

1980

# Vilate B. McDonald and Evelyn Brough v. Barton Brothers Investment Corp. et al : Brief of Third-Party Plaintiff

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

VILATE B. MCDONALD and  
EVELYN BROUGH,

Plaintiffs-Respondents,

vs.

BARTON BROTHERS INVESTMENT  
CORPORATION,

Third-Party Plaintiff-  
Respondent,

vs.

GOLDEN WEST DEVELOPMENT  
CORPORATION, INC., and  
L. A. CAMPBELL,

Third-Party Defendants-  
Appellants.

Case No. 16974

BRIEF OF THIRD-PARTY PLAINTIFF  
BARTON BROTHERS INVESTMENT CORPORATION, RESPONDENT

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EVELYN BROUGH,	:	
	:	
Plaintiffs-Respondents,	:	
	:	BRIEF OF THIRD-PARTY
vs.	:	PLAINTIFF BARTON BROTHERS
	:	INVESTMENT CORPORATION,
BARTON BROTHERS INVESTMENT	:	RESPONDENT
CORPORATION,	:	
	:	
Third-Party Plaintiff-	:	
Respondent,	:	
	:	
vs.	:	
	:	Case No. 16974
GOLDEN WEST DEVELOPMENT	:	
CORPORATION, INC., and	:	
L. A. CAMPBELL,	:	
	:	
Third-Party Defendants-	:	
Appellants.	:	

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NATURE OF THE CASE

This was an action by plaintiffs for specific performance of real estate contract for two residential lots or for damages against the defendant-third-party plaintiff who interpleaded against third-party defendants for specific performance and/or damages claiming that defendant-third-party plaintiff had no obligation to provide said lots to plaintiff.

RELIEF SOUGHT ON APPEAL

The third-party plaintiff seeks to affirm the judgment entered against third-party defendant, L. A. Campbell.

## STATEMENT OF FACTS

By Uniform Real Estate Contract agreement dated 16 December 1970, Barton Brothers Investment Corporation contracted to purchase from the estate of B. O. Brough, deceased, approximately 22 acres of land situated in Davis County, Utah. (Plaintiff's Exhibit A). The contract gave Barton the option to purchase additional acreage west of an oil pipe line:

"Buyer shall have the option of buying or refusing to buy the acreage West of the Oil Pipe Lines except that Seller shall have the option of retaining one lot West of said pipe lines, to be adjusted in said payment due June 1, 1975."

Purchase price was \$3,000.00 per acre payable June 1, 1975.

Some time in June 1974 or prior thereto, Barton met third-party defendant, L. A. Campbell, at Tracy Collins Bank in Bountiful, Utah and discussed Barton's land he was purchasing from Brough. (TR 136, 144) Barton offered to sell the Brough land to Campbell for \$8,500.00 an acre. (TR 89) Barton told Campbell that plaintiffs, Violate B. McDonald and Evelyn Brough, had an option to purchase two lots from the Brough property once it had been platted and recorded and any purchase by Campbell would need to be subject to plaintiffs' option to buy. Campbell acknowledged at trial that he was aware of Barton's obligation to plaintiff for two lots (TR 137-138) and at that time Campbell made arrangements to "take care of the Brough

sisters..." (TR 136-137) An Earnest Money Receipt and Offer to Purchase was drawn up between Barton and Campbell dated June 7, 1974 for the sale of the subject ground for \$8,500.00 per acre. (Defendant's Exhibit 1) No mention of the Brough sisters' option for two lots was noted in defendant's exhibit 1.

On about the 29th of July, 1974, Barton met with the representatives of B. O. Brough's estate to pay the estate the balance due on the contract of 16 December 1970. (Plaintiff's Exhibit A) At that closing, Jim Brough, representing the B. O. Brough estate and his sisters, Violate B. McDonald and Evelyn Brough, plaintiffs, requested an instrument in writing which would reflect the right of plaintiffs to select two lots when the land was platted and recorded. Another Earnest Money Receipt and Offer to Purchase dated July 29, 1974 (Plaintiff's Exhibit B) was signed by Barton as seller and plaintiffs as buyer reserving to plaintiffs the option to select two lots provided that their selection was made, (1) within 10 days after the platt was recorded with Kaysville City and (2) provided there was tendered \$5,000.00 for offsite improvements within 30 days after completion of the offsite improvements in the subdivision immediately adjacent to said lots on the basis of \$2,500.00 per lot.

At the time of the closing on the Brough contract, \$3,000.00 was placed in escrow for acreage adjustment and to assure plaintiffs value for two lots if they exercised their option. (TR 122) Broughs conveyed the subject land to Barton by Warranty Deed dated 15 July 1974 and recorded 30 July 1974. (Defendant's Exhibit 4)

Barton and Campbell met again at Tracy Collins Bank, Bountiful, on or about August 18, 1974 to "close" the transaction on the sale of the ground. Mr. John Busk, representing Tracy Collins Bank, prepared a closing statement dated August 18, 1974. (Defendant's Exhibit 2) That closing statement under the category of Sales Price showed an escrow account, 1 acre, \$8,500.00. Campbell acknowledged (TR 98-99) that the purpose of the \$8,500.00 escrow was "...held back specifically to take care of the Brough girls." He further said that he felt the escrow took care of the whole situation and he felt with that money in escrow and having bought the land for \$8,500.00 per acre that they were well compensated and ahead. Barton also acknowledged that understanding between himself and Campbell (TR 154) and testified that Campbell agreed to honor the obligation due and owing the Brough sisters.

At the time of the closing, Campbell requested that the deed from Barton, rather than showing Campbell Construction Company as the grantee as called for in the Earnest

Money Receipt and Offer to Purchase (Defendant's Exhibit 1), reflect Golden West Development Corporation as grantee, a different corporation but one in which Campbell also held a principal interest. The deed dated 18 July 1974 was subsequently recorded 30 July 1974. (Defendant's Exhibit 3)

After Barton conveyed the land to Campbell the land was platted and recorded. Sales commenced through Secure Realty of Bountiful, an office owned and operated by Wayne Parkin, a partner of Campbell. Sales also were made by Brough through his office, Brough Realty, Kaysville, Utah.

Mr. Brough subsequently contacted Parkin and asked that Parkin convey two lots to plaintiffs as he, Brough, had understood Campbell had agreed to do. Parkin said he did not understand fully the arrangements on the two lots and he would discuss the matter and notify Brough. Later Parkin told Brough that a meeting of the principal share holders of Golden West Development Corporation had been called to discuss the matter of the Brough sisters' two lots. He informed Brough, "...it was the decision of the corporation that we would not acknowledge any agreement that he might or might not have entered into with a predecessor." (TR 130) Campbell said that he also informed Brough shortly thereafter in a telephone conversation:

A. I just told him that as far as we were concerned, we didn't have any obligation on the transaction.

Q. Did you give him any explanation as to that?

A. No, that's all. (TR 139)

Campbell testified that the two lot agreement would have been honored by himself and Golden West Development Corporation if Barton had come to Campbell and discussed the matter:

A. I think Mr. Barton should have come to me when this came to a head and tried to sit down with with us and work a settlement out on it. If Mr. Jim Brough wanted these two lots, why he should have set down with Golden West and worked out a negotiable price on these lots at the time, improved lots, which we would have done. But, he didn't contact me.

Q. You would have done that had Mr. Barton come to you and said now is the time?

A. Very definitely. If he would have come to us, those lots would have been open and we would have probably worked them out. But he would have had to compensate us for it.

Q. And that was based upon your agreement with him previously I take it, is that correct?

A. Right.

Q. But you're saying that that's why you didn't put this thing together as you agreed to do because he never came and sat down with you?

A. True. (TR 141-142)

By letter of February 4, 1977, plaintiffs made demand on Barton for the two lots pursuant to the agreement of

July 29, 1974 (Plaintiff's Exhibit B) or the comparable value of those lots. Barton could not comply. Suit was commenced by plaintiffs shortly thereafter.

## ARGUMENT

### POINT I

SINCE THE PRESENT ACTION WAS AN ACTION IN EQUITY FOR SPECIFIC PERFORMANCE AND MONEY DAMAGES WERE AWARDED ONLY AS AN ALTERNATIVE, THE DOCTRINE OF PART PERFORMANCE IS AVAILABLE.

Appellant's argument that the Doctrine of Part Performance is not available in an action at law for monetary damages for breach of an oral contract to convey land, was neither pleaded nor argued in the trial court, nor was the court's "alternate judgment" for money damages either formally or otherwise objected to by appellant at the time such ruling was made. (TR 184) In fact, when respondent Barton's counsel suggested that specific performance might still be possible, Mr. Fadel, appellant's counsel, argued against the possibility of specific performance, in favor of money damages. (TR 190) At no time did appellant ever object to or express any disfavor with the court's ruling that money damages should be paid as an alternative to specific performance where respondent's part performance made ineffective the operation of the Statute of Frauds.

Rule 46, Utah Rules of Civil Procedure, states that while "Formal exceptions to rulings or orders of the Court are unnecessary," a party must, "at the time the ruling or order of the court is made or sought, make known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefore..."

Although appellant had ample opportunity to object to the court's ruling against him on this issue, no where in the transcript is there evidence that appellant ever objected to the alternative decree of money damages or to the use of the Doctrine of Part Performance on the presently stated grounds. This being the case, appellant should not be allowed to raise such an objection on appeal.

Had appellant stated such an objection to the court below, that court may not have given an alternate decree for money damages, but instead may have more diligently inquired after the possibility of specific performance, as was suggested by respondent's counsel. (TR 190)

Nevertheless, respondent Barton contends that appellant's first argument is invalid on its fact.

This was not an action only at law for monetary damages as appellant claims but rather, on the face of the pleadings as well as the ruling of the court, an action in equity for specific performance of appellant's promise.

Plaintiff's Complaint prayed as follows:

1. For an Order of the Court requiring the defendants to provide to the plaintiffs the lots as agreed in the agreement.
2. In the alternative for judgment against the defendant in an amount equal to the present value of the lots in question, together with interest thereon at the legal rate.

The prayer of the Third-Party Complaint was:

1. For any and all of what the plaintiffs may recover from defendant and third-party plaintiff.

Clearly, respondent included in its Third-Party Complaint a prayer for the same relief against appellant as was sought against respondent by plaintiffs. This prayer was for specific performance, with money damages only as an alternative.

The judgment of the Court was for specific performance, with money damages to be awarded only in the event that specific performance was impossible. (TR 184)

Section 25-5-8, U.C.A. (1953), Statute of Frauds, states:

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

Since the present action was for specific performance and specific performance was granted, the doctrine of part performance was a completely valid argument in respondent's behalf.

The cases relied on by appellant to establish that part performance is not an available argument to defeat the Statute of Frauds in an action for monetary damages are distinguishable from the present case. In McKinnon v. Corporation, Etc., Latter-day Saints, 529 P.2d 434 (Utah 1974), the action was entirely one for monetary damages. Specific performance was not even requested. But in the present case, specific performance was both prayed for and decreed by the court. Only because specific performance was "impossible" was an alternate judgment for money damages declared at all.

In Ravarino v. Price, 123 Utah 559, 260 P.2d 570 (1953), the court's statement, quoted by appellant, that "It is well settled in this jurisdiction that the Doctrine of Part Performance is not available in an action for damages on an oral contract to convey land," was mere ill-supported dictum, since the court had already reversed the trial court's decree for specific performance on the grounds that the alleged part performance was insufficient to take an oral contract out of the Statute of Frauds anyway.

In Baugh v. Darley, 112 Utah 1, 184 P.2d 335, (1947) the Ravarino court's sole support for the "well settled" doctrine, again the action was one at law only, and no specific performance was pled or decreed, as an alternative

or otherwise.

Respondent contends that the doctrine of part performance should be available in the present case, as allowed by the court below.

## POINT II

### THE DOCTRINE OF PART PERFORMANCE AS EXCLUDING THE OPERATION OF THE STATUTE OF FRAUDS IS VERY BROAD.

Respondent reiterates part of appellant's quote from Ravarino v. Price, supra, comment 6:

In Price v. Lloyd, 31 Utah 86, 86 P. 767, 772, 8 L.R.A., N.S., 870, (1906) this court said:

Courts of equity, in establishing the doctrine invoked by plaintiff, have not, by any means, intended to annul the Statute of Frauds, but only to prevent its being made the means of perpetrating a fraud...

And in Burns v. McCormick, 233 N.Y. 230, 135 N.E. 273, 374, (1922) the Court of Appeals of New York, through Mr. Justice Cardozo announced:

The peril of perjury and error is latent in the spoken promise. Such, at least, is the warning of the statute, the estimate of policy that finds expression in its mandate.

Thus, according to Justice Cardozo and this court, the primary purpose for the Statute of Frauds is to avoid the possibility of perjured testimony of oral contracts. Yet, in the case at bar no possibility of perjury concerning the oral contract exists. Indeed, the most favor-

able testimony to respondent regarding the oral contract was that given by appellant himself. Appellant Campbell, testified concerning the oral contract as follows (TR 136):

Q. When did you make that agreement with him [J. Barton]?

A. That was when we first bought it.

Q. What date?

A. Don't ask me, I don't keep dates in my mind that good.

Q. Okay, Your Earnest Money Agreement was in June of '74, just to refresh your memory. Was it at that time?

A. Well, it was prior to that--I think it was prior to that signing of the Earnest Money or somewhere around that vicinity.

Q. I see, so some time prior to June of '74 you made an agreement with Mr. Barton to take care of the Brough sisters--is that what you are saying?

A. In that vicinity, yes.

The reason given by Justice Cardozo for invoking the Statute of Frauds is not present in the case at bar. But the reason for invoking the exception to the Statute of Frauds of part performance, as quoted in Price v. Lloyd, supra, is "to prevent its being made the means of perpetrating a fraud." The possibility of the Statute of Frauds being used to perpetrate a fraud in the present case compels allowing the exception.

Appellant, by his own testimony, admitted having made an agreement with respondent to honor the option

of the Brough sisters. This agreement was made to induce respondent to sell the subdivision to appellant. If appellant, after admitting having made the agreement, and after respondent had performed fully by selling the property in reliance on the promise, were then allowed to have the promise declared invalid for the Statute of Frauds, this would put the Statute of Frauds to the very use it was intended to prevent.

Appellant's claim that there was no clear oral agreement is also entirely unsupported by the evidence. We quote from Campbell's testimony on page 144 of the Trial Transcript, lines 4-12:

Q. Did you ever have any conversation with Mr. Jake Barton relative to an agreement which he had with the Brough sisters?

A. Yes. I had this previous negotiation with him at the very first when he said that he had this obligation.

Q. Did he represent to you that in fact he felt that he had a right to those two lots?

A. Oh, very definitely. He asked me if I would, you know, if I would acknowledge this and I told him that down the road we would work it out.

Barton testified that the agreement was in fact worked out "in quite minute detail prior to going into closing."  
(TR 162)

The trial court, in its Formal Findings of Fact, paragraph 16, accepted the foregoing testimony to the

effect that appellant, Mr. Campbell, verbally agreed to honor the agreement with the Brough sisters.

Finally, appellant subtitled his second argument by claiming that "The Doctrine of Part Performances as Excluding the Operation of the Statute of Frauds is Extremely Limited." We reiterate 25-5-8, U.C.A. (1953), Statute of Frauds, which states, "nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof." The language of the statute makes very plain the desire of the legislature that the doctrine of part performance is to have a very broad application. Appellant has cited no case law which defeats the language of this statute, particularly as applied to the facts of the present case, where respondent's part of the agreement was fully performed, the oral agreement was admitted by appellant, specific performance was decreed by the court, and a failure to follow the statute would allow appellant to perpetrate a fraud.

### POINT III

APPELLANT'S ORAL PROMISE TO HONOR  
PLAINTIFFS' OPTION FOR TWO LOTS WAS  
PART OF THE ORIGINAL CONSIDERATION  
FOR THE SALE OF THE SUBDIVISION BY  
RESPONDENT TO APPELLANT.

Viewing appellant Campbell's own testimony most

favorably, the oral agreement came, not "on or after July 30, 1974," but "at the very first" (TR 144) "when we first bought it" (TR 136), prior to the Earnest Money Agreement (TR 136), or "sometime prior to June of '74" (TR 136). The record shows that Campbell was very certain in his own mind that he had made an agreement with and was obligated to Barton concerning the Brough lots when he first bought the subdivision from Barton. In fact, Campbell stated that, based on this he would have made a settlement honoring the agreement if only Barton had taken the initiative by contacting Campbell. (TR 141)

Thus, Campbell's agreement to honor the Brough option was part of the original consideration for the subdivision sold by Barton to Campbell. Barton would not have sold the property, had Campbell not agreed to honor the Brough option. And this was clearly the reason Campbell agreed "when we first bought it" (TR 136) to "work something out."

This was the view accepted by the trial court (Formal Findings of Fact, paragraph 14), which further found that Barton's obligation on this oral contract was fully performed (Formal Findings of Fact, paragraph 14), which performance consisted of the sale and transfer of title of the land to Campbell.

Appellant's cost analysis is completely irrelevant,

since Campbell, had he honored the Brough option, would have gotten exactly what he bargained for. Again, Campbell, by his own admission, agreed to deliver the two lots to the Brough sisters, should they so choose. By not honoring that agreement, Campbell left himself with a windfall-- property worth much more than the \$8,500.00 in escrow.

#### POINT IV

THE PRESENT ACTION IS ONE IN EQUITY FOR SPECIFIC PERFORMANCE, AND THIS IS THE RELIEF WHICH WAS GRANTED; IN ANY EVENT, RESPONDENT SHOULD NOT BE WITHOUT A REMEDY MERELY BECAUSE OF THE WAY PLAINTIFFS APPROACHED AND PLEADED THE CASE.

The trial court ruled that "plaintiffs were not required to pre-pay the FIVE THOUSAND (\$5,000.00) DOLLARS for improvements where the defendant refused to convey the lots in question." (Conclusions of Law, paragraph 3)

Respondent respectfully submits that, were this court to reverse the trial court's ruling on this point with respect to appellant, the entire decision of the trial court should also be reversed with respect to respondent. For, if the plaintiffs were not excused from tendering the \$5,000.00 to Barton, then Barton should not be required to perform his part of the contract with plaintiffs.

Nevertheless, appellant contends that plaintiffs' failure to tender the \$5,000.00 shows that plaintiffs

never intended to obtain specific performance, and that the action was a legal action for damages, thereby precluding part performance as a basis for respondent's Third-Party Complaint. This contention is inapplicable to the present situation.

It should be pointed out that respondent is in a difficult situation regarding the technical distinction between actions at law and equity. The present case has involved two lawsuits, one by plaintiff against respondent, and the other by respondent against appellants. In the latter suit, respondent may only recover, at most, what plaintiff recovered from respondent in the former suit. But respondent is handcuffed in the latter suit by the plaintiffs' pleadings in the former suit. Thus, had the plaintiffs chosen only to seek monetary damages from respondent in an action at law, respondent could not then seek specific performance against appellant in his Third-Party Complaint.

Appellant would have the court believe that because this court in past cases has refused to allow use of the doctrine of part performance in an action at law, under very different fact situations, respondent should then be without remedy, merely because plaintiffs chose not to seek specific performance.

Respondent contends that: (1) the present case is

an action in equity; (2) the relief granted by the court was specific performance, an equitable relief; and (3) even if this court should find the opposite on both of these issues, the Doctrine of Part Performance should be allowed to defeat the Statute of Frauds on the unique facts of the present case.

#### POINT V

THE ORAL PROMISE MADE BY APPELLANT WAS NOT A MODIFICATION OF, BUT A PART OF THE ORIGINAL CONTRACT, AND THERE ARE SUFFICIENT MEMORANDA TO TAKE THE ORAL PROMISE OUT OF THE STATUTE OF FRAUDS ANYWAY.

Appellant's argument that a contract required to be in writing cannot be modified by an oral agreement is invalid for the following reasons:

First, as was discussed above, Campbell's promise to honor the Brough option was part of the original contract between Campbell and Barton.

Second, both appellant's brief and the evidence were ambiguous as to what particular written instrument embodies the entire contract. And even were Campbell's promise deemed a modification of some written contract, the court in Zions Properties, Inc. v. Holt, 538 P.2d 1319 (1975), as quoted by appellant, pointed out that the statute of frauds applied equally to modifications of contracts as well as to original contracts. It follows that the ex-

ceptions to the statute of frauds should apply to modifications also. Thus, in the present case, whether or not Campbell's agreement is deemed a modification to or part of the original contract, Barton's obligations thereunder were fully performed, and the doctrine of part performance takes it out of the Statute of Frauds.

Third, the memoranda of the oral agreement are much more abundant in the case at bar than in Zions. There, notations on a check were the only concrete evidence of the oral agreement. Here, both the written memoranda and oral evidence are more than adequate to concretely establish the oral contract. The closing statement prepared by Mr. Busk of Tracy Collins Bank mentions the \$8,500.00 held in escrow for one acre, to allow for the Brough lots. (Defendant's Exhibit 2) Campbell's deposition and testimony shows that he knew what the \$8,500.00 was for and did not object to its being withheld at the time of closing.

The Earnest Money Agreement (Defendant's Exhibit 1), signed by Campbell, specified the purchase price of the property at \$8,500.00 per acre, which agrees with and further supports the escrow agreement.

The Tracy Mortgage Company check stub (Plaintiff's Exhibit C) also mentions a deduction for "2/3 acre in 2 lots being repurchased."

And finally, Mr. Campbell himself testified of his

oral agreement to assume Barton's obligation to the Brough sisters.

There can be no question that the oral contract existed, and the evidence establishes it clearly enough to easily satisfy the Statute of Frauds.

#### POINT VI

APPELLANT'S ORAL PROMISE MUST BE DEEMED  
AN ORIGINAL OBLIGATION AND NEED NOT BE  
IN WRITING.

Section 25-5-6, U.C.A. (1953), Statute of Frauds,  
states in pertinent part:

A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the promisor and need not be in writing:

(1) Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise, or by one who has received a discharge from an obligation in whole or in part in consideration of such promise.

The only case law applicable to this statute is Kahn v. Perry Zolezzi, Inc., 119 Utah 256, 226 P.2d 118 (1950), where the defendant corporation agreed to assume an obligation of one of the incorporators on a note upon receiving property from the incorporator equal to the amount of the note. In holding that the defendant corporation was bound to its agreement under §25-5-6 U.C.A (1953), this court said:

So concluding, it is not necessary to determine whether or not there is sufficient memoranda in writing of the agreement of the corporate defendant to take the case from the Statute of Frauds.

In the case at bar, Campbell, the promisor, received property from Barton upon undertaking to apply the property in answering for Barton's obligation to the Brough sisters. This is a situation clearly within the meaning of Section 25-5-6. The equities of the present case are also clearly deserving of the application of Section 25-5-6 in upholding the trial court's decision. Campbell's promise should be deemed an original obligation and need not be in writing.

#### POINT VII

THE STATUTE OF FRAUDS DOES NOT APPLY TO AN ACTION FOR SPECIFIC PERFORMANCE OF A CONTRACT WHICH HAS BEEN PARTLY PERFORMED.

The present case also falls under Section 25-5-8, U.C.A. (1953), Statute of Frauds, which states that:

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

As has been discussed above, the present case is among those intended to be reached by this statute.

#### POINT VIII

THIS COURT HAS TENDED TO BE PARTICULARLY WILLING TO ALLOW AN ORAL CONTRACT TO STAND WHERE ITS EXISTENCE IS ADMITTED BY THE PARTY AGAINST WHOM IT IS BEING ENFORCED.

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

in an action between two remainderman to have property sold and proceeds divided, defendant counterclaimed for specific performance of an oral agreement by plaintiff to sell his interest to defendant. Plaintiff-appellant contended that no oral contract existed, but his own testimony showed that an agreement did exist. In granting specific performance to defendant, this court stated:

...we think that inasmuch as the appellant's own testimony establishes an oral agreement on his part to sell his interest in the property to his brother we are warranted in concluding that the acts of part performance were done in reliance on that contract. In Jones v. Jones, 333 Mo. 478, 63 S.W. 2d 146, 90 A.L.R. 219, (1933) and in Higgins v. Exchange Nat. Bank, 142 Misc. 69, 253 N.Y.S. 859, (1931) was held that where the existence of the oral contract is established by an admission of the party resisting specific performance or by competent evidence independent of the acts of part performance, the requirement that the acts of part performance must be exclusive referable to the oral contract is satisfied. Corbin on Contracts, Sec. 430, approves the holding of those cases.

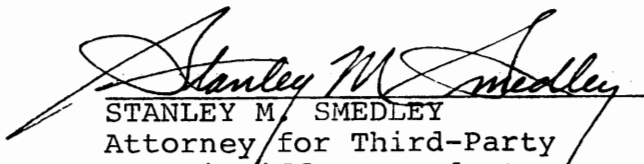
Even should this court find the written memoranda establishing an oral contract to be not quite sufficient to satisfy the Statute of Frauds, the fact that appellant himself testified as to the oral contract should allow the court to find in favor of respondent.

### CONCLUSION

Campbell, from the beginning of his negotiations with Barton was aware of the obligation to the Brough sisters and agreed to assume that obligation. The memoranda of the parties to the sale of the land substantiate and verify the details of that agreement and therefore remove this case from the Statute of Frauds relating to the transfer of real property. Additionally the statutes of the State of Utah specifically lift this case from the defense of Statute of Frauds and the decision of the trial court should be affirmed.

DATED this 19<sup>th</sup> day of June, 1980.

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CERTIFICATE OF SERVICE BY MAIL

I certify that on this 19<sup>th</sup> day of June, 1980, I served a copy of the foregoing Brief of Third-Party Plaintiff, Barton Brothers Investment Corporation, on George K. Fadel, Attorney for Third-Party Defendant, 170 West Fourth South, Bountiful, Utah 84010 and to Rodney S. Page, Attorney for Plaintiffs, 40 South 125 East, Clearfield, Utah 84015, by mailing said copy to said attorneys, postage prepaid.

Marie Nichols