

1953

# Robert P. Woolley v. Milton S. Wycoff: Brief of Defendant and Appellant

Utah Supreme Court

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# In the Supreme Court of the State of Utah

FILED

OCT 2 - 1953

ROBERT P. WOOLLEY,

*Plaintiff and Respondent*

vs.

MILTON S. WYCOFF,

*Defendant and Appellant*

Clerk, Supreme Court, Utah

CASE No. 8046

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BRIEF OF DEFENDANT AND APPELLANT

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and Appellant*

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# In the Supreme Court of the State of Utah

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ROBERT P. WOOLLEY,

*Plaintiff and Respondent*

vs.

MILTON S. WYCOFF,

*Defendant and Appellant*

Case No. 8046

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## BRIEF OF DEFENDANT AND APPELLANT

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### STATEMENT OF FACTS

This action was brought by Woolley, respondent, a licensed real estate broker (R-22) for a real estate commission for services under an alleged oral contract to find a tenant for a ten-year lease (R-12), for approximately 10,000 square feet of space in a warehouse building located at approximately 1550 South 2nd West, Salt Lake City, Utah. This property included a large warehouse. Wycoff, defendant and appellant, was interested in purchasing this particular real property, but only if he could find a tenant (R-135) to lease

the front portion of the warehouse (R-137) at the rate of 4c per square foot on a ten-year lease.

Wycoff never purchased this 2nd West property, although he made an offer to purchase it on August 8, 1951, (R-124). He signed a standard earnest money receipt agreement and paid \$1,000 earnest money to a local real estate company not herein involved (R-124). After it was accepted, but before he discovered that his offeree did not have good title (R-15), he proceeded with tentative plans to utilize the property.

Woolley, although a licensed real estate broker, is not a member of the Salt Lake Real Estate Board (R-131). Cheney, a mutual friend of both Wycoff and plaintiff had interested Wycoff in a business venture involving processing war surplus materials which would require the use of part of a large warehouse such as that located on South 2nd West (R-144). Cheney discovered that plaintiff Woolley had a client who was seeking approximately 10,000 square feet of warehouse space (R-135). Cheney introduced Woolley to Wycoff (R-2). There is a conflict as to whether this meeting occurred and as to what was said, if anything, but there is agreement that this particular alleged conversation is the only basis for the oral employment contract under which Woolley recovered a \$2,099.80 judgment in the lower court for a real estate commission.

Woolley's own account of this conversation which he claims formed the contract is as follows:

“(Woolley) \* \* \* About that time Mr. Cheney spoke up and said, ‘If Woolley can find a tenant for this building,’ which could have been, ‘how will he

come out on the deal?

“ \* \* \*

“A. Mr. Cheney said, ‘How will he come out—how will Woolley come out’. Mr. Wycoff said, ‘I will pay Mr. Woolley the leasing commission if he can find a tenant’, and I said, ‘That is fine with me.’”  
(R-27)

On cross examination Woolley’s testimony concerning this conversation was as follows: .

“Q. (Mr. Durham) Is it true Mr. Wycoff said, ‘I want a tenant if I purchase this 2nd West property’?

A. No, he said, ‘I will buy the property if I can find a tenant—if you can find a tenant’. I am very certain he did not say there was any question as to whether he would buy the building, but if he found a tenant, he would buy—if I found a tenant he would buy the building. (R-46).

Cheney, the only witness to the alleged conversation testified as Woolley’s witness. His account of this conversation after a fifteen day recess (R-130,131) was as follows:

“A. I am trying to think how the conversation started out. I introduced Mr. Woolley and reminded—told Mr. Wycoff again he was a real estate broker, and that he was the man who had a lessee who might be interested in looking at this property, and I said to Wycoff, ‘Now where is Woolley coming out on this’ kind of prefacing the conversation, and Wycoff said, ‘We will take care of him’ and Woolley said, ‘That is all right with me’, so I let the whole thing drop.

"I assumed they had come to some agreement and knew what they were talking about, at that point.

Q. Was there any discussion at that time as to the terms that Mr. Wycoff wanted Mr. Woolley to obtain out of a tenant? Or the size?

A. All I remember was \$400 a month, or 4c a foot. That is about what—I think it was 10,000 feet. They wanted 4c a foot.

Q. And the conversation was this building on South 2nd West as 1554, was it referred to; in other words, you were talking about this building, about this space in the building?

A. That's right." (R135, 136).

On cross examination, Cheney repeated what occurred:

Q. (By Mr. Durham) Mr. Cheney, was there any discussion with Mr. Woolley and Mr. Wycoff this first meeting, as to specifically any commission; was the word 'commission' used there?

A. Not that I rember.

Q. Now would you repeat again the exact words as you recall them concerning where Mr. Woolley was going to come out on this?

A. That is just about the way I put it.

Q. To Wycoff you stated that?

A. Yes.

Q. 'Where is Woolley going to come out on this?

A. Yes.



Q. Mr. Woolley did not raise that question?

A. No.

Q. Mr. Wycoff did not raise that question?

A. No.

Q. And then who was the next person to speak, after you said, 'Where is Woolley coming out on this'?

A. Well Slim says, 'We will take care of him'.

Q. By 'Slim' you mean Mr. Wycoff?

A. That is right. Woolley said, 'That is good enough for me'. What they meant by that, I didn't know. I assumed they had, as between themselves, come to some agreement. There was no more discussion that I remember." (R-140).

Wycoff denied that the foregoing conversations took place and denied that he ever said "I will pay the commission" (R-93). He also denied ever discussing commission with Woolley (R-118) in the presence of Woolley or at any other time (R-93).

Easton, the prospective tenant for the 10-year lease, advised Wycoff he would take such a lease. This lease was never drafted or executed and Easton never paid Wycoff any money. Shortly before September 1, 1951, he started to move into the 2nd West property (R-59) without authority from Wycoff (R-120), and took approximately 5,850 square feet more (R-27) than he orally promised to lease from Wycoff for which he paid Friedmans, the owners, \$450 per month (R-48).

Wycoff first determined that Friedman's title was encumbered beyond their equity in the property under the earnest money agreement after Friedman had accepted his offer (R-15). He thereafter rescinded the temporary agreement and, after a trial on the merits, recovered judgment for his \$1,000 earnest money (R-15).

Wolley demanded his entire commission at the rate of 5 percent of the first five years' rentals and 3 percent of the second five years' rentals, or \$1,920 on September 20, 1951 (R-36), even though under the terms of the oral 10-year lease agreement with Easton, Wycoff would have received only \$400 per month for 10 years if he had purchased and leased the 2nd West property (R-52, 54).

In the complaint Woolley alleged that the action was for money damages for breach of an oral contract (R-1). In Wycoff's Amended Answer (R-12) which was granted by order of the court (R-11), Wycoff denied the existence of the oral contract and defended on the further grounds that the complaint failed to state a claim upon which relief could be granted and that the action was barred by the Statute of Frauds (R-12).

On cross-examination Woolley reaffirmed the oral nature of the transaction:

"Q. Isn't it true there is no writing of any kind between you and Mr. Wycoff involving this transaction?

A. That is true." (R-46).

The rules of the Salt Lake Real Estate Board were introduced into evidence (R-76). The rules specified at page

5 thereof that the real estate commission shall be not less than 5 percent for the first five years; 3 percent for the next five years; 2 percent beyond. Under Sub-division L, which is under the said general heading, the following appears:

“(L) *When Commission Earned.* A commission on a lease is earned and payable when, through the agency of the broker, the minds of lessor and lessee have met on the terms of the lease as evidenced by a cash deposit or written agreement.”

There is no conflict in the evidence that Easton never paid either a cash deposit or signed a written agreement with Wycoff.

The trial court made the following Findings of Fact and Conclusions of Law:

### *“Findings of Fact”*

1. That at all times hereinafter mentioned plaintiff was a real estate broker duly registered and licensed by the Securities Commission of the State of Utah, pursuant to Chapter 61-2, U. C. A. 1953 (formerly Section 82-2-2, U.C.A. 1943).

2. That on or prior to August 1, 1951, the defendant had entered into negotiations with Bessie E. Friedman and Western Salvage and Supply, Inc., a Utah corporation, for the purchase by defendant of certain improved real estate at 1550 South Second West street, Salt Lake City, Utah.

3. That on or about the 1st day of August, 1951, the defendant represented to plaintiff that he held an option from the said Bessie E. Friedman and Western Salvage and Supply Company, Inc., by the

terms of which defendant had the right to purchase the said improved property and the defendant on or about the said 1st day of August, 1951, orally employed and engaged plaintiff to secure for defendant a tenant ready, able, and willing to lease from the defendant a specified portion of the said premises for a period of 10 years and at a rental of \$400.00 per month and agreed that, in consideration thereof, defendant would pay to plaintiff the usual and customary real estate broker's commission then prevailing in and about Salt Lake City, Utah.

4. That thereafter and on or about the 15th day of August, 1951, plaintiff did procure and make available to defendant a tenant, to-wit, one A. A. Easton of Salt Lake City, Utah, who was then and there a person ready, willing, and able to lease and who did orally agree with defendant to lease the specified portion of the said property from defendant for a period of 10 years and at a rental of \$400.00 per month.

5. That the usual and customary and also the fair and reasonable real estate broker's commission then and there prevailing in and about Salt Lake City for procuring a tenant ready and willing to lease on the landlord's terms was and now is a sum equal to five percent of the rentals agreed upon for the first five years of the term of the lease and three percent of the rentals agreed upon for the next five years of the term of the lease.

6. That the said defendant failed and refused to exercise his option to purchase the above described property and therefore failed and refused to enter into a lease agreement with the said A. A. Easton on the terms aforesaid, or at all.

7. That thereafter and on or prior to the 20th day of September, 1951, plaintiff made demand up-

on defendant for the payment of the said sum of \$1,920,000 for real estate brokerage commission and that the defendant failed and refused to make payment thereof, or of any part of the same.

8. That there is now due and owing from defendant to plaintiff as commission for plaintiff's services as a real estate broker the sum of \$1,920.00, together with interest thereon at the rate of six percent per annum from the 20th day of September, 1951.

From the foregoing findings of fact the Court makes the following its conclusions of law:

### *Conclusions of Law*

That plaintiff is entitled to a judgment against the defendant for the sum of \$2,092.80 and for his costs of cour herein expended." (R-166-8).

Wycoff filed a timely motion for a new trial (R-170) which was denied by the court (R-72), whereupon appeal was taken to this court (R-174).

## STATEMENTS OF POINTS

### POINT I

**THERE CAN BE NO RECOVERY BY A REAL ESTATE BROKER UNDER AN ORAL EMPLOYMENT CONTRACT TO OBTAIN A TENANT BECAUSE "REAL ESTATE" AS USED IN THE STATUTE OF FRAUDS INCLUDES A TENANCY FOR YEARS.**

### POINT II.

**THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

# ARGUMENT

## I.

**THERE CAN BE NO RECOVERY BY A REAL ESTATE BROKER UNDER AN ORAL EMPLOYMENT CONTRACT TO OBTAIN A TENANT BECAUSE "REAL ESTATE" AS USED IN THE STATUTE OF FRAUDS INCLUDES A TENANCY FOR YEARS.**

There is but one question in this case: Does the term "real estate" contained in the Statute of Frauds (Sec. 25-5-4 (5) U.C.A. 1953,) include a ten-year lease? Sec. 25-5-4 (5) U.C.A. 1953 (hereinafter referred to as the 5th Subdivision of the Statute of Frauds) reads as follows:

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

" \* \* \*

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

The general construction statute (hereinafter referred to as the general statute) specifically defines "real estate" to include such a tenancy at Sec. 68-3-12 (10) U.C.A. 1953, as follows:

"In the construction of these statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute:

" \* \* \*

"(10) The terms 'land,' 'real estate' and 'real property' include land, tenements, hereditaments,

water rights, *possessory rights* and claims.” (Emphasis added.)

That a tenancy for years is a “possessory right” is too apparent to require supporting legal authority.

Under the decisions of this court it is clear that there can be no recovery for a real estate broker’s services selling “real estate” which are not provided for by written agreement. *Baugh v. Darley*, 112 Utah 1, 184 P.2d 335. (1947); *Case v. Ralph*, 56 Utah 243 188 P. 640 (1920).

Nor can the operation of the Statute of Frauds here be nullified by the doctrine of part performance because that doctrine is “purely equitable in nature and has no place in an action at law” *Baugh v. Darley*, supra, at 184 P.2d 337. Also the doctrine of equitable estoppel is inapplicable here because the plaintiff complains only of Wycoff’s refusal to carry out the alleged promise to pay him a commission in the future, which promise in no way operated as an abandonment of an existing right by Wycoff as is requisite for an estoppel. *Ravarino v. Price* ..... Utah ....., 260 P.2d 570, case No. 7882 decided August, 1953; *Papanikolas v. Sampson*, 73 Utah 404, 274 P.856. (1929); *Elliott v. Whitmore*, 23 Utah 342, 65 P.70 (1901).

Therefore, if “real estate” in Sec. 25-5-4(5) U.C.A. 1953, includes a tenancy for years, the trial court erred in awarding plaintiff broker a judgment for a commission.

The general construction statute now contained in Sec. 68-3-12(10) U.C.A. 1953 has been in effect in Utah in its present form since statehood. The same general definition, in a different form, antedated statehood. (See Sec. 2997(2),



2 C.L. of Utah 1888. It was first expressed in its present form in Sec. 2498(10) of the Revised Statutes of Utah, 1898. It is to be noted that the language of Subdivision 10 is not couched in permissive language. Unlike Subdivision 21 and some of the other subdivisions of the same section, the words *may mean* are not employed. The legislature said simply, the term "real estate" *includes* possessory rights. Subdivision 5 of the Statute of Frauds was enacted later than the general construction statute on March 11, 1909. (See Utah Session Laws of 1909, Page 119 and Compiled Laws of Utah, 1907, Section 2466, which contains only the first four subdivisions of the present 25-5-4 U.C.A. 1953). Thus there can be no question that the 5th Subdivision of the Statute of Frauds must be construed in light of the general definition of "real estate."

The purpose of general construction statutes is discussed in the 3rd edition of *Sutherland on Statutory Construction*, page 224, Vol. II, Sec. 3003, as follows:

"Practically all of the states enacted at an early date a general statute defining terms commonly used in legislative enactments. It must be presumed that all subsequent legislation is enacted in light of and with knowledge of these general interpretive statutes and thus the statutes control except where a clear legislative intent to substitute a different interpretation appears" \* \* \* Where general interpretive statutes exist these should be relied on extensively in determining the meaning of particular words. The rules of *in pari materia*, adoption of prior statutes, and legislative construction support the generous use of these statutes. It is to be regreted that so many cases have been decided without apparent concern for the enlightening direction of the general interpretive chapter of the



code. In many codes it appears as the first chapter and its very location bespeaks the importance and generality that the legislature attached to it."

Justice Thurman in *State Board of Land Commissioners vs. Ririe*, 56 Utah 213, 190 P.59, 63, states forcefully the reason why the general construction statute should be utilized in a case comparable to the present:

"\* \* \* it nevertheless stands as an unimpeachable fact that the (general) statute is a positive rule of construction enacted as such by the legislature and must be given full force and effect. (Cyc. 1105, and Case cited). No statute or series of statutes in pari materia could by name possibly be more potent in determining the meaning of a word or words used in a statute than is an act of the legislature itself enacted for that especial purpose."

An examination of every reported Utah case which has cited the general construction statute from the beginning of the Utah Reports (Sec. 68-3-12 U. C. A.; Sec. 88-2-12 U. C. A. 1943; Sec. 2498 C.L. of Utah 1907) as reported by Shephard's Utah Citations has been made and it indicates that this Court has consistently utilized the general construction statute's definitions in construing specific statutes unless such general definition was clearly inapplicable.

Two cases decided by this court involving Subdivision 4 of the general construction statute, one using the general definition and the other not, indicates that the general statute is applicable to define "writing" to include "printing" when a clear contrary legislative intent is not apparent from the specified statute under scrutiny. *Pingree National Bank v. McFarland*, 57 Utah 410 195 P.313 (1921) (general con-

struction statute's definition of "writing" to include "printing" applies to N.I.L.'s requirements of a "written" endorsement,) and *First Savings Bank of Ogden v. Bramwell* 67 Utah, 247 P.573, (1926) (same general definition does not apply to statute dealing with recording fees to include printed words when specific statute states fees are to be charged on "words actually written in.")

*State Board of Land Commissioners v. Ririe* 56 Utah 213, 190 P.59 (1920) considered whether the state land board had authority to invest state funds in the purchase of *town* bonds when the specific statute authorized only that such funds "shall be invested in \* \* \* *city* \* \* \* bonds." The court utilized the provision now contained in Subdivision 21 of 68-3-12 U.C.A. 1953, which states that "the word 'city' may mean incorporated town," to determine that *town* bonds were a legal investment. See also *Chatwin v. Terry*, 107 Utah 340, 153 P.2d 941 (1944) which used Subdivision 7 of the general Statute to determine that jurisdiction of the juvenile courts includes females under 21 years as well as males when the specific statute used only the word "he". The following cases also hold the general construction statute's definitions applicable:

*Public Utility Commission v. Jones*, 54 Utah 111, 179 P.745 (1919); *Pleasant Valley Coal Company v. Carbon County*, 81 Utah 13, 16 P.2d 712 (1932); *Western Beverage Company of Provo v. Hansen*, 98 Utah 332, 96 P.2d 1105 (1939); *Romney v. Lynch*, 58 Utah 479, 199 P.974 (1921) *McMilan v. Emery*, 59 Utah 553, 205 P.898 (1922); *Lavagnino v. Uhlig*, 26 Utah 1, 71 P. 1046 (1903); *aff'd*. 198 U. S. 443, 49 L. Ed. 1119.

As already indicated, the only cases where the general statute has been held inapplicable have been as in the "writing" cases (*supra*) or where there was an explicit or implicit statutory definition to the contrary contained in the specific statute involved in the following cases: *Young v. Corless*, 56 Uah 564, 191 P. 647 (1920); and *In re Lamont's Estate*, 95 Utah 219, 79 P.2d 649 (1958). All of these cases are distinguishable from the instant case.

The evident purpose of the 5th Subdivision of the Statute of Frauds was to require a real estate agent or broker to reduce any employment contract to writing. Kratovil in *Real Estate Law* says:

"Because of the endless litigation that has arisen as to the existence of an employment contract, in many states (Arizona, California, Idaho, Indiana, Iowa, Kentucky, Michigan, New Jersey, Oregon, Oklahoma, Ohio, Utah, Washington, Montana, Nebraska, and Wisconsin, for example) the contract of employment must be in writing in order for the broker to be entitled to a commission. (Page 68, Prentice-Hall, Inc. 8th Printing, 1950).

(See 17 A.L.R. 892-4 and 9 A.L.R.2d 751-3 for the *haec verba* provisions of the Statute of Frauds of other states similar to Sec. 25-5-4 (5) U.C.A. 1953.) It is apparent that Utah's statute was one of the earliest. All later enactments have been worded to avoid the problem whether a broker's employment contract to obtain a leasehold as well as a freehold interest is within the statute. In every instance a leasehold interest is included within the prohibitions of the statute.

There may be stronger reasons of public policy which require a writing under the 5th subdivision of our Statute of

Frauds than under the other provisions of said statute. The provisions concerning services to be performed within a year, and cases involving recovery for a reasonable value of improvements based on oral agreement to purchase, for instance, have been contrasted with this provision in the following language:

“It is different with the statute on brokers’ agreements. It provides that any agreement for the performance of service as real estate broker shall be void unless in writing. The statute is as applicable to contracts implied in law as any other. In effect, it forbids any recovery for service in selling land which are not provided for by written agreement.” (*Baugh v. Darley*, 112 Utah 1; 184 P. 2d 335, 339).

The annotation at 17 A.L.R. 891, at pages 894 and 895 collects the cases which contain judicial explanations for this addition to the Statute of Frauds. The Nebraska Supreme Court’s opinion in *Barney v. Lasbury*, 76 Neb. 701, 107 N.W. 89 (1906), is illustrative of the policy behind such an addition to the statute, which requires a broker’s employment contract to be written:

“The reasons which impelled the legislature to pass that act are known to the courts and the profession generally. Innumerable suits were being instituted from time to time, by agents and brokers after the owners of land had sold the same, claiming a commission on the ground that they had been instrumental in securing the purchaser; and in many cases owners of land were compelled to pay double commission on account of such claims. In order to prevent such disputes and protect property owners under just such cases as the one we are considering, the legislature passed the act.”

The uniform refusal of every jurisdiction to permit a *quantum meruit* recovery by the broker who fails to reduce his employment contract to writing, makes evident how strong this policy is. (See particularly *Hale v. Kreisel*, ..... Wis. ...., 215 N.W. <sup>220</sup>227 (1927) which overrules *Seifert v. Dirk*, 175 Wis. ~~200~~, 184, N.W. 698 (1921) which temporarily permitted a *quantum meruit* recovery under a void oral contract contrary to all other jurisdictions. Note the discussion in the annotation following 17 A.L.R. 885).

The Utah cases are in harmony with this principle. *Watson v. Odell*, 58 Utah 276, 198 P.772 and *Case v. Ralph*, 56 Utah 243, 188 P640.

In *Stroble v. Tearl*, ..... Tex. ...., 221 S.W.2d 556 (1949) the Texas Supreme Court reversed the decisions of the two lower courts under facts similar to the instant case. The Texas Statute of Frauds uses only the words "real estate". The Court held that the **realtor's oral contract to procure** a tenancy for years was void because such a tenancy was included in the term "real estate".

The annotation at 103 A.L.R. 833 has examined the cases dealing with the question whether an interest created by lease is "real estate" within the meaning of the Statute of Frauds requiring a written employment contract. The Ohio and Michigan equivalent of the 5th Subdivision of the Statute of Frauds, unlike Utah's, contain the words, "an interest" or "any interest in real estate", and the Supreme Courts of those states have held that a lease is included in such statutory language. *Brenner v. Spiegle*, 116 Ohio St. 631, 157 N.E. 491 (1927) and *Hannan Real Estate Exch. v. Traub*, 217 Mich. 162, 185 N.W. 706 (1921). The California and Washington Statute of Frauds are more nearly similar to

Utah's in that they contain only the term "real estate". However, in examining the statutes of those two states, it is apparent that all California and Washington decisions are to be distinguished because of the effect of their particular general construction statutes. The *Civil Code of California*, (Hillier-Lake, 1947, published by Bender-Moss Company), at page 3, Chapter 13, contains the applicable general construction statutory language:

"Section 13. *Words and phrases, how construed.* Words and phrases are construed according to the context and the approved usage of the language, *but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition.*" (Emphasis added.)

"Section 14. \* \* \* The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context.

"2. The words 'real property' are co-extensive with lands, <sup>eme</sup>tenements, hereditaments."

The legislative history at the above page reference indicates that this California statute was first enacted in 1873. An examination of the Washington statute indicates, at Title 2, Chapter 1, *Remington Revised Statutes of Washington*, that a few words are defined as in our general statute, but that Washington has no general statutory definition of the words "real estate."

Obviously, California and Washington cases must be distinguished from the instant case, and none of the cases from



other jurisdictions have considered general construction statutory definition of "real estate" as is involved here. In fact, none of the decisions examined by this writer have construed a general construction statute together with the Statute of Frauds. All decisions cited by defendant to the lower court have been examined and distinguished. It would seem apparent that the effect of the definition of "real estate" contained in Section 68-3-12 (10) has at least as great an effect on our Statute of Frauds as does the use of the words "an interest" or "any interest" in real estate in other jurisdictions where the courts have always held that a term for years is included within the mandate of the statute which requires a real estate agent to have his employment contract in writing.

Defendant agrees with Justice Thurman in *State Board of Land Commissioners v. Ririe*, supra, at 190 P.63, as to the burden of proof under our general construction statute:

"As to that question the (general) statute itself imposes the burden upon those who take the negative view."

However, the defendant wishes to declare that the context of the Statute of Frauds contains no repugnancy when the terms "real estate" and "real property" are defined by the language of the general construction statute. Plaintiff argued to the trial court that the legislature could not have intended to permit an oral lease for one year or less and to deny a broker his commission on this very same lease. It is submitted that such a result would be squarely in line with the policy of our Statute of Frauds and would carry out the manifest intent of the legislature.

## POINT II.

### **THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

For the reasons stated under Point I of the Argument, the court below erred in its judgment because the complaint stated this action to recover a real estate commission was based upon an oral contract which is not a claim upon which relief can be granted.

## CONCLUSION

The trial court erred in entering judgment against Wycoff in favor of plaintiff real estate broker because "real estate" as used in the 5th Subdivision of the Statute of Frauds (Sec. 25-5-4 (5) U.C.A. 1953) is defined by the general construction statute (Sec. 68-3-12) (10) U.C.A. 1953) to include a 10-year lease, and plaintiff cannot recover for his services because they were not provided for by a written agreement of any kind.

WHEREFORE, M. S. Wycoff, defendant and appellant, prays that the judgment of the lower court be reversed and the lower court instructed to make new findings and conclusions consistent with this court's opinion.

Respectfully submitted,

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and Appellant.*