

1987

Lee A. Fitzgerald and Helen Fitzgerald, his wife v.
Boyd Corbett and Keith Gurr, and Utah
Ranchlands : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

870444

IN THE SUPREME COURT OF THE STATE OF UTAH

LEE A. FITZGERALD and)	
HELEN FITZGERALD, his wife,)	
)	Case No. 870444
Plaintiffs/Appellants,)	
)	
vs.)	
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BOYD CORBETT and KEITH GURR,)	
and UTAH RANCLANDS,)	
)	
Defendants/Respondents.)	

BRIEF OF APPELLANTS

An Appeal from the Judgment of the Fourth Judicial
District Court dated October 27, 1987
Honorable J. Robert Bullock, Judge

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment entered by the Fourth Judicial District Court on the 27th of October, 1987 (Record 140-143), and jurisdiction is conferred upon this Court pursuant to Rule 3 of the Rules of the Utah Supreme Court.

NATURE OF THE PROCEEDINGS BELOW

Plaintiffs Fitzgerald filed a complaint (Record 1-16) for slander of title to remove two notices of interest recorded by the defendants. The defendants filed an Answer and Counterclaim (Record 31-36). The case was tried by the Court sitting without a jury on October 24, 1985. Further hearings were heard on October 24, 1986, November 6, 1986, and September 18, 1987. The trial court entered judgment (Addendum No. 1) removing the notices of interest, but did not award damages, and ordering the plaintiffs Fitzgerald to deliver deeds to real property to defendants Corbett and Gurr and to five purchasers of properties from Corbett and Gurr who were not parties to the action. The court also entered Amended Findings of Fact and Conclusions of Law (Addendum 2).

ISSUES PRESENTED ON APPEAL

1. Is the Settlement Agreement of September 10, 1982, enforceable?

2. Were the provisions of the Settlement Agreement requiring Fitzgeralds to honor past sales of Corbett and Gurr barred by the doctrine of res judicata?

3. Is the Settlement Agreement of September 10, 1982, vague and ambiguous, and thus unenforceable?

4. Did the trial court err in ordering the delivery of deeds to third parties and to counterclaimants Corbett and Gurr?

5. Did the trial court err in failing to award damages for the slander of title?

STATEMENT OF THE CASE

This is the third time that litigation between plaintiffs, Fitzgerald, and defendants, Corbett and Gurr, have come before the Supreme Court. The first two times it came before this Court, Corbett and Gurr appeared as the plaintiffs and appellants; this time, Fitzgeralds appear as plaintiffs and appellants. To avoid the confusion between the designations, this writer will refer to the parties by their surnames, "Fitzgeralds" meaning Leland A. Fitzgerald and Helen Fitzgerald, and "Corbett and Gurr" meaning Boyd Corbett and Keith Gurr.

The facts and issues in this case are interwoven with the prior litigation. Therefore, this statement of facts must of necessity provide background for the issues raised by this appeal.

Commencing in January, 1977, Fitzgeralds began acquiring property in Cedar Valley, Utah, from a variety of sellers. By February 1, 1977, the first contractual agreements were entered into between Fitzgeralds and Corbett and Gurr. A somewhat lengthy description of the business dealings between the parties is set forth in the Memorandum Decision in the first litigation (Exhibit No. 10, Addendum No. 3). Those dealings included Earnest Money Receipts and Offers to Purchase, Uniform Real Estate Contracts, and Options, several in number. The parties came into dispute over payments and amounts owed under the various agreements, and the purported exercise of the options, and in 1981, Corbett and Gurr commenced suit against the Fitzgeralds in the Fourth District Court, Civil No. 50,224. the matter was tried before Judge J. Robert Bullock, sitting without a jury. On May 4, 1982, Judge Bullock rendered a Memorandum Decision (Exhibit 10, Addendum 3).

On May 17, 1982, Corbett and Gurr filed a notice of appeal from that Memorandum Decision, in Supreme Court case No. 18529. On June 25, 1982, Judge Bullock entered Judgment on the Memorandum Decision (Exhibit 1, Addendum 4). On June 29, 1982, Corbett and Gurr filed an additional notice of appeal in Supreme Court case No. 18594.

The judgment entered by Judge Bullock awarded judgment in favor of Corbett and Gurr against Fitzgeralds in the

amount of \$4,709.96 (paragraph 1, Judgment, Addendum 4), but ruled that Corbett and Gurr had no interest in the properties described in the judgment. On September 9, 1982, Fitzgeralds gave Corbett and Gurr credit on a payment past due on a contract dated September 1, 1977, which was not part of the litigation before Judge Bullock (Exhibit 14, Addendum 5). Corbett and Gurr signed a release of that judgment on September 28, 1982 (Exhibit No. 13, Addendum No. 6).

On September 10, 1982, the parties entered into a Settlement Agreement (Exhibit No. 11, Addendum No. 11). On October 4, 1982, Corbett and Gurr made payment of \$48,720.79 and received additional credits on the contract not involved in the pending matter (Exhibits No. 21, 22, and 23, Addenda 8, 9, and 10).

On November 1, 1982, this Court, on motion of respondents for dismissal of the appeals with prejudice, granted dismissal of the appeals in both 18529 and 18594 (Exhibit No. 4, Addendum No. 11).

On November 1, 1982, Boyd Corbett, doing business as Utah Ranchlands, filed and recorded a notice of interest (Exhibit No. 2, Addendum No. 12).

November 26, 1982, a further hearing was held before Judge Bullock in the trial court (Exhibit No. 26, Addendum No. 13).

On January 6, 1983, additional hearings were held

before Judge Bullock (Exhibit No. 27, Addendum No. 14).

On April 19, 1983, Judge Bullock rendered an Order—
and Judgment (Exhibit No. 5, Addendum No. 15).

On May 17, 1983, Corbett and Gurr filed a new appeal in the matter pending before Judge Bullock (Exhibit 28, Addendum 16), from the April 19, 1983, order.

In the new appeal, Corbett and Gurr raised the issue of whether or not Fitzgeralds had made an open court offer to honor prior sales of Corbett and Gurr, which the Court specifically declined in its order and judgment of April 19, 1983 (Exhibit No. 5, Addendum No. 15).

On April 18, 1984, Corbett filed and recorded an additional notice of interest (Exhibit No. 3, Addendum No. 17). On November 1, 1985 the Supreme Court rendered a decision in that appeal (Record 59:63, Addendum 17).

On May 26, 1983, after the notice of appeal had been filed in the case pending before Judge Bullock, Fitzgeralds brought suit to remove the notice of interest and for damages for slander of title by the filing of the notice of interest by Boyd Corbett and Utah Ranchlands, a partnership of Boyd Corbett and Keith Gurr.

The appeal from the judgment rendered in that case is the matter now before this Court.

POINT I

The Trial Court Erred in Holding the Settlement Agreement Was Enforceable Because the Conditions of the Agreement Were Not Met.

After Corbett and Gurr had lost the case they brought against the Fitzgeralds, Civil No. 50,224, tried by Judge Bullock, and after they had filed their appeals in that proceeding (Supreme Court Nos. 18529 and 18594), counsel for Corbett and Gurr failed to file a brief on appeal, as required by the Rules of the Supreme Court (Record, Supreme Court cases 18529 and 18594).

That case involved a Uniform Real Estate Contract dated May 13, 1977, an Earnest Money Agreement and Option to Purchase dated February 1, 1977, and an Option dated September 7, 1977 (Exhibit No. 1, Addendum No. 4). Corbett and Gurr also had a Uniform Real Estate Contract dated September 1, 1977, with Fitzgeralds which, at that time, was still in force and effect. The September 1, 1977, Uniform Real Estate Contract was not a part of Judge Bullock's decision and the Supreme Court cases 18529 and 18594 (Record: 312:24-25 and 313:1-6, testimony of Lee A. Fitzgerald; Record: 281:7-13, testimony of Boyd Corbett).

On September 10, 1982, while the two appeals were pending in the Supreme Court, the parties entered into an agreement denominated as Settlement Agreement (Exhibit No. 11, Addendum 7). That Agreement and its enforceability is the

subject matter of this appeal.

A. Failure to pay \$49,000+ on September 10, 1982.

The next to last sentence of that Settlement Agreement provides:

This Agreement subject to payment in excess of \$49,000 on the DuPratt contract on this 10th day of September, 1982 (emphasis added).

As stated in Ephraim Theatre Company v. Hawk, 321

P.2d 221, 7 Utah 2d 163 (1958):

...the fundamental concepts in regard to contracts: that their purpose is to reduce to writing the conditions upon which the minds of the parties have met and to fix their rights and duties in respect thereto. The intent so expressed is to be found, if possible, within the four corners of the instrument itself in accordance with the ordinary accepted meaning of the words used... Generally speaking, neither of the parties, nor the court has any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hardship, but they must be enforced "in accordance with the intention as *** manifested by the language used by the parties to the contract."

ID at 166.

That statement was again affirmed by the Court in Jones v. Acme Building Products, Inc., 450 P.2d 743, 22 Utah 2d 202 (1969), at page 206.

Whether the above quoted portion of the Settlement Agreement is a condition of the contract is to be taken from the fair reading of the Agreement. In Cheever v. Schramm, 577 P.2d 951 (1977), the Court said:

The intention to create a condition in a contract must appear expressly or by clear implication.

Id. at 953.

That was reiterated in Creer v. Thurman, 581 P.2d 149 (1978), where the Court said:

Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in light of all the circumstances when they executed the contract.

Id. at 151.

It is also supported in Porter v. Groover, 734 P.2d 464 (1987), where the Court said:

Whether a promise is conditional depends upon the parties' intent, which is derived from a fair and reasonable construction of the language used in light of all the circumstances when the parties executed the contract.

Id. at 465.

The Settlement Agreement (Exhibit No. 11, Addendum No. 7), shows that after spelling out, in three paragraphs, respective responsibilities under the Settlement Agreement, the parties said "This Agreement is subject to payment in excess of \$49,000 on the DuPratt contract on this 10th day of September, 1982. Clearly, upon the language drawn by the signers of the agreement itself, the Settlement Agreement was conditioned upon payment of the \$49,000 on that specific date.

The circumstances under which that was included on

Exhibit 11, are as follows:

Q: (to Leland Fitzgerald): What was the reason for including in Exhibit 11 the reference to the payment of the \$49,000?

A: I was in a real bad financial bind on some property and I needed money real bad and I told Mr. Corbett to try to resolve this and he come out and this is what we resolved.

(Record 317:23-25, 318:1-3)

That the condition was not met is borne out by the testimony of all of the parties to this litigation. Mr. Corbett admitted that the \$49,000 was not paid on September 10, 1982, as required by the Settlement Agreement (Record 283:19-25, 284:1-8). Corbett further agreed that the Settlement Agreement was subject to payment on that date. He was asked:

Q: And he entered into this Agreement and it specifically provided that it was subject to paying the excess of that payment in excess of \$49,000 on September 10, 1982?

A: Yes.

(Record 284:22-25, 285:1).

Mr. Gurr stated:

Q: You know for a fact that you didn't pay the \$49,000 on the 10th of September, don't you?

A: No I don't.

Q: You don't know that?

A: I don't know that. Whenever the check was made out or whenever the cashier's check

was made out, that's when it was paid and the records will show that date, and I don't know when it was.

Q: If it was paid on October 4, then that's what the record will show.

A: Sure.

(Record 314:3-13).

Exhibit No. 21 shows that the payment of the \$49,551.70 was credited by three credits given to Corbett and Gurr and a payment of \$48,720.79 on October 4, 1982. Exhibit No. 22 shows that that payment of \$48,720.79 was then paid by Mr. Fitzgerald on the indebtedness about which he testified on the DuPratt contract on October 6, 1982. Exhibit No. 23 shows the record of payment and shows that the 1982 payment on that contract was paid on October 4, 1982, 57 days late. No evidence was offered by Corbett and Gurr to dispute that the payment was paid on October 4, 1982, and not on September 10, 1982 as required by Exhibit No. 11 (Addendum No. 7).

In Bentley v. Potter, 694 P.2d 617 (1984), the Court said:

Failure of consideration exists "wherever one who has either given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for that performance."

Id. at 619.

That position on failure of consideration is quoted again in Copper State Leasing v. Blacker Appliance & Furniture, 90 U.A.R. 23, August 31, 1988, at page 25.

Fitzgeralds were not at fault in the failure of Corbett and Gurr to make that \$49,000 payment on September 10, 1982. There is a failure of consideration for that Settlement Agreement. A condition to it was that the payment of the \$49,000 owed under the September 7, 1977, contract be paid on that date, the 10th of September, 1982. The testimony was admitted by Corbett and Gurr that the payment was to be made on that date, and that payment was not made on that date. Thus there is a failure of consideration.

B. Failure to Terminate Legal Proceedings.

The Settlement Agreement (Addendum No. 7) reads:

We G. Boyd Corbett and Keith L. Gurr, doing business at Utah Ranchlands, hereby agree to settle all legal actions, lawsuits, appeals to the Supreme Court, etc., concerning Leland A. and Helen S. Fitzgerald and all their Cedar Valley property.

The factual circumstances are that they did not settle all of their lawsuits. The dismissal of the pending appeals was not occasioned by acts of Corbett and Gurr, but it was dismissed on the respondents' motion for dismissal of the appeals, with prejudice, which was granted on November 1, 1982 (Exhibit No. 4, Addendum No. 11). The Record of the Supreme Court in cases 18529 and 18594 will show that in pursuance of the Settlement Agreement, Corbett & Gurr did not initiate any dismissal of their appeals.

In addition to failing to dismiss their appeals in the underlying proceeding (Civil No. 50,224, District Court of

Utah County) presided over by Judge J. Robert Bullock, upon which judgment had been entered June 24, 1982 (Exhibit No. 1, Addendum No. 4), Corbett and Gurr continued to pursue the matter, as is demonstrated by Exhibit No. 26, a minute entry of November 26, 1982 and the minute entry, Exhibit No. 27, wherein the Court said:

The Court will also hear arguments, if any, as to whether or not the Court should, on its own initiative, amend the judgment with respect to the offer of defendants, Lee A. Fitzgerald and Helen Fitzgerald, referred to in the Court's memorandum decision of May 4, 1982.

After hearing the matter, Judge Bullock entered an Order and Judgment (Exhibit No. 5, Addendum No. 15), wherein the Court said:

1. Plaintiffs [Corbett and Gurr] allege that the Court erred in its judgment entered June 25, 1982, by failing to order defendant, Lee Fitzgerald, to perform according to his offer to honor contracts between plaintiffs and innocent purchasers of property covered under May 13, 1978 contracts.

Language in the memorandum decision entered May 4, 1982, which apparently created the ambiguity as to whether or not the Court intended to so order, was included in the decision to encourage the defendant to perform according to his unsolicited offer so as to minimize litigation and avoid further loss and damage to innocent purchasers. However, defendant's offer had no bearing whatsoever on the decision entered by the Court, the decision was not conditioned thereon, and the Court did not intend to assume responsibility for supervising defendant's performance according to the offer. The Court, therefore declines to alter its judgment on the basis that the alleged omission constituted error, oversight, or mistake.

Thereafter, Corbett and Gurr filed an appeal of that Order and Judgment (Exhibit No. 28, Addendum No. 16). They pursued then the very issues that they now pursue in this proceeding, as is demonstrated by Exhibit No. 25, their brief filed on appeal. Almost two thirds of that brief addressed the issues germane to the original judgment. Specifically, Corbett and Gurr addressed, at page 21 of their brief, the issue of the so-called agreement to honor their prior contracts with third parties, which is carried forward on pages 22 and 23 of the brief. Attached to it was the very Settlement Agreement at issue in this proceeding. That appeal culminated in the decision of this Court, in Corbett v. Fitzgerald, 709 P.2d 384 (1985) (Addendum No. 18).

The trial court in this case should have ruled that there was a failure of consideration when Corbett and Gurr breached conditions of the Settlement Agreement by failing to settle their legal actions, lawsuits, and appeals but continued to pursue them thereafter. As stated in VanDyke v. Mountain Coin Mach. Distrib., Court of Appeals of Utah, August 3, 1988, 758 P.2d 962 (1988),

Thus, Mountain Coin proceeded with the lawsuit despite consummation of the parties' agreement resolving the lawsuit.

Id. at 964.

The Court of Appeals held that the trial court in that proceeding did not err in directing a verdict that Moun-

tain Coin had breached the settlement agreement.

In the case now at bar, the trial court erred in not ruling that Corbett and Gurr had breached the Settlement Agreement by continuing their litigation.

By the time of the final ruling in this matter, the Supreme Court had ruled in 1985 in the former matter. The Court's ruling was submitted as a supplement to the record (Record, pages 59-63).

The trial court should have ruled that Corbett and Gurr had breached the Settlement Agreement by continuing their litigation, and that this barred any further rights to claim benefits under the Settlement Agreement.

C. Failure to make payment on tender of \$11,000 payment.

The defendants breached the Settlement Agreement by failing to make payment or tender of payment of the \$11,000 required by paragraph 3 of the Settlement Agreement (Addendum No. 7). Mr. Gurr was asked about that payment. The Agreement called for \$11,000 paid in three annual installments of \$3,667 plus interest at seven percent, commencing February 1, 1983. Mr. Gurr was asked:

Q: If I understand you correctly, with regard to the \$11,000, you never took the \$3,667 to him plus the interest on those payments as those payments became due.

A: No, but we talked about it.

...

Q: You never did tender the \$11,000 in by handing him a check for the \$11,000?

A: No, because he never did proceed to honor these contracts like he agreed to do.

(Record 313:7-11, 15-18)

In answer to a question by the Court about the \$11,000, Mr. Corbett said:

Thank you, your Honor. So basically the answer to your question, the \$11,000, we never did offer payment. I never did. Now my partner Keith Gurr could have. I did not.

(Record, 265:15-18)

Mr. Fitzgerald corroborated their testimony when he was asked:

Q: My question was, did anyone ever tender any payment of the \$3,667 that was to paid on February 1 of the following year?

A: No.

Q: Did they ever pay anything on the contract?

A: No.

Q: Did they ever offer to pay anything on the agreement?

A: No.

(Record 325:5-14)

Under the Settlement Agreement, Corbett and Gurr were to have paid \$11,000 commencing February 1, 1983, in three annual installments of \$3,667. For that, they were to receive 320 acres to be deeded to them as received by Fitzgerald from

the persons from whom he was purchasing the same property.

Nowhere in the Record did Corbett and Gurr ever produce evidence that they had made an offer to pay the sum owed under the Settlement Agreement. If they had made an offer in writing of a particular sum, delivered to Fitzgerald, it would be equivalent to the actual production or tender of money. But both have testified that they did not make any such tender of payment. 70A-2-511, Utah Code Annotated, 1953, as amended, pertaining to tender of payment under the Commercial Code, provides, in part, that unless agreed otherwise, a tender of payment is a condition to the seller's duty to tender and complete any delivery.

As stated in Zion's Properties, Inc. v. Holt, 538 P.2d 1319 (1975),

A tender requires that there be a bona fide, unconditional, offer of payment of the amount of money due, coupled with an actual production of the money or its equivalent (emphasis added).

The Court went on to say:

But there was no actual tender of the amounts due under the contract within the foregoing definition...

Unless there is some showing of legal excuse or justification for failure to perform the obligations of a contract, it must be enforced according to its terms.

Id. at 1322.

That statement has not been changed, and was reaffirmed in LHIW, Ind., v. DeLorean, 753 P.2d 961 (1988).

D. Consideration for the settlement agreement.

While it might be argued that the \$49,000 payment required to be made on September 10, 1982, could not constitute consideration for the Settlement Agreement, as it was already obligated and past due under the September 1, 1977, Uniform Real Estate Contract on which Corbett and Gurr were delinquent with their payment, nevertheless it could be argued that their agreement to settle all legal actions, lawsuits and appeals concerning Leland and Helen Fitzgerald and the payment of \$11,000 in three annual installments of \$3,667 commencing February 1, 1983, do constitute consideration for the Settlement Agreement of Leland and Helen Fitzgerald to deed Corbett and Gurr the 320 acres and to honor Corbett and Gurr's previous sales. Nevertheless, the failure of consideration in failing to pay the \$49,000 when required by the condition of the Settlement Agreement on September 10, 1982, and the failure to drop their legal proceedings and instead pursuing those trial court proceedings on November 26 and January 6, their Notice of Appeal, Exhibit No. 28, their brief filed on appeal, Exhibit 29, and the ultimate decision of the Court, Exhibit 5, rendered on April 19, 1983, and the decision in Corbett and Gurr v. Fitzgerald, 109 P.2d 384 (1985) together with their failure to make the payments of \$11,000 as required by the Settlement Agreement, all demonstrate that there was a failure of consideration on the part of Corbett and Gurr.

Thus, the Settlement Agreement is not enforceable, and this Court should so rule.

As stated in DeMentas v. Estate of Tallas, 764 P.2d 628 (1988),

In a contract action in this state, consideration or a legally sufficient substitute for consideration must be established as part of plaintiff's prima facie case.

Id. at 632.

Corbett and Gurr did not establish their prima facie case of the consideration having been met for the enforcement of the Settlement Agreement. The trial court erred in holding that the Settlement Agreement was enforceable.

POINT II

The Trial Court Erred in Failing to Rule that the Issue of Honoring Defendants' Contracts with Third Parties Was Res Judicata.

After the judgment in the original proceeding brought by Corbett and Gurr against Lee and Helen Fitzgerald (plaintiffs' Exhibit No. 1, Addendum No. 4), and after the appeals of those matters were dismissed (plaintiffs' Exhibit No. 4, Addendum No. 11) on motion of the respondents, further hearings were held (Exhibit No. 26). Thereafter, the trial court judge, J. Robert Bullock, entered an Order, specifically with regard to the so-called oral agreement in open court to honor contracts with third parties.

Paragraph 1 of that Order specifically rules that the open court statement was not intended to be a binding agree-

ment to honor the contracts of Corbett and Gurr to third parties. Nevertheless, plaintiffs submitted to the Court a partial transcript of that open court statement as Exhibit 9.

Following Judge Bullock's ruling, Corbett and Gurr filed a Notice of Appeal (Exhibit 28, Addendum No. 16). In the pursuit of that appeal, they filed a brief on appeal which is a part of this record as Exhibit No. 29. Point 5 of that brief asserts that the open court statement should be made a part of the final judgment. Attached to that brief was a copy of the Settlement Agreement, Exhibit No. 11, the very agreement in issue by the counterclaim of Corbett and Gurr.

This Court has spoken on a number of occasions on the doctrine of res judicata and its two branches of claim preclusion and issue preclusion. One of the more complete statements is found in Searle Bros. v. Searle, 588 P.2d 689 (1978), wherein the Court set forth the four elements of the collateral estoppel doctrine, which is now identified as issue preclusion.

That decision was reaffirmed in a decision involving the plaintiff in this case, handed down in August, 1988, in Trimble Real Estate v. Monte Vista Ranch, 758 P.2d 451 (1988), wherein the Court of Appeals set forth the distinction between claim preclusion and issue preclusion. The Court therein points out that the first branch of res judicata is known as "claim preclusion."

Under claim preclusion, the most recent decision this writer has found is the case of Madsen v. Borthick, decided December 12, 1988, 97 U.A.R. 13, wherein the Court said:

Claim preclusion bars a cause of action only if the suit in which that cause of action is being asserted and the prior suit satisfy three requirements. First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Id. at 14.

In this case, all four parties (Corbett and Gurr and Lee and Helen Fitzgerald) were the same parties; the claim was alleged during that proceeding and should have been presented in that proceeding; and the issue resulted in a final judgment (Exhibit No. 1, Addendum No. 4). Initially, the appeal in that case was dismissed on motion of the respondents for failure of the plaintiffs to file a brief on appeal (Exhibit No. 4 in this proceeding). After additional hearings, the case was appealed again, and the final decision was rendered in Corbett and Gurr v. Fitzgerald, *supra*, wherein the Court directed itself to the judgments rendered and which were the subject matters of the first two appeals, Nos. 18529 and 18594. Thus, the Court declined to consider those original appeal issues, inasmuch as those issues were dismissed with prejudice.

Thus, under claim preclusion, the claims now asserted concerning the open court offer are barred.

The second avenue for consideration is the second leg of the doctrine of res judicata, being what was formerly called collateral estoppel and is now called issue preclusion.

The four elements of issue preclusion were set forth in Searle Bros., supra, but are further identified in Trimble, supra, involving, coincidentally, a second trial of a claim brought against Lee Fitzgerald, the plaintiff in this proceeding. In that case, the Court of Appeals identified the four elements of issue preclusion and defined them specifically on page 454. They were reiterated by this Court in Noble v. Noble, 761 P.2d 1369 (1988), and in Madsen, supra.

Applying the doctrine of issue preclusion to the facts of this case, the brief of appellants Corbett and Gurr in the appeal of the case, tried by Judge Bullock, Supreme Court No. 19225, the Court specifically found that the assignments of error in plaintiffs' brief, namely, the claimed errors of the trial court in not including the alleged open court agreement of Lee and Helen Fitzgerald to honor the contracts of Corbett and Gurr with third parties (pages 21-23 of their brief) are barred. The Court said:

The assignments of error in plaintiffs' brief are directed toward the original judgments, the same judgments from which plaintiffs appealed in Corbett v. Fitzgerald, numbers 18529 and 18594, supra. This Court declines now to consider those original appeal issues,

inasmuch as those issues and their appeals were dismissed with prejudice. The order to show cause hearings held subsequent to plaintiffs' original appeals to this Court do not provide an occasion for plaintiffs to now appeal the results of those hearings and include in the instant appeal those issues that were raised and dismissed in the original appeals. The express ruling by this Court on all issues raised by the prior appeals is binding upon the parties, the trial court and this court. C & J Industries, Inc. v. Bailey, 669 P.2d 855, 856 (1983). Plaintiffs' claims of error as to the original judgments were dismissed by this Court with prejudice. That dismissal constitutes an affirmance of the original judgments, and they are not subject to further attack in a subsequent appeal.... Plaintiffs accepted the sum of \$4,709.96 from defendants I [Leland Fitzgerald and Helen Fitzgerald] and released their judgment against them. That judgment is therefore not reviewable on appeal. (emphasis added)

Id. at 386.

In the proceeding now before the Court (Exhibit No. 14, Addendum No. 5) shows that on September 9, 1982, the day before the so-called Settlement Agreement was executed, Leland Fitzgerald gave a receipt and credit of \$4,709.96 against the September 1, 1977, contract payment of \$54,261.03, leaving a balance of \$49,551.70. The \$49,551.70 is shown to have been credited on Exhibit No. 21 as payment on the September 1, 1977, contract.

That was a satisfied judgment and is not reviewable on appeal. Corbett and Gurr attempt in this proceeding to claim that the open court offer, Exhibit No. 9 in this proceeding, is somehow tied to this proceeding as a clarification

of the Settlement Agreement, Exhibit No. 11. By so doing, Corbett and Gurr are attempting to secure the inclusion of that prior issue despite the Court's ruling that the issue was not reviewable on appeal.

This Court should not countenance such a back door approach to inclusion of an issue already ruled upon by this Court as being nonreviewable. The Court should hold that the claim that the Fitzgeralds should honor the contracts of Corbett and Gurr with third parties is barred by the doctrine of res judicata.

POINT III

The Doctrines of Interpretation of Contracts as Applied to the Evidence Presented Preclude the Trial Court's Ruling that the Settlement Agreement Was Enforceable.

On the issue of the interpretation of contracts, three decisions of note should be considered. In Provo City Corporation v. Nielson Scott Co., 603 P.2d 803 (1979), this Court said:

In interpreting the contract in question, this Court deals with a question of law. As such, the same deference need not be accorded the lower court's position as we would accord findings of fact.

Id. at 805.

In Walter E. Heller v. U.S. Rock Wool Co., 762 P.2d 1104 (1988), the Court of Appeals of Utah said:

Questions of contract interpretation, such as this, are questions of law to which we owe no deference but review for

correctness. Ted R. Brown and Assocs. v. Carnes Corp., 753 P.2d 964 (1988).

Id. at 1105.

And in Power Sys. & Controls v. Keith's Elec., 765 P.2d 5 (1988), the Court of Appeals of Utah said:

It is well-settled that if a trial court interprets a contract as a matter of law, the trial court's interpretation is afforded no particular deference on appeal... However, when a contract is ambiguous because of uncertainty or incompleteness concerning the parties' rights and duties under the contract, extrinsic evidence is permissible to ascertain the parties' intent.

Id. at 9-10.

The primary issue in this appeal is that the trial court ordered the plaintiffs to deliver deeds to "honor" contracts entered into between the defendants, Corbett and Gurr, and third parties.

During closing argument of the trial of the former proceeding, counsel for the Fitzgeralds, prior to May 4, 1982, made an offer to the court to honor legitimate contracts Corbett and Gurr had entered into with third parties. That is referred to on page 12 of the Memorandum Decision of Judge Bullock dated May 4, 1982 (Exhibit No. 10, Addendum No. 3).

Plaintiffs attempted during the trial of the matter now at bar to use that open court statement as a basis for interpretation of the meaning of the phrase in the Settlement Agreement (Exhibit No. 11, Addendum No. 7) that said "Fitzgeralds agree to honor all Corbett and Gurr's previous sales."

Even though the open court statement was made more than four months prior to the Settlement Agreement. In applying the rules of interpretation, this Court has stated:

The test to be applied is, would the meaning be plain to a person of ordinary intelligence and understanding viewing the matter fairly and reasonably in accordance with the usual and natural meaning of the words and in light of the existing circumstances.

Auto Lease Company v. Central Mutual Insurance Co., 7 Utah 2d 336, 325 P.2d 264 (1958).

At no place in the pleadings or in the evidence did counsel for Corbett and Gurr, or they themselves, assert that the wording of the Settlement Agreement was ambiguous. While it is well settled that if a contract is ambiguous, extrinsic evidence as to the parties' intent must be received and considered in an effort to glean what the parties actually agreed to, this requires the taking of evidence and the making of factual findings. Hornsby v. Corp. of the Presiding Bishop, Court of Appeals of the State of Utah, July 8, 1988, 758 P.2d 723.

As stated in LDS Hospital v. Capitol Life Insurance Co., October, 1988, 94 U.A.R. 16:

A cardinal rule in construing the contract is to give effect to the intentions of the parties and, if possible, these intentions should be gleaned from an examination of the text of the contract itself.

In testimony, Boyd Corbett stated that when the Settlement Agreement was prepared and signed, Keith Gurr was not

present (Record 280:17-24). Nowhere in the testimony of Boyd Corbett was any explanation given as to the intent of the parties of the expression in the Settlement Agreement "Fitzgeralds agree to honor all Corbett and Gurr's previous sales."

Apparently, Corbett and Gurr's counsel intended to show that the prior open court statement explained the intent of the parties some four months later and it was so indicated in the Findings of Fact. The Court made a Finding No. 20 that the quotation in open court in the earlier proceeding before Judge Bullock is a basis for the background of an interpretation of the Exhibit 11. However, that cannot be the basis of it, first, because it was not contemporaneous with the preparation of the Settlement Agreement. Furthermore, the Supreme Court ruling that addressed that issue in the second appeal and in the ruling of April 19, 1983, by Judge Bullock (Exhibit No. 5) cannot be the basis for the intention of the parties on September 10, 1982.

The Settlement Agreement itself shows that it deals with numerous other matters. The intention of the one-line statement pertaining to the honoring of Corbett and Gurr's sales at the bottom of the Settlement Agreement cannot be inferred from the conduct and behavior presented to the Court prior to a judgment four months earlier.

After the judgment had been entered wherein Judge Bullock had not ordered Fitzgeralds to honor those contracts,

for counsel to say in the Settlement Agreement that that was the intent of the parties is not borne out by the record.

Furthermore, the Record at 253:10-20 and 254:1-25 shows that counsel for Corbett and Gurr says that the transcript was offered not to explain the intent of the parties in the Settlement Agreement, but to demonstrate that a notice of interest filed by Corbett and Gurr predicated the filing of the action at bar is in fact a lis pendens.

The trial court in this matter indicated at Record 256:1-18 that Exhibit No 9, the transcript of the open court offer from the prior trial was received to show the intent of the notice of interest. No testimony was given as to what was meant by the words "honor the previous sales." The words as stated from the four corners of the Agreement, and which were not explained by the testimony of the parties except this reference to the prior open court offer in the earlier trial. The evidence before the trial court does not meet the requirements of this Court's decisions holding that where there is an ambiguity, the Court must first find that there is an ambiguity and must take evidence on that ambiguity.

Nowhere in the Amended Findings of Fact filed by the trial court in this matter does the Court make any finding that this contract is ambiguous, nor does it make any finding except Findings 19 and 20 pertaining to the prior open court statement as a basis to determine the intent of the parties.

In Cottonwood Mall Co. v. Sine, decided November, 1988, 95 U.A.R.-11, page 13, this Court adopted the majority rule from Valcarce v. Bitters, 12 Utah 2d 61, 362 P.2d 427, 428 (1961):

[A] condition precedent to the enforcement of any contract is that there must be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced.

The problem with the statement in the Settlement Agreement is that it does not indicate that if Fitzgeralds are to honor Corbett and Gurr's previous sales, what sales are referred to, nor whether or not by "honoring" they mean that if the consideration paid to Corbett and Gurr on those contracts is turned to Fitzgeralds, then Fitzgeralds would carry out the balance of the terms of the contracts.

As it was presented to the Court by reference to the prior open court statement, Corbett and Gurr are in the inequitable position of asking the Court to order Fitzgeralds to deliver deeds to Corbett and Gurr's buyers, with Corbett and Gurr retaining all of the consideration previously received on those contracts.

The record is deficient in showing the intentions of the parties at the time of signing the Settlement Agreement. As stated in Buehner Block Co. v UWC Associates, 752 P.2d 892 (1988),

there are no findings of fact respecting the intentions of the parties based upon extrinsic evidence.

Id. at 895.

In the case at bar there is no extrinsic evidence other than the inadmissible and improperly received Exhibit 9 transcript from the prior trial from which the intentions of the parties could be determined as to the meaning of "honor Corbett and Gurr's previous sales." Absent such finding, as stated in Buehner, supra, the Court cannot divine the intent of the parties, and the unexplained intent makes the contract unenforceable. This position is further supported by the recent decision of the Utah Court of Appeals, Crowther v. Carter, January 4, 1989, 99 U.A.R. 29, wherein the Court said:

But it is not the function of a court to rewrite an unambiguous contract. Provo City Corp. v. Nielson Scott Co., 603 P.2d 803 (Utah 1979).

Id. at 30.

In this case, the Court ruled on a matter without findings and took an issue in the Settlement Agreement without making findings as to the intent of the parties and without hearing extrinsic evidence, with the exception of a statement made four months earlier in closing argument by counsel prior to the ruling by Judge Bullock in the earlier decision. The court then wrote a condition into the Settlement Agreement and ordered the issuance of deeds on highly questionable contracts, as is more fully explained in the remainder of this brief.

The Court should rule that it was error to hold that

the language in the open court offer prior to judgment to define the intent of the parties four months later in a Settlement Agreement after judgment had been entered and the matter was pending on appeal. Accordingly, the contract should be held unenforceable.

POINT IV

The Trial Court Erred in Ordering Fitzgeralds to Deliver Deeds to James F. Pratt, Vern H. Bollander, Dale E. Beus, Lynn N. and Myna S. Murdock, James B. and Judy R. Alvey, and Corbett and Gurr.

In this case, the trial court, in interpreting the contract to require Fitzgeralds to honor the sales of Corbett and Gurr, ordered the Fitzgeralds to convey deeds to persons designated by Corbett and Gurr in their testimony. The Court further ordered Fitzgeralds to grant a specific performance of the Settlement Agreement and ordered Fitzgeralds to convey to Corbett and Gurr 320 acres of property on payment of \$11,000.

In Barker v. Francis, 741 P.2d 548 (1987), the Court of Appeals acknowledged that

It is not necessary, however, that the contract itself contain all the particulars of the agreement. The crucial factor is that the parties agreed on the essential elements of the contract.

Id. at 551.

In this case, there was no testimony of what the essential elements of the contract were, particularly as it pertains to "honoring the Corbett and Gurr previous sales."

In the Barker case, supra, the Court held that it was improper for the trial court to interpret contracts to require a payment of a one-half interest in the ranch that was the subject of the litigation, because the parties were unable to deliver title to one-half of the ranch properties since their wives had not joined in the Earnest Money Receipt and Offer to Purchase. The Court quoted from Herrin v. Herrin, 595 P.2d 1152, 1155 (Mont. 1979):

While a court may interpret contracts which are open to interpretation, a court may not make a new one for the parties and may not alter or amend one which the parties themselves have made.

The Court then also cited Provo City Corp. v. Nielson Scott Co., 603 P.2d 803, 806 (1979) on the rewriting of an ambiguous contract.

In the case at bar, the contract was clearly ambiguous as to what it meant in the contract to "honor all Corbett and Gurr's previous sales." The Court nevertheless went on to order specific performance. The order to convey title is deficient in several respects:

A. There was no evidence that Fitzgeralds had title to the properties which were the subject matter of the sales of Corbett and Gurr, and could convey title as ordered by the Court.

B. There was an ambiguity and no explanation given as to who was to get the funds already paid to Corbett and

Gurr on their previous sales, as they had done in prior contracts, as testified to by Lee Fitzgerald.

C. There was no testimony on what sales the parties were contemplating when they signed the Settlement Agreement.

D. What does "honor Corbett and Gurr's previous sales" mean?

In order to enter the judgment the trial court had to rewrite terms into that Settlement Agreement that were neither set forth in the Agreement itself nor testified to by any of the parties to the action.

In the Settlement Agreement, it was provided that Leland and Helen Fitzgerald agreed to give by warranty deed 320 acres, and that warranty deeds would be given "at the time it is released to Leland and Helen Fitzgerald as per the schedule with Helen Stassi and John L. Yurka." The judgment entered and signed by the Court provided that upon payment of \$11,000, the plaintiffs were ordered to convey the 320 acres without including the provision that "the warranty deed is to be given at the time the property is released to Leland A. and Helen Fitzgerald" in accordance to their schedule.

In addition, the Settlement Agreement provided that Corbett and Gurr were to pay \$11,000 in three annual installments of \$3,667 plus interest at 7% on the principal balance beginning February 1, 1983. The judgment of the Court ordered Fitzgeralds to convey the title to the property upon the pay-

ment of \$11,000 with no provision for the interest provided in the Settlement Agreement, thus rewriting the terms of the Settlement Agreement.

The testimony of James Pratt is that he traded Corbett and Gurr a bag of diamonds, with an appraised value of \$60,000 but that with Corbett and Gurr he agreed to show them as a payment on a contract of \$22,000. (Testimony of James Pratt, Record 301:11-25, 305:1-6). The sales contract, Exhibits 16 and 16a provided if the lawsuit between Corbett and Gurr and Fitzgeralds goes against the sellers, the seller would return the cash of \$22,000 (Record 305:1-18). The contract with James Pratt was a conditional contract pertaining to the initial lawsuit brought by Corbett and Gurr against the Fitzgeralds, which provided as a condition that if the lawsuit went against Corbett and Gurr, they would return his \$22,000. In fact, the lawsuit did go against Corbett and Gurr, and on appeal it was affirmed, both on the first dismissal of the first appeal and the second appeal. Under those circumstances, the obligation of Corbett and Gurr was to return the cash of James F. Pratt. Nevertheless, the court ordered the Fitzgeralds to convey title to land covered by the contract. Under those circumstances specific performance was erroneously ordered by the court.

Mr. Bolinder was not called at the trial in this matter, and the exhibits pertaining to the Bolinder contract

were presented to the court under the testimony of Boyd Corbett. Exhibit No. 17 shows that a credit was given to Utah Ranchlands for \$15,000 for drilling credit as set forth in the contract and that the balance of \$63,000 had been paid down to a balance of \$43,000 by the time of trial. No order was made that the remaining \$43,000 should be paid over to the Fitzgeralds, who were expected to honor the contract, nor was any order entered pertaining to the \$15,000 drilling certificate credit or the downpayment. Under those circumstances, the trial court was in error in ordering a conveyance of title to Bolinder. No evidence was presented that Fitzgeralds had title to the property that was to be conveyed to Bollanders.

Corbett and Gurr presented as evidence of an agreement with Dale Beus a ledger sheet, Exhibit No. 18, which showed a balance of \$44,850. However, counsel for Corbett and Gurr acknowledged that the Exhibit 18 he submitted as evidence of the Dale Beus contract is not a contract at all, and that it pertains to property in Box Elder County and not any property which is the subject of the Settlement Agreement between the parties (Record 378:6-25).

When Leland Fitzgerald was called to testify regarding the Beus contract, he produced Exhibit No. 24, which counsel for Corbett and Gurr later acknowledged was the only contract between Corbett and Gurr and Beus. Exhibit No. 24 was produced when Mr. Fitzgerald asked Mr. Beus to produce his

contract. He came to Mr. Fitzgerald's home and produced Exhibit No. 24, which is a contract signed by Boyd Corbett only and does not bear the signature of Dale Beus. The unrebutted testimony is that Mr. Fitzgerald confronted Mr. Beus and Mr. Corbett and said he could not understand why they would bring him a contract to sell 80 acres of land for \$10, of which \$1 had been paid, with \$9 yet to be paid. Mr. Beus said that Mr. Corbett said that if he gave Fitzgerald that contract, Fitzgerald would give him 80 acres (Record 321:16-24, 322:1-2). Mr. Fitzgerald went on to inquire of Mr. Beus about this so-called contract and asked Mr. Beus if it was a bona fide contract, why didn't he sign it? Mr. Beus said he did not want to get into any legal trouble and did not want to jeopardize himself and he would not sign it (Record 322:20-23). Clearly the evidence presented to the court, unrebutted, and the examination of Exhibit No. 24, shows that there was no contract between Corbett and Gurr and Beus, and the Court's order ordering the conveyance of title to Mr. Beus of that 80 acres described in that contract is error.

With regard to the Murdock contract, the testimony of the Murdocks was, "I am not sure we had a contract as such, but Boyd owed us some money and we'd invested in another Hide-away Ranch and he had turned it over to the Draper Bank and we'd paid the Bank the installments and finished paying it off through the bank, and we have the cancelled checks and bank

deposit books showing that we was paid in full" (Record 295:9-15). This referred to the Hideaway Ranch in Juab County, not a contract pertaining to the Settlement Agreement as alleged. Mrs. Murdock was asked if they ever had a contract for property in Cedar Valley, to which she said she did not (Record 296:19-21). Mr. Murdock was asked by counsel for Corbett and Gurr whether or not he had a contract for purchase of property (Record 298:5-7):

Q: Did you have a written contract for purchase of that property?

A: We never did have a contract.

Thus, by the Settlement Agreement they were attempting to enforce the honoring of a contract that by the testimony of the buyers was not a written contract.

When the court a year later allowed Corbett and Gurr to reopen the case in a hearing on November 6, 1986, Mrs. Murdock was called and identified a contract (Exhibit No. 30) which they then said was a written contract. They had loaned Corbett and Gurr \$25,000 (Record 416:7-10) and that they had been paying \$40,000 on a Juab County property, the Hidden Valley Ranch property earlier testified to (Record 416:14-16). Then in order to produce a contract, they produced Exhibit 30 and claimed it to be the contract that should be honored.

With regard to James D. Alvey, Corbett and Gurr produced Exhibit No. 15, a Uniform Real Estate Contract dated 14 September 1977 and a record of payments. That record of pay-

ments shows that payments had been received from and after September 10, 1982, the date of the Settlement Agreement, and counsel for Corbett and Gurr admitted that those payments had been received for those several years by Mr. Gurr.

No explanation was made for the reason that if the Settlement Agreement was really a valid and enforceable agreement, why the payments received after September 10, 1982 were not turned over to the Fitzgeralds instead of being pocketed by Mr. Gurr (Record 377:17-22 and 427:25 and 428:1-4). The Court inquired whether the money had been going to Mr. Fitzgerald, but Mr. Brown informed the Court they had not, but they were prepared to pay that money to Mr. Fitzgerald so that he would not be "out." The Court asked if it was being held by the bank, and Mr. Brown stated that the bank was collecting it and they had been giving credit to Mr. Gurr on other indebtedness (Record 428:9-15).

In order for the trial court to have entered the order ordering the Fitzgeralds to convey deeds to these buyers, the court had to write into the contract the definition of what sales were intended by the parties on September 10, 1982, to include the five buyers to whom deeds were to be delivered; the court had to conclude that all of the contracts were enforceable contracts, despite the foregoing explanations of the inadequacy of the contracts; and the court had to write into the Settlement Agreement a provision that Corbett

and Gurr were to retain all of the payments they had received, except those received after 1982 on the Alvey contract; and that Fitzgeralds should convey by deeds to the various parties without any other evidence being presented as to whether or not title of the specific property involved was held by Fitzgeralds. The order of conveyances in the judgment is in error and should be reversed by this Court.

POINT V

The Trial Court Erred in Failing to Award Damages and Attorneys Fees to Fitzgeralds for Expenses Incurred as a Result of the Filing of the Faulted Notice of Interest by Corbett and Gurr.

After Judge Bullock had entered judgment June 25, 1982, in the original proceeding brought by Corbett and Gurr against Fitzgeralds (Addendum 4), Utah Ranchlands filed a Notice of Interest and recorded it on November 1, 1982 (Exhibit No. 2, Addendum No. 12). On April 18, 1984, Boyd Corbett filed a Notice of Interest (Exhibit No. 3, Addendum No. 17) (Testimony of Boyd Corbett, Record 226:23-25, 227:1-23).

The property described in the notice of interest was part of the properties included in Judge Bullock's judgment (Exhibit No. 1, Addendum No. 4). Testimony of Boyd Corbett was that at the time of filing of the notice of interest he knew that they were included within the descriptions of the judgment declaring that Corbett and Gurr and Utah Ranchlands had no interest in those described proerties (Record 227:24-25, 228:1-3).

Thereafter, Corbett and Gurr's counsel introduced Exhibit No. 9, which is the partial transcript pertaining to the open court offer of the Fitzgeralds, in order to show that the notice of interest was intended to be a lis pendens (Record 253:4-20).

The first notice of interest was recorded on November 1, 1982, the same date that the Supreme Court dismissed the appeals of Corbett and Gurr in Supreme Court 18529 and 18594 (Exhibit No. 4, Addendum 11).

Neither in filing their initial appeals or in the subsequent appeals, did Corbett and Gurr ever file a motion for stay of execution pending appeal and or supersedeas bond. Under numerous established decisions of this court, the judgment of Judge Bullock from the time of its entry and recording (Exhibit 1, Addendum 4) which judgment was recorded on June 30, 1982, was a valid and enforceable judgment which under paragraph five ruled that Corbett and Gurr had no interest in the properties described in Exhibit A attached to the judgment. Corbett admits it included the properties which were the subject matters of the notice of interest.

At that point, on November 1, 1982, the parties had no pending litigation.

Pursuant to the provisions of 78-40-2, Utah Code Annotated, 1953 as amended, a lis pendens may be filed "in any action affecting the title to or the right of possession of

real property." Plaintiff, at the time of the filing of the complaint or thereafter, may file a notice of the pendency of action. The notice of interest is not a notice of a pendency of action; there was no pending action; it was a final judgment which became ultimately final on November 1, 1982, prior to the filing of the notices of interest. At that time, Corbett and Gurr had no interest in the properties.

This action was commenced originally as an action for slander of title and to remove the cloud on the title occasioned by the notice of interest. Plaintiffs put into evidence Exhibits 6, 7 and 8, coupled with the testimony of Lee Fitzgerald as to damages he suffered as a result of being drawn into litigation by T.H. Bell, in part due to the filings of the notice of interest. The fact that that lawsuit was in part caused by the notice of interest is demonstrated by Exhibit 8, letters from T.H. Bell, and particularly the letters dated February 12, 1983 and February 13, 1984, typewritten letters which are a part of Exhibit A in which T.H. Bell asserts the fact that Corbett and Gurr had filed notices clouding the title and impairing his sales. T.H. Bell had a contract that originally had been entered into with Corbett and Gurr. When Corbett and Gurr defaulted, it was then rewritten as a contract between Fitzgeralds and T.H. Bell (Exhibit No. 7). In addition to that, Fitzgeralds put into evidence the attorneys fees occasioned by the litigation (Exhibit No. 25).

In the recent decision of Bass v. Planned Management Services, 761 P.2d 566 (1988), this Court addressed the elements of a slander of title action, which requires a slanderous written or oral statement. The Court said

A slanderous statement is one that is derogatory or injurious to the legal validity of an owner's title or to his or her right to sell or hypothecate the property.

Id. at 568.

The testimony of Lee Fitzgerald, coupled with the exhibits (Record 233:4-25 and 234:1-9) demonstrate the required proof of special damages.

The second element stated in Bass, supra, is that the statement must be false. At the time of the recording of the notice of interest, Judge Bullock had ruled that Corbett and Gurr and Utah Ranchlands had no interest in those properties; therefore, the two notices of interest filed constituted a false statement.

The statement must also have been made with malice, and this court declined at that time to rule on the definition of malice, but the testimony of Boyd Corbett referred to above was to the effect that he knew that the court had ruled that he had no interest in the property; nevertheless, he filed both notices of interest. Fitzgeralds now assert that that knowledgeability of the lack of interest in the property and the filing of the notices constitute a legal malice, meeting the third requirement for a slander of title.

Fourth, specific damages must be proven. The exhibits cited above demonstrate that Mr. Fitzgerald incurred over \$8,000 in legal expenses, plus attorneys fees, to bring the action to clear the title. Under those circumstances, it was error for the trial court to decline to award damages, even though the court ordered the removal of the notices of interest as not being valid claims against the property and not a lis pendens under 78-40-2.

The court went on to say that:

Slander of title actions are based only on palpable economic injury and require a plaintiff to prove special damages... Special damages are ordinarily proved in a slander of title action by evidence of a lost sale or the loss of some other pecuniary advantage. Absent a specific monetary loss flowing from a slander affecting the saleability or use of the property, there is no damage.

Id. at 568.

In this case, the unrebutted testimony and evidence submitted by Fitzgeralds shows that they incurred legal expenses to defend the action brought against them by T.H. Bell, and also the attorneys fees involved in this proceeding to clear the title. All of that meets the requirements set forth in Bass, supra.

This Court should rule that it was error to decline to award Fitzgeralds damages for the slander of title.

CONCLUSION

This Court should rule that the so-called Settlement Agreement is unenforceable because Corbett and Gurr failed to meet the conditions precedent of payment of \$49,000 on September 10, 1982. This Court should further rule that the Settlement Agreement is unenforceable because of the breach of contract of Corbett and Gurr in failing to drop the actions they had commenced against the Fitzgeralds, and their failure to make payment of the \$11,000 in accordance with the terms of the Settlement Agreement.

This Court should further rule that the issue of honoring Corbett and Gurr's prior sales is res judicata and barred by the prior rulings of the Utah Supreme Court and Judge Bullock's rulings.

The Court should further rule that the Agreement was vague and ambiguous, and that the trial court failed to take evidence to establish the intent of the parties at the time as regards the issue of honoring of prior sales, and that without such findings the Agreement cannot be implemented.

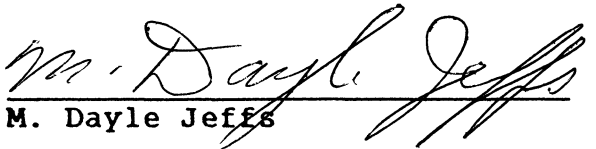
The Court should also rule that the Order of the trial court ordering the delivery of deeds is in error, and reverse the decision of the trial court.

The Court should reverse the trial court's decision on the slander of title issue, and should the trial court to enter judgment in accordance with testimony now before it, or

to take further testimony on the issue of damages suffered by the Fitzgeralds as a result of the improperly filed notice of interest.

This Court should reverse the disposition of the trial court.

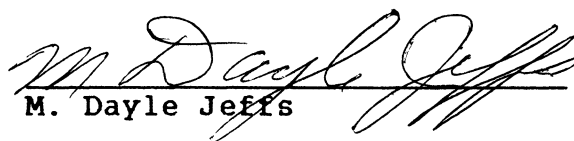
Respectfully submitted this 22nd day of February, 1989.


M. Dayle Jeffs

CERTIFICATE OF DELIVERY AND OF MAILING

I hereby certify that eleven copies of the foregoing was delivered to the Clerk of the Court, Utah Supreme Court, and that four copies were mailed to the below named parties by placing same in the United States mails, postage prepaid, this 22nd day of February, 1989, addressed as follows:

James R. Brown
Jardine, Linebaugh, Brown & Dunn
370 East South Temple, #400
Salt Lake City, UT 84111


M. Dayle Jeffs

ADDENDUM NO. 1

JAMES R. BROWN (#456)
JARDINE, LINEBAUGH, BROWN & DUNN
Attorneys for Defendant Keith Gurr
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 532-7700

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

LEE A. FITZGERALD and)	
HELEN FITZGERALD, his wife,)	
)	JUDGMENT
Plaintiffs,)	
)	
vs.)	
)	
BOYD CORBETT and KEITH GURR,)	
and UTAH RANCLANDS,)	Civil No. 63914
)	Judge George E. Ballif
Defendants.)	

The above-entitled matter came before the Honorable George E. Ballif, Judge, for trial on the 24th day of October, 1985 and continued from time-to-time until the 6th day of November, 1986, when the matter was finally concluded by way of testimony and final argument. The Court having made its Findings of Fact and Conclusions of Law and being fully apprised in the premises and for good cause appearing, therefor, it is hereby,

ORDERED, ADJUDGED AND DECREED that Plaintiffs are entitled to have the two notices of interest which appear of record in the Utah County Recorder's Office to be removed. It is further,

ORDERED, ADJUDGED AND DECREED that Plaintiffs are not entitled to any recoverable damages as the same has not been shown. It is further,

ORDERED, ADJUDGED AND DECREED that Defendants are entitled to specific performance of the Settlement Agreement dated September 10, 1982 and that upon payment of the sum of \$11,000, Plaintiffs are hereby ordered and directed to convey to the Defendants 320 acres of real property, more fully described as follows:

The Southwest Quarter of the Southeast Quarter and the West half less the Southwest Quarter of the Northwest Quarter of Section 3, Township 8 South, Range 2 West, Salt Lake Base and Meridian.

It is further,

ORDERED, ADJUDGED AND DECREED that Plaintiffs and each of them are to convey to the persons and the property as provided below:

a. To James F. Pratt, the Southwest Quarter of the Southwest Quarter of Section 36, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

b. To Vern H. Bolinder, the South one-half of the Southeast Quarter of the Northeast Quarter and the West one-half of the Northeast Quarter of Section 10,

Township 8 South, Range 2 West, Salt Lake Base and Meridian, and the Southwest Quarter and the North one-half of the Northwest Quarter and the Southeast Quarter of the Northwest Quarter of Section 3, Township 8 South, Range 2 West, Salt Lake Base and Meridian, and Parcel No. 33, Section 5, Township 8 South, Range 2 West, Salt Lake Base and Meridian.

c. To Dale E. Beus, the North half of the Southwest Quarter of Section 30, Township 7 South, Range 1 West, Salt Lake Base and Meridian.

d. To Lynn N. Murdock and Mina S. Murdock, his wife, Lots 1 and 2 of the West half of the Northwest Quarter of Section 30 and commencing at the center of Section 30, thence East 80 rods, thence North 100 rods, thence West 160 rods, thence South 100 rods, thence East 180 rods, to the point of beginning, all in Section 30, Township 7 South, Range 1 West, Salt Lake Base and Meridian.

It is further,

ORDERED, ADJUDGED AND DECREED that Defendants cause to be paid to the Plaintiffs the sum of \$17,279.91 together with interest at the rate of 8.75% from and after September 10, 1982, and upon receipt of said payment, Plaintiffs are to deed to James D. Alvey and Judy R. Alvey, his wife, and others as

provided in the Uniform Real Estate Contract, all of the Southeast Quarter of Section 28, Township 7 South, Range 2 West, Salt Lake Base and Meridian. Payment provided herein, however, is to be upon the same terms and conditions as contained in the September 14, 1977 contract and it is recognized that those payments are not all due at the present time and that the payments will be made at the rate of \$350.92 per month until paid in full.

DATED this 27th day of October 1987.

BY THE COURT:



GEORGE E. BALLIF
Judge

ADDENDUM NO. 2

OCT 27 PM 1:3

FILED
[Signature]

JAMES R. BROWN (#456)
JARDINE, LINEBAUGH, BROWN & DUNN
Attorneys for Defendant Keith Gurr
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 532-7700

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

LEE A. FITZGERALD and)	
HELEN FITZGERALD, his wife,)	
)	AMENDED
Plaintiffs,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
vs.)	
)	
BOYD CORBETT and KEITH GURR,)	
and UTAH RANCLANDS,)	Civil No. 63914
)	Judge George E. Ballif
Defendants.)	

The above-entitled matter came on for trial before the Honorable George E. Ballif on the 24th day of October, 1985, and continued from time-to-time until the 6th day of November, 1986 when the matter was finally concluded by way of additional testimony and final argument. The Court having taken the matter under advisement and fully considered the same now hereby makes its:

FINDINGS OF FACT

1. Plaintiffs are husband and wife and have entered into certain contractual negotiations with Defendants.

2. The Defendants agreed to purchase certain real property located in Utah County, which purchase agreement was the subject matter of prior litigation before this Court in the matter entitled Boyd Corbett and Keith Gurr, individuals, and Utah Ranchlands, a partnership, v. Lee A. Fitzgerald and Helen Fitzgerald, his wife, Perry G. Fitzgerald and Carolyn S. Fitzgerald, his wife, Civil No. 50224.

3. The trial court, Judge J. Robert Bullock, sitting without a jury in Civil No. 50224, rendered a decision in May of 1982 affecting the parties' contractual rights and obligations. Judge J. Robert Bullock entered a second judgment dated June 25, 1982, Plaintiffs' Exhibit No. 1. Defendants herein, through counsel, filed a Notice of Appeal, No. 18,529, in the Supreme Court of the State of Utah after Judge J. Robert Bullock had rendered the decision in May, 1982, but prior to the time that Judge J. Robert Bullock had entered a judgment, Plaintiffs' Exhibit No. 1, on June 25, 1982. After the entry of the judgment by J. Robert Bullock, Defendants herein filed an appeal with the Utah Supreme Court, No. 19,594.

4. Appeals No. 18,529 and No. 19,594 were dismissed by order of the Utah Supreme Court on November 1, 1982.

5. Defendants in this action purchased, under several Uniform Real Estate Contracts, certain properties from

Plaintiffs and in turn sold various parcels thereof to third parties who are not parties to this litigation.

6. A major concern of all parties, both in the preceding litigation and this litigation, is the rights of the innocent purchasers who were to receive title through Defendants in this action from the purchase of real property from Plaintiffs.

7. Defendants herein were dissatisfied with the decision of May 1983 and filed the notices of appeal primarily to have reviewed by the Utah Supreme Court the question of "innocent third parties" to whom they had sold certain parcels of the property being purchased from Plaintiffs since that question had not been answered by the earlier litigation.

8. That parties, after the notices of appeal had been filed, negotiated and entered into an agreement which appears as Exhibit No. 11 entitled Settlement Agreement.

9. The Plaintiffs acknowledged that they executed the document in the presence of Mr. Corbett on or around September 10, 1982, the date it bears.

10. Mr. Corbett testified that within 24 hours of the Corbett/Fitzgerald signing, Mr. Gurr signed the document.

11. At the time of the execution of Exhibit No. 11, on or about September 10, 1982, there was a pending appeal before the Supreme Court filed by the Defendants.

12. After the Settlement Agreement, Exhibit No. 11, had been executed, Plaintiffs filed a Motion to Dismiss the appeal on October 18, 1982, and the Defendants herein allowed to go unopposed said motion to dismiss the appeal, and the appeal was duly dismissed by the Utah Supreme Court consistent with the language of the Settlement Agreement, Exhibit No. 11.

13. Subsequent to the dismissal, Plaintiffs Leland A. Fitzgerald, wrote two letters to the Defendants which appear as Exhibits 19 and 20, acknowledging the dismissal of the case before the Utah Supreme Court and inquiring about a list of purchasers on contracts referred to in the Settlement Agreement, Exhibit 11.

14. The clear intent from Exhibit No. 11 and Exhibits 19 and 20 is that Plaintiffs would honor the outstanding third party contracts and that any purported limiting language in Exhibits 19 and 20 of "honor all legitimate claims" and "consider honoring (Murdock) contract if it was at his residence within five days" would simply go to the manner in which performance could reasonably be expected to take place and that reasonable times to tender them and consider their authenticity would be matters based upon reasonableness under the circumstances rather than views of Plaintiffs as expressed in those letters.

15. Subsequent to September 10, 1982, Plaintiffs were paid \$49,000 on the DuPratt contract, and Defendants offered to

make payment in to court of the three annual installments of \$3,667 for the payment of the 320 acres. There is good and valuable consideration to support the agreement which appears as Exhibit No. 11.

16. Some of the provisions of the contract have been performed to date and the court finds as fact that Defendants have attempted to perform the remainder of the provisions and have offered to make payment and stand ready, willing and able to perform the remaining provisions.

17. That there are five contracts of which the Defendants had entered into with innocent third party purchasers which contracts should be honored pursuant to the terms and conditions of Exhibit 11 and they are as follows:

a. James D. Alvey and Judy R. Alvey contract, dated September 14, 1977, appears as Exhibit 15;

b. James E. Pratt contract, entered into on August 15, 1981, appears as Exhibit 16;

c. Vern H. Bolinder contract, dated December 2, 1977, which appears as Exhibit 17;

d. Dale E. Beus contract, dated May 27, 1981, which appears as Exhibit 24;

e. Lynn N. Murdock and Mina S. Murdock contract, dated December 15, 1978, which appears as Exhibit 30.

18. Plaintiffs are entitled to any and all payments due or to become due from and after September 10, 1982 on any

of the five contracts, and upon receipt of those payments, Plaintiffs and each of them are to convey to the five purchasers from Defendants the real property as described in the contracts.

19. In final argument in the original case, counsel for Plaintiffs urged to the court to adopt the Fitzgerald's position and stated to the court:

We, Mr. and Mrs. Fitzgerald, do not want the persons who have bought from Corbett and Gurr to be hurt. And so we are suggesting to the court that an equitable verdict on termination would be if the court would terminate Corbett and Gurr out and enter as part of that termination order that Lee and Helen Fitzgerald honor all of the contracts that Corbett and Gurr have entered into with innocent bona fide purchasers of property under that contract. And they will do so and they are willing to do it for the remaining unpaid balance. If the persons have paid it all and not got their title, he'll just give them their title for nothing. If they've paid all but the last payment, he will take the last payment and give them their title. So that no persons will be hurt as a result of the terminating of the Corbett and Gurr contract. They will all be honored, if they are bona fide purchasers. I'm not talking about contractors that like the price, I'm talking about bona fide purchasers of land who would be purchasers."

20. The foregoing quote by counsel for Plaintiff in the original proceeding is not an agreement made in open court, but is background for the interpretation of Exhibit No. 11, and the authenticity of the document, Exhibit 11, which is the compromise of the dispute between the parties while the matter was on appeal.

21. That as a result of the entering into Exhibit No. 11, and the refusal by Plaintiffs to honor the contracts and accept the payments tendered by Defendants, Defendant Corbett filed of record two "notices of interest" which appear as Exhibits No. 2 and 3.

22. That Exhibits 2 and 3 do not constitute a valid lis pendens.

23. Plaintiffs have failed to show any damages that have been incurred as a result of the filing by Defendant Corbett of the "notices of interest."

WHEREFORE, the Court having found the foregoing Findings of Facts, now hereby enters its:

CONCLUSIONS OF LAW

1. Plaintiffs are entitled to removal of the notices of interest.

2. Plaintiffs are not entitled to any damages as a result of the recordation of said notices of interest.

3. That the agreement between the parties, Exhibit 11, is a valid contract between the parties and that the parties on both sides are entitled to a specific performance of the same and that the five purchasers of the parcels delineated in Exhibits 15, 16, 17, 24 and 30 are entitled to have the property deeded to them upon payment of any and all obligations

that were due and owing as of September 10, 1982. That the James D. Alvey and Judy R. Alvey contract had a balance due as of September 10, 1982 of \$17,279.91. That all payments received from and after that date should be the property of Plaintiffs and each of them. Upon full payment by James D. Alvey and Judy R. Alvey, as provided in Exhibit 15, Plaintiffs are to deed to the Alveys said property as described in Exhibit 15.

4. That the property described in Exhibit 16 to James F. Pratt, Exhibit 17 to Vern H. Bolinder, Exhibit 24 to Dale E. Beus, Exhibit 30 to Lynn N. Murdock and Mina S. Murdock, his wife, were all paid in full prior to September 10, 1982, and Plaintiffs are directed to deed to said individuals the property as described in the respective contracts.

5. That Defendants and each of them are to pay to the Plaintiffs the sum of \$11,000 in an exchange therefore and upon payment of the same, Plaintiffs are to deed to the Defendants 320 acres consisting of the Southwest Quarter of the Southeast Quarter and the West half except for the Southwest Quarter of the Northwest Quarter of Section 3, Township 8 South, Range 2 West, Salt Lake Base and Meridian.

6. Defendants are entitled to their costs in this proceeding.

DATED this 27th day of October, 1987.

BY THE COURT:



GEORGE E. BALLIF
Judge

ADDENDUM NO. 3



FILED
DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

1977 MAY -4 PM 1:35

WILLIAM E. HUGHES, CLERK
W.E.H. DEPUTY

DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH

BOYD CORBETT and KEITH GURR,
Individuals, and UTAH RANCHLANDS,
a Partnership,

Plaintiffs,

vs.

LEE A. FITZGERALD and HELEN
FITZGERALD, his wife, PERRY
G. FITZGERALD and CAROLYN S.
FITZGERALD, his wife,

Defendants.

Civil No. 50224

MEMORANDUM DECISION

See 115

Throughout this Memorandum Plaintiffs Corbett and Gurr will be referred to as P, Defendant Leland Fitzgerald as D, and Third Party Defendant as PF.

On January 31, 1977, D purchased 12,940 acres of land located in Cedar Valley from Richard McKinney. Under that contract, the land covered thereby was to be released to D as follows:

1. 24 40-acre tracts (960 acres) upon receipt of \$75,000 down payment on or before April 1, 1977; and,
2. 10 40-acre tracts (400 acres) upon receipt of each \$30,000 annual payment to be made on or before February 11, 1978, and each year thereafter.

One quarter section (160 acres) by the Hillside Stake Farm was to be released first, and the balance to be released beginning on the south side working northward.

On February 1, 1977, the following day, D entered into an earnest money agreement with P for the sale of a portion of the property covered under the McKinney contract. Shortly thereafter, D received two checks amounting to \$10,000, the amount shown as earnest money. This agreement

granted to P/buyer a one-year option to purchase an additional 10,300 acres of property covered in the McKinney contract. Under the terms of the earnest money agreement, P was to pay \$100,000 no later than May 1, 1977 and another \$100,000 no later than July 1, 1977, at which time D was to release certain portions of the McKinney property to P. D testified that on the due date of the first payment, Corbett (P) failed to appear at Draper Bank with the money and therefore that Gurr (P) agreed that the earnest money should be forfeited.

However, on May 13, 1977, shortly after the due date of the first \$100,000 payment under the earnest money agreement, a contract was negotiated between D/seller and P/buyer for the sale of 3,140 acres of the property covered under the McKinney contract, which contract along with others incorporated most of the property covered under the earnest money agreement. By the terms of the May 13 contract, P was to pay \$136,000 down and \$16,600 plus interest (\$39,350 the first year) on June 1, 1978, 1979, and 1980, and \$33,200 hereafter until paid in full - the full price being \$461,000. Upon the closing on June 7, 1977, P did not have \$136,000 cash and D therefore accepted a one-month note for \$62,556, apparently the difference between the full down payment and a payment to be made on P's behalf by Curtis Young. D does not acknowledge receipt of the \$73,400 payment and claims he received no additional money until August 24, 1977 when P paid \$30,000. On September 2, 1977 D claims P paid an additional \$34,676.50 on the May 13 contract down payment. The note was renewed until January 2, 1978, but remains unpaid.

The May 13 contract was ambiguous as to D's obligation to release and deed property to P. The contract made apparently conflicting demand that D release 380 acres upon closing and release one acre for each \$116.87 of principal paid. D released 380 acres upon closing, but no further releases have been made. D was required to release and deed to P

142 acres each June 1 concurrent with P's payment. No additional payments or deeds were exchanged relative to the May 13 contract.

In August 1977, D sold to P 320 acres of the McKinney property which was not covered in any other contract. These 320 acres were part of the 960 acres due D from McKinney upon down payment. Although D delivered title to P, D received only a portion of the purchase price and a note for the balance. This note, in the amount of \$3,856.90, came due on January 2, 1978, the same day as the note on the May 13 contract, but also remains unpaid.

On March 6, 1978, P sold 2/3 of the May 13 contract property, a total of 2,240 acres, to PF. When PF became aware of contract disputes relative to the May 13 contract between P and D, he failed to make the payment to P required on September 6, 1978. Instead, PF made the payment to D. On October 6, 1978 P terminated PF's interest in the property for failure to make payment. P offered to rescind the contract with PF by returning the property traded to P as down payment but PF refused.

During the period of time between June 7, 1977 (execution of the May 13 contract) and June 1, 1978 (the due date of the first payment under the May 13 contract) disputes arose between P and D. the disputes centered on the crediting of P for the \$10,000 earnest money, P's willingness to pay on the notes relating to both the closing of the May contract and payment on the August contract, and D's ability to deliver releases to additional ground as required under the May contract.

These disputes came to a head following the June 1, 1978 due date of the first installment payment on the May 13 contract. On that date P was to pay D \$16,600 plus interest for a total of \$39,350. In return D was obligated to release and deed one acre of ground for each \$116.87 of principal received, or about 142 acres. When P failed to make the

June 1, 1978 payment within the 30-day grace period, D sent a notice of termination to P. P claims this notice did not meet statutory requirements. A meeting ensued shortly thereafter on July 10, 1978 at which time P claimed to be ready, willing, and able to perform, but that D could not produce the required releases. D claimed he had the deeds at this meeting ready to convey, but would not give them to P because P wanted credit for the \$10,000 earnest money. The escrow agent present at this meeting testified that she did not see the deeds and that when she later checked, no deeds had been recorded by D. On August 3, 1978, P wrote a letter to the escrow agent stating that P would pay D when D could show where P had been credited for the \$10,000 earnest money. On January 15, 1979, D filed the notice of termination against P, which P also claims was defective. No further payments or releases have been made under the May 13 contract.

During this period of dispute under the May 13 contract, more specifically on September 6, 1977, P and D entered into an option contract whereby P was granted an option to purchase an additional 6,380 acres of the property covered under the McKinney contract. The option was to be exercised by written notice from P to D on January 15, 1978, at which time a \$100,000 down payment was apparently due. Between the time the option contract was entered into and the time it was to be exercised, P, with D's knowledge, sold some of the ground covered under the option to several third parties. In particular, P had arranged to trade a portion of the option property to McOmber for a motel. P needed releases to 400 acres of the property covered under the McKinney contract in order to make the trade. Under the option contract, all releases granted after execution of the option contract were to be in accordance with D's contract with McKinney. As of the execution date of the option, McKinney was obligated to have provided D with 960 acres, most of which D had already sold and deeded to P under the May 13 contract (380 acres),

and the August contract (320 acres). The evidence indicates that another 160 acres of the 960 released to D, which were not covered under any contract between P and D, were sold to a third party. Thus, as of the execution date of the option, McKinney was not obligated to provide releases to more than 100 acres of the property covered under the option.

However, on February 11, 1978 upon D's payment of \$30,000 to McKinney, McKinney was obligated to release another 400 acres to D, and therefore to P if the option had been exercised. According to P, these 400 acres were to include the property which he had traded to McOmber. Prior thereto, in December of 1977, D had advised P that he was having trouble getting the releases from McKinney. As a result, P was unwilling to turn over the \$100,000 down payment on the option to D, unless D could produce deeds to the 400 acres due D from McKinney on February 11, 1978. In addition, P claims D paid McKinney on January 4, 1978 in advance of the January 15, 1978 execution date on the option and that therefore D was obligated to deliver the 400 acres on the execution date. McKinney, in fact, did not deliver the releases in accordance with his contract with D.

Although no written notice that P intended to exercise the option was given to D, P claims they tendered performance as of the execution date by depositing with the escrow agent a blank check made out to D (with available funds sufficient to cover the check) and by instructing the escrow agent to issue the check if D could produce releases to the 400 acres.

P now seeks specific performance of the May contract and the September option, and alternatively, damages. D counterclaims to recover on the unpaid notes, to terminate any claims P might have to the option property, and to recover the balance owing on the May 13 contract or, in the alternative, to quiet title to the May 13 contract property in D according to the termination notice.

As to P's claim against PF, P seeks to enforce

paragraph 16A of the Uniform Real Estate Contract, which releases him from any obligation to convey property and allows P to retain all payments as liquidated damages. PF seeks to recover the difference between the value of the property he gave and the value of the property he received. In the event the May 13 contract is enforced, PF seeks judgment for the difference between the rescission amount, as described above, and the amount owing to P upon reinstatement of the March contract.

All parties seek to recover attorney fees.

EARNEST MONEY AND OFFER TO PURCHASE

The Court is of the opinion that the earnest money agreement was replaced by several subsequent contracts by tacit, if not express, agreement of the parties. There is some question, therefore, as to whether or not either party has shown by a preponderance of the evidence a meeting of the minds with respect to the \$10,000 earnest money essential to a finding by the Court of an enforceable contract with respect thereto. However, the Court believes that the evidence does preponderate in favor of the proposition that D gave P credit for the \$10,000 by reducing the purchase price of the land under the May 13 contract from \$471,000 to \$461,000, and therefore, the issue is moot.

MAY 13 CONTRACT

The language of paragraph 20 of the May 13 contract is ambiguous as to the obligations of each party at the time of execution. By the terms thereof seller is to release and deed to buyer "one (1) acre for each \$116.87 principal reduction paid hereunder." The contract further states that "concurrent with the execution of this agreement Seller shall release and deed to Buyer title to the following described land:", which included 380 acres of specific property. The ambiguity lies in the amount of property D is required to release and deed to P upon payment of the \$136,000 down payment. If the "one-acre-for-each-\$116.87-principal-reduction" clause operates independent of the "concurrent-with-execution"

clause, and principal is construed to mean the full purchase price of \$461,000 rather than the balance of \$325,000, then upon execution D would be required to release and deed to P an excess of 1163 acres. If the "one-acre-for-each-\$116.87-principal-reduction" clause applies only to the balance of the \$325,000, then D would only be required upon execution to release and deed 380 acres as described.

The evidence preponderates toward the latter view for the following reasons:

1. Under the first interpretation, D would have had to release and deed to P upon execution more ground than P would have paid for. The purchase price of the ground was \$150 per acre. At that rate P would have paid for about 907 acres but would have received releases and deeds to at least 1163 acres upon execution of the contract.

2. There is no evidence that upon closing P demanded more than 380 acres or made any arrangements for the release of more ground prior to the initial payment.

3. The term "principal" generally applies to an amount financed against which interest is charged. D financed \$325,000 not \$461,000.

4. Under the first interpretation, all deeds would have been transferred when less than 80% of the purchase price had been paid. However, under the latter interpretation, the last of the property would have been transferred concurrent with the final payment.

Based on the foregoing interpretation of the contract, the Court finds that neither party was in breach prior to June 1, 1978, the date the first installment payment became due. D had performed his duty to that point by deeding 380 acres to P. P's counterperformance was the payment of \$136,000. Although D signed the May 13 contract which acknowledged receipt of \$136,000, the money was not received, and the evidence indicates that neither party expected to receive it until some unspecified time after closing. Apparently,

\$73,400 of the down payment was to be paid by Curtis Young on P's behalf. The balance of the \$136,000 was given by P to D in the form of a promissory note in the amount of \$62,556 ($\$73,400 + \$62,556 = \$135,956$).

Although the evidence shows 1) that D has never been paid on the note, the renewal of which came due on January 2, 1978, and 2) that Curtis Young and others have not paid more than \$64,676.50 of the alleged \$73,400, the Court believes D acquiesced to P's method of making the down payment. There is no evidence that D demanded P's performance prior to June 1, 1978. And, neither of D's termination notices referred to delinquency on the down payment. D's first notice to P dated June 29, 1978 states, "If all payments due under this contract are not paid in full immediately, this contract will be rescinded..." Unfortunately, it does not state what payments D considered due. However, it is dated the day before the expiration of the 30-day grace period relative to the June 1, 1978 payment. The next notice dated July 31, 1978 referenced only the "Payment due June 1, 1978," although no further payments had been made between the dates of the two notices.

The critical issue relative to the May 13 contract is whether or not either party placed the other in breach by tendering performance required as of the June 1, 1978 installment payment. It is clear to the Court that D was obligated to release and deed 142 acres to P upon each June 1 payment of \$16,600 plus interest starting in 1978, and continuing until 1981 when the acreage and the payment were to double. In the Court's view of the law, obligations to pay and obligations to release and deed property which become simultaneously due are generally considered conditions concurrent. Specifically, it is the Court's opinion that D's duty to release and deed property to P did not arise until P came forth with the payment and, conversely, P's duty to make the payment did not arise until D came forth

with the releases and deeds.

According to Williston,

"It is one of the consequences of concurrent conditions that a situation may arise where no right of action ever arises against either party. Since a conditional tender is necessary to put either party in default, so long as both parties remain inactive, neither is liable and neither has acquired a right of action. Moreover, the possibility of putting either party in default will cease if the delay is too long. It may be supposed by the terms of the contract the concurrent performances were to be rendered on a day fixed, or it may be supposed that no time was stated for performance. Under the first supposition (which is the case here) if time was of the essence of the contract both parties will be discharged unless one or the other takes the initiative and makes a conditional tender at or about the time stated in the contract."

Williston on Contracts, Section 832, Sufficiency of Readiness and Willingness to Perform, pp. 96-100.

The situation described by Williston fits the facts of this case. D failed at any time to tender performance of his obligation to "release and deed" property to P upon the June 1, 1978 payment. D's alleged tender at the July 10, 1978 meeting was insufficient because D did not have the ability to perform at that time. The escrow agent's testimony was that no deeds had been recorded from McKinney to D upon search following the July meeting. D did not allege nor did the evidence show any other attempt on the part of D to tender his performance.

P also failed to tender performance of the June 1, 1978 payment. Assuming P had the present ability to perform and that D had waived any objection to the method of payment, P's alleged tender at the July 10, 1978 meeting failed because it was contingent upon performance to which P was not entitled. "A tender, to be good, must be free from any condition which the tenderer does not have a right to insist upon." Sieverts v. White, 2 Utah 2d 351, 273 P.2d 974. Apparently P's tender was contingent upon two conditions, neither of which P was entitled to. The conditions were 1) credit for the \$10,000 earnest money and 2) release of deeds for payment of the down

payment according to the "one-acre-for-each-\$116.87-of-principal-paid" clause. (See discussion of the interpretation of the May 13 contract, above) The escrow agent testified that, based on her recollection of the July 10, 1978 meeting, "(T)here was some dispute over the \$10,000 and some dispute as to whether or not Lee actually had to get some of the land released from McKinney or not." P's letter of July 21, 1978 substantiates and clarifies P's conditions. In the letter P states that \$73,400 was paid down and that \$16,600 of principal was tendered and therefore he was entitled to release of 770 acres ($\$73,400 + \$16,600 / \$116.87 = 770$), less the 380 acres received with the down payment, or 390 acres. Under our interpretation of the contract, D's counterperformance relative to any of the down payment (the alleged payment of \$73,400) was satisfied upon receipt of the initial 380 acres. P therefore had a right to only 142 acres upon the June 1, 1978 payment and not 390 acres as he requested.

The parties clearly agreed that time was of the essence. (See paragraph 16 of the contract) Neither party tendered performance at the specified time. The first alleged tender did not occur until 40 days after the due date of the June payment and 10 days after the expiration of the grace period. At that time D could not produce the required deeds and P was asking for ground and earnest money credit to which he was not entitled. No further tender was made of the performance required by either party on June 1, 1978

Where neither party performed, or tendered performance in a timely manner, and time was of the essence, it is the opinion of the Court that both parties were discharged of their duties under the contract, and the parties should be left where they are found unless the Court in equity should decide that such would amount to an unjust enrichment of

one of the parties. "Under some circumstances a quasi contract arises independent of the intention of the parties where a special contract has been partly performed and such quasi contract is founded upon the doctrine of unjust enrichment. The basis of liability under a quasi contract resulting from a part performance of a special contract is the benefit conferred upon a defendant by the part performance of a special contract, and not the detriment incurred by the plaintiff." 66 Am. Jur. 2d, Restitution and Implied Contracts, Section 12. Partial or defective performance of contract, ¶. 954.

Williston adds,

"Indeed, wherever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract, restitution of the value of what has been given must be allowed."

Williston on Contracts, Section 1479, Rescission & Restitution, No Liability in Contract, at pp. 271-272. Also, Williston clearly sets forth the elements of a claim for unjust enrichment:

- "1. A benefit conferred upon the defendant by the plaintiff;
2. An appreciation or knowledge by the defendant of the benefit; and
3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value."

Id., at 276.

These elements are present in this case. The evidence shows that D has received a benefit, with knowledge and appreciation of such benefit, which is disproportionate to the value of what he gave up so as to make its retention inequitable. To date, D has received the following benefit under the May 13 contract:

earnest money	\$10,000.00
check (Exhibit 25)	30,000.00
check (Exhibit 26)	34,483.13
check (Exhibit 28)	193.37
title policy	1,387.50

escrow fee	75 00
recording fee	<u>12.50</u>
	\$76,151.50

In return, D has given P title to 380 acres, valued at \$150 per acre at the time of contract or \$57,000; and, the use of \$62,556 until the contract failed, valued at \$7,670 81. Adding these values shows a total value given by D of \$64,670.81

The difference between the value D gave (\$64,670.81) and the value he received (\$76,151.50) is \$11,480.69. The Court concludes that D has been unjustly enriched by this amount and, therefore, grants judgment in favor of P for \$11,480 69

In order to avoid adding to D's unjust enrichment, the Court denies D's prayer for judgment on the delinquent \$62,556 promissory note signed by P as part of the down payment on the May 13 contract.

Also, as part of this decision, the Court acknowledges D's offer in open court to honor the contracts covering the May 13 contract property made between P and all "innocent and bona fide purchasers prior to trial regardless of the amount paid to P," and expects D to perform according to this offer.

THE SEPTEMBER OPTION

The Court denies P's request for specific performance of the September option because the option was not exercised according to its terms and P failed to tender performance as of the execution date, January 15, 1978. It is elementary contract law that an offeror may choose the method of acceptance, and such method must be followed unless waived by the offeror. More specifically, "This court has long adhered to the rule that an option must be exercised in accordance with its terms." Nance v. Schoonover, 521 P.2d 896, Equitable Realty, Inc. v Nielsen, 519 P.2d 423, 30 U.2d 433. The contract clearly states that the option is to be exercised by written notice to D on or before January 15, 1978. There is no evidence that P gave the required written notice

Although P claims that D actually participated in several of P's contract sales of the option property prior to the execution date and that D, even after execution date, indicated that he would work things out, the Court finds that the evidence is insufficient to sustain a waiver under either contention.

The Court also concludes that by the terms of the September option P was obligated to tender \$100,000 to exercise the option, but D was not concurrently obligated to tender releases to 400 acres as P demanded. Under the terms of the September option it is not entirely clear that either the \$100,000 down payment or releases according to the McKinney contract were required on the execution date. However, the evidence indicated that the parties thought the \$100,000 was due at that time, and such is the most reasonable interpretation of the option language. But, the option did not create a concurrent condition that D release and deed 400 acres of ground to P as P alleges. The contract clearly states that "releases granted after execution of contract shall be in accordance with the McKinney contract. As of the execution date on the September option, D could not have been obligated to deliver more than 100 acres. At that time, McKinney was obligated to have provided 960 acres to D. Although D had received title to this property, most of it had already been deeded to P under other contracts; 380 acres upon closing of the May 13 contract and 320 acres upon closing of the August sale. D also sold 160 acres of the McKinney property, not covered in any contract between P and D, to a third party. Therefore, at most, D could have delivered title to 100 acres upon execution of the option, January 15, 1978.

P claims the option agreement created concurrent conditions, that D was obligated to produce 400 acres upon payment of \$100,000 down, and therefore that a conditional tender was sufficient to place D in breach. It is P's

Contention that these obligations became concurrent because D made his \$30,000 payment to McKinney on January 4, 1978 rather than February 11, 1978 when it became due. Therefore, P was entitled to the 400 acres to which D became entitled upon payment. This argument is unconvincing because at the time the option was entered (September 7, 1977), P could not have predicted or required D's early payment. Therefore, the parties upon entrance of the contract clearly did not contemplate concurrent conditions, and the law should not imply such against the intent of the parties at the time the contract was entered into.

Even if a conditional tender were sufficient to place D in breach, P's alleged tender did not satisfy legal requirements. For a conditional tender to operate it must be communicated to the other party. See 74 Am. Jur. 2d, Section 1, Tender. "Tender implies the physical act of offering the money or the thing to be tendered, but this cannot rest in implication alone." Id., Section 7, Production and Offer. The escrow agent's testimony was that she did not tender the blank check to D. Absent evidence that P tendered it, no tender was made. Also, a blank check in the instant case was probably insufficient tender. Although a check is good tender when not objected to (Sieverts v. White, 273 P.2d 974, 2 U.2d 351), the opportunity to object must be afforded the creditor. "There is no waiver where the creditor is not present to object." 74 Am. Jur. 2d, Tender, Section 10, p. 553. Because no meeting took place on the execution date, D was not present when the check was deposited, and the presence of the check was not communicated to D prior to the execution date, D could not have waived his right to full tender.

THE MARCH CONTRACT

The Court finds that the March contract created the following obligations:

1. Upon execution of the March contract, P was obligated to deed 60 acres to PF in partial payment for the

exchange property deeded from PF to P at that time. valued at \$252,000. Also. in return for the exchange property P was obligated to deed an additional 640 acres to PF, 60 acres "at such time as Seller is able to obtain releases from RLC Investment, Inc." and 580 acres "to be released to Buyer at such time as Seller obtains release of said acreage from Leland A Fitzgerald" in accordance with the May contract.

2 Six months after execution of the contract, specifically on September 6, 1978, PF was obligated to pay \$23,238 75 plus interest, and to continue to pay that amount each March 6th and September 6th until paid in full. In return P was to release and deed one acre for each \$368 principal reduction paid, or about 63 acres upon each payment. These obligations created concurrent conditions; that is, P's duty to deliver 63 acres upon each payment did not arise until PF came forth with the payment and, conversely, PF's duty to make each installment payment did not arise until P came forth with the deeds.

Under this interpretation of the contract, the Court concludes, as it has with respect to the May 13 contract, that neither party made a conditional tender of performance required on September 6, 1978 sufficient to place the other party in breach, and therefore, neither party has a cause of action against the other. PF never claimed to have tendered performance. Rather, PF claimed that he did not have to pay P the September payment, and therefore, paid it to Lee Fitzgerald because of P's prospective inability to deliver the required deeds. PF was aware of the dispute between P and D on the May 13 contract and that P would be unable to perform on the March contract unless those disputes were resolved. Utah law is clear that if the vendor has "so lost or encumbered his title that he will not be able to fulfill his contract, he cannot insist that the purchaser

continue to make payments where it is obvious that his own performance will not be forthcoming." Marlowe Investment Corporation v. Radmall, 485 P.2d 1402, 26 Utah 2d 124. And, a "buyer should not be heard to complain unless it appears that it will be impossible or at least highly unlikely that the seller will be unable to perform his contract when he is called upon to do so." Corporation Nine v. Taylor, 513 P.2d 417, 30 Utah 2d 47. In that case, the fact that the seller had sold to a third party some of the land previously sold, but not yet deeded, to plaintiff/buyer was not sufficient to show that the seller would be unable to perform when his obligation arose.

The key factual issue here is whether or not P's performance was impossible or sufficiently unlikely to excuse D from his obligation to pay P, or at least make a conditional tender. If the sale of land to a third party was insufficient to show impossibility or sufficient unlikeliness, a fortiori, contract disputes which were yet unresolved would also be insufficient.

PF also claimed that P breached his covenant, under paragraph 11, that he would not "default in the payment of his obligations against said property." This contention falls short because P's performance which was concurrent with D's obligation to provide certain deeds, never was called for by D tendering those deeds. (See discussion of the May 13 contract.)

PF also claimed that under paragraph 18 of the contract, he had the right to pay D directly and receive credit for such payment. But, paragraph 18 does not apply because it specifically excludes the right to make payment relative to liens or encumbrances "herein provided for or referred to," and the \$325,000 owed to D is obviously referred to in the contract.

As to P's performance, P never claimed to have tendered the deeds required concurrent with the September 6,

1978 payment, and there is no evidence that P ever did tender those deeds. Therefore, neither party placed the other in breach by tendering performance in a timely manner or otherwise, and the Court must leave the parties where it finds them, unless such would amount to an unjust enrichment of the other.

PF, at the time the contract was entered into, deeded property to P valued by the parties at \$252,000. In return PF has received 60 acres valued at the time of contract at \$320 per acre, or \$19,200. Given the disparity between the value of what P has received and the value of what P has paid, the Court concludes that P has been unjustly enriched and that leaving the parties where they are found would be tantamount to enforcement of an otherwise unenforceable forfeiture provision. See Kay v. Woods, 549 P.2d 709; Perkins v. Spencer, 243 P.2d 446, 121 Utah 468; Jacobson v. Swan, 278 P.2d 274, 2 U.2d 59.

In accordance with the foregoing analysis, the Court concludes the following as to the March contract:

1. P's prayer for enforcement of paragraph 16(a) of the Uniform Real Estate Contract which would release P from its obligations to convey the property and allow P to retain all payments as liquidated damages, and any other relief requested, including attorneys fees, is denied.

2. ^{PF's} D's prayer for judgment for the difference in the value of the property he delivered to P and the value of the 60 acres he received, and attorneys fees, is also denied.

3. In order not to unjustly enrich P when P was unable to perform, P is ordered to return to PF the property received without any encumbrances and in the same condition as when it was received. In return, ^{PF} D is ordered to pay P the contract price of \$320 per acre for the 60 acres received, or \$19,200.

AUGUST SALE

Pursuant to agreement of the parties, the Court finds with respect to the August sale as follows:

1. P signed a note in favor of D,

Lee Fitzgerald, in partial payment for property received;
and

2. Said Note in the amount of \$3,856.90 has been delinquent since January 2, 1978.

From the foregoing findings the Court grants Plaintiff's request for judgment on the note in the amount of \$6,170.73 and reasonable attorneys fees in the sum of \$600.

ATTORNEY FEES

The following principles apply to the resolution of the various requests for attorney fees:

1. "Attorney's fees cannot be recovered unless provided for by statute or by contract." B & R Supply Co. v. Bringham, 503 P.2d 1216, 28 U.2d 442.

2. "The rule that judgment must be based on findings of fact, which in turn must be based on evidence, is applicable to awarding attorney fees." F.M.A. Financial Corp. v. Build, Inc., 404 P.2d 670, 17 U.2d 80.

3. "Since both judges and lawyers have special knowledge as to the value of legal services, such services are not always required to be proven by sworn testimony, and they are sometimes submitted upon stipulation as to the amount, or the judge may fix the amount on the basis of his own knowledge and experience, and/or in connection with reference to a bar approved schedule." Id.

4. "Attorney's fees may not be awarded where there is nothing in the record to sustain the award either by way of evidence or by stipulation of the parties as to how the Court may fix it." Butler v. Butler, 461 P.2d 727, 23 U.2d 59.

5. "It is appropriate to apply basic principles of contract law, namely, the creation of a contract requires a meeting of the minds of the parties; and the burden of so proving is upon the party who claims there was a contract." Spanish Fork Packing Co. v. House of Fine Meats, Inc., 508 P.2d 1186, 29 U.2d 312.

Applying these principles to the contracts before the Court, the Court concludes as to each contract "as follows:"

1. May 13 Contract

Under the theory that attorney fees are recoverable only if provided for by contract or statute, and that basic contract principles apply as to whether or not there is a contract, neither party is entitled to recover attorney fees. Neither party performed, the contract expired, and its terms became unenforceable. Even if the contract were enforceable, neither party placed the other in breach so as to trigger the enforcement of the clause covering attorney fees.

2. September Option

The contract provision providing for recovery of attorney fees expired when the option was not timely exercised and when P failed to tender performance. Again, there is no contract or statute under which attorney fees can be awarded.

3. March Contract

The analysis is identical to that under the May Contract.

4. August Sale

Reasonable attorney fees, in the amount of \$600, are recoverable by D under the terms of the delinquent note.

Counsel for defendant Lee Fitzgerald is directed to prepare and submit to the Court for signature within 15 days under Rule 2.9 of the Rules of Practice appropriate judgments and orders necessary to implement this decree, except as it affects the March contract between Perry Fitzgerald and Corbett and Gurr. As to the latter contract, counsel for Perry Fitzgerald will prepare said judgments and orders.

Dated this 4th day of ^{May}~~April~~, 1982.

BY THE COURT:

CC: Byron L. Stubbs, Esq.
M. Dayle Jeffs, Esq.
Robert B. Hansen, Esq.


JUDGE

ADDENDUM NO. 4

16339

M. DAYLE JEFFS OF JEFFS AND JEFFS
Attorneys for Defendants Fitzgerald
90 North 100 East
P. O. Box 683
Provo, Utah 84603
Telephone: 373-8848

NOTED
UTAH COUNTY RECORDER
DEPUTY
PR. AEB
JUN 30 1982

RECEIVED AT THE REQUEST OF
JUN 30 1982 PM 3:59

16339

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

BOYD CORBETT and KEITH GURR,
individuals, and UTAH RANCH-
LANDS, a partnership,

Plaintiffs,

JUDGMENT

vs.

LEE A. FITZGERALD and HELEN
FITZGERALD, his wife, PERRY
G. FITZGERALD and CAROLYN S.
FITZGERALD, his wife,

Civil No. 50224

Defendants.

This matter came on duly and regularly to be heard before the above entitled Court, Judge J. Robert Bullock sitting without a jury on the 9th and 10th day of February, 1982 upon the Complaint of the plaintiffs, the Counterclaim of the defendants, Lee A. Fitzgerald and Helen Fitzgerald, and the Counterclaim of the defendants, Perry G. Fitzgerald and Carolyn S. Fitzgerald. The issues of the plaintiffs and all other parties is reserved for further trial. The Court having heard the evidence, both oral and documentary, having heard the arguments of counsel, having been fully advised in the premises, and having taken the matter under advisement, and based upon the Findings of Fact and Conclusions of Law heretofore entered, now makes and enters the following:

JUDGMENT

1. Plaintiffs are granted judgment against the defendants, Lee A. Fitzgerald and Helen Fitzgerald, in the amount of \$4,709.96.

2. It is the judgment of the Court that plaintiffs and defendants, Lee A. and Helen Fitzgerald, are discharged of any obligations under the May 13, 1977 Uniform Real Estate Contract. Said contract is held to be of no further force or effect.

3. It is the judgment of the Court that the Earnest Money Agreement and Option to Purchase dated February 1, 1977 expired for non-payment and by mutual agreement of the parties.

4. Plaintiffs are adjudged to be entitled to retain the 380 acres heretofore conveyed to plaintiffs by Lee A. and Helen Fitzgerald under the May 13, 1977 Uniform Real Estate Contract.

5. The Court rules that plaintiffs have no interest in the remaining properties described in the May 13, 1977 contract and more particularly described in Exhibit "A" attached hereto and by reference made a part hereof.

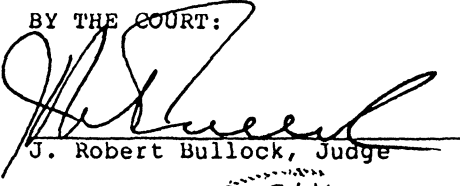
6. The Court rules that the plaintiffs have no interest in and to the properties described in the September 7, 1977 option more particularly described on Exhibit "B" attached hereto.

7. Except for the \$600.00 attorney's fees awarded defendants, Lee A. and Helen S. Fitzgerald, and included in the computations of paragraph 1 above, each party shall bear their own costs and attorney's fees.

1
2 8. All other claims encompassed in the plead-
3 ings of this action between plaintiffs, Boyd Corbett and Keith
4 Gurr, and defendants, Lee A. Fitzgerald and Helen S.
5 Fitzgerald, are dismissed with prejudice.

6 Dated and signed this 25th day of June, 1982.

7 BY THE COURT:

8 
9 J. Robert Bullock, Judge

10
11
12 STATE OF UTAH)
COUNTY OF UTAH) ss
13 I, THE UNDERSIGNED CLERK OF THE DISTRICT COURT
14 OF UTAH COUNTY, UTAH, DO HEREBY CERTIFY THAT THE
ANNEXED AND FOREGOING IS A TRUE AND CORRECT COPY OF
AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH
CLERK.

15 WITNESS MY HAND AND SEAL OF SAID COURT THIS

16 30th DAY OF June, 1982
WILLIAM F. HUISE, CLERK

17 BY George A. Fitzgerald DEPUTY
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EXHIBIT "A"

The Northwest Quarter of Section 31, Township 7 South, Range 1 West, of the Salt Lake Base and Meridian.

Lots 1, 2, 3, 4 and the East half of the Southwest Quarter of Section 30, Township 7 South, Range 1 West of the Salt Lake Base and Meridian. Also: Commencing at the center of Section 30, Township 7 South, Range 1 West, Salt Lake Base and Meridian; thence East 80 rods; thence North 100 rods; thence West 160 rods; thence South 100 rods; thence East 80 rods to beginning.

The Northwest Quarter, the West half of the Northeast Quarter, Lots 3, 4, all of Section 19, Township 7 South, Range 1 West, Salt Lake Base and Meridian.

The North half of the Northwest Quarter, the West half of the Northeast Quarter, the Southeast Quarter and the South half of the Southwest Quarter, all of Section 18, Township 7 South, Range 1 West, Salt Lake Base and Meridian.

The Northeast Quarter, the Southeast Quarter, the South half of the Southwest Quarter, the Northwest Quarter, all of Section 7, Township 7 South, Range 1 West, Salt Lake Base and Meridian.

The Northwest Quarter of the Northeast Quarter, the North half of the Northwest Quarter, the Southwest Quarter of the Northwest Quarter, the Northwest Quarter of the Southwest Quarter all of Section 6, Township 7 South, Range 1 West, Salt Lake Base and Meridian.

The East half of Section 28, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

The East half of Section 2, Township 8 South, Range 2 West, Salt Lake Base and Meridian.

The North half of the Northwest Quarter, the North half of the Southeast Quarter of the Northwest Quarter, all of Section 1, Township 8 South, Range 2 West, Salt Lake Base and Meridian.

The Southwest Quarter of the Southwest Quarter of Section 36, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

EXHIBIT "B"

All of Section 22, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

All of Section 23, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

All of Section 27, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

All of Section 26, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

All of Section 34, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

All of Section 35, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

All of Section 2, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

The East half of Section 33, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

The East half and the Southwest Quarter of Section 21, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

The Southwest Quarter of the Southwest Quarter of Section 36, Township 7 South, Range 2 West.

All of Section 3, Township 8 South, Range 2 West, Salt Lake Base and Meridian, excepting therefrom the Southwest Quarter of the Northwest Quarter of said section.

The North half of Section 25, Township 7 South, Range 2 West, Salt Lake base and Meridian.

The East half and the Southwest Quarter of Section 21, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

The West half of Section 24, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

The East half of the Northwest Quarter of Section 28, Township 7 South, Range 2 West, Salt Lake Base and Meridian.

The South half of the Southeast Quarter of the Northeast Quarter and the West half of the Northeast Quarter of Section 10, Township 8 South, Range 2 West, Salt Lake Base and Meridian.

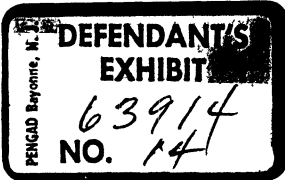
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The East half of the Northwest Quarter and the Southwest Quarter of the Northwest Quarter of Section 12, Township 8 South, Range 2 West, Salt Lake Base and Meridian.

Excepting therefrom any and all oil, gas and mineral rights.

Excepting therefrom any and all grazing rights until property is fenced.

ADDENDUM NO. 5



8418

SEA 9, 1982

CUSTOMER'S ORDER NO	DEPT	DATE
NAME		
ADDRESS		

SOLO BY CASH C O D CHARGE ON ACCT MOSENETD PAID OUT

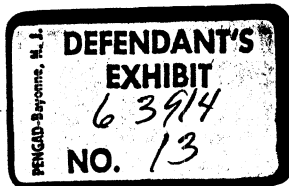
QUAN	DESCRIPTION	PRICE	AMOUNT
1			
2	Received of		
3			
4	for F.T 2 years old.		
5			
6	\$ 4,709.96 Judgment		
7			
8	Credit towards Sept '77		
9			
10	Contract payment.		
11	54,261.03		
12	\$ - 4,709.96		
13			
14	\$ 49,551.70		
15			
16			
17	Bad Credit		
18			

REC'D BY

Rediform
5H 330

KEEP THIS SLIP
FOR REFERENCE

ADDENDUM NO. 6



RELEASE OF JUDGMENT

For the sum of \$4,709.96 herein paid in full on this 28th day of September, 1982, We, Boyd Corbett and Keith Gurr, acting as individuals, and doing business as Utah Ranchlands, release the \$4,709.96 judgment against Helen S. and Lee A. Fitzgerald, in favor of Boyd Corbett and Keith Gurr and Utah Ranchlands, entered on June 29, 1982 in the Fourth District Court in and for Utah County, Utah, Case No. 50,224

Utah Ranchlands

A handwritten signature in cursive script, appearing to read "Boyd Corbett", written over a horizontal line.

Boyd Corbett, as an individual
for Utah Ranchlands

A handwritten signature in cursive script, appearing to read "Keith Gurr", written over a horizontal line.

Keith Gurr, as an individual
for Utah Ranchlands

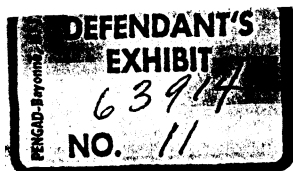
State of Utah)
County of Salt Lake) SS.

On this 28th day of Sept. 1982 personally appeared before me Boyd Corbett and Keith Gurr, the signers of the within instrument who duly acknowledged to me that they executed the same.

A handwritten signature in cursive script, appearing to read "Bess C. Cutler", written over a horizontal line.

Notary Public at Draper, Utah
My Comm. expires 8-15-86

ADDENDUM NO. 7



SETTLEMENT AGREEMENT

We, G. Boyd Corbett and Keith L. Gurr, doing business as Utah Ranchlands, hereby agree to settle all legal actions, lawsuits, appeals to the Supreme Court, etc., concerning Leland A. and Helen S. Fitzgerald and all their Cedar Valley property.

In consideration for settlement, We, Leland A. and Helen S. Fitzgerald agree to give by Warranty Deed 320 acres located in The SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ and the W $\frac{1}{2}$ except for the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ all in Section 3, T 8 S, R 2 W, SLBM. Warranty deed will be given at the time it is released to Leland A. and Helen S. Fitzgerald, as per schedule with Helen Stassi and Johnell Yurka.

We, G. Boyd Corbett and Keith L. Gurr, agree to pay Leland A. and Helen S. Fitzgerald, \$11,000.00 in three annual installments of \$3,667.00 plus interest at 7 % on principle balance owing beginning Feb. 1, 1983 and annually thereafter until principle with interest is paid in full.

This agreement subject to payment in excess of \$49,000.00 on the DuPratt contract on this 10th day of September, 1982.

Fitzgerald's agree to honor all Corbett and Gurr's previous sales ^{1, 2, 3}
Dated this 10th day of September, 1982. *H. S. Fitzgerald*

Utah Ranchlands by

G. Boyd Corbett

G. Boyd Corbett
as a partner and as an individual

Keith L. Gurr

Keith L. Gurr
as a partner and as an individual

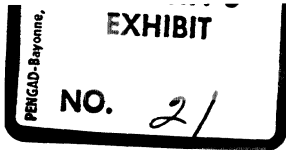
Leland A. Fitzgerald

Leland A. Fitzgerald
as an individual

A. J. A. 11. 7

Exhibit #1

ADDENDUM NO. 8



1982

File # 4579

10/4/82

Leland A. Fitzgerald
Helen S. Fitzgerald

\$49,551.70 - Annual Payment from Utah Ranchlands

691.00 Less Payment to Joe Mascaro

110.23 Less Payment to Utah County Treasurer - B-1508-A
139.91 " " " " " " B-1533-A

\$48,720.79 TOTAL

1984



CUSTOMER'S RECEIPT ONLY

DRAPER Bank
& TRUST
903 EAST 12300 SOUTH PH 571-3141
P.O. BOX 897 DRAPER UTAH 84020

97-105
1243

No 4759

ITER **Keith Gurr**

DATE Sept. 24, 1984

PAYABLE

LEE FITZGERALD

48,911.34***

48,911.34

DOLLARS

CASHIER'S CHECK

THIS IS A MEMORANDUM ONLY
NOT NEGOTIABLE

ADDENDUM NO. 9

Name & Address

LELAND A. FITZGERALD
208 EAST 13800 SOUTH
DRAPER, UTAH 84020

Code	No.	No.	Mo.	Day	Yr.	393635	Number
R	146	01	10	06	82		0030406

RECEIVED FROM:

VALLEY TITLE COMPANY TRUST ACCOUNT

CHECK

CASH



DESCRIPTION	TRAN. CODE		APPLIED TO	LOAN NO.	ENTERPRISE CODE	QUANTITY	UNITS	YR.	AMOUNT
	CR.	DB.							
	67		AUTO.						\$
PAYMENT ON NOTE	65	66	PRIN.	1	6108				48,720.79
	33	34	INT.						
			CO	TYPE					

GENERAL LEDGER ACCOUNTS

		MAIN	SUB	DETAIL	BR	PROJ	DESCRIPTION
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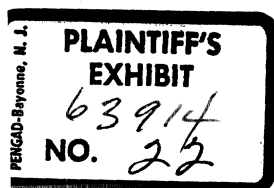
Vicki Wright
AUTHORIZED SIGNATURE

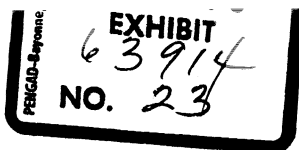
TOTAL RECEIVED

DT 71 72

\$48,720.79

ORIGINAL





CORBETT & GURR PAYMENTS

<u>DATE</u>	<u>AMOUNT OWED</u>	<u>AMOUNT PAID</u>	<u>DATE DUE</u>	<u>DATE PAID</u>	<u>DAYS LATE</u>	<u>AMT DUE</u>
1980	\$ 56,610.77	\$ 59,610.77	8-7-80	9-9-80	32	\$ 365.76
1981	56,935.85	56,935.85	8-7-81	9-21-81	44	480.04
1982	49,551.70	49,551.70	8-7-82	10-4-82	57	541.50 ✓
1983	51,586.19	41,974.99	8-7-83	10-3-83	56	11,255.01 *
1984	48,911.34	60,911.34	8-7-84	9-24-84	47	440.86

1980	59,610.72 X 7% = 4,172.75 divided 365 = \$11.43 @ day X 32 days = \$ 365.76
1981	56,935.85 X 7% = 3,985.50 divided 365 = 10.91 " X 45 days = 480.04
1982	48,720.79 X 7% = 3,410.45 " " " 9.34 " X 57 days = 541.50 ✓
1983	41,974.99 X 7% = 2,938.24 " " = 8.04 " X 56 days = 450.24
	9,611.20 X 7% = 1,057.23 " " = 2.89 " X 413 " = 11,255.01 *
1984	48,911.00 X 7% = 3,423.79 " " = 9.38 " X 47 days = 440.86

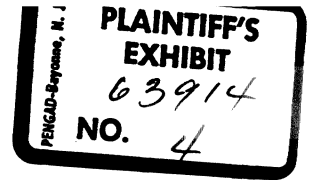
* 1983 9,611.20 + \$450.24 + 1,193.57 = \$11,255.01

ADDENDUM NO. 11

UPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH

November 1, 1982

OFFICE OF THE CLERK



┌
M. DAYLE JEFFS
ATTORNEY AT LAW
90 NORTH 100 EAST
POST OFFICE BOX 683
PROVO, UTAH 84603
└

Boyd Corbett, Keith Gurr and Utah
Ranch Lands, a partnership,
Plaintiffs and Appellants,

v.

No. 18529 and 18594

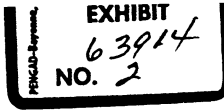
Lee A. Fitzgerald, Helen Fitzgerald, his wife,
Perry G. Fitzgerald and Carolyn Fitzgerald,
his wife,
Defendants and Respondents.

This dayrespondent's motion for dismissal of appeals with prejudice is granted.

Geoffrey J. Butler, Clerk

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ADDENDUM NO. 12



Boyd Corbett
E-2 NOV -1 PM 3 07

27171

27171

NOTICE OF INTEREST

Notice of Interest is hereby given by Boyd Corbett dba Utah Ranchlands for and on behalf of his buyers and as part of that settlement agreement with Leland A. Fitzgerald and Helen S. Fitzgerald dated September 10, 1982 wherein Fitzgerald:

Agreed to honor "all Corbett's previous sales."

Also, as part of the memorandum decision dated May 4, 1982 by the Honorable Robert Bullock wherein stated, "... also, as part of this decision, the Court acknowledges Defendant's (Fitzgerald) offer in open Court to honor the contracts covering the May 13th contract made between all innocent and bona fide purchasers prior to trial regardless of the amount paid to Plaintiff (Corbett), and expects Defendant to perform according to this offer."

The property is listed below:

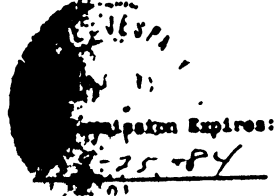
1/2 of Section 2, Township 8 South Range 2 West S.L.B.M. SW 1/4 of the SE 1/4 and the W 1/2 except for the SW 1/4 of the NW 1/4 of Section 3, Township 8 South Range 2 West S.L.B.M. N 1/2 of the NW 1/4 of Section 30 Township 7 South Range 1 West. SW 1/4 of the SW 1/4 of Section 36, Township 7 South Range 2 West, NW 1/4 of the NW 1/4 of Section 1, Township 8 South Range 2 West. W 1/2 of the NW 1/4 of Section 25, Township 7 Range 2 W 1/2 of the NW 1/4 and the SW 1/4 of the SE 1/4 all in Section 30, Township 7 South Range 1 West.

Boyd Corbett

Boyd Corbett

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

On the 29th day of October, 1982, personally appeared before me Boyd Corbett, the signer of the above instrument, who duly acknowledged to me that he executed the same.

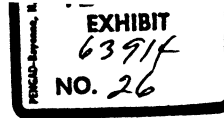


Joyce Bergman
Notary Public
Residing at: Salt Lake City, Utah

2010 REC 427

STATE OF UTAH
COUNTY OF UTAH
I, THE UNDERSIGNED RECORDER, SALT LAKE COUNTY, UTAH
DO HEREBY CERTIFY THAT THE ANNEXED AND FORWARDED IS,
TRUE COPY OF THE ORIGINAL OF THE DOCUMENT IN THE
OFFICIAL RECORD IN HIS OFFICE AS THE SAME APPEARS IN
BOOK 2010 PAGE 427
WITNESS MY HAND AND SEAL OF SAID OFFICE THIS 8th
DAY OF AUGUST 1985
BIRLA S. BIRLA RECORDER
Bertha DEPUTY

ADDENDUM NO. 13



In the Fourth Judicial District Court

of the State of Utah
In and For Utah County

BOYD CORBETT and KEITH GURR,
individuals, and UTAH RANCHLANDS, **Plaintiff**
a Partnership,

vs.

LEE A. FITZGERALD and HELEN
FITZGERALD, his wife, PERRY
G. FITZGERALD and CAROLYN S.
FITZGERALD, his wife,

Defendant

MINUTE ENTRY

CASE NUMBER 50224

DATED November 26, 1982

J. Robert Bullock, **JUDGE**

Reported by E. V. Quist, C.S.R.

ORDER TO SHOW CAUSE

This matter came before the Court for hearing on defendants Perry G. and Carolyn S. Fitzgerald's order to show cause. Plaintiffs Boyd Corbett and Keith Gurr appearing in person without counsel. No one appearing for or on behalf of the defendants. The Court passed this matter until 10:00 a.m.

— This matter was recalled. The plaintiffs present without counsel. Defendants appearing by and through attorney Robert B. Hansen.

Mr. Hansen addressed the Court in support of relief as prayed for by defendants.

Mr. Corbett addressed the Court in his own behalf. Mr. Hansen responded on behalf of defendants. Mr. Gurr addressed the Court in his own behalf. Mr. Hansen addressed the Court further.

The Court stated this matter will be continued to allow plaintiffs to bring Lee Fitzgerald into the matter, but Mr. Hansen may put on his expert witness at this time with the reservation it may not be binding against Lee Fitzgerald.

Frank J. Blankenship was sworn and testified on direct examination by Mr. Hansen.

Defendant's Exhibit 1 - Letter - marked.

Witness examined on cross by Mr. Corbett and by Mr. Gurr. Exhibit 1 received.

Mr. Corbett offered a copy of previous appraisal which was received into evidence. The document was received by the Court.

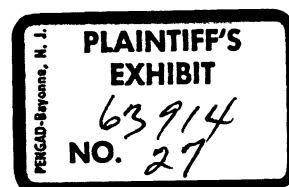
This matter is continued for further hearing and taking of evidence to *Se* Thursday, January 6, 1983, at 2:00 p.m., without a jury.

cc: Boyd Corbett
Keith Gurr
Robert B. Hansen, Esq.
M. Dayle Jeffs, Esq.

RECEIVED DEC - 6 1982

ADDENDUM NO. 14

27th at 12:30 p.m.



IN THE FOURTH JUDICIAL DISTRICT COURT
OF THE STATE OF UTAH
IN AND FOR UTAH COUNTY

BOYD CORBETT, KEITH GURR and
UTAH RANCH LANDS,

Plaintiffs,

-vs-

LEE A. FITZGERALD, HELEN
FITZGERALD, PERRY G. FITZGERALD
and CAROLYN FITZGERALD,

Defendants.

Civil Case Number 50,224

Dated January 6, 1983

J. Robert Bullock, Judge

MINUTE ENTRY AND NOTICE

The hearing on the order to show cause issued by the Court on October 27, 1982, to plaintiffs, Boyd Corbett and Keith Gurr, is continued to January 20, 1983, at 9:00 o'clock a.m.

The Court has treated and will treat the motion of defendants, Perry Fitzgerald and Carolyn S. Fitzgerald, for such order to show cause as a motion to amend the Judgment entered on May 17, 1982.

The Court will also hear arguments, if any, as to whether or not the Court should on its own initiative amend the Judgment with respect to the offer of defendants, Lee A. Fitzgerald and Helen Fitzgerald, referred to in the Court's Memorandum Decision of May 4, 1982.

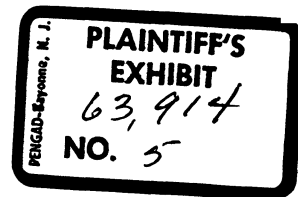
Any interested party to this action may appear and be heard, provided a brief written statement of position is filed prior to the date of hearing and a copy served upon all counsel.

cc: Byron L. Stubbs, Esq.
Robert B. Hansen, Esq.
M. Dayle Jeffs, Esq.
David B. Boyce, Esq.
John C. Heaton, Esq.

Michael Mazuran, Esq.
Allen Swan, Esq.
S. Thomas Bowen, Esq.
Stanley R. Smith

RECEIVED JAN 11 1983

ADDENDUM NO. 15



DISTRICT COURT OF UTAH COUNTY,

STATE OF UTAH

- - -

BOYD CORBETT and KEITH GURR,
individuals, and UTAH RANCHLANDS,
a partnership,

Plaintiffs,

vs.

LEE A. FITZGERALD and HELEN
FITZGERALD, his wife, PERRY
G. FITZGERALD and CAROLYN S.
FITZGERALD, his wife,

Defendants.

Civil No. 50224

ORDER AND JUDGMENT

Pursuant to Rule 60(a), Utah Rules of Civil Procedure, the Court amends, corrects and clarifies its judgment in the following particulars:

1. Plaintiffs allege that the Court erred in its judgment entered June 25, 1982 by failing to order defendant, Lee Fitzgerald, to perform according to his offer to honor contracts between plaintiffs and innocent purchasers of property covered under the May 13, 1978 Contract.

Language in the Memorandum Decision entered May 4, 1982 which apparently created the ambiguity as to whether or not the Court intended to so order, was included in the decision to encourage the defendant to perform according to his unsolicited offer so as to minimize litigation and avoid further loss and damage to innocent purchasers. However, defendant's offer had no bearing whatsoever on the decision

rendered by the Court, the decision was not conditioned thereon, and the Court did not intend to assume responsibility for supervising defendant's performance according to the offer. The Court, therefore, declines to alter its judgment on the basis that the alleged omission constituted error, oversight, or mistake.

2. With regard to the March Contract, the Court did err in its judgment entered May 17, 1982, relative to unjust enrichment. Upon a complete review of the matter the Court finds that it erred in the following particulars:

(a) The Court ordered the return of property which plaintiffs received upon execution of the March Contract, although the record shows plaintiffs had sold the property to a third party;

(b) The judgment failed to consider that plaintiffs assumed a mortgage on the property they received approximating \$48,500.

Although the Court believes these oversights should have been brought to its attention when the proposed findings and judgment were submitted by counsel and not months later after the parties entered into an agreement resulting in the dismissal of an appeal to the Supreme Court, the Court is now disposed, in the interests of justice, to correct the judgment, nevertheless.

The Court does not alter its position that the decision should be and is based upon the equitable principle of unjust enrichment. Specifically, it was and is the Court's

holding that plaintiffs who failed to perform according to the terms of the contract should not be allowed to retain the benefit of property for which they have not paid. The Court is likewise firm in its position that neither party is entitled to enforce the contract according to its terms. The measure of damages is, therefore, the value of the benefit conferred upon plaintiffs which they unjustifiably retained, not the amount required to place the parties in their pre-contract positions or the amount required to compensate the defendant for the detriment incurred in providing the property.

For the purposes of doing equity as between the parties, the Court finds upon a consideration of all of the evidence that the benefit conferred upon the plaintiffs at the time the contract was entered into was the sum of \$125,000, less the assumed debt in an amount of \$48,500, making a net benefit of \$76,500. This benefit valuation was arrived at upon a consideration of all the evidence including the following:

1. The price plaintiffs obtained in their subsequent sale of the property;
2. Testimony as to the accuracy of the contract price as a reflection of either the value of the property plaintiffs received or the value of the property they gave under the terms of the contract;
3. The provision of the contract relative to releases and consideration for the down payment received by seller

in light of all the testimony and the contract taken as a whole;

4. The appraisals received into evidence; and,

5. The price defendant paid to acquire the property in 1974 plus testimony of improvements made and the general condition of the property.

Plaintiffs unjustifiably retained only that portion of the benefit conferred (\$76,500) for which they had not paid. Therefore, since plaintiffs deeded 60 acres to defendant, the \$76,500 should be reduced by the reasonable value of those 60 acres. In the Court's opinion the reasonable value of the 60 acres is \$240 per acre for a total of \$14,400. This amount was arrived at by adjusting downward the total contract price for 2240 acres by the amount of the inflation in the valuation of the property received (\$175,500), and then dividing that adjusted price by the total number of acres. ($\$716,800 - \$175,500 = \$541,300 \div 2240 \text{ acres} = \text{approximately } \240 per acre)

Subtracting the value of the 60 acres (\$14,400) from the value of the benefit conferred upon the plaintiffs (\$76,500), the Court holds that plaintiffs were unjustly enriched by a net of \$62,100. The Court also finds as a matter of equity that defendant should receive legal interest on that amount from the contract execution date of March 6, 1978.

The Judgment heretofore rendered on May 17, 1982

is amended, corrected and clarified in accordance with the foregoing.

Further, it is Ordered, Adjudged and Decreed that in lieu of the return of the apartment house and duplex by plaintiffs, defendants, Perry G. Fitzgerald and Carolyn S. Fitzgerald, do have and recover from plaintiffs the sum of \$62,100 together with interest thereon at the rate of 6% per annum from March 6, 1978 to May 14, 1981, and at the rate of 10% per annum thereafter to the date hereof, and at the rate of 12% per annum on the total principal and interest from the date hereof until paid.

The parties shall bear their own costs and attorneys fees.

Dated this 19th day of April, 1983.

BY THE COURT:


JUDGE

CC: Byron L. Stubbs, Esq.
M. Dayle Jeffs, Esq.
Robert B. Hansen, Esq.
Allen M. Swan, Esq.
Michael J. Mazuran, Esq.

ADDENDUM NO. 16



BYRON L. STUBBS
Attorney for Plaintiffs
530 East Fifth South
Salt Lake City, Utah 84102
(801) 328-4207

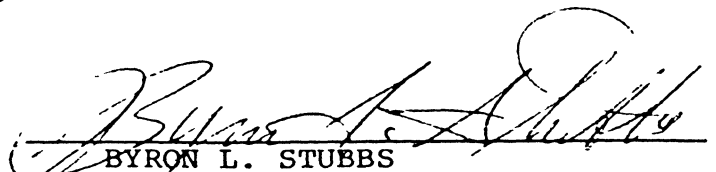
DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

BOYD CORBETT and KEITH GURR, :
individuals, and UTAH RANCLANDS, :
a partnership, : NOTICE OF APPEAL
Plaintiffs, :
vs. :
LEE A. FITZGERALD and HELEN : Civil No. 50224
FITZGERALD, his wife, PERRY G. :
FITZGERALD and CAROLYN S. :
FITZGERALD, his wife, :
Defendants.

Notice is hereby given that BOYD CORBETT and KEITH GURR, individuals, and UTAH RANCLANDS, a partnership, hereby appeal to the Supreme Court of the State of Utah from the Order and Judgment entered in this action on the 19th day of April, 1983, in favor of LEE A. FITZGERALD and HELEN FITZGERALD, his wife, as well as the judgment entered on the same date, to-wit: April 19, 1983, in favor of PERRY G. FITZGERALD and CAROLYN S. FITZGERALD, his wife.

DATED: May 17, 1983


BYRON L. STUBBS
Attorney for Appellants
530 East Fifth South
Salt Lake City, Ut 84102

1
2
3
4 CERTIFICATE OF DELIVERY

5 I hereby certify that a copy of the foregoing Notice of
6 Appeal was delivered by T.R.S., a delivery service, to:

7 M. Dayle Jeffs
8 Attorney for Defendants Fitzgerald
9 90 North 100 East, P.O. Box 683
10 Provo, Utah 84603

11 Michael J. Mazuran
12 Attorney for T.H. Bell
13 9 Exchange Place, Suite 200
14 Salt Lake City, Ut 84111

15 David B. Boyce
16 Milton A. Oman
17 Attorneys for Richard & Jolen McKinney
18 61 South Main Street
19 Salt Lake City, Ut 84111

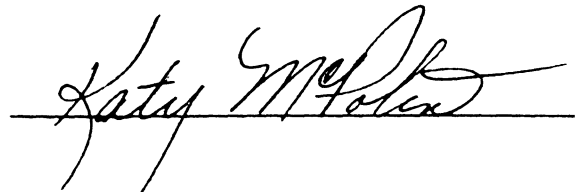
20 Jon C. Heaton & Gordon Strachan
21 Attorneys for Helen Stassi & Johnell Yurka
22 424 East 500 South
23 Salt Lake City, Ut 84111

24 Allen M. Swan
25 Attorney for Sterling W. Sill
26 330 South Third East
27 Salt Lake City, Ut 84111

28 S. Thomas Bowen
Attorney for Dale Jones
36 South State St #200
Salt Lake City, Utah 84111

Mr. Stanley Smith
2185 Monticello Drive
Idaho Falls, Idaho 83401

25
26
27
28

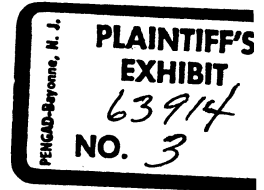


A handwritten signature in cursive script, appearing to read 'Katy M. Jones', is written over a horizontal line.

ADDENDUM NO. 17

April 17, 1984

11432



NOTICE OF INTEREST ON BEHALF OF CORBETT'S BUYERS WHEREAS . . .

1. Leland Fitzgerald and his attorney, Dale Jeffs, promises in open court to honor all of Corbett's sales "regardless of the amount paid" if Judge Robert Bullock would rule in their favor.

2. Judge Bullock has ruled in their favor.

3. About two years have passed now since Mr. Jeffs and Fitzgerald have made their offer and to this day not one of Corbett's sales have been honored.

4. Fitzgerald again reconfirmed his offer in a letter in November 1982.

5. Since Mr. Fitzgerald and Mr. Jeffs apparently have not the personal integrity of their spoken word in open court, Corbett hereby files a Notice of interest on some additional property that was overlooked, but still a bonafide sale on behalf of his buyers. That property is described as follows:

All of Section 3 except the SW 1/4 of the NW 1/4.

The West 1/2 of Section 2.

The above in Township 8 South Range 2 West S.L.B.M.

Also

The East 1/2 of Section 33 Township 7 South Range 2 West S.L.B.M.

Also

The NW 1/4 of Section 31 Township 7 South Range 1 West S.L.B.M.

The South 1/2 of the SW 1/4 of Section 30 Township 7 South Range 1 West S.L.B.M.

The South 1/2 of the SW 1/4 and the North 1/2 of the NW 1/4 of Section 18 Township 7 South, Range 1 West S.L.B.M.

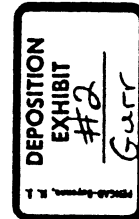
The NW 1/4 of Section 7 Township 7 South Range 1 West S.L.B.M.

The West 1/2 of the NE 1/4 of Section 7 Township 7 South Range 1 West S.L.B.M.

The South 1/2 of the SW 1/4 of Section 7 Township 7 South Range 1 West S.L.B.M.

The South 1/2 of the SW 1/4 of Section 7 Township 7 South Range 1 West S.L.B.M.

The West 1/2 of the SE 1/4 of Section 7 Township 7 South Range 1 West S.L.B.M.



BOOK 212 PAGE 767

Boyd Corbett
Boyd Corbett

COUNTY OF UTAH)
STATE OF UTAH) ss

SUBSCRIBED AND SWORN to before me this 18th day of April, 1984

My Commission Expires:

12-15-95

NOTARY PUBLIC
UTAH COUNTY RECORDS
DEPT. OF COMMERCE
SALT LAKE CITY

APR 18 AM 11:37

11432

Beraldine H. Wood
Notary Public

Residing at: Orem, Ut.



ADDENDUM NO. 18



Boyd CORBETT and Keith Gurr, individuals, and Utah Ranchlands, a partnership, Plaintiffs and Appellants,

v.

Lee A. FITZGERALD and Helen Fitzgerald, his wife, Perry G. Fitzgerald and Carolyn S. Fitzgerald, his wife, et al., Defendants and Respondents.

No. 19225.

Supreme Court of Utah.

Nov. 1, 1985.

In case involving various real estate transactions among parties, judgment was

red for both defendants I and defendants II, and plaintiffs appealed. Both appeals were dismissed with prejudice. Defendants II filed motion to amend original judgment between plaintiffs and defendants II on basis that plaintiffs had disposed of real property ordered to be reconveyed to defendants II. The Fourth District Court, Utah County, J. Robert Bullock, J., entered money judgment in lieu of its original judgment of reconveyance in favor of defendants II. Plaintiffs appealed. The Supreme Court, Timothy R. Hanson, District Judge, held that amendment of original judgment allowing money damages rather than reconveyance was proper. Affirmed.

Appeal and Error ¶1097(1), 1195(1)
Express ruling by appellate court on issues raised by prior appeals is binding on parties, trial court, and appellate court in subsequent appeal.

Judgment ¶314

Amendment of original judgment had provided for reconveyance of property, to allow award of money damages where real property could not be conveyed due to disposal of property to parties, was proper, where basis utilized by trial court in determining appropriate money damages was supported by evidence.
Rules Civ.Proc., Rule 60(b)(7).

on L. Stubbs, Salt Lake City, for plaintiffs and appellants.

Dayle Jeffs, Provo, Robert B. Hanfichael J. Mazuran, David B. Boyce, Milton A. Oman, Jon C. Heaton and n Strachan, Allen M. Swan, K. Thomsen, Salt Lake City, for defendants respondents.

OTHY R. HANSON, District Judge:

case, which is before the Court at this time, involves various real estate transactions among the parties regarding property located in Cedar Valley, Utah. First appeal was from the original

judgment entered by the trial court following a trial where both plaintiffs and defendants' reciprocal claims were considered. The parties' status as appellants or respondents does not change in this subsequent appeal. The first appeal was taken by plaintiffs Corbett, Gurr, and Utah Ranchlands from judgments entered by the trial court on May 17, 1982, and June 29, 1982. Plaintiffs appealed from judgments for both defendants Lee A. Fitzgerald and Helen Fitzgerald (hereinafter "defendants I") and defendants Perry G. Fitzgerald and Carolyn S. Fitzgerald (hereinafter "defendants II"). Both appeals were dismissed with prejudice by the Court on November 1, 1982. *Corbett v. Fitzgerald*, Utah, No. 18529, appeal dismissed (Nov. 1, 1982); *Corbett v. Fitzgerald*, Utah, No. 18594, appeal dismissed Nov. 1, 1982).

Subsequent to this Court's dismissal of the original appeals, defendants II brought before the trial court a motion seeking an order requiring plaintiffs to appear and show cause why the original judgment between plaintiffs and defendants II should not be amended and corrected. The nature of the requested amendment and correction was to enter an award of money damages to defendants II against plaintiffs rather than the original order and judgment of reconveyance that had been entered by the trial court in its May 17, 1982 judgment. The basis for the motion for an order to show cause was that the real property could not be reconveyed inasmuch as plaintiffs had disposed of the property to third parties. An order to show cause was issued, and several hearings were held by the trial court. Following the hearings, the trial court found that plaintiffs could not reconvey, and after receiving testimony regarding the value of the properties, the trial court entered a money judgment in lieu of its original judgment of reconveyance in favor of defendants II and against plaintiffs.

In addition to the foregoing, the trial court at the conclusion of the hearings entered certain orders clarifying the basis for its earlier June 29, 1982 judgment as to

defendants I, but did not disturb the original judgment.

[1] In the present appeal, plaintiffs seek to resurrect the issues that were raised in the first appeal. The assignments of error in plaintiffs' brief are directed toward the original judgments, the same judgments from which plaintiffs appealed in *Corbett v. Fitzgerald*, Nos. 18529 and 18594, *supra*. This Court declines now to consider those original appeal issues, inasmuch as those issues and their appeals were dismissed with prejudice. The order to show cause hearings held subsequent to plaintiffs' original appeals to this Court do not provide an occasion for plaintiffs to now appeal the results of those hearings and include in the instant appeal those issues that were raised and dismissed in the original appeals. The express ruling by this Court on all issues raised by the prior appeals is binding upon the parties, the trial court, and this Court. *C & J Industries, Inc. v. Bailey*, Utah, 669 P.2d 855, 856 (1983). Plaintiffs' claims of error as to the original judgments were dismissed by this Court with prejudice. That dismissal constitutes an affirmance of the original judgments, and they are not subject to further attack in a subsequent appeal.¹

The only question properly before this Court now is whether the actions of the trial court following the order to show cause hearings, specifically the trial court's order and judgment of April 19, 1983, were appropriate. Those actions and the amendment of the original judgment only deal with plaintiffs and defendants II. Plaintiffs accepted the sum of \$4,709.96 from defendants I and released their judgment against them. That judgment is therefore not reviewable on appeal. *See Ottenheimer v. Mountain States Supply Co.*, 56 Utah 190, 193-94, 188 P. 1117, 1118 (1920).

1. Rule 76(c) of the Utah Rules of Civil Procedure (repealed), in effect during these appeals, reads as follows:

Effect of dismissal of an appeal. The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

We direct our attention to the nature of the trial court's order of April 19, 1983, and whether the amendment of the original judgment to allow an award of money damages against plaintiffs was proper under the circumstances. We treat the order as one issued in response to a motion brought under Rule 60(b)(7) of the Utah Rules of Civil Procedure. This Court will reverse the trial court's ruling only when there has been an abuse of discretion. *See Larsen v. Collina*, Utah, 684 P.2d 52, 54 (1984).

[2] Plaintiffs' brief on appeal contains no claim of error as to the trial court's actions at the order to show cause hearings. This Court's independent review reveals no error by the trial court. The original judgment ordered reconveyance of the real properties at issue. Since those real properties had been disposed of by plaintiffs to third parties, making it impossible for plaintiffs to comply, an amendment of the original judgment in favor of defendants II allowing money damages rather than reconveyance, was appropriate. The basis utilized by the trial court in determining an appropriate money damages award is supported by the evidence and was well within his discretion.

To the extent that the issues are properly before us, the trial court's order is affirmed.

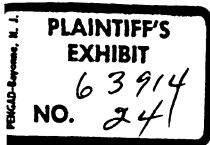
HALL, C.J., and DURHAM, STEWART, and ZIMMERMAN, JJ., concur.

HOWE, J., having disqualified himself, does not participate herein; TIMOTHY R. HANSON, District Judge, sat.



See generally Prudential Federal Sav. & Loan Ass'n v. St. Paul Ins. Cos., 22 Utah 2d 70, 44 P.2d 724 (1968); *Gammon v. Federated Milk Producers Ass'n*, 14 Utah 2d 291, 383 P.2d 44 (1963); *Davis v. Payne & Day, Inc.*, 12 Utah 2d 107, 363 P.2d 498 (1961); *Helper State Bank v. Crus*, 95 Utah 320, 81 P.2d 359 (1938).

ADDENDUM NO. 19



REAL ESTATE CONTRACT

THIS AGREEMENT, made this 27th day of May, 1981
between G. Boyd Corbett, hereinafter called the seller,
and Dale E. Beus, hereinafter called the buyer.

WITNESSETH, That in consideration of the stipulations herein contained, and the payments to be made as hereinafter specified, the seller agrees to sell unto the buyer, and the buyer agrees to purchase from the seller the following described real property situated in the County of Utah, State of Utah, and more particularly known and described as follows, to-wit: North 1/2 of the S.W. 1/4 of Section 30, Township 7 South
Range 1 West S.L.R.M

or the sum of 10.00 Dollars
in which the buyer has paid the sum of 1.00

dollars, the receipt whereof is hereby acknowledged.

And the buyer, in consideration of the premises, hereby agrees to pay to the seller, at nine
the remaining principal, with interest at the rate of

10 per cent. per annum, at the times and in the manner following:
Balance due September 15, 1981

And the buyer, in consideration of the premises, hereby agrees to regularly and seasonably pay all taxes and assessments which may be hereafter lawfully imposed on said premises, and keep buildings insured against loss by fire in a reliable insurance company in the sum of \$_____ payable the seller as his interest may appear.

All improvements placed thereon shall remain, and shall not be removed before the final payment is made as above agreed.

In case the buyer, his legal representatives or assigns, shall pay the several sums of money aforesaid punctually and at the several times above specified, and shall fully and literally perform all and singular, the agreements and stipulations aforesaid, according to the true intent and tenor hereof, then the seller will make unto the buyer, his heirs or assigns, upon request, a deed conveying said premises in fee simple, with the usual covenants of warranty, excepting, however, from the operation of subject matter of said covenants the before mentioned taxes and assessments, and all liens and incumbrances, created or imposed by the buyer or his assigns.

But in case the buyer shall make default in any way of the covenants herein contained or shall fail to make the payments aforesaid, or any of them punctually upon the strict terms, and at the time above specified, without any failure or default, the times of payment being declared to be the essence of this agreement, then seller shall have the right to declare this agreement null and void, and in such case, all the rights and interests hereby created or then existing in favor of the buyer, derived under this agreement, shall utterly cease and determine, and the premises aforesaid shall revert to and revest in the seller, without any declaration of forfeiture, act of re-entry, or without any other act by the seller to be performed, and without any right of the buyer of reclamation or compensation for money paid or improvements made, as absolutely, fully and perfectly as if this agreement had never been made.

The seller hereby agrees to furnish to the buyer, or his assigns, a policy of title insurance or a complete abstract of title to the within described premises, certified a responsible abstract company.

AND IT IS FURTHER AGREED, That no assignment of this agreement, or of the premises above described, shall be valid unless the same shall be endorsed on or permanently attached hereto and countersigned by the seller, and no agreement or condition or relations between the buyer and his assignee, or any other person, acquiring title or interest from or through him shall preclude the seller from the right to convey the premises to the buyer or his assigns, on the payment of unpaid portion of the purchase money which may be due to the seller.

Abstract or title insurance and fire insurance policies to remain in possession of the seller until final payment is made.

IN WITNESS WHEREOF, The seller and buyer have signed and delivered this agreement in duplicate, the day and year first above written.

Witnesses

Seller.

Buyer.