiffs' claimed oral contracts relate to title in the Warrs' Irrigation Water, such contracts, to the extent they ever existed, are merged and extinguished by the parties' deeds as a matter of law.

## **2. The Warranty Deeds Explicitly Address the Subject of Water**

Even if the collateral rights exception could be applied to terms relating to title, the warranty deeds in this case indicate that title to water was not collateral to the title to plaintiffs' lots. The warranty deeds given to each plaintiff describe all water rights associated with the lots, and thereby manifest plainly that the subject of water rights was not collateral to sale of the lots. For example, when plaintiffs Freddie and Karen Martinez bought Lot 1 from the Warrs, the Warrs had already installed a well on Lot 1 and applied to the State Engineer for certification of their water rights. R. 670.<sup>3</sup> The warranty deed for Lot 1 therefore conveys the water right together with the lot:

LOT 1, ROCKY TOP SUBDIVISION, A SUBDIVISION OF TOOELE COUNTY, according to the official plat thereof, recorded in the office of the County Recorder of Tooele County, Utah. TOGETHER WITH WATER RIGHT APPLICATION NO. 15-3242 (A61781) & 8" well, filed with the State of Utah.

Tr. Ex. 62, (copy attached to Appellants' Br. at App. C). Thus, when the parties intended a conveyance of water rights, they described those rights on the deed itself.

Further, all of the plaintiffs' warranty deeds incorporate the official plat, which clearly provides: "Lot purchasers are responsible for . . . on-lot wells." Tr. Ex. 17 (copies

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<sup>3</sup> This, incidentally, explains why the Warrs advertised the sale of the Martinez' lot, unlike the other lots, with "water, utilities." *See* Appellees' Br. at 1-2, 6. This fact was acknowledged by stipulation of the parties, R. 670, and by the Martinez in their trial testimony. R. 953 at 194-95, R. 954 at 15-16.

attached to Appellants' Br. as App. B); R. 675; Tr. Exs. 24, 34, 43, 54, 56, 62, 75 (Warranty Deeds) (copies attached to Appellants' Br. as App. C). This statement constitutes an explicit limitation on the Warrs' responsibility to provide water to the lots. This limitation is not collateral to the rights conveyed in the warranty deeds, but is a part of the deeds themselves, as if written out on their face. *See Barbizon of Utah, Inc. v. General Oil Co.*, 471 P.2d 148, 149-50 (Utah 1970) ("When lands are granted according to an official plat of a survey, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed . . . as if such descriptive features were written out on the face of the deed or grant itself.").

### **3. Plaintiffs' Argument Distorts the Law of Collateral Terms**

The plaintiffs seriously distort the law in an attempt to make the collateral rights exception applicable to their claims. Plaintiffs incorrectly claim that contract terms are collateral (a) where performance of the terms is intended to take place after conveyance of the lots, and (b) where the property is not mentioned in the deeds. Appellees' Br. at 24. These assertions are not supported by the decisions of this Court, and manifest the plaintiffs' plain misunderstanding of the doctrine of merger and the collateral rights exception.

#### **a. Where Terms Relate to Title, the Time of Performance is Immaterial**

Plaintiffs rely on *Stubbs v. Hemmert*, 567 P.2d 168 (Utah 1977), for the proposition that contract terms should be deemed collateral to the deeds where the performance of those terms is intended to take place at some time after the delivery of the deed. Appellees' Br. at 24. Plaintiffs further claim that "in *Dansie v. Hi-Country Estates Homeowners Ass'n.*, 987 P.2d 30 (Utah 1999), this Court reiterated the foregoing standard." *Id.* Plain-

tiffs materially misrepresent the Court's holding in *Dansie* and the current state of the law.

The *Dansie* Court addressed the *Stubbs* decision but did not "reiterate" it. Rather, in language omitted from the plaintiffs' brief, the *Dansie* Court pointed out that years earlier, it had clarified and corrected the erroneous standard set forth in *Stubbs*. See *Dansie*, 1999 UT 62, ¶¶ 20-21, 987 P.2d 30 (copy attached to Addendum as **App. A**). In reality, this Court in *Dansie* expressly rejected the same argument plaintiffs make here:

The Association argues that under *Stubbs* the language of the 1973 Contract is not extinguished by the later deeds because the "1973 Contract requires the buyers to become members of the Homeowners Association at some point after the signing of the Contract . . . , it contemplates performance after the delivery of the deed, and constitutes a collateral agreement."

However, nearly a decade after *Stubbs*, this court clarified the collateral rights standard, holding that "covenants relating to title and encumbrances are not considered to be collateral because they relate to the same subject matter as does the deed." *Secor* [v. *Knight*], 716 P.2d 790, 793 (Utah 1986) (citation omitted). The contract language relied on by the Association here is clearly a "covenant[ ] related to title and [an] encumbrance[ ]" upon the title to the Property.

*Id.* (emphasis added). Because the disputed terms related to title, the Court held as a matter of law that they were not collateral but were merged in the parties' deeds. *Id.* The Court's decisions in *Secor* and *Dansie* make it clear that terms relating to title in real property are not collateral to the deeds by which the property is conveyed, regardless of when performance of those terms is intended to take place.

#### **b. Terms Omitted from the Deed Are Not Collateral**

Plaintiffs argue that because the warranty deeds do not mention the Irrigation Water, title to the Irrigation Water must, "by definition," be a different subject matter than the title to their lots, and therefore collateral. Appellees' Br. at 24, *quoting Dansie*, 716 P.2d at 792. Plaintiffs seriously misconstrue the holding of *Dansie*. The "subject matter" referred

to in *Dansie* is the subject of “title and encumbrances” generally, not just the title to the particular interests described in the deed.<sup>4</sup> If property not mentioned in the deed was “by definition” a different subject matter and therefore collateral to the conveyance in the deed, then the collateral rights exception would swallow up the doctrine of merger, effectively eliminating it. The merger doctrine only arises when the deed conveys something different than the buyer thought it was buying or the seller thought it was selling. If a subject were deemed to be collateral whenever it was left out of the deed, this exception would apply in every case in which the merger doctrine was raised. The fact that title to the Irrigation Water is not described in the deeds means that it was not conveyed, not that it is collateral to the sale of the lots.

**C. The Parol Evidence Rule Excludes Evidence of Merged and Extinguished Terms**

If the plaintiffs’ alleged oral contracts are subject to the doctrine of merger, then any evidence of such contracts proffered for the purpose of contradicting the deeds should likewise be excluded under the parol evidence rule. This Court has historically applied the merger doctrine in conjunction with the parol evidence rule to exclude parol evidence of contracts—whether written or oral—offered for the purpose of contradicting the terms of the parties’ written deeds. *See Reese Howell Co. v. Brown*, 158 P. 684 (Utah 1916).

Parol evidence of prior terms is inadmissible to contradict a valid, written deed, because the deed represents the parties’ final, integrated agreement as a matter of law. *See Dubrowsky*, 740 P.2d at 1327; *Secor*, 716 P.2d at 792. Evidence of prior terms is also

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<sup>4</sup> In the sense of being a separate interest in real property, the Irrigation Water is of course “a different subject matter” than the lots. It is for this reason that the Irrigation Water must also be purchased by a separate agreement and paid for with separate consideration.



inadmissible for the reason that such terms are merged in the deeds and the existence of such merged terms is irrelevant to the parties' rights under the deed. *See Reese Howell*, 158 P. at 157 (“[T]he [trial] court did not err in rejecting appellant’s offer of proof [of prior contracts] upon the ground that it was immaterial, if for no other reason.” (emphasis added)); *Maynard v. Wharton*, 912 P.2d at 450 (“[T]he parties’ intent regarding Lot 15 [as set forth in a prior agreement] is irrelevant after delivery and acceptance of the deed.” (emphasis added)). The trial court’s finding that the deeds were not integrated is contrary to settled law, and the court therefore erred by admitting and relying on plaintiffs’ parol evidence of contrary terms over the Warrs’ objection.

#### **D. The Doctrine of Merger Must Be Strictly Enforced**

The doctrine of merger must be rigorously maintained to preserve the integrity of written deeds and to encourage the diligence of the parties. *Secor*, 716 P.2d at 795. If in fact the plaintiffs believed that they should have acquired title to the Warrs’ Irrigation Water with the purchase of their lots, it was their duty to see that a covenant to that effect was included in the deeds they purchased. *Id.* This Court has declared: “in the sales of land, the law remits the party to his covenants in his deed; if . . . the party has not taken the precaution to secure himself by covenants, he has no remedy for his money, even on failure of title.” *Reese Howell Co.*, 158 P. at 689. The State’s entire system of recorded conveyances depends on the reliability and integrity of recorded deeds. The Court should not permit that integrity to be compromised by plaintiffs’ subsequent allegations of additional oral terms contrary to the terms accepted and recorded in their written deeds.

## **II. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF FRAUDS**

As plaintiffs acknowledge, a claimant seeking to avoid the statute of frauds under the theory of part performance must show acts of part performance done in reliance on the alleged oral contract such that “(a) they would not have been performed had the contract not existed, and (b) the failure to perform on the part of the promisor would result in fraud on the performer who relied, since damages would be inadequate.” *Martin v. Scholl*, 678 P.2d 274, 275 (Utah 1983) (copy attached to Addendum as **App. B**) (quoted in Appellees’ Br. at 28). Plaintiffs do not even argue that damages would be inadequate to compensate their alleged losses, and they utterly fail to show any action on their part that would not have been performed absent the oral contract they allege.

### **A. Plaintiffs Do Not Even Address the Requirement of Showing Their Eligibility for an Equitable Remedy**

It is well-established that there can be no equitable award of specific performance without some showing that the plaintiffs’ reliance on the oral promises of the defendant resulted in substantial losses, and that damages would be inadequate to compensate their loss. *See Martin v. Scholl*, 678 P.2d at 275-76 and cases cited therein. This is because the doctrine of part performance is based on the equitable theory of estoppel and therefore detrimental reliance must be shown. *Id.* (quoting *In re Roth's Estate*, 269 P.2d 278, 281 (Utah 1954)). Plaintiffs acknowledge this requirement, but having acknowledged it, they have failed to address it both in their evidence before the trial court and in their brief on appeal. *See Appellees’ Br.* at 28 (quoting *Martin* at 275). As previously explained, plaintiffs here have proved no losses resulting from the purchase of their lots, which were priced based on an appraisal of the land without water rights. R. 353-55; R. 674-75. Nor have plaintiffs

explained why damages would be inadequate to remedy any losses they might claim. *See* Appellants' Br. at 35-37. The trial court's lengthy findings of fact are likewise silent on this issue, and it is not addressed in the Judgment. This omission is fatal. Plaintiffs cannot recover under the doctrine of part performance without some showing of substantial loss.

**B. Plaintiffs Have Utterly Failed to Show Any Act of Reliance Exclusively Referable to the Oral Contracts They Allege**

Even if the plaintiffs could show the kind of losses that would qualify them for the equitable remedy they seek, they do not show that such losses were the result of acts of reliance that can be explained only by reference to the oral contract they claim. In other words, they cannot satisfy the requirement of "exclusive referability."

**1. Plaintiffs' Alleged Acts of Reliance Are Not Exclusively Referable to Any Promise for Free Irrigation Water**

Plaintiffs show no act of part performance done in reliance on their alleged oral contracts that would not have been performed had the contracts not existed. The trial court found that the plaintiffs had purchased their lots in reliance on the Warrs' alleged promise that they would not be charged for Irrigation Water. However, the Warrs have shown that the plaintiffs purchased lots pursuant to their written contracts, not in the performance of unwritten agreements. *See* Appellants' Br. at 28. The Warrs also have shown that many people, including plaintiffs Wayne and Miriam Lewis, have purchased lots without any expectation of Irrigation Water. Plaintiffs do not and cannot deny that the purchase of their lots can be explained without reference to the Irrigation Water. This act is therefore insufficient, as a matter of law, to constitute part performance in circumvention of the statute of frauds. *See Martin v. Scholl*, 678 P.2d at 278-79 (exclusive

referability is a question of law); *see also Bradshaw v. McBride*, 649 P.2d 74, 79-80 (Utah 1982); *Baugh v. Logan City*, 495 P.2d 814, 816 (Utah 1972).

In their brief, plaintiffs also assert that they improved their lots by building homes and, in the case of three plaintiffs, a water distribution pipeline in reliance on oral contracts with the Warrs for free Irrigation Water. *See Appellees' Br.* at 28. The trial court did not find, nor could it reasonably have found, that these acts were done in reliance on the alleged contract for free Irrigation Water; therefore plaintiffs' claims of reliance are entitled to no deference.

Further, there are at least three reasons why plaintiffs' improvements cannot establish part performance. First, the lot improvements were not required by the parties' alleged agreement and therefore were not done in performance or part performance of the alleged oral contracts. *See Martin*, 678 P.2d at 275 *and sources cited therein*. Second, plaintiffs' improvements to the lots are not exclusively referable to the alleged contracts. For instance, the homes plaintiffs built are not dependent on the Irrigation Water, but are fully supplied with culinary water by on-lot wells, consistent with the general practice in the area. R. 633, 667-74. The fact that all but one of the plaintiffs have built homes without Irrigation Water and have comfortably occupied those homes for several years, *see* R. 663, 667-74, suggests that this act was not dependent on an expectation of Irrigation Water and therefore cannot be exclusively referable to the oral contracts plaintiffs allege. Likewise, the plaintiffs' participation in the construction of the distribution pipeline is equally consistent with the Warrs' understanding that the lot owners intended to purchase Irrigation Water, and is not exclusively referable to the claimed contracts. Finally, the de

minimus participation of the three plaintiffs who helped with construction of the water line does not constitute “significant” reliance,<sup>5</sup> and could not serve as part performance for the other seven plaintiffs, even if it otherwise qualified as part performance.

Plaintiffs make no effort to show how any of their acts of alleged reliance are exclusively referable to the alleged promise that they would be given Irrigation Water free of charge. Plaintiffs claim that they would not have purchased lots or built improvements unless they believed they would be given free Irrigation Water with the lots, but there is nothing about the plaintiffs’ actions themselves that manifests any such understanding.<sup>6</sup> As this Court has explained, the doctrine of part performance is an “acts-oriented rather than a word-oriented evidentiary requirement,” and “equity declines to act on words . . . unless the words are confirmed and illuminated by deeds.” *Martin*, 678 P.2d at 275, 277. In this case, the plaintiffs are long on after-the-fact words, but exceedingly short on any meaningful deeds.

## **2. Plaintiffs Cannot Avoid the Requirement of Showing Acts Exclusively Referable to the Oral Contracts They Allege**

Because plaintiffs cannot show any act exclusively referable to the oral contracts they allege, they seek to dispense with this requirement by arguing that it is “satisfied” by independent evidence of the contract. Appellees’ Br. at 29. Plaintiffs’ argument misrepresents the law of part performance as set forth by this Court in *Martin v. Scholl*:

“[W]here either independent acts which prove the contract can be found, or an admission

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<sup>5</sup> The three plaintiffs who helped with the line have stipulated that their contributions were \$300 or \$600 of the total cost, which was between \$6,000 and \$10,000. R. 668.

<sup>6</sup> It is undisputed, of course, that the amount the plaintiffs paid for their lots was based on an appraisal of the land without irrigation water. R. 353-55; R. 674-75. Thus, while plaintiffs may claim they would never have purchased lots without the Irrigation Water, it is clear that what they paid for was exactly that.

of the contract is present, the requirement of exclusive referability may be relaxed.” 678 P.2d at 278 (emphasis added). Plaintiffs cite this language, but overstate its effect by claiming that their independent evidence “satisfied” the requirement of exclusive referability. Appellees’ Br. at 29. The *Martin* case demonstrates that the evidentiary standard for part performance is more stringent than plaintiffs would have the Court believe, and demands more compelling evidence than plaintiffs can provide.

In *Martin*, the trial court found that the claimants’ independent evidence had shown the existence of an oral contract. 678 P.2d at 278. The Utah Supreme Court did not question this finding of fact, but nevertheless reversed the district court as a matter of law because the acts of reliance urged by the plaintiff were not exclusively referable to the alleged contract, but could be explained on other grounds. *Id.* at 279. This Court held that “the necessity of showing acts of part performance which were exclusively referable to the claimed agreement remain[ed] vital,” in spite of the trial court’s finding of oral contract, because the evidence of the contract was not undisputed, i.e., “the evidence of the oral contract . . . required the judge to weigh the credibility of Martin’s witnesses against witnesses for the [defendants] who vigorously disputed the existence of an oral contract.” *Id.* The trial court in the instant case found the existence of an oral contract by “beyond a preponderance of the evidence,” R. 921, but the *Martin* Court stated that the exclusive referability requirement cannot be relaxed even where the trial court finds the existence of the contract is proved by clear and convincing evidence. 678 P.2d at 280 n.1.

The rule established by *Martin* is that the exclusive referability requirement may be “relaxed where there [is] no evidentiary concern regarding the existence of a contract,” but

where the contract is disputed, as it is here, the requirement remains vital. *Id.* at 279 (emphasis added). Plaintiffs have shown no acts of reliance that can be explained only by reference to the oral contract they allege. Their claim of part performance must therefore fail.

Even where the oral contract is undisputed, the requirement of showing acts exclusively referable to the contract is not “satisfied,” but merely “relaxed.”<sup>7</sup> In *McDonald v. Barton Bros. Investment Corp., Inc.*, 631 P.2d 851 (Utah 1981), the defendant, a property purchaser, admitted that he had entered into the oral agreement claimed by the seller, but this agreement was not included by covenant in the written purchase agreement. *Id.* at 852. The trial court held that the purchaser was bound under the doctrine of part performance, but this Court reversed. The court stated:

The controlling issue on . . . appeal is not whether [the] oral contract was proved by clear and convincing evidence, . . . but whether the alleged acts of part performance were themselves referable to and done in pursuance of that contract. If the acts relied on were not done in the execution of the oral contract but can be explained on another ground, they are insufficient to remove the bar of the statute of frauds, and the contract is unenforceable.

*Id.* at 853 (emphasis added). The Court reversed the trial court’s finding of part performance because the acts of alleged reliance were not exclusively referable to the parties’ oral contract. *Id.* Plaintiffs in this case cannot avoid the requirement of demonstrating acts exclusively referable to the oral contracts they allege. Their failure to do so means that their alleged oral contracts are barred by the statute of frauds and are unenforceable.

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<sup>7</sup> A “relaxed” standard might require plaintiffs to show acts of part performance that are “not readily explainable” or “not reasonably explicable” on some ground other than the alleged oral contract. *See Martin*, 678 P.2d at 280. The acts of supposed reliance undertaken by the plaintiffs are readily explainable on the ground that the Warrs intended to sell the Irrigation Water to the plaintiffs, and in fact provide no evidence whatever that the water was to be given free of charge.

### 3. Plaintiffs' "Independent Evidence" Is Not Compelling

Even if the requirement of exclusive referability could be "satisfied," the independent evidence put forward by the plaintiffs falls far below the "high evidentiary standard" required for the operation of the part performance doctrine in circumvention of the statute of frauds. *Martin v. Scholl*, 678 P.2d at 276 (citing *Van Natta v. Heywood*, 195 P. 192, 194 (Utah 1920)). As discussed in the Warrs' opening brief, the independent evidence relied on by the trial court is equivocal at best. *See* Appellants' Br. at 29-35. It shows only that the Warrs intended to develop the Irrigation Water for use on the Erda Farm and in the Subdivision and documents the Warrs' efforts to accomplish this purpose.<sup>8</sup> Again, this is not disputed. The only dispute in this case is whether the Irrigation Water

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<sup>8</sup> Although the Warrs have not challenged the trial court's factual findings in this appeal, the Warrs nevertheless take issue with the plaintiffs' characterization of the evidence in their brief. For example, plaintiffs falsely claim that the Warrs filed a Change Application in 1983 to change the place of use of the Irrigation Water to the Subdivision to facilitate development of the Subdivision. Appellees' Br. at 5. However, the record shows that the Warrs changed the place of use to the entire 110-acre Erda Farm, not just the Subdivision, which was later located on a portion of the Farm. *See* R. 677; Tr. Ex. 3 (copy attached to Appellants' Br. at App. G). The Subdivision was not even created until 1985, and the Warrs had no intention of subdividing their property in 1983. R. 676; Tr. Ex. 15 (copy attached to Appellants' Br. at App. F); R. 954 at 68. Contrary to plaintiffs' suggestion, the Warrs are not obliged under the terms of their Change Application or subsequent Applications for Extensions to use any portion of the Irrigation Water on the plaintiffs' lots.

Plaintiffs also quote Hazel Warr's testimony out of context to suggest unfairly that she admitted to perjury while on the witness stand. Appellees' Br. at 12. Mrs. Warrs' statement, "I suppose I'm perjured," was not, as plaintiffs' insinuate, an explanation of her testimony, but a reaction to plaintiffs' counsel's mischaracterization of her Affidavit in the Bleazard litigation. Counsel insisted that the Affidavit represented that the Irrigation Water was sold with the lots. R. 954 at 95 (copy attached to Addendum as **App C**). Mrs. Warr disagreed, but admitted that, to the extent the Affidavit meant what plaintiffs' counsel said it meant, her prior testimony in the Affidavit was false. *Id.* Read in context, however, Mrs. Warr's testimony makes it clear that she did not understand the Affidavit this way when she signed it, but understood it to say only that lot purchasers were told they would be provided with Irrigation Water for their purchase. *Id.* at 95-97.



was promised to lot purchasers free of charge. The only evidence of such promises is the plaintiffs' own testimonies, which themselves were often inconclusive.<sup>9</sup> At any rate, the plaintiffs' self-serving testimonies are not the kind of "independent evidence" that can satisfy the "high evidentiary standard" required to circumvent the statute of frauds.

**C. Hazel Warr Did Not Legally Authorize Anyone to Sell Her Interest in the Irrigation Water**

Plaintiffs argue that Hazel Warr promised them Irrigation Water, and that even if she didn't, she should be bound under principles of agency or estoppel by the alleged statements of her husband or her son. Appellees' Br. at 32. Plaintiffs' claims are unsupported by the record or the law.

The record cited by plaintiffs in their brief shows that only three plaintiffs—Fred Martinez, Karen Martinez, and Wayne Reynolds—even claim to have received promises from Hazel. Appellees' Br. at 32 *citing* R. 953 at 79-80, 195-96; R. 954 at 6-9, 27, 45-46, 50. Plaintiffs do not provide any evidence from the record that Hazel ever promised to provide free Irrigation Water to the other seven plaintiffs with their lots. *Id.*<sup>10</sup>

Because they can find no evidence that Hazel Warr ever promised free Irrigation Water to the remaining plaintiffs, plaintiffs claim in the alternative that Hazel Warr is liable under the principles of agency and estoppel for promises allegedly made by Edward Warr or by the Warrs' estranged son, Howard Warr. Appellees' Br. at 33-35. Plaintiffs cite no

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<sup>9</sup> For example, Clifford Ruben testified: "We just thought the water came with the deed itself." Q: "Is that what you were told?" A: "No, we just assumed that." R. 953 at 120 (emphasis added). Lorelee Crittenden likewise testified: "They never did say a price or anything at that time. That's why we made an assumption that water went with it." R. 954 at 22 (emphasis added).

<sup>10</sup> Plaintiffs cite the testimony of Sandy Spears, but her testimony when questioned as to who had promised her Irrigation Water was only: "You know, I'm not sure. I think it was just in the conversation about the—I don't recall which one it was." R. 953 at 80.

case law in support of these theories, but rely on provisions of the Restatement (Second) of Agency, §§ 8 and 8B. Whatever the general rules of agency and estoppel may be, the Utah Legislature has made it clear, and this Court has expressly held, that where the underlying transaction is one that must normally be reduced to writing under the statute of frauds, any agent purporting to act on behalf of a seller must likewise be authorized in writing. Utah Code Ann. § 25-5-1; *Bradshaw v. McBride*, 649 P.2d 74, 78-79 (Utah 1982). Plaintiffs can produce no writing authorizing either Edward Warr or Howard Warr to sell Hazel Warr's interest in the Irrigation Water. Their claims of reliance on the alleged promises of these persons are therefore incapable of conveying Hazel Warr's interest in the Irrigation Water.

### **III. PLAINTIFFS' CLAIMS ARE BARRED AS A MATTER OF LAW BY THE STATUTE OF LIMITATIONS**

Plaintiffs argue that the trial court properly concluded that the statute of limitations was tolled under the "misleading conduct" and "exceptional circumstances" exceptions until the plaintiffs' discovery of their cause of action in late 1995. Appellees' Br. at 35. The trial court reached no such conclusion, but held only that the plaintiffs had timely brought their cause of action after the discovery of their claims. R. 955 at 148; R. 920. Further, there is no evidence of any such misleading conduct or exceptional circumstances.

#### **A. Plaintiffs Do Not Support Their Claims from the Record**

Although the trial court found no misleading conduct or exceptional circumstances in this case, plaintiffs attempt to shore up the trial court's Judgment by alleging it in their brief. *See* Appellees' Br. at 36-38. However, the plaintiffs' allegations are unsupported by any citation to the record, as required by Utah R. App. P. 24(a)(7) & (e). *Id.* The Court therefore has no obligation to address these allegations and may rule as a matter of law that

the plaintiffs' claims are barred by the statute of limitations. *See MacKay v. Hardy*, 973 P.2d 941, 948 n.9 (Utah 1998) *and cases cited therein*.

**B. Plaintiffs Have Not Alleged Facts Sufficient to Toll the Statute**

But even if the Court should decide to address plaintiffs' claims of misleading conduct or exceptional circumstances, plaintiffs' assertions are insufficient to justify a tolling of the statute of limitations under these exceptions because they do not show (i) that plaintiffs exercised due diligence to discover their cause of action within the statutory period, (ii) that the Warrs undertook any affirmative acts of concealment, or (iii) that application of the statute of limitations would be irrational or unjust in the present circumstances.

**1. Plaintiffs Failed to Exercise Due Diligence**

As a pre-requisite to a tolling of the statute of limitations under either the misleading conduct or the exceptional circumstances versions of the discovery rule, plaintiffs must show that, by exercise of "due diligence," they "could not reasonably have discovered the facts underlying the cause of action in time to commence an action within" the statutory limitations period. *Berenda v. Langford*, 914 P.2d 45, 52, 55 (Utah 1996) (citations omitted). Plaintiffs made no effort to discover their claims within the statutory period. Plaintiffs allege no facts that would have prevented them from examining their deeds within the statutory period and determining that the Irrigation Water was neither conveyed nor promised in the deeds. "[D]iligence involves a duty on the part of both parties to make certain that their agreements have in fact been fully included in the final document." *Secor*, 716 P.2d at 794 (emphasis added). If the plaintiffs truly believed that they were promised Irrigation Water with the purchase of their lots, it was their duty to exercise at least this

minimal degree of diligence.

## **2. Plaintiffs Allege No Affirmative Acts of Concealment**

Plaintiffs argue that they did not discover their cause of action until 1995 because of the Warrs' "misleading conduct," Appellees' Br. at 35-37, but they allege no act on the part of the Warrs that would suffice to toll the statute of limitations under the fraudulent concealment exception. In order to invoke this exception, plaintiffs must "allege[ ] and make[ ] out a prima facie case that a defendant has taken affirmative steps to conceal the plaintiffs' cause of action." *Berenda*, 914 P.2d at 50 (emphasis added). Even plaintiffs' unsupported assertions do not show any action by the Warrs that could reasonably mislead the plaintiffs or conceal the facts on which their action is based.

The only misleading conduct plaintiffs allege was that the Warrs told them that they intended to provide the water "as soon as delivery became possible," that "the water could not yet be delivered because of the pending litigation with Bleazard and various problems with the pipeline," and that "deeds were being prepared." Appellees' Br. at 36. Each of these supposedly "misleading statements" was actually true, and each one has been stipulated to by the parties. *See* R. 680 (Warrs intended to provide the Irrigation Water for sale to lot owners if and when it became available); R. 665 (Warrs provided plaintiffs with opportunity to purchase Irrigation Water after title was secured and delivery became possible); R. 677, 668 (capacity of Railroad Pipeline is inadequate to deliver Irrigation Water); R. 673, 667 (Bleazard prevented conveyance of water until 1993); R. 665 (Warrs prepared quit-claim deeds in 1993 for sale of Irrigation Water). Further, there is nothing about any of these statements that could reasonably mislead the plaintiffs into thinking that

the Irrigation Water would be given to them free of charge.

Other than these admittedly true statements, plaintiffs allege as misleading conduct only that “the Warrs never indicated to the Plaintiffs that . . . the Plaintiffs would be charged an additional fee for the water.” Appellees’ Br. at 37. There is nothing misleading about the Warrs’ silence on this point, since there is no evidence that any of the plaintiffs ever asked the Warrs, either before or after the sale of the lots, whether they would be charged for Irrigation Water. The Warrs’ silence under these circumstances cannot be construed as the taking of “affirmative steps to conceal the plaintiffs’ cause of action.” *Berenda*, 914 P.2d at 50.

### **3. Plaintiffs Do Not Show Any Exceptional Circumstance**

Under the exceptional circumstances exception, plaintiffs must show “that the application of the statute of limitations would be irrational or unjust.” *Burkholz v. Joyce*, 972 P.2d 1235, 1237 (Utah 1998). To determine this, the Court “will apply a balancing test to weigh ‘the hardship imposed on the claimant by the application of the statute of limitations against any prejudice to the defendant resulting from the passage of time.’” *Snow v. Rudd*, 2000 UT 20, ¶ 11, 998 P.2d 262 (citations omitted). The factors the Court will consider in this balancing test include: “whether the defendant’s problems caused by the passage of time are greater than the plaintiff’s . . . and whether the claim has aged to the point that witnesses cannot be located, evidence cannot be found, and the parties cannot remember basic events.” *Sevy v. Security Title*, 902 P.2d 629, 636 (Utah 1995). In this case the balance favors the Warrs.

The only hardship plaintiffs claim is that they would lose their case against the

Warrs if the statute of limitations is applied. Appellees' Br. at 39. But this is the result in every instance where the statute of limitations is applied, and is not the kind of "exceptional circumstance" that requires the statute to be tolled. The Warrs, on the other hand, have suffered severe prejudice as a result of plaintiffs' delay in bringing their cause of action. Edward Warr, who was the person principally involved in the sale of the lots, R. 73, suffered the onslaught of heart disease and diabetes in the years subsequent to the sale of these lots, and underwent a quadruple bypass heart surgery prior to the trial of this case. R. 689; R. 954 at 138, 149. In December of 2000, Mr. Warr passed away as a result of his illness. Mr. Warr's illness and old age affected his memory and prevented him from effectively testifying in his own defense during the trial. R. 954 at 138, 145-49. The trial court acknowledged that Edward Warr's testimony was unreliable because of his physical condition, and ultimately disregarded his testimony in its entirety. R. 954 at 150. It should be obvious that the defense is prejudiced where the testimony of its principal witness is disregarded by the court. Because the prejudice to the Warrs caused by plaintiffs' delay outweighs the harm to plaintiffs, the "exceptional circumstances" exception is inapplicable in this case and plaintiffs' claims are barred by the four-year statute of limitations.

#### **IV. THE LEWISES LACK THE PRIVACY OF CONTRACT NECESSARY FOR THEM TO BRING AN ACTION AGAINST THE WARRS**

Plaintiffs do not address any of the privity arguments asserted by the Warrs in their opening brief, except to state, in a conclusory fashion, that by virtue of the quit claim deed, "the [Crittendons'] claim for the water rights is now vested in the Lewises, and they are entitled to the irrigation water." Appellees' Br. at 39-40. However, there is no legal basis for the Lewises' claim, which is barred both by their lack of privity with the Warrs and by

their failure to set forth this subsequent transaction in a supplemental pleading. *See* Appellants' Br. at 41-44.

**V. THE TRIAL COURT'S JUDGMENT REQUIRES THE WARRS TO CONVEY AN EXCESSIVE AMOUNT OF WATER**

In an attempt to increase their already unfair taking of the Warrs' Irrigation Water, plaintiffs claim that they are each entitled to a deed granting them .079 cfs of water. Appellees' Br. at 40. Plaintiffs ignore the fact that the Rose Spring is subject to seasonal fluctuations and drought conditions. The amount of water actually available to the Warrs from the flow of Rose Spring is probably insufficient to supply .079 cfs, and the Warrs' water right is limited to a percentage of that flow. *See* Appellants' Br. at 44-45. Plaintiffs simply claim, without citation to the record, that "[t]he record plainly established that the Plaintiffs were promised sufficient water to irrigate five acres,"<sup>11</sup> and that .079 cfs is required for this purpose. Appellees' Br. at 40. However, the record actually shows that plaintiffs can claim no more than 7.5% of the Warrs' water right, up to a maximum of .075 cfs.

Plaintiffs do not deny that .075 cfs of water is sufficient to irrigate 4.5 acres, and do not claim that any more than 4.5 acres of their lots is irrigible land. *See id.* Plaintiffs cite testimony of Vern Loveless indicating that .079 cfs would irrigate their lots, and attach the quit-claim deeds prepared by Mr. Loveless in 1993 for that amount. *Id.* at 40, Supp. App. at "A." However, plaintiffs omit the portion of Mr. Loveless' testimony explaining how he corrected those deeds the following year after determining that .079 cfs could not reasonably be used on the plaintiffs' lots and prepared new quit-claim deeds for 7.5% of the

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<sup>11</sup> Appellants' examination of the record on this point revealed only the testimony of Melvin Spears, who testified that the Warrs never told him how much irrigation water would be conveyed. R. 953 at 42.

Irrigation Water, up to a maximum of .075 cfs. *See* R. 954 at 185 (copy attached to Addendum as **App. D**); R. 954 at 185-86; Tr. Exs. 90, 92, 97, 98.

The plaintiffs uniformly testified that they were never presented with quit-claim deeds until late 1995, by which time the 1993 deeds had indisputably been replaced by deeds conveying 7.5% of the Irrigation Water. R. 593 at 58-59, 101-102, 182-83, 204-05; R. 954 at 53. Every lot owner who acquired Irrigation Water from the Warrs was conveyed 7.5%. R. 665-67; Tr. Exs. 97, 98, 108. This was also the amount prayed for in the plaintiffs' own Complaint, R. 34,<sup>12</sup> and although he expressed some confusion as to what the actual percentage should be, Judge Young specifically ruled from the bench that the Warrs were to convey a percentage of their water sufficient to irrigate 4.5 acres of the plaintiffs' lots. *See* R. 955 at 145, 149-50. The Court should not countenance plaintiffs' avaricious and overreaching attempt to take more water than they can even use, and potentially more than the Warrs own. Any quit-claim deeds executed on behalf of plaintiffs should be limited to 7.5% of the Warrs' original water right.

### **CONCLUSION**

For all of the foregoing reasons, this Court should reverse the judgment of the trial court and remand this case with instructions to enter judgment in favor of the Warrs.

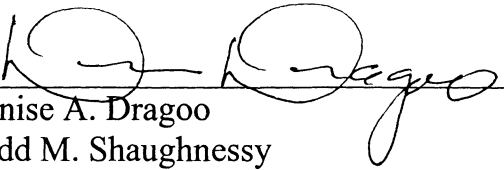
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<sup>12</sup> The Complaint actually indicates that each plaintiff's "respective share" is "7.5 cfs." R. 34. This is of course is many times more water than the entire Rose Spring contains. Plaintiffs presumably mean 7.5 percent.



DATED this 10th day of January, 2001.

Snell & Wilmer L.L.P.



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Erik G. Davis

Attorneys for Defendants and Appellants

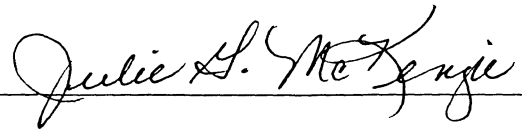
Edward C. Warr and Hazel V. Warr

**CERTIFICATE OF SERVICE**

I hereby certify that on this 10th day of January, 2001, I caused two true and correct copies of the within and foregoing REPLY BRIEF OF APPELLANT to be sent via U.S.

Mail, postage prepaid, to the following,:

Anthony L. Rampton  
Marci Batty Rechtenbach  
Jones Waldo Holbrook & McDonough  
170 South Main, Suite 1500  
Salt Lake City, Utah 84101



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## **ADDENDUM**

Tab A

**J. Rodney Dansie, Plaintiff and Appellant, v. Hi-Country Estates Homeowners Association, a Utah non-profit corporation, Defendant and Appellee.**

**No. 970517**

**SUPREME COURT OF UTAH**

***1999 UT 62; 987 P.2d 30; 1999 Utah LEXIS 98; 372 Utah Adv. Rep. 6***

**June 22, 1999, Filed**

**SUBSEQUENT HISTORY:**

[\*\*\*1] Rehearing Denied October 6, 1999. Released for Publication October 22, 1999.

**PRIOR HISTORY:**

Third District, Salt Lake County. The Honorable Pat B. Brian.

**COUNSEL:**

George A. Hunt, Salt Lake City, for plaintiff.

A. Howard Lundgren, Sheleigh A. Chalkley, Salt Lake City, for defendant.

**JUDGES:**

HOWE, Chief Justice. Associate Chief Justice Durham, Justice Stewart, Justice Zimmerman, and Justice Russon concur in Chief Justice Howe's opinion.

**OPINIONBY:**

HOWE

**OPINION:**

[\*\*31] HOWE, Chief Justice:

[\*P1] Plaintiff J. Rodney Dansie appeals from a judgment in this declaratory judgment action that his eighty acres of real property were subject to the covenants, conditions, and restrictions which had been imposed on an adjacent subdivision, the Hi-Country Estates Phase I Subdivision (the "Subdivision" or "Phase I"), and that his property was subject to assessments made by the defendant Hi-Country Estates Homeowners Association (the "Association").

**BACKGROUND**

[\*P2] Dansie owns two forty-acre parcels of real property (collectively the "Property") located in southwest Salt Lake County, Utah. These parcels abut the Subdivision to the south and west; specifically, these parcels are described as the southwest quarter [\*\*\*2] of the southwest quarter (the "westerly parcel") and the southeast quarter of the southwest quarter (the "easterly parcel") of section 5, township 4 south, range 2 west, Salt Lake Base and Meridian. Dansie also owns two lots within the Subdivision--lots 43 and 51.

[\*P3]

In 1970, Gerald H. Bagley, Charles Lewton, and Keith Spencer (the "developers") began to develop the Subdivision. At that time, they recorded a "Declaration of Protective Covenants" for the Subdivision. Soon afterwards, Dansie became aware of the planned Phase I development following the erection of a sign announcing the Subdivision's development. Dansie then met the developers in connection with negotiations for an agreement between them and Dansie's father to provide water to the Subdivision. Dansie also reviewed a sales brochure which indicated lot sizes and prices and described the Subdivision as a private community, accessible through an electronic gate. In early 1973, Lewton organized the Association, a Utah non-profit corporation, and filed a certificate of incorporation. According to the certificate of incorporation, the purpose of the Association was to provide for maintenance, upkeep and preservation of the [\*\*\*3] streets, roads and common area within [the Subdivision] and also to ... promote the health, safety and welfare of the residents within [the Subdivision] and any additions thereto as may hereafter be brought within the jurisdiction of this Association ....

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[\*\*32] P4 In December 1973, Lewton and an entity described as "Hi-Country Estates Second" sold to Bagley, under a written contract, five forty-acre parcels of land adjacent to the Subdivision that included the Property. In this real estate contract (the "1973 Contract"), Bagley received the right to use the Association's roads in the Subdivision for access to the property he was purchasing. In return, Bagley would become a member of the Association and pay a proportionate share of the costs of road maintenance and other services. Although the 1973 Contract's terms specifically bound Bagley's assigns and successors, it was not recorded in the Salt Lake County Recorder's Office.

[\*P5]

In 1977, Bagley hired Dansie as a contractor to assist with the development and maintenance of the Subdivision's water system, by digging water lines, making connections, and repairing pumps. Acting in that capacity, Dansie aided in the placement and [\*\*\*4] installation of a 40,000-gallon water tank on the westerly parcel in 1978.

[\*P6] Dansie acquired lots 51 and 43 within the Subdivision in 1984 and 1985, respectively. In November 1985, Bagley conveyed the westerly parcel to Dansie by warranty deed. Prior to that conveyance, however, Bagley had executed a trust deed in favor of United Bank, whose successor foreclosed on the westerly parcel in February 1989 (the "foreclosure") and later sold it to Fidelity National Insurance Company. With Dansie's aid, his in-laws, Paul G. and Ida F. Evans (the "Evanses"), purchased the westerly parcel at a public sale in March 1989. The Evanses ultimately conveyed the westerly parcel to Dansie in 1993 as part of a divorce settlement between Dansie and their daughter. In 1989, Bagley's attorney, Ralph Marsh, conveyed the easterly parcel to Dansie. None of the aforementioned deeds to the Property made any reference to any covenants, conditions, or restrictions on the property, nor did any appear in the Property's chain of title.

[\*P7]

In 1986, prior to the foreclosure, Dansie conveyed the westerly parcel and lot 43 in the Subdivision to himself and his wife by a quit-claim deed to create a joint tenancy [\*\*\*5] in the parcels. This quit-claim deed describes the property conveyed as:

PARCEL ONE:

The Southwest Quarter of the Southwest Quarter of Section 5, Township 4 South, Range 2 West, Salt Lake Base and Meridian.

PARCEL TWO:

ALL OF Lot 43, HI-COUNTRY ESTATES, according to the official plat thereof on file in the Office of the Salt Lake County Recorder, State of Utah.

TOGETHER WITH a right-of-way over and across and [sic] the private roads located within said subdivision.

SUBJECT TO covenants, conditions, and restrictions on HI-COUNTRY ESTATES, as recorded in Book 3541, Page 68, Entry No. 2607748, Official Records, and the Rules and Regulations of the HI-COUNTRY ESTATES Homeowner's Association.

ALSO SUBJECT TO restrictions, rights of way, and easements appearing of record or enforceable in law and equity.

[\*P8]

In 1990, the Association began sending the Evanses assessment notices for the westerly parcel. Dansie acted as their agent and attempted to ascertain the reason for the Association's attempted collection of assessments on a parcel outside the boundaries of the Subdivision. While the Association had previously assessed Dansie for lots 43 and 51 in the Subdivision, and while he [\*\*\*6] was aware of the specific breakdown of the Association's assessments, he had not received assessment notices on the westerly parcel at any time he had owned the parcel prior to the foreclosure. In November 1991, Backman-Stewart Title Services, Ltd., paid the "1991 Association assessment, gate repair fee plus interest, penalties and fees" on Dansie's behalf, although the payment was made under Dansie's protest.

[\*P9] The Association continued in its attempts to collect fees and assessments on the Property from Dansie. In response to these repeated attempts, Dansie filed this declaratory judgment action against the Association, seeking a determination that he was entitled to an easement either by prescription and/or implication across the roads of the Subdivision, [\*\*33] and that the Subdivision's covenants, conditions and restrictions ("CC&Rs") and the Subdivision's "right to make such assessments [pursuant to the CC&RS] is limited as a matter of law against property located within the physical boundaries" of the Subdivision and not against the Property. The Association counterclaimed, seeking a judgment against Dansie for all unpaid assessments, interest on the assessments, and attorney [\*\*\*7] fees, alleging that under the 1973 Contract, Dansie was a member of the Association and was therefore subject to the Subdivision's CC&Rs and was also subject to all corresponding fees and assessments.

[\*P10] At trial, the court dismissed with prejudice Dansie's claim for a prescriptive easement and for declaratory relief. Also, the court declared Dansie's claim

for an implied easement "effectively mooted by the judgment." On the counterclaim, the trial court determined: (1) The quit-claim deed unambiguously imposed both the Association's CC&Rs on the westerly parcel and Association membership on Dansie; (2) Both parcels were subject to the Association's CC&Rs by virtue of Dansie's actual notice of the CC&Rs; and (3) Dansie was thereby bound to pay all assessments and fees as required by Association membership. The court awarded the Association judgment for all past assessments and fees, including interest and attorney fees. Dansie now appeals.

### ANALYSIS

[\*P11] Dansie assigns as error the trial court's conclusions that (1) the quit-claim deed subjected the westerly parcel to the CC&Rs and imposed Association membership on Dansie; (2) Dansie had knowledge, either constructive or actual, [\*\*\*8] of the CC&Rs, which subjected the Property to them even though they were not in the chain of title to the Property; and (3) the Association's by-laws (the "By-laws") required Dansie to pay the Association's attorney fees in this action.

#### I. THE QUIT-CLAIM DEED

[\*P12] Dansie contends that the trial court erred in concluding that the quit-claim deed subjected the westerly parcel to the Subdivision's CC&Rs that had been imposed earlier on the Subdivision. As set out above, the deed conveyed two parcels of land. Parcel One was the westerly parcel. Parcel Two was lot 43, HI-COUNTRY ESTATES, a lot in the Subdivision. Following the description of lot 43, there were three qualifying paragraphs as follows:

TOGETHER WITH a right-of-way over and across and [sic] the private roads located within said subdivision.

SUBJECT TO covenants, conditions, and restrictions on HI-COUNTRY ESTATES, as recorded in Book 3541, Page 68, Entry No. 2607748, Official Records, and the Rules and Regulations of the HI-COUNTRY ESTATES Homeowner's Association.

ALSO SUBJECT TO restrictions, rights-of-way, and easements appearing of record or enforceable in law and equity.

[\*P13] The Association correctly [\*\*\*9] characterizes the three qualifying paragraphs as the habendum clause of the deed whose purpose is to curtail, limit, or qualify the estate conveyed in the granting clause. See *Haynes v. Hunt*, 96 Utah 348, 353, 85 P.2d 861 (1939). However, the issue in the instant case is whether this habendum clause qualifies both parcels or

only Parcel Two. The trial court interpreted the "SUBJECT TO" and the "ALSO SUBJECT TO" paragraphs to apply to both Parcels One and Two. This was error for the following reasons.

[\*P14] First, the drafter of the deed clearly intended to deal with the two parcels separately as evidenced by labeling them "Parcel One" and "Parcel Two." All three of the qualifying paragraphs appear under the heading "PARCEL TWO," clearly indicating that they apply only to lot 43. They do not appear under the heading "PARCEL ONE." From the date of the Subdivision's creation, lot 43 was subject to the CC&Rs. Every succeeding conveyance of a Subdivision lot would have properly indicated that the lot was subject to the CC&Rs. However, Parcel One had not theretofore been subjected to the CC&Rs because it lay outside the Subdivision. The "Declaration of Protective Covenants" referred to [\*\*\*10] in the deed expressly imposed the CC&Rs only on the Subdivision. [\*\*34] We should not lightly assume that they could be also imposed on adjoining property such as Parcel One without a clear expression of intent by the owner to do so. That was not done here. "Restrictive covenants are not favored in the law and are strictly construed in favor of the free and unrestricted use of property." *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 198 (Utah 1991) (citing *Robbins v. Finlay*, 645 P.2d 623, 627 (Utah 1982); *Freeman v. Gee*, 18 Utah 2d 339, 345, 423 P.2d 155, 159 (1967); *Parrish v. Richards*, 8 Utah 2d 419, 421, 336 P.2d 122, 123 (1959)).

[\*P15] Second, if we determine that the "SUBJECT TO" and the "ALSO SUBJECT TO" paragraphs apply to Parcel One as the trial court did, then by the same reasoning we must conclude that the preceding qualifying paragraph reading "TOGETHER WITH a right of way over and across and [sic] the private roads located within said subdivision" must also apply to Parcel One. That reading would obviously be erroneous because it would amount to Dansie unilaterally granting to himself and his wife a right-of-way over the Subdivision's roads for [\*\*\*11] the benefit of Parcel One without the consent of the Association that owned the roads. A right-of-way cannot be created in that manner.

[\*P16] For the foregoing reasons, we reverse the trial court's conclusion that the quit-claim deed imposed the CC&Rs on the westerly parcel.

#### II. ACTUAL AND CONSTRUCTIVE NOTICE OF THE CC&Rs

##### A. Notice

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[\*P17] Dansie next assigns as error the trial court's conclusion that the Property was subject to the Subdivision's CC&Rs because of Dansie's actual and constructive notice that it had been the Subdivision's developers' intention to impose the CC&Rs on any additional phases of the Subdivision, including the Property adjoining the Subdivision. The Association relies largely upon the 1973 Contract. In that contract, Bagley received the right to use the Association's roads in the Subdivision for access to the property he was purchasing. In return, the contract required Bagley to become a member of the Association and pay a proportionate share of the costs for road maintenance and other services.

[\*P18] The Association concedes that there is no document that specifically imposes the CC&Rs on the Property. The "Declaration of Protective Covenants," recorded [\*\*\*12] in 1970 by the developers, specifically imposed the CC&Rs only on the Subdivision. While it may well have been the intent of the developers to impose the covenants on additional phases of the Subdivision which might be developed later, that was never done by a written instrument. Moreover, even if Dansie had notice or even knowledge of the developers' intent and knew of the obligation to subject the Property to the CC&Rs that the 1973 Contract imposed upon Bagley, Dansie was not a party to that contract, nor is it contended that he is a successor or assign of that contract so as to be bound by its terms. The Association cites no legal authority that would obligate Dansie to burden the Property with the CC&Rs simply because he had notice of the intent of the original developers and knowledge of the 1973 Contract. In neither of the deeds by which Dansie acquired title to the Property was there any attempt to burden the Property with the CC&Rs. Dansie acquired the Property free of all covenants, conditions, and restrictions. He cannot be bound by the intent of prior owners to subject the Property to the CC&Rs.

#### B. Merger

[\*P19] There is an additional reason why the Property is not burdened [\*\*\*13] by either a membership requirement or the associated CC&Rs. Dansie contends that even assuming the 1973 Contract did impose the CC&Rs, "the contract terms merged into subsequent deeds conveying the property and were therefore extinguished as a matter of law." The generally accepted rule dealing with merger supports Dansie's position "that on delivery and acceptance of a deed the provisions of the underlying contract for the conveyance are deemed extinguished or superseded by the deed." *Secor v. Knight*, 716 P.2d 790, 792 (Utah 1986) (citations omitted). [\*\*\*35] However, the Association correctly points out that there are exceptions to the application of merger. We agree that exceptions to this

doctrine exist, "including fraud, mistake, and the existence of collateral rights in the contract of sale." *Secor*, 716 P.2d at 793. The Association argues that the collateral rights exception applies in this case. We disagree with this argument.

[\*P20] If the original contract requires the seller to perform an act considered to be collateral to the conveyance of title, those obligations are not extinguished but instead survive the deed. *Stubbs v. Hemmert*, 567 P.2d 168, 169 (Utah 1977). In [\*\*\*14] *Stubbs*, this court indicated that a determination of whether contract terms were either collateral or part of the obligation to convey title depended to a great extent on the intent of the parties. *Id.* There, we examined contract terms allowing a vendor to remove certain equipment and personal property from a building at a time after delivery of the deed. We determined that these contract terms were, in fact, collateral, stating:

When seller's performance is intended by the parties to take place at some time after the delivery of the deed it cannot be said that it was contemplated by the parties that delivery of the deed would constitute full performance on the part of the seller, absent some manifest intent to the contrary.

*Id.* at 169-70. The Association argues that under *Stubbs* the language of the 1973 Contract is not extinguished by the later deeds because the "1973 Contract requires the buyers to become members of the Homeowners Association at some point after the signing of the Contract ..., it contemplates performance after the delivery of the deed, and constitutes a collateral agreement."

[\*P21] However, nearly a decade after *Stubbs*, this [\*\*\*15] court clarified the collateral rights standard, holding that "covenants relating to title and encumbrances are not considered to be collateral because they relate to the same subject matter as does the deed." *Secor*, 716 P.2d 790, 793 (Utah 1986) (citation omitted). The contract language relied on by the Association here is clearly a "covenant[] related to title and [an] encumbrance[]" upon the title to the Property. The CC&Rs burden the title. The 1973 Contract's language clearly intends membership in the Association to be required simultaneously with the passing of title to the Property. A duty to pay maintenance fees and other monetary assessments and to comply with the Subdivision's CC&Rs are fundamental elements of Association membership. Therefore, it cannot be said that this duty exists collateral to the title or that it does not "relate to the same subject matter as does the deed." *Id.* Without express language imposing the membership requirement in the later deeds, the requirement in the

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contract merged with the later deeds, and has thereby been extinguished.

[\*P22] In sum, Dansie's actual or constructive notice of the intent of his predecessor in title does [\*\*\*16] not impose Association membership on him or the Subdivision's CC&Rs on the Property.

### III. IMPLIED EQUITABLE SERVITUDES

[\*P23] In the alternative, the Association contends that we can affirm the trial court's judgment under the theory of implied equitable servitude. The Association relies on a Maine case holding that an implied equitable servitude may be imposed where the evidence establishes:

(1) a common owner subdivides property into a number of lots for sale; (2) the common owner has a "general scheme of development" for the property as a whole, in which the use of the property will be restricted; (3) the vast majority of subdivided lots contain restrictive covenants which reflect the general scheme; (4) the property against which application of an implied covenant is sought is part of the general scheme of development; and (5) the purchaser of the lot in question has notice, actual or constructive, of the restriction.

3 *W Partners v. Bridges*, 651 A.2d 387, 389 (Me. 1994) (emphasis added) (quoting *Chase v. Burrell*, 474 A.2d 180, 181 (Me. 1984)).

[\*P24] It is readily apparent that even the first 3W Partners' requirement cannot be [\*\*\*36] met. The Property has never been [\*\*\*17] subdivided nor offered for sale as individual lots. In *Hayes v. Gibbs*, 110 Utah 54, 169 P.2d 781 (1946), we imposed a building restriction on the defendant's lot where the restriction appeared in ninety-five percent of the deeds to the subdivision's lots. There, the defendant had notice of the restriction that appeared in his chain of title. The instant case presents a far different fact situation.

[\*P25] It is a long-standing, well-accepted requirement that covenants are to be embodied in a written instrument bearing the covenantor's signature. See 9 Richard R. Powell on Real Property § 60.03 (1998). Admittedly, there are certain instances where covenants can be imposed by implication, such as "from the language of a deed or lease or from the conduct of the parties." *St. Benedict's Dev. Co.*, 811 P.2d at 198 (citing 20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 173 (1965)). Those instances, however, are extreme, and, "as a general rule, ... not favored in the

law." *Id.* (citing 20 Am. Jur. 2d § 12; *Brown v. Safeway Stores, Inc.*, 94 Wash. 2d 359, 617 P.2d 704 (1980)). For such a covenant to be impliedly imposed on property, "the support for [\*\*\*18] it must be 'plain and unmistakable' or it must be 'necessary' as a matter of law." *Id.* (quoting 20 Am. Jur. 2d § 173).

[\*P26] In the instant case, the Subdivision's developers placed the CC&Rs by written instrument on Phase I alone. The developers' written, signed, and recorded Protective Covenants expressly limit their application to "the described property," which is Phase I. Furthermore, while the Association's certificate of incorporation refers to "any addition[al property] as may hereafter be brought within the jurisdiction of the Association," the Property has never either been part of Phase I or been brought under the Association's purview. Therefore, if Association membership--with its corresponding fees, assessments, and CC&Rs--as is currently imposed upon Phase I lot owners is to be impliedly imposed upon the Property, it must be done in plain and unmistakable language. That has not been done here; thus, the Association's theory of implied equitable servitudes is not applicable here.

### IV. ATTORNEY FEES

[\*P27] The By-laws, after setting forth the assessments for which each member is responsible, dictate:

If the assessment is not paid within thirty (30) days after the [\*\*\*19] due date, ... the Association may bring an action at law against the owner personally obligated to pay the same or foreclose the lien against the property, and interest, costs, and reasonable attorney[] fees of any such action shall be added to the amount of such assessment.

[\*P28] As we have found that the Property is not subject to Association membership, the Association cannot recover from Dansie the attorney fees the By-laws impose. While Dansie is a member of the Association by virtue of his ownership of two lots within the Subdivision, that cannot make him liable for attorney fees arising from a suit involving property outside of the Association's purview.

[\*P29] The judgment below is reversed and the case is remanded for determination of Dansie's claim of an easement across the Association's property.

Associate Chief Justice Durham, Justice Stewart, Justice Zimmerman, and Justice Russon concur in Chief Justice Howe's opinion.



Tab B

**Rodney MARTIN, Plaintiff  
and Respondent,**

**v.**

**Bernice SCHOLL, Executrix of George H. Chaffin Estate, and George H. Chaffin Investment Company, a Utah limited partnership, Defendants and Appellants.**

**No. 17542.**

**Supreme Court of Utah.**

**Nov. 14, 1983.**

Ranch laborer brought action for specific performance of oral contract for conveyance of 120 acres of land. The Fourth District Court, Utah County, Allen B. Sorensen, J., entered judgment for laborer, and appeal was taken. The Supreme Court, Howe, J., held that ranch laborer's working long, hard hours for owner and declining other and better offers of employment elsewhere did not constitute exclusively referable acts of reliance on owner's alleged oral agreement to convey 120 acres of land to laborer sufficient to take contract out of statute of frauds where those acts were consonant with laborer's employment.

Reversed.

Stewart, J., filed a dissenting opinion in which Durham, J., concurred.

**1. Frauds, Statute of  $\S$ 129(1)**

Ordinarily verbal gift of land or oral agreement to convey land is within statute of frauds; however, doctrine of part performance allows court of equity to enforce oral agreement if it has been partially performed, notwithstanding statute. U.C.A. 1953, 25-5-8.

**2. Frauds, Statute of  $\S$ 129(12)**

Ranch laborer's working long, hard hours for owner and declining other and better offers of employment elsewhere did not constitute exclusively referable acts of reliance on owner's alleged oral agreement

to convey 120 acres of land to laborer sufficient to take contract out of statute of frauds where those acts were consonant with laborer's employment.

Arthur H. Nielsen, Clark R. Nielsen, John D. Russell, Salt Lake City, for defendants and appellants.

Gordon L. Roberts, Raymond J. Etcheverry, Kent O. Roche, Salt Lake City, Dave McMullin, Payson, for plaintiff and respondent.

HOWE, Justice:

Defendant George H. Chaffin Investment Company, a limited partnership, seeks reversal of a decree granting plaintiff Rodney Martin specific performance of an oral contract which the trial court found that the deceased George H. Chaffin had made to convey or devise to him certain real property in Genola, Utah County.

Martin began working as a ranch laborer for Chaffin in 1936. He became foreman over all of Chaffin's farm and ranch properties in 1947 and continued in that capacity beyond Chaffin's death to January of 1976. The Investment Company disputed but the trial court found that Chaffin in 1947 had orally agreed to convey to Martin 120 acres of land referred to as "the home place" if Martin would continue working as his foreman. Martin remained, receiving a salary and occasional raises. The trial court determined that he labored long and unusual hours and, with his wife, rendered personal services to Chaffin in reliance upon the contract. In 1968 Chaffin formed the Investment Company as part of his estate plan and conveyed certain real property to it, including the 120 acre ranch. The trial court found that Martin had no notice of the conveyance and, further, that a gift of an interest in the Investment Company which Chaffin had made to Martin in 1969 was for his faithful service, unrelated to the 1947 agreement. The trial court held that Chaffin had breached the oral agreement when he died in 1975 without having conveyed or devised the ranch

to Martin. Consequently Martin was granted a decree of specific performance against the Investment Company which, as a constructive trustee, held the ranch for him. No cause of action was found against the executrix of the Chaffin estate.

Our standard of review was stated in *Randall v. Tracy Collins Trust Co.*, 6 Utah 2d 18, 23, 305 P.2d 480, 483 (1956):

In an equity review of facts if the record shows a fair preponderance, or even if the evidence is balanced evenly, the trial court finding should be sustained. If the evidence is so vague and uncertain that the finding is obviously erroneous, there may be a new finding on review.

[1] Ordinarily a verbal gift of land or an oral agreement to convey land is within the statute of frauds. However, the doctrine of part performance allows a court of equity to enforce an oral agreement, if it has been partially performed, notwithstanding the statute. U.C.A., 1953, § 25-5-8 of the Utah Statute of Frauds provides:

Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

In the context of an elderly aunt's promise to devise property to her nephew, this Court outlined our standard of sufficient part performance:

First, the oral contract and its terms must be clear and definite; second, the acts done in performance of the contract must be equally clear and definite; and third, the acts must be in reliance on the contract. Such acts in reliance must be such that a) they would not have been performed had the contract not existed, and b) the failure to perform on the part of the promisor would result in fraud on the performer who relied, since damages would be inadequate. Reliance may be made in innumerable ways, all of which could refer exclusively to the contract. This reliance provision is included to prevent unfounded and fraudulent claims against a decedent's estate, which are inherent within such situations as this.

*Randall v. Tracy Collins & Trust Company*, supra, at 24, 305 P.2d at 484. In that case we held that the nephew's change of residence from Ogden to Provo in order to live near his aunt, to care for her and to manage her affairs met that standard. Professor Corbin states a similar standard:

(1) The performance must be in pursuance of the contract and in reasonable reliance thereon ... (2) The performance must be such that the remedy of restitution is not reasonably adequate ... (3) The performance must be one that is in some degree evidential of the existence of a contract and not readily explainable on any other ground.

2 Corbin on Contracts, § 425 (1950). Another statement of the rule explains:

Part performance to be sufficient to take a case out of the statute must consist of clear, definite, and unequivocal acts of the party relying thereon, strictly referable to the contract, and of such character that it is impossible or impracticable to place the parties in status quo, mere nonaction being insufficient.

37 C.J.S., Statute of Frauds, § 250 (1943).

The critical observation to make in reading these delineations of what constitutes sufficient part performance is that it must be proved by strong evidence. Whether phrased in "reliance" terminology where the evidentiary measurement is a substantial change in position or worded in "performance" language where the measurement is whether the acts appear to be a result of the contract, or whether they are explainable on another ground, the strong, acts-oriented evidentiary standard is constant. This acts-oriented rather than word-oriented evidentiary requirement is consistent with one of the worthwhile functions of the Statute of Frauds. It is:

[to impose] a high evidentiary standard by which oral real estate contracts must be proved to qualify for a specific performance. Equity has always demanded more conclusive proof of a contract before granting its "most perfect remedy" of specific performance ...

"The Doctrine of Part Performance as Applied to Oral Land Contracts in Utah," 9 Utah Law Review 91, 105 (1971).

This Court in *Price v. Lloyd*, 31 Utah 86, 86 P. 767 (1906), reversed a judgment which had awarded land to a niece who had performed personal services for the deceased and, with her husband, had moved onto his property. The judgment was reversed because the niece's use of the land and other acts for her uncle were insufficient evidence "that her status or relation had been so far altered that not to enforce a performance . . . inflict[ed] an unjust and unconscionable . . . loss to her. . . . She [showed] no such strong equities . . . as . . . are required to be shown independent of the parol gift or verbal contract." *Id.* at 101, 86 P. at 772. Speaking of certain improvements the niece made to the land, this Court stated:

[W]e are of the opinion that the improvements are not of such value or character as to take the case out of the operation of the statute. Furthermore the evidence does not satisfy us with that clearness and persuasion required by the authorities that they were made in consequence [sic] of a gift, or in pursuance of a promise to convey, or that they are otherwise referable thereto. Indeed, there is little or no direct evidence proving such fact, nor is there any circumstance from which it may be reasonably inferred . . . [The improvements] . . . are as consistent with some interest in the premises less than a freehold as with an estate in freehold.

*Price v. Lloyd*, *Id.* at 98, 86 P. at 770.

This strong evidentiary standard had been observed in *Brinton v. Van Cott*, 8 Utah 480, 33 P. 218 (1893). There, in reliance language, this Court held that the defendant's failure to fulfill the contract would work a fraud upon the rights of the plaintiff since she gave up plans of future independence to faithfully perform personal services of incalculable value for the defendant. Although the young woman's reliance was continued performance of service rather than a substantial change in

position, the evidentiary concern was satisfied since it was uncontested that the young woman's sacrifice of plans of future independence and continued service were a result of an actual contract. Crucially significant was the fact that the existence of the contract had been admitted as true. Further:

The agreement was distinct and certain as to what plaintiff should receive. There was no vague, uncertain, undefined expectation of benefits to be derived, but a distinct positive promise,—not to make plaintiff a gift, but in consideration of certain services, to bestow upon her her entire property.

*Id.* at 486, 33 P. at 220. Consequently, in *Brinton*, both equity and the statute of frauds' purpose of verifying an actual agreement were accomplished.

Similarly, this Court maintained a high evidentiary standard in *Van Natta v. Heywood*, 57 Utah 376, 195 P. 192 (1920). We stated:

[T]his class of cases should be scrutinized with particular care; and unless under the circumstances the proof is positive, clear, and convincing, the relief sought should, and will, be denied.

*Id.* at 381, 195 P. at 194. Significantly, not only many friends' and neighbors' testimony but independent evidence supported the existence of an oral contract and the plaintiff's reliance upon it:

[T]he plaintiff accepted the offer of the said Joseph McCullough [decedent], and entered into possession of all the property of said estate, and at all times worked for the said Joseph McCullough until his death, without compensation, except when plaintiff was drafted into the United States army, during which time the said Joseph McCullough leased the property belonging to his said estate subject to the condition that the said lease should be canceled upon the discharge and return of the plaintiff herein from the army; that upon the retirement of plaintiff from service in the army he returned to the said Joseph McCullough, and thereupon the lease was terminated, and

plaintiff again went into possession of the property of said estate, and continued to possess the same and care for and remain with the said Joseph McCullough, without compensation, until the death of said McCullough ...

*Id.* at 377, 195 P. at 192.

As we have suggested, the greatest value of the requirement of exclusively referable acts of reliance is its evidentiary significance.

[A]cts of part performance must be exclusively referable to the contract in that the possession of the party seeking specific performance and the improvements made by him must be reasonably explicable only on the postulate that a contract exists [Citations omitted.] The reason for such requirement is that the equitable doctrine of part performance is based on estoppel and unless the acts of part performance are exclusively referable to the contract, there is nothing to show that the plaintiff relied on it or changed his position to his prejudice ...

*In re Roth's Estate*, 2 Utah 2d 40, 44, 269 P.2d 278, 281 (1954).

In *Ravarino v. Price*, 123 Utah 559, 260 P.2d 570 (1953), quoting from the earlier *Price v. Lloyd* case, we remarked:

"... In order that a plaintiff may be permitted to give evidence of a contract not in writing, and which is in the very teeth of the statute and a nullity at law, it is essential that he establish [in equity], by clear and positive proof, acts and things done in pursuance and on account thereof, exclusively referable thereto, and which take it out of the operation of the statute."

*Id.* at 574, 260 P.2d at 578. In the next paragraph we quoted Justice Cardozo:

"Equity ... declines to act on words, though the legal remedy is imperfect, unless the words are confirmed and illuminated by deeds...."

*Id.* at 574, 260 P.2d at 578. The *Ravarino* case involved an inter vivos transfer rather than an instance of a promise to devise. The statute of frauds remained a bar because the promisee did not acquire possession

of the property and the purchase of a strip of adjoining land was reasonably explainable on grounds other than the existence of an oral contract.

As recently as in *McDonald v. Barton Brothers Investment Corp.*, Utah, 631 P.2d 851 (1981), another inter vivos transfer of land case, we reaffirmed the requirement of exclusively referable acts of reliance. We articulated:

If the acts relied on were not done in the execution of the oral contract but can be explained on another ground, they are insufficient to remove the bar of the statute of frauds and the contract is unenforceable.

*Id.* at 853. See also *Coleman v. Dillman*, Utah, 624 P.2d 713 (1981); *Holmgren Brothers, Inc. v. Ballard*, Utah, 534 P.2d 611 (1975). Cf. *Jackson v. Jackson*, 122 Utah 507, 252 P.2d 214 (1953) (where a property settlement agreement was an insufficient memorandum of an oral contract to remove the contract from the statute and the promisee's raising of the children was a term she had agreed to in the property settlement rather than an act exclusively referable to the oral contract).

However, as the *Brinton* and *Van Natta* cases allude, where the contract is admitted or strong independent acts which prove the contract exists, the requirement of exclusively referable acts has been relaxed. Therefore, in the case of *In re Roth's Estate*, supra, we remanded with instructions to grant specific performance because even though it was possible to explain the taking possession and making of improvements on some other basis than that a contract existed, the promisor's own testimony established an oral agreement on his part to sell his interest in the property to his brother. We explained the rule:

[W]here the existence of the oral contract is established by an admission of the party resisting specific performance or by competent evidence independent of the acts of part performance, the requirement that the acts of part performance must be exclusive[ly] referable to the oral contract is satisfied. ...

*Id.* 2 Utah 2d at 45, 269 P.2d at 281. Likewise in *Randall v. Tracy Collins & Trust Co.*, supra, 6 Utah 2d at 24, 305 P.2d at 484 we expressed:

If the contract has great clarity and definiteness, there may be no need for reliance which is exclusively referable to the contract, so long as performance fulfills the terms.

In light of its history in our cases, the requirement of exclusive referability is "an evidentiary requirement of equity that the facts speak for themselves." 9 Utah Law Review 91, supra, at 107. The requirement overcomes "the court's reluctance to prevent the statute from operating on the basis of purely oral evidence." *Id.* at 106. As a corollary, where either independent acts which prove the contract can be found, or an admission of the contract is present, the requirement of exclusive referability may be relaxed because the evidentiary concern is assuaged by either the admission or the independent acts. Consequently, the more conclusive the direct proof of the contract, the less stringent the requirement of exclusively referable acts. As Professor Corbin puts it:

If there is ample and convincing direct testimony less corroboration by circumstances is required. In most cases, such circumstantial corroboration is indispensable....

In great numbers of cases in which the part performance has been held insufficient on some ground or other and specific enforcement has been refused, the most compelling factor has been insufficiency of proof, the weakness often lying in the uncertainty and conflicting character of the direct human testimony itself.

2 Corbin on Contracts, supra, § 442 at 528.

[2] In the case at bar the court found evidence to support a contract between Martin and Chaffin which was based upon the testimony of Martin's witnesses:

5. The Court finds that the terms of the oral contract between Martin and Chaffin are sufficiently supported by the testimony of the witnesses William Stanley Bradford, Albert Nielsen, Bill Nielsen

and Eddie Allen, all of whom have no interest in the outcome of this case, to meet the burden of persuasion required by *Randall v. Tracy-Collins Trust Co.*, 6 Utah 2d 18 [305 P.2d 480], and the Court therefore finds that the oral agreement was entered into as alleged.

The court also found that Martin relied upon the oral agreement:

7. From the time Chaffin and Martin entered into their agreement in the spring of 1947 until Chaffin's death on July 30, 1975, Martin worked exclusively for Chaffin as his foreman in reliance upon their agreement that the subject property would be conveyed to Martin. In reliance on their agreement, Martin labored 10 to 16 hours per day, 7 days a week during the summer months and, occasionally when necessary, worked around the clock. In the winter time, Martin labored 8 to 10 hours per day, 7 days a week. During this period of time Martin's salary ranged from \$75 per month in 1947, to \$375 per month in 1975. From 1960 until 1969, Martin received \$325 per month without a single raise. Additionally, it is found that Rodney Martin and his wife Martha, provided substantial personal services to Chaffin and that Martin's son Denny performed substantial labor with respect to the farming operations on Chaffin's farms and ranches for which he was not compensated. It is further found that these services would not have been provided but for the agreement between Chaffin and Martin that the subject property was to be conveyed to Martin.

The court concluded that Martin would not have continued to work for and provide personal services to Chaffin except for the agreement between them.

We respect the court's findings and recognize the deference to be paid to the trial court who views first-hand the witnesses as they offer their testimony. We have no quarrel with his basic findings of the extent of services rendered by Martin to his employer. However, reviewing the court's application of our law to those findings, we

can only conclude that the court erred in its holding that there was sufficient part performance. The trial court drew one conclusion from Martin's services but that is legally insufficient since they admit of another equally valid and consonant conclusion against his claim of contract. See *Price v. Lloyd*, supra.

The fact that Martin worked for Chaffin as his foreman is not an exclusively referable act of reliance on the alleged oral agreement since it was consonant with Martin's employment. Martin's long hours, not atypical of a ranch foreman's life, were remunerated by salary. Martin's wife's driving Chaffin to various locations on occasion and asking him to stay for dinner when he was at the Martin house during mealtime were not inconsistent with good relations between an employer and an employee and his family. (At least once Mrs. Martin received compensation for her efforts). Further, Martin's son was compensated for his labors from the time he reached the age of fourteen. (In arguing about the son's testimony, Martin's attorney agreed "The man has testified he got paid. I don't think there is any dispute about it.")

Martin's claim that he declined other and better offers of employment elsewhere to remain with Chaffin is also unavailing to prove reliance since, as we quoted earlier, mere nonaction is insufficient to constitute part performance. Professor Corbin concurs:

If the performance rendered by the promisee consists wholly of forbearance to act, the fact is less likely to be evidential in character than when it consists of affirmative action.

2 Corbin on Contracts, supra, § 430 at 474. This claim of forbearance is at best highly equivocal as to Martin's motives.

Of course, the fact that Martin continued to work long, hard hours for his employer might be viewed as sufficient reliance had there been an admission of an oral agreement as in *Brinton*, supra, or independent acts pointing to such an agreement as in *Van Natta*, supra, where the promisor

leased the property contingent upon the promisee's return from the army. However, the evidence of the oral contract in this case required the judge to weigh the credibility of Martin's witnesses against witnesses for the Investment Company who vigorously disputed the existence of an oral contract. Thus the necessity of showing acts of part performance which were exclusively referable to the claimed agreement remains vital. Yet with only the foundation of a finding of fact that a contract was made based upon disputed testimony that the ranch had been orally promised to him over 30 years ago, Martin contends (and the dissenting opinion advocates) that the oral contract should be enforced. None of the case law we have discussed would permit it. In all of our cases either the requirement of acts of exclusive referability was met, or it was relaxed where there was no evidentiary concern regarding the existence of a contract. Neither Martin's proof of the oral contract nor his acts in supposed reliance so comply.

Even in *Randall v. Tracy Collins Trust Co.*, supra, which is most similar to the case at bar, the nephew changed the location of his home, and left his business to become an employee of his aunt's bank so that he could look after her business in reliance upon the oral contract. Moreover, he and his family changed lifestyles to prepare meals and sit home with her at nights and on holidays. Martin and his family did not change locations, interrupted no lifestyle and did no other acts that were not consonant with his job as ranch foreman. In *Randall* the contract and its terms were proved by clear, convincing and unequivocal testimony. We found the evidence to be sufficient because as we quoted from the trial court's memorandum decision:

"There is no direct evidence to dispute any of this testimony, and a careful examination of the transcript certainly would not justify a concept that the effectiveness of the testimony had been destroyed on cross examination."

*Id.* at 22, 305 P.2d at 483. However, the testimony of Martin's witnesses as to the existence of an oral contract was controverted and a major point of dispute of the lawsuit.<sup>1</sup> The trial court's finding of an oral contract must be followed by a finding of exclusively referable acts which Martin has failed to demonstrate. He and his family's acts of labor, neighborliness and forbearance, as we have expressed, were entirely consonant with his employment as ranch foreman. Even if we follow the standard advocated in the dissenting opinion (which is mentioned in some of our cases and by Professor Corbin) that the acts of part performance need only be "not readily explainable" or "not reasonably explicable" on some other ground, our result would not be different. Martin's acts of claimed part performance of a vigorously disputed contract are so equivocal that they do not meet any of those high evidentiary standards.

We have no quarrel with the argument in the dissenting opinion that the statute of frauds should not be used to perpetrate a fraud upon an innocent and unsuspecting person such as an employee who renders services in good faith upon a promised expectation. Such a rule would be easy to apply if there were some magical way of determining in each case whether in fact a contract had indeed been made. We could then apply the statute as a bar or refuse to apply it depending upon whether a contract was in fact made. There being no sure-proof method of determining whether a contract was made, the Legislature has made it the policy in this state that oral contracts for the conveyance of land will not be enforced except where there is sufficient part performance to provide a high evidentiary basis for their existence. This policy which the Legislature has translated into the statute of frauds may well result, in some cases, in the denial of a benefit to a well-deserving employee or servant. We are helpless to prevent that result where the evidence of part performance of the

claimed contract falls below the high evidentiary standard required by courts of equity—regardless of the precise words which they may use in describing that standard. As unfortunate as it would be to deprive a man who had worked his life in reliance upon the expectation of receiving property, it would be equally serious to take property from an owner after his death (when he cannot be heard) on the strength of a questionable oral agreement supposedly made many years prior. If the statute of frauds is to be given any force, we cannot affirm the trial court.

With the exception of Martin's interest in the Investment Company, the decree is reversed. Costs awarded to appellant.

HALL, C.J., and OAKS, J., concur.

STEWART, Justice, dissenting:

I respectfully submit that the majority assumes the role of a trial court on this appeal by, in effect, retrying the case on a critical evidentiary point and ignoring the trial court's findings of fact which contradict the factual assumptions the majority makes. The consequence is that a man and his family who worked some thirty years for the deceased George H. Chaffin is deprived of property which was promised to him in return for his services. In my view, the statute of frauds, which was designed to prevent frauds, in effect perpetrates on the plaintiff the very result which the statute was intended to avoid.

#### I.

Crucial to this decision is our standard of review in equity cases. In *Jensen v. Brown*, Utah, 639 P.2d 150 (1981), we recently addressed that standard because of numerous inconsistent rules as to our scope of review in equity cases. We reiterated that "we reverse only when the trial court's finding is against the clear weight of the evidence." *Id.* at 152. See also *McBride v. McBride*, Utah, 581 P.2d 996

1. We find nothing in the record to indicate that the trial court found the existence of the contract by clear and convincing evidence as stated

in the dissenting opinion. However, this fact is of no consequence to our decision.



(1978); *Chevron Oil Co. v. Beaver County*, 22 Utah 2d 143, 449 P.2d 989 (1969); *Metropolitan Investment Co. v. Sine*, 14 Utah 2d 36, 376 P.2d 940 (1962).

As the majority states, this Court in *Randall v. Tracy Collins Trust Co.*, 6 Utah 2d 18, 23, 305 P.2d 480, 483 (1956), enunciated the standard of review in statute of frauds cases:

In an equity review of facts if the record shows a fair preponderance, or even if the evidence is balanced evenly, the trial court findings should be sustained. If the evidence is so vague and uncertain that the finding is obviously erroneous, there may be a new finding on review. *Stanley v. Stanley*, 97 Utah 520, 94 P.2d 465 [1939]; *Morley v. Willden*, 120 Utah 423, 235 P.2d 500 [1951]; *Perry v. McConkie*, 1 Utah 2d 189, 264 P.2d 852 [1953]; *Youngren v. King*, 1 Utah 2d 386, 267 P.2d 913 [1954].

However, the majority does not hold that the evidence as to the existence of the contract or as to any element of the doctrine of part performance is "so vague and uncertain that the finding is obviously erroneous." *Id.* Indeed, the Court does not hold that any of the findings are inadequately supported by the evidence. Rather, on its own view of the evidence, the Court simply holds that the plaintiff's conduct was not exclusively referable to the oral contract, without even acknowledging that the trial court, in effect, held that it was exclusively referable on the basis of substantial evidence.

## II.

The majority opinion is primarily devoted to establishing the proposition that in a part performance case the plaintiff's conduct relied upon to show part performance must refer "exclusively" to the contract. In *Randall v. Tracy Collins Trust Co.*, *supra*, the case relied on by the trial court, this Court stated that the test for determining the necessary part performance is whether the plaintiff would not have performed the acts of part performance but for the contract. The trial court in the

instant case, relying upon *Randall*, stated in its findings of fact: "It is further found that these services would not have been provided but for the agreement between Chaffin and Martin that the subject property was to be conveyed to Martin." This conclusion is based on the following detailed findings of fact:

1. Plaintiff Rodney Martin was employed by the defendant George H. Chaffin in 1932 as a laborer at Chaffin's quarry located in Lemington, Utah. Martin continued to work for Chaffin in that capacity until the fall of 1936 when Martin left the quarry and began work as a ranch laborer for Chaffin on Chaffin's farm and ranch properties located in both Genola and Payson, Utah. In 1938 Martin was made a foreman with respect to all of Chaffin's farm and ranch properties located in Genola, Utah. In 1947, Martin became the foreman with respect to all of Chaffin's farming and ranch properties and continued in that capacity until Chaffin's death in 1975; and thereafter until January 1, 1976 for Chaffin's successor in interest.

2. During the period of time that Martin worked for Chaffin, Chaffin owned a number of separate and distinct parcels of real property, each of which was referred to by a common name by Chaffin, his employees and residents of the community. The parcel which is the subject of this action consisting of 120 acres located in Utah County, State of Utah, particularly described as

The Northwest quarter of the Northwest quarter of Section 34, Township 9 South, Range 1 East, Salt Lake Base and Meridian and the East half of the Northwest quarter of Section 34

was commonly referred to by the defendant Chaffin, the plaintiff Martin, Chaffin's employees and others in the community as the home ranch, the home place, or simply the ranch.

3. In the spring of 1947 Martin and Chaffin entered into an oral lease agreement under the terms of which Chaffin agreed (a) to lease three of his parcels of real property (namely, the 120 acre home

ranch, which is the subject of this action, the Staley pasture, and the Nielsen place) to Martin (b) to stock the properties and (c) to provide the equipment necessary for farming operations. In consideration for this lease, Martin agreed to pay to Chaffin 50 percent of the profits which he derived from the operations on these three parcels of real estate. This oral lease was unilaterally terminated by Chaffin approximately four to six weeks after it was entered into.

4. At the time Chaffin terminated the above-described oral lease, he requested that Martin remain in his employment and act as foreman for all of his farming and ranch operations. As inducement, Chaffin offered and promised that in the event Martin remained with him as his foreman, he would convey the 120 acres in Genola commonly known as the "home place" or "home ranch" to Martin at or before his (Chaffin's) death and would raise Martin's salary \$25 per month. After several days of deliberation and discussions with his wife, Martin accepted Chaffin's offer and immediately commenced performance under the terms of their agreement.

5. The Court finds that the terms of the oral contract between Martin and Chaffin are sufficiently supported by the testimony of the witnesses William Stanley Bradford, Albert Nielsen, Bill Nielsen and Eddie Allen, all of whom have no interest in the outcome of this case, to meet the burden of persuasion required by *Randall v. Tracy-Collins Trust Co.*, 6 Utah 2d 18, 305 P.2d 480, and the Court therefore finds that the oral agreement was entered into as alleged.

6. The Court further finds the agreement sufficiently complete to support a decree of specific performance.

7. From the time Chaffin and Martin entered into their agreement in the spring of 1947 until Chaffin's death on July 30, 1975, Martin worked exclusively for Chaffin as his foreman in reliance upon their agreement that the subject property would be conveyed to Martin. In reliance on their agreement, Martin

labored 10 to 16 hours per day, 7 days a week during the summer months and, occasionally when necessary, worked around the clock. In the winter time, Martin labored 8 to 10 hours per day, 7 days a week. During this period of time Martin's salary ranged from \$75 per month in 1947, to \$375 per month in 1975. From 1960 until 1969, Martin received \$325 per month without a single raise. Additionally, it is found that Rodney Martin and his wife Martha, provided substantial personal services to Chaffin and that Martin's son Denny performed substantial labor with respect to the farming operations on Chaffin's farms and ranches for which he was not compensated. *It is further found that these services would not have been provided but for the agreement between Chaffin and Martin that the subject property was to be conveyed to Martin.*

8. The Court finds that plaintiff completed his part of the bargain upon the death of George Chaffin.

9. In 1975 Chaffin died without having conveyed the subject property to Martin. [Emphasis added.]

It seems to me that unless the Court can demonstrate that these findings are erroneous, it cannot reverse the trial court without rewriting the standards of review which govern the relationship between this Court and the trial courts.

What the majority position essentially boils down to, as best I understand it, is that a person who makes an oral contract with his employer for the conveyance of land cannot under any circumstances rely upon his continuation in employment to show part performance of the oral contract. Perhaps that is an overstatement of the majority opinion; I certainly hope it is, but given the trial court's findings, and specifically the finding that "but for the agreement between Chaffin and Martin that the subject property was to be conveyed to Martin," Martin would not have performed the services which he did, I see no other alternative.

The plaintiff claims that he worked ten to sixteen hours per day, seven days a week, for nearly thirty years and that the reasonable value of his thirty years of work as a farm manager was shown to be approximately \$400,000. The defendants, of course, denied these allegations, but it is significant that the trial court declined to make a finding, proposed by the defendants, that plaintiff's salary was consistently higher than the average salary paid to farm workers in Utah during the entire period of his employment.

I submit that the trial court's finding that the extraordinary services performed by the plaintiff and his family "would not have been provided *but for the agreement between Chaffin and Martin that the subject property was to be conveyed to Martin*," is simply another way of phrasing the majority's "exclusively referable" standard in cases of this type where an employee is induced to stay on working for another on the strength of a promise of a future conveyance. The test employed by the trial court is a stringent test—stringent enough to meet the basic policy underlying exceptions to the statute of frauds. It is a test that would avoid fraud and is also appropriate in light of the fact that a plaintiff in such circumstances as the instant is not likely to be able to show much stronger proof of part performance or substantial reliance than was shown here. Moreover, the "but for" test rests squarely on the authority of *Randall v. Tracy Collins Trust Co.*, 6 Utah 2d 18, 24, 305 P.2d 480, 484 (1956).

### III.

The majority concedes that although the "exclusively referable" doctrine is sometimes made an element of the part performance doctrine, as it is generally phrased, it need not be so if evidence is strong enough that an oral contract for the conveyance of land was entered into.

The "exclusively referable" doctrine is a special application of a generally broader

and less stringent rule for sufficient part performance. Professor Corbin states the general rule as follows:

(1) *The performance must be in pursuance of the contract and in reasonable reliance thereon . . . .* (2) The performance must be such that the remedy of restitution is not reasonably adequate . . . . (3) *The performance must be one that is in some degree evidential of the existence of a contract and not readily explainable on any other ground.*

2 *Corbin on Contracts* § 425 (1950) (emphasis added).<sup>1</sup>

The third element of the rule of part performance as stated by Corbin does not require that the performance be "exclusively referable" to the contract, only that it be "in some degree evidential" of the contract's existence and "not readily explainable on any other ground." This standard, which is clearly lower than the "exclusively referable" test, has been previously articulated by this Court. *E.g., Ravarino v. Price*, 123 Utah 559, 575, 260 P.2d 570, 578 (1953) (part performance must be "clearly referable" to contract).

The rationale behind the "clearly referable standard" is that often evidence of the contract is not adequately proved by evidence independent of the part performance, and part performance in such circumstances acts as additional proof of the contract. "[T]he part performance must be clearly evidential of the existence of a contract—it must be such as would not ordinarily have taken place in the absence of a contract and therefore is not reasonably explicable on some other grounds." 2 *Corbin on Contracts*, *supra*, § 430 at 473.

However, where the existence of the contract is clearly shown by independent evidence, this standard is relaxed. Thus, Corbin states:

It has been held in a well reasoned case that the performance rendered by the plaintiff need not be such as to be referable to the contract in the sense

1. The majority quotes the same passage in its opinion, but it also quotes a far more strict

statement of the standard from C.J.S., *Statute of Frauds*, § 250, which it seems to follow.

that it is clearly evidential that the alleged contract was made, if the defendant admits the making of such a contract but differs as to a part of its terms. The admission itself relates the performance to the contract and makes unnecessary any other proof of the terms so far as they are admitted.

2 *Corbin on Contracts, supra*, § 430 at 475.

By its rigid application of the "exclusively referable test," the majority raises the standard of proof in cases such as the instant case to a level that is unnecessarily high. In cases where the existence of the contract has already been proved by independent evidence, as in the instant case, the exclusively referable test in effect requires that the plaintiff "reprove" the existence of the contract by part performance. Even when the proof of the existence of the contract is somewhat in doubt, the majority requires corroboration by a standard much stricter than the one Corbin suggests. Concededly, where there is no other evidence of the contract, the "exclusively referable" test is an appropriate test. However, in this case there is other evidence of the contract.

Utah cases are in accord with the principle stated by Corbin. In *In re Roth's Estate*, 2 Utah 2d 40, 269 P.2d 278 (1954), the seller in an oral contract to convey land contended that because certain improvements to property by the buyer were not "exclusively referable" to the contract, the contract should not be enforced. We held that because the seller's own testimony established that an oral contract existed, the exclusively referable rule did not apply, even though "it might be possible to explain the taking of possession and the making of improvements on some other basis than that a contract existed." *Id.* at 44, 269 P.2d at 281. We cited with approval holdings from other jurisdictions that

where the existence of the oral contract is established by an admission of the party resisting specific performance or by competent evidence independent of the acts of part performance, the re-

quirement that the acts of part performance must be exclusive[ly] referable to the oral contract is satisfied.

*Id.* (emphasis added), citing *Jones v. Jones*, 333 Mo. 478, 63 S.W.2d 146 (1933); *Higgins v. Exchange Nat. Bank*, 142 Misc. 69, 253 N.Y.S. 859 (1931). Similarly, in *Randall v. Tracy Collins Trust Co.*, 6 Utah 2d 18, 24, 305 P.2d 480, 484 (1956), we stated:

If the contract has great clarity and definiteness, there may be no need for reliance which is exclusively referable to the contract, so long as performance fulfills the terms.

*Accord Van Natta v. Heywood*, 57 Utah 376, 195 P. 192 (1920); *Brinton v. Van Cott*, 8 Utah 480, 33 P. 218 (1893).

Of the cases cited by the majority which are apparently to the contrary, two are distinguishable. In *Holmgren Brothers Inc. v. Ballard*, Utah, 534 P.2d 611 (1975), the issue was not whether the part performance was exclusively referable, but whether a contract existed at all. Although the evidence showed that an oral contract to convey land had originally existed, the buyer later repudiated the contract by refusing to accept the proffered conveyance. We held that the buyer's weeding and discing of the land was not sufficient evidence to prove the contract. *Jackson v. Jackson*, 122 Utah 507, 252 P.2d 214 (1953), is also distinguishable on the ground that the plaintiff failed to prove the existence of an oral contract to make a will.

The only cases actually to the contrary are *McDonald v. Barton Brothers Investment Corp.*, Utah, 631 P.2d 851 (1981); *Ravarino v. Price*, 123 Utah 559, 260 P.2d 570 (1953); and *Price v. Lloyd*, 31 Utah 86, 86 P. 767 (1906). The rule in those cases is that even where the existence of an oral contract is clearly and convincingly proved by evidence independent of the part performance, the part performance must be shown to be exclusively referable to the contract. The rationale is that the part performance doctrine is essentially one of estoppel, *Ravarino v. Price, supra*, 123 Utah at 567, 260 P.2d at 574, and that the referability of the past performance must

be shown in order to establish the requisite reliance on the contract. *In re Roth's Estate*, 2 Utah 2d 40, 44, 269 P.2d 278, 281 (1954). I submit that such an emphasis on estoppel is misplaced and that it should be weighed along with other pertinent factors.

If these cases are followed, even when significant substantial part performance has been rendered, the door is open for a defendant to deny a valid oral contract simply because he is able to conjure up a motive for the plaintiff's performance that is not exclusively referable to the contract. As Corbin states in the section entitled "Oral Contracts to Transfer Land in Return for Services":

Where the making of the oral contract is proved beyond any reasonable doubt, and where the services have been long[,] continued, onerous, and of a kind incapable of just estimation in money, the chancellor's conscience will be so moved as to lead to the conclusion that it is a "virtual fraud" for the defendant to hide behind the statute.

2 *Corbin on Contracts, supra*, § 435 at 498.

The rule should be that if clear and convincing evidence proves the existence of the contract, then it is sufficient for the plaintiff to show that the part performance is "clearly referable" to the contract, i.e., was clearly in reliance on the contract or in accordance with the terms of the contract. The opposing party should then have the burden of proving alternate explanations, if any exist, for the part performance. In fact, defendants in the instant case attempted to do this, and the trial court refused to find in their favor.

The majority concedes that "the more conclusive the direct proof of the contract, the less stringent the requirement of exclusively referable acts." It then quotes with approval Corbin's statement that "[i]f there is *ample and convincing direct testimony* [then] less corroboration by circumstances is required." Even by the ma-

jority's own standard, then, the question here is whether the testimony was sufficiently "ample and direct" to prove, clearly and convincingly, that Chaffin contracted with the plaintiff to give him the "home place" when Chaffin died if the plaintiff would stay on as Chaffin's foreman.

The trial court was persuaded that the independent testimony of four disinterested witnesses proved the existence of such an oral contract between Martin and Chaffin. (See the trial court's finding of fact number five, quoted above.) William Bradford, a former employee of Chaffin, testified that in 1955 "[Chaffin] told me that if Rod stayed with him (Chaffin) he was going to get the Genola Home Place." Bradford had two other conversations with Chaffin, one in the late 1940's and one in 1965, which confirmed Chaffin's intent to leave the land in question to the plaintiff.

Albert Nielsen, a neighbor, testified that about six months before Chaffin died Nielsen asked to purchase ten acres of the land in question. Chaffin refused because when he died "[the land] belonged to Rod Martin."

Bill Nielsen, the son of Albert and also a neighbor, asked Chaffin in about 1970 or 1971 if he could buy some ground. Nielsen testified "[Chaffin] said he couldn't sell it because it was promised to Rod." This was confirmed by an earlier conversation between Bill Nielsen and Chaffin one summer when Bill had been an employee.

Finally, Eddie Allen, another former employee, testified that in about 1957 Chaffin had said that Martin "will get this place some day."

The trial court, on the basis of what I think is clear and convincing evidence, found that the contract alleged by plaintiff in fact existed. The majority discounts that finding and the supporting testimony and rules in effect that the evidence was not sufficiently clear and direct to establish the disputed contract.<sup>2</sup> It states that "the

2. The majority states in footnote 1 that "[w]e find nothing in the record to indicate that the trial court found the existence of the contract by

clear and convincing evidence as stated in the dissenting opinion." The trial court did not invoke that phrase, but the testimony of the

existence of the oral contract was controverted and a major point of dispute in the lawsuit." It also implies in quoting from *Randall v. Tracy Collins Trust Co.* that the above-summarized testimony was disputed by direct evidence, and that its effectiveness was "destroyed on cross-examination."

On the contrary, the record shows that the defendant did not destroy the testimony of plaintiff's witnesses by cross-examination, and the trial court impliedly so found. Thus, what the majority does is retry this case by reweighing the credibility of the witnesses. That is not the prerogative of this Court, irrespective of the fact that this is an action in equity.

Although I recognize that Chaffin (i.e., the deceased) performed acts on occasion which were not necessarily consistent with the existence of the contract conveying the property to plaintiff, I submit, on the other hand, that neither were those acts necessarily inconsistent with the existence of the contract. In any event, given the existence of the contract, Chaffin's subsequent conduct did not have the effect of either vitiating it or proving that it did not exist. What is critical, and is clear in the record, is that the plaintiff devoted his whole life to maintaining the deceased's farm as if it were the plaintiff's own farm. The trial court's finding that plaintiff would not have spent "his lifetime as he did but for" the existence of the contract should be dispositive.

I respectfully submit that the doctrine of part performance in this case has been construed so narrowly that it has failed to achieve its intended purpose of avoiding application of the statute of frauds with such rigor as to produce the very kind of fraud that the statute was intended to prevent.

DURHAM, J., concurs in the dissenting opinion of STEWART, J.

witnesses referred to in Finding of Fact No. 5, quoted above in its entirety, was not controverted and, together with the conceded acts of the

**AUTO WEST, INC., Charles Bryan, Paul Graff and Norman P. Stephens, Plaintiffs, Counter-defendants, Appellants and Cross-Respondents,**

**v.**

**Richard BAGGS, Defendant, Counter-claimant, Respondent and Cross-Appellant.**

**No. 17984.**

Supreme Court of Utah.

Jan. 23, 1984.

Auto dealership and shareholders commenced action against another shareholder, who was also general manager, seeking termination of proxies held by defendant, accounting, and return of all moneys improperly taken from dealership. Defendant filed answer and counterclaimed alleging slander. After bench trial, the Fifth District Court, Iron County, Robert F. Owens, J., awarded plaintiffs \$6,334.12 in damages, and awarded defendant \$25,000 damages for slander, and appeals were taken. The Supreme Court, Stewart, J., held that: (1) circuit court judge was properly appointed to sit as district court judge; (2) protection of interests of all parties in maintaining dealership franchise was sufficient to support irrevocability of proxies given to defendant; (3) proxies terminated by operation of law; and (4) evidence was sufficient to support finding that defendant was slandered.

Affirmed.

Hall, C.J., filed opinion concurring in part and dissenting in part, in which Howe and Durham, JJ., joined.

### 1. Judges ⇌ 3

Where appointment of circuit judge was not pursuant to statute governing ap-

plaintiff, consisted of evidence that clearly meets that standard.

Tab C

1  
2 So, your intention was to sell the water with the lots, as  
3 you said in your affidavit?  
4 A No, we did not sell it with the lots.  
5 Q You're saying that the affidavit --  
6 A I mean --  
7 Q The affidavit is false?  
8 A Now, ask -- please ask that question again.  
9 Q You're saying in your affidavit you signed in 1988  
10 that you sold lots, or you subdivided and platted the Rocky  
11 Top Subdivision, with the intent of selling platted lots with  
12 water developed from your interest in the Rose Spring.  
13 That's what you said in 1988. Is that true or false?  
14 A I still don't quite understand. That we sold the  
15 water with the lots?  
16 Q That you developed -- you subdivided and platted  
17 Rocky Top Subdivision with the intent of selling platted lots  
18 with water developed from the Rose Spring. Is that true, as  
19 you said in 1988?  
20 A We would sell them water rights, but we didn't sell  
21 the water with the lots.  
22 Q So it's your testimony today that what you said in  
23 1988 was wrong?  
24 A I suppose I'm perjured.  
25 THE COURT: What's the objection?



1 MS. DRAGOO: The objection is it mischaracterized  
2 the testimony.

3 THE COURT: If she doesn't understand the question,  
4 she can say she can't answer it. The objection is overruled  
5 on mischaracterization.

6 Q (BY MR. RAMPTON) Do you understand my question?

7 A No, I don't.

8 Q And I want to make sure that you are clear on this  
9 point. In 1988, you said, under oath, that you subdivided  
10 and platted the Rocky Top Subdivision with the intent of  
11 selling platted lots with water developed from your interest  
12 in the Rose Spring. That's what you said in 1988. Was that  
13 true?

14 A If it's got it here, in 1988 we was still in court  
15 with Bleazards. That's when he said, "leave it alone or I'll  
16 have you in court." I'm seventy years old. I don't  
17 understand like you guys.

18 Q Well, I'm --

19 A But we were still in court with Bleazard in 1988, so  
20 it I'm -- if I've made a mistake, I did.

21 Q Let's go on to Paragraph 9 in the affidavit,  
22 Mrs. Warr. You have already testified that, at the time that  
23 you signed this affidavit, you sold six lots; Spears, Teresa,  
24 Brenda, Howard, Wayne Reynolds, and the Crittendens' lots to  
25 them.

1           A     Yes.

2           Q     They're -- this affidavit, in Paragraph 9, you say,  
3     quote:

4

5                     We have sold six of the eleven lots in the Rocky Top  
6                     Subdivision upon our representation that gravity  
7                     flow irrigation water would be provided to such  
8                     lots from our interest in the Rose Spring.

9

10           Period, end quote. Is that what you said in 1988?

11           A     Well, that was our intention: If we had the water,  
12     they would have it.

13                     THE COURT: Let me ask you a question. You  
14     subsequently got the water. How did your intention change  
15     after you got the water?

16           A     This was in 1984?

17                     THE COURT: No, this is was made in 1988.

18                     THE WITNESS: No, we was -- we didn't settle with  
19     Bleazard until 1990.

20                     THE COURT: You settled with Bleazard in 1990. Did  
21     your intent change in any respect, or what you had said in  
22     this affidavit?

23                     THE WITNESS: If we got the water, got it down here,  
24     that the plaintiffs were always told that they would have  
25     their irrigation water, but it would not be free.

Tab D

1 the well -- or, is the allocation of 40 percent.

2 THE WITNESS: That's right. We did not know what  
3 the flow was. We did not quantify that. We were aware it  
4 was less than four second feet.

5 THE COURT: Right. But there's a benefit to the  
6 property owners to convert it into their well because they  
7 can draw more total water out.

8 THE WITNESS: That's right.

9 Q (BY MS. DRAGOO) Turning to Exhibit 78, do you  
10 have that in your book?

11 A Yes, I do.

12 Q All right. What is that exhibit?

13 A This is a copy of the list of names that Hazel gave  
14 me for whom to prepare quit claim deeds.

15 Q Was this 1993?

16 A I believe so.

17 Q If you would refer to Exhibit 92. This deed refers  
18 to 7.5 percent.

19 A Yes, it does.

20 Q How did this come about?

21 A After I had prepared the first round, the quit claim  
22 deeds, I believe Hazel and Clayton made some effort to convey  
23 those.

24 I made it a point to avoid getting involved in the  
25 commercial terms of that. They came back to me about a year

1 later and asked me to prepare some more deeds, I think  
2 because they had new names, either through lot sales or  
3 something along those lines.

4 I had had the time to think about the issue a little  
5 bit, and suggested that rather than giving enough water to  
6 irrigate an entire five acres, when it came time to prove  
7 beneficial use, we would probably lose some of that right  
8 through the construction of paved and unirrigated areas on  
9 the lots; driveways, road way, barns, corrals, house.

10 And I proposed preserving as much of the water right  
11 as we could, and cut back the amount of water being conveyed  
12 by these deeds to .75. This would be enough to irrigate  
13 four-and-a-half acres.

14 Combined with the quarter-acre with domestic water  
15 right would be four and three-quarters acres irrigated area  
16 on a five-acre lot.

17 The balance would not have irrigation rights to it,  
18 but would probably be occupied by unirrigated areas anyway.

19 Q Have you done any further testing of flows of the  
20 spring?

21 A No, I have not.

22 Q And will -- once you prepared those quit claim deeds  
23 in '94 from 7.5 percent, did you then prepare quit claim  
24 deeds for several other owners besides the exhibit that we've  
25 mentioned?

1           A     I believe there were several quit claim deeds at  
2     that time; I don't recall who or how many.

3           Q     Would you turn to Exhibit 80?

4           THE COURT:   You have proved up the amount of use  
5     that's being done on the Howard property after, with this  
6     higher draw?

7           THE WITNESS:   No, only for his domestic water right.

8           THE COURT:   Okay.

9           THE WITNESS:   No proof would be called for until  
10    after he had an approved application.

11          THE COURT:   Yes.

12          Q     Did you prepare this quit claim deed to Melvin  
13    Spears?

14          A     It looks like one that I prepared, yes.

15          Q     And that's the same type of quit claim deed you  
16    prepared in '94?

17          A     This was ours, of 1993 issue.

18          Q     Right. Did you also prepare a change application  
19    based on these quit claim deeds?

20          A     In my deposition I denied remembering such, but  
21    after the deposition, I went through my personal files on  
22    these matters. I went through those files step by step, and  
23    found that I had a draft for a change application.

24                I also had a plot report showing the water users in  
25    the vicinity, which would have probably been reference