

1988

Mel Trimble Real Estate v. Monte Vista Ranch : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

M. Dayle Jeffs; Jeffs and Jeffs; Attorney for Respondents.

Robert J. Debry; Attorneys for Appellant.

Recommended Citation

Legal Brief, *Mel Trimble Real Estate v. Monte Vista Ranch*, No. 880323.00 (Utah Supreme Court, 1988).
https://digitalcommons.law.byu.edu/byu_sc1/2283

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH SUPREME COURT

UTAH
DOCUMENT
KFU

45.9

.S9

DOCKET NO.

880323

IN THE UTAH SUPREME COURT

MEL TRIMBLE REAL ESTATE,

Plaintiff/Appellant,

vs.

MONTE VISTA RANCH, INC. and
WALLACE OHRAN, RAY E. NELSON
HOWARD D. SHERWOOD, ET AL.,

Defendants/Respondents.

PETITION FOR
CERTIORARI

Supreme Court
No. 880323

Court of Appeals
No. 860135-CA

Category No. 13

PETITION FOR CERTIORARI

Robert J. DeBry, Esq.
ROBERT J. DEBRY & ASSOCIATES
4001 South 700 East, #500
Salt Lake City, Utah 84107
Attorneys for Plaintiff/Appellant
Mel Trimble Real Estate

M. Dayle Jeffs, Esq.
JEFFS & JEFFS
90 North 100 East
P. O. Box 888
Provo, Utah 84603
Attorneys for Defendants/
Respondents

FILED

SEP 2 1988

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

MEL TRIMBLE REAL ESTATE,)	
)	
Plaintiff/Appellant,)	PETITION FOR
)	CERTIORARI
vs.)	
)	Supreme Court
)	No. _____
MONTE VISTA RANCH, INC. and)	
WALLACE OHRAN, RAY E. NELSON)	Court of Appeals
HOWARD D. SHERWOOD, ET AL.,)	No. 860135-CA
)	
Defendants/Respondents.)	Category No. 13

PETITION FOR CERTIORARI

Robert J. DeBry, Esq.
ROBERT J. DEBRY & ASSOCIATES
4001 South 700 East, #500
Salt Lake City, Utah 84107
Attorneys for Plaintiff/Appellant
Mel Trimble Real Estate

M. Dayle Jeffs, Esq.
JEFFS & JEFFS
90 North 100 East
P. O. Box 888
Provo, Utah 84603
Attorneys for Defendants/
Respondents

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
QUESTION FOR REVIEW.....	1
REFERENCE TO COURT OF APPEALS DECISION.....	1
JURISDICTIONAL STATEMENT.....	1
DETERMINATIVE AUTHORITY.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	3
 POINT I:	
THE TRIAL COURT AND THE COURT OF APPEALS MISLED BY CONFUSING LANGUAGE IN THE UTAH SUPREME COURT'S PRIOR OPINION INVOLVING ONLY THE BUYER (FITZGERALD) AND THE BROKER (TRIMBLE).....	3
 POINT II:	
CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN CLARIFY ITS OWN AMBIGUOUS DECISION.....	5
 POINT III:	
THE COURT OF APPEALS FAILED TO REVIEW ITS OWN RECORD BEFORE RULING ON THE ISSUE OF COLLATERAL ESTOPPEL.....	7

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Mel Trimble Real Estate v. Fitzgerald,</u> 626 P.2d 453 (Ut. 1981).....	3
<u>Trimble v. Monte Vista Ranch,</u> at p. 9.....	3
<u>Trimble v. Monte Vista Ranch,</u> Slip Opinion at p. 4.....	3
<u>Trimble v. Monte Vista Ranch,</u> Slip Opinion at p. 5.....	5

QUESTION FOR REVIEW

Did the trial court and court of appeals err by concluding that the doctrine of collateral estoppel applied to this case?

REFERENCE TO COURT OF APPEALS DECISION

The opinion of the court of appeals is reported at 758 P.2d 451 (Ct.App. 1988). A copy of the Slip Opinion is attached as Exhibit A.

JURISDICTIONAL STATEMENT

The decision of the court of appeals was entered on July 8, 1988. A Petition for Rehearing was filed on July 21, 1988. That petition was denied by the court of appeals on August 3, 1988.

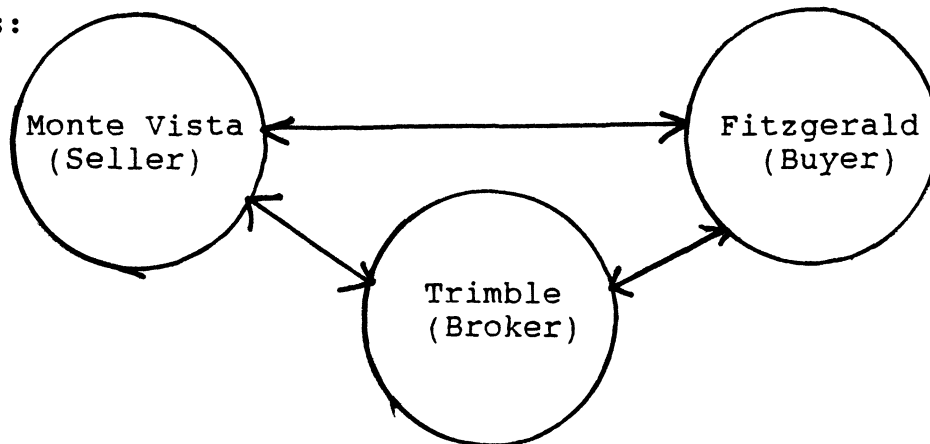
Jurisdiction of this court is conferred by Utah Code Ann., §78-2-2(5) (Amended 1986).

DETERMINATIVE AUTHORITY

Not applicable.

STATEMENT OF THE CASE

Trimble was a real estate broker. Monte Vista was a landowner. Fitzgerald was a land-buyer. Trimble introduced Monte Vista to Fitzgerald. Fitzgerald purchased land from Monte Vista. In schematic form, the relationships are as follows:



In an earlier action, Trimble sued Fitzgerald for a real estate commission. The basis for that lawsuit was an earnest money agreement between Fitzgerald and Monte Vista. The earnest money agreement stated: "Buyer to be responsible for all real estate commissions." Trimble lost that trial and this court affirmed. See generally, Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (Ut. 1981) (copy attached as Exhibit B).

After Trimble failed to collect a commission from Fitzgerald (buyer), Trimble sued Monte Vista (seller) for a

commission growing out of the same transaction. The basis for the second lawsuit was an (admitted) oral listing agreement wherein Monte Vista agreed to pay Trimble a six percent commission if the property was sold. See Mel Trimble Real Estate v. Fitzgerald, Id. at p. 453. This second lawsuit was dismissed on grounds of Collateral Estoppel. The court of appeals affirmed. (See Trimble v. Monte Vista Ranch, at pg. 9, Exhibit A.)

ARGUMENT

POINT ONE

THE TRIAL COURT AND THE
COURT OF APPEALS WERE MISLED
BY CONFUSING LANGUAGE IN THE UTAH
SUPREME COURT'S PRIOR OPINION INVOLVING
ONLY THE BUYER (FITZGERALD) AND THE BROKER (TRIMBLE)

The first case (Mel Trimble Real Estate v. Fitzgerald) was an action by a broker (Trimble) against a buyer (Fitzgerald) for a real estate commission. The present case (Trimble v. Monte Vista Ranch) is a case by a broker (Trimble) against the seller (Monte Vista) for a real estate commission. Obviously, the parties are different and the issues are different. Thus, there can be no collateral estoppel. Mel Trimble Real Estate v. Monte Vista Ranch, Slip Opinion at p. 4 (Exhibit A).

The problem is that the trial court and the court of appeals were both misled by confusing language of this court's opinion. Specifically, this court approved the following language:

. . .[T]he agreement of December 7, 1977, imposed upon defendant (Fitzgerald) the liability for the real estate commission, if any, owed plaintiff (Trimble) upon this transaction.¹

In the case of Trimble v. Monte Vista (Exhibit A), the trial court construed that language to mean that neither Fitzgerald (buyer) nor Monte Vista (seller) owed Trimble a commission. Thus, the trial court stated:

The issue at the first trial and the present issue are essentially the same, that is, whether a real estate commission was due (Trimble) from the sale of Monte Vista. . . and if so, who should pay that commission.²

The court of appeals accepted that strained interpretation:

From all that appears in the Supreme Court opinion, the jury's judgment that Fitzgerald (buyer) did not owe a commission(sic) means

¹Mel Trimble Real Estate v. Fitzgerald, 526 P.2d at 455 (Exhibit B).

²Exhibit C at p. 2.

that Trimble was not entitled to a commission at all. . .³

In short, both the trial court and the court of appeals have interpreted this court's prior opinion to mean that Trimble was not entitled to a commission from either Fitzgerald (buyer) or Monte Vista (seller).

Of course, that is an absurd result. That first lawsuit was an action by Trimble (broker) against Fitzgerald (buyer). The seller (Monte Vista) was simply not involved in Trimble's first lawsuit.⁴ Thus, there can be no collateral estoppel.

POINT TWO

CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN CLARIFY ITS OWN AMBIGUOUS DECISION

This court's first decision was drafted by a very elderly retired judge. At best, the decision is obscure.

The first trial was conducted solely on the theory of a third party beneficiary contract. That is, Trimble

³Mel Trimble Real Estate v. Monte Vista Ranch, Slip Opinion at p. 5 (Exhibit A).

⁴In the first trial, Fitzgerald (buyer) cross-claimed against Monte Vista (seller) for unrelated matters.

(broker) claimed that he was a third party beneficiary to a contract between Fitzgerald (buyer) and Monte Vista (seller)⁵ The trial court refused to give the third party beneficiary instruction. This court affirmed. (See Exhibit B.)

Inexplicably, this court failed to even analyze the third-party beneficiary issue. This court simply stated, without analysis:

. . .[W]e think Instruction No. 8 fairly and adequately covered the contentions of the parties as they were presented to the court. We find no error in giving Instruction No. 8 and in refusing to give appellant requested Instruction No. 23.⁶

626, P.2d at 455.

The confusing nature of the opinion has misled the trial court and the court of appeals with respect to the issue of collateral estoppel in this subsequent lawsuit. If the confusion originated in this court, only this court can

⁵The earnest money contract between buyer and seller states: "Buyer to be responsible for all real estate commissions." See Mel Trimble Estate v. Fitzgerald, 626 P.2d at p. 454.

⁶This court also ignored Trimble's argument that a third-party beneficiary contract is a two-party agreement; however, the literal wording of Instruction No. 8 requires a three-party agreement. (See Exhibit D, Appellant's Reply Brief, at p. 5.)

clarify the confusion. Certainly, Trimble should not suffer because of an ambiguous or confusing opinion.

POINT THREE

THE COURT OF APPEALS FAILED TO REVIEW ITS OWN RECORD BEFORE RULING ON THE ISSUE OF COLLATERAL ESTOPPEL

The opinion of the court of appeals focused on what documents were available for the trial court to make its decision. The opinion infers that Trimble had a duty to locate or submit additional documents to the court.

However, there was abundant evidence in the existing record to negate the collateral estoppel issue. The court of appeals simply failed to look at its own record and failed to evaluate Fitzgerald's citations to the record.

Early in the litigation, Ohran (seller) made a motion to dismiss on the basis that Ohran (seller) was an indispensable party in the original action. (R.17, R.20.)⁷ Actually, that argument was simply a res judicata argument under a different name. (R.49, at Point III.)

In any case, the relationships in the earlier case were explained to the trial judge in great detail. (R.39,

⁷(All citations to record included at Exhibit E.)

R.90.) Indeed, plaintiff's entire trial brief from the earlier trial was presented to the trial court. (R.49.) That document describes the relationships in graphic form.

It is possible that the lower court judges might have been misled by an ambiguous opinion of this court. However, the parties were not misled! Monte Vista knows full well that it was not a party in the first lawsuit! It is a matter of extreme bad faith for Monte Vista to rely on an ambiguous opinion from this court. Monte Vista should have conceded that it was not a party in the first lawsuit. If certiorari is not granted, Monte Vista will simply profit from its own bad faith.

DATED this 2 day of Sept, 1988.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff/
Appellant

By: 

MAILING CERTIFICATE

I certify that on the 2nd day of Sept,
1988, a true and correct copy of the foregoing PETITION FOR
CERTIORARI (Trimble v. Monte Vista Ranch, Inc.), was mailed,
postage prepaid, by depositing a copy of the same in the U.S.
mail, to the following:

M. Dayle Jeffs
JEFFS & JEFFS
90 North 100 East
P. O. Box 888
Provo, Utah 84603

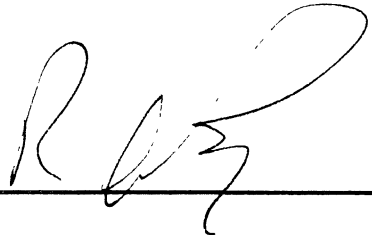

A handwritten signature, appearing to be "R. J.", is written over a horizontal line.

EXHIBIT A

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Mel Trimble Real Estate,)
)
Plaintiff and Appellant,)
)
v.)
)
Monte Vista Ranch, Inc. and)
Wallace Ohran, Ray E. Nelson,)
Howard D. Sherwood, et al.,)
)
Defendants and Respondents.)

OPINION
(For Publication)

Case No. 860135-CA

Before Judges Orme, Garff and Jackson.

ORME, Judge:

FILED

Mary T. Noonan
JUL 8 1988
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

In an earlier case, Mel Trimble Real Estate and its agent sued Leland Fitzgerald for a real estate sales commission allegedly owed. Trimble was unsuccessful in that action and the Utah Supreme Court affirmed in Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (Utah 1981). Trimble then brought this action to recover the commission against Monte Vista Ranch, Inc., which contracted to sell the property to Fitzgerald, and its shareholders. Monte Vista's motion for summary judgment was granted on res judicata grounds. Trimble appeals from the lower court's grant of the motion for summary judgment. We affirm.

FACTS

In 1977, Monte Vista's president, Wallace Ohran, engaged Trimble to sell Monte Vista's ranch property located in Cedar Valley, Utah. Ohran orally agreed that Monte Vista would pay Trimble a 6% sales commission. Trimble located a buyer, Fitzgerald, who negotiated with Monte Vista regarding the purchase price. Initially, Monte Vista offered to sell the ranch for \$2,000,000 and to pay Trimble's commission. The final offer, to which Fitzgerald agreed, included a reduction in price to \$1,875,000, on the condition that Fitzgerald would pay Trimble's commission. An earnest money agreement, which both Monte Vista and Fitzgerald signed, stated that the

"[b]uyer [was] to be responsible for all real estate commissions." However, it did not specify how much Trimble was to be paid or the terms of payment. Trimble was not a party to the earnest money agreement.

The ranch was Monte Vista's major asset and, for tax purposes, Fitzgerald ultimately agreed to a transfer of corporate stock instead of a transfer of the title to the property itself. Accordingly, Monte Vista's shareholders entered into a stock sale agreement with Fitzgerald. The stock sale agreement contained an integration clause which explicitly stated that this subsequent agreement "constitutes the entire agreement among the parties" and "supersedes all prior agreements." The stock sale agreement was silent on the issue of commissions.

A dispute ensued as to whether Fitzgerald's earlier agreement to pay Trimble the commission was still in effect or whether it had been agreed instead that Trimble could buy part of the ranch on favorable terms in lieu of a commission. Trimble declined to purchase any part of the ranch and demanded a cash commission. Fitzgerald paid \$5000 toward Trimble's commission but refused to pay more. Trimble then sued Fitzgerald on the ground that it was a third party beneficiary of the earnest money agreement. In that action, a jury concluded that Fitzgerald did not owe anything to Trimble and the trial court's decision based on the verdict was upheld by the Utah Supreme Court in Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (Utah 1981).

Following the conclusion of the litigation against Fitzgerald, Trimble filed this suit against Monte Vista and its former shareholders alleging breach of contract and the right to recover the balance of the unpaid commission. The five named shareholders filed a motion to dismiss, which was denied. Monte Vista moved for summary judgment on a number of grounds, including res judicata and collateral estoppel, and attached to its supporting memorandum a copy of the Utah Supreme Court opinion affirming the judgment in the prior trial. The former shareholders joined in the motion.

The entirety of Trimble's opposition to the summary judgment motion, insofar as premised on res judicata and collateral estoppel, consisted of a single paragraph disputing, in conclusory terms, Monte Vista's argument that the question of whether any commission was owed to Trimble had been litigated in the first action and decided adversely to Trimble. The district court granted the motion for summary judgment, albeit originally on only statute of limitations

grounds. For reasons which are not altogether clear, the resulting judgment was set aside.

The motion for summary judgment, insofar as premised on other grounds, was then resubmitted. Additional memoranda were submitted and the motion orally argued, but Trimble offered no other information relative to the res judicata issue. The court issued a memorandum decision determining that the action was precluded on res judicata grounds. In making its decision, the court relied, as had the parties, exclusively on the Supreme Court's reported decision in the earlier case.

Trimble's appeal is premised on several grounds, which we regard as raising three points. First, even if it was appropriate for the district court to decide the res judicata question with reference only to the Supreme Court's opinion, it erred in finding in that opinion any basis for concluding that the commission issue raised in the present action had already been decided adversely to Trimble. Second, the district court should not have looked just to the opinion but should have scrutinized the pleadings and papers in the first action to see what issues were actually litigated and how they were decided. Third, this court should, in any event, take judicial notice of the pleadings and papers in the prior action in evaluating the propriety of the district court's decision in this case. Before turning to consider these issues, we pause briefly to review the doctrine of res judicata.

I. RES JUDICATA AND COLLATERAL ESTOPPEL

The doctrine of res judicata reflects the refusal of courts to tolerate pointless litigation and is based on the premise that the proper administration of justice is best served by limiting parties to one fair trial of an issue or cause. 46 Am.Jur.2d Judgments § 395 (1969). "[R]es judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980).

The doctrine of res judicata has two separate but related branches which can be asserted as affirmative defenses. Penrod v. Nu Creation Creme, Inc., 669 P.2d 873, 874-75 (Utah 1983); Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 389 (Utah Ct. App. 1987). The first branch, now known as claim preclusion but referred to previously as "pure" res judicata, bars the relitigation by the parties or their privies of a claim for relief previously resolved by a final judgment on the merits. Penrod v. Nu Creation Creme, Inc., 669 P.2d at 875.

See, e.g., Braselton v. Clearfield State Bank, 606 F.2d 285, 287 (10th Cir. 1979). "The same rule also prevents relitigation of claims that could and should have been litigated in the prior action but were not." Penrod v. Nu Creation Creme, Inc., 669 P.2d at 875. Under claim preclusion, the judgment is final and serves as the full measure for relief to be accorded between the same parties on the same claim or cause of action. 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1977).

The second branch of res judicata is collateral estoppel, or issue preclusion. Under this doctrine, the relitigation of factual issues that have once been litigated and decided is precluded even if the claims for relief in the two actions are different, Penrod v. Nu Creation Creme, Inc., 669 P.2d at 875, and even if only "the party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication." Copper State Thrift & Loan v. Bruno, 735 P.2d at 390 (emphasis in original). This case turns on application of the collateral estoppel doctrine since Monte Vista and its shareholders were not parties to the prior action but, rather, contend the issue of whether any commission was owed had been litigated in that action and decided adversely to Trimble, who was a party to the prior action.

In Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978), the Utah Supreme Court outlined the following test to determine whether collateral estoppel applies:

- 1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?
- 2) Was there a final judgment on the merits?
- 3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
- 4) Was the issue in the first case competently, fully, and fairly litigated?

If all four elements of the test are satisfied, collateral estoppel bars relitigation of the same issue. In this case, Trimble, the party against whom the commission issue was allegedly decided, was a party to the prior action and that action resulted in a final judgment on the merits adverse to

Trimble. It remains to be seen whether the other two elements of the test were satisfied, i.e., whether the pertinent factual issue decided in the prior action is identical to the key issue in this case and whether it had been actually litigated.

II. SUPREME COURT OPINION

The district court premised its collateral estoppel conclusions strictly on the Supreme Court's opinion in the prior action. According to the opinion, the Supreme Court reviewed the trial transcript and determined that the litigants enjoyed a "fair and full trial, without prejudicial error." Mel Trimble Real Estate v. Fitzgerald, 626 P.2d at 455. Trimble's theory at trial was that Fitzgerald owed Trimble a monetary commission in the amount of \$125,000.00. Id. at 454. According to the opinion, the trial court had occasion to determine "as a matter of law" that the "agreement . . . imposed upon [Fitzgerald] the liability for the real estate commission, if any, owed [Trimble] upon this transaction." Id. at 455.

Trimble's contention on this appeal that the trial court's "as a matter of law" ruling was really not one or was entirely gratuitous, is simply not persuasive, at least when the opinion is considered by itself. It is surely appropriate to conclude the trial court would not have ruled that if any commission were owed it was owed by Fitzgerald, unless that question had been presented and litigated. From all that appears in the Supreme Court opinion, the jury's judgment that Fitzgerald did not owe a commission means that Trimble was not entitled to a commission at all--and that collateral estoppel would properly bar this action to recover such a commission.¹

III. RECOURSE TO RECORD IN PRIOR ACTION

Trimble argues, however, that the Supreme Court opinion is misleading and that the district court in the instant

1. Trimble's decision not to join Monte Vista or its shareholders in the action it commenced against Fitzgerald tends to suggest Trimble knew that, aside from whatever commissions other parties might owe, no commission was owed by Monte Vista or its shareholders. Where a party has a claim against one or more from among several parties, it is customary to join all of those parties in a single action and leave the factfinder to determine which of them actually is liable. That practice also saves "the parties and the judicial system considerable time and money." Serr v. Rick Jensen Constr., Inc., 743 P.2d 1202, 1204 (Utah 1987).

proceeding should not have decided the collateral estoppel question based solely on the opinion. Trimble contends that it is difficult to make a determination that the issue was actually litigated and decided from the four corners of the opinion. We tend to agree. Close examination of the record in a proceeding may well lead to a conclusion somewhat at odds with the apparent "plain meaning" of a reported decision. See, e.g., Halladay v. Cluff, 739 P.2d 643 (Utah Ct. App. 1987). Trimble argues on appeal that the district court in this case should have examined the record from the first proceeding as this examination would show that Trimble's second complaint raised new causes of action based on facts which had not been actually litigated and which did not depend for its success on any factual issues decided adversely to Trimble in the first action.

The strongest support for Trimble's position is Parrish v. Layton City Corp., 542 P.2d 1086 (Utah 1975), where the Court stated: "Since the record of the prior action was not before the trial court, there is no basis to sustain the determination that plaintiff's claim was barred by the doctrine of res judicata." Id. at 1087. However, Parrish is readily distinguishable from the case at hand because the trial court in Parrish, without the record of the prior proceeding, had absolutely no basis for determining the res judicata issue.²

2. Parrish was a 3-2 decision. It turned on a lack of compliance with rules of evidence and procedure "by which a judicial record may be proved." Parrish v. Layton City Corp., 542 P.2d at 1087. The dissenters pointed out that, absent a transcript on appeal, the court should presume the judge had the appropriate records before him since appellant had the burden of proving otherwise. Id. at 1089 (Ellett, J., dissenting). Parrish was referred to in dicta in Searle Bros. v. Searle, 588 P.2d 689, 692 (Utah 1978), as support for the proposition that the trial court should not have decided the applicability of res judicata doctrines without independently examining the record of the prior litigation. Searle was also a 3-2 decision and, interestingly, the author of the Parrish majority opinion joined the dissent.

We do not read Parrish and Searle as imposing an affirmative obligation on the court to independently consider the record in the prior litigation, regardless of the procedural posture in which a collateral estoppel issue arises and the position taken and tactics adopted by the resisting party. Such a requirement would be especially inappropriate in a case like this, where both parties' handling of the summary judgment motion clearly suggested that the collateral estoppel question could be properly decided by reference to some other source, namely the reported Supreme Court opinion.

By contrast, in the instant case the Supreme Court opinion provides a basis upon which the district court could determine that collateral estoppel barred the instant action.

As we see it, once Monte Vista submitted to the district court a copy of the Supreme Court opinion, which on its face showed that the key issue had been litigated and decided, the burden shifted to Trimble, if it believed more than the opinion was needed to make a fully informed decision, to produce the record of the prior proceeding, urge the court to take judicial notice of it, or otherwise show that the opinion should not be taken at face value. Instead, Trimble limited its resistance to arguing how the Supreme Court opinion should actually be construed and to the doctrinal requirements of collateral estoppel. An analogous situation is when an affidavit is submitted to the court in support of a motion for summary judgment. If the resisting party believes the affidavit is inaccurate or incomplete, that party may move to strike it or may submit a counteraffidavit. But if that party limits its response to arguing what the facts in movant's affidavit mean and to legal arguments, the court will rightly conclude that its disposition may properly turn on the affidavit which was submitted. The trial court in this case was likewise led to believe that the opinion was all that it needed to decide the collateral estoppel aspect of the motion for summary judgment.

Trimble's argument that the court should not have decided the motion without review of the record in the prior proceeding must additionally be rejected for the reason that that issue was never raised before the trial court and is raised for the first time on appeal, see, e.g., Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 657 (Utah 1988), an issue revisited in the next section.

IV. JUDICIAL NOTICE

Finally, Trimble argues that the rule on judicial notice permits--or even requires--this court to take notice of the record in the first proceeding and to evaluate the district court's decision in light of what the record actually shows. This issue is a difficult one, as Utah R. Evid. 201 does not explicitly allow or prohibit the taking of judicial notice for the first time on appeal.

Rule 201, which governs judicial notice of adjudicative facts,³ provides in subsection (c) that "[a] court may take judicial notice, whether requested or not." However, under subsection (d) a court is required to "take judicial notice if requested by a party and supplied with the necessary information." Moreover, the rule specifically provides in subsection (f) that "[j]udicial notice may be taken at any stage of the proceeding."

Trimble argues that since it has requested this court to take notice of the proceeding and has supplied us with the "necessary information," we are obligated to take judicial notice since notice may be taken at "any stage of the proceeding." This argument is plausible, see 21 C. Wright & K. Graham, Federal Practice and Procedure § 5110 at 525 (1977), but creates a dilemma. "Where the issue of judicial notice is raised for the first time on appeal, the appellate court is faced with a conflict between the policy that decisions ought not to run contrary to indisputable facts and the procedural policy that prohibits a party from raising issues on appeal that were not raised below." Id. See People v. Bush, 37 Cal. App.3d 952, 112 Cal. Rptr. 770 (1974) (under California Evidence Code § 459, court cannot take notice for first time on appeal of a matter not noticed below in order to permit a party to assert a legal theory not presented to the trial court). See also Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d at 657.

We agree that the better interpretation limits mandatory judicial notice to the trial court. See 21 C. Wright & K. Graham, Federal Practice and Procedure § 5110 at 525 (1977). See also Holbrook v. Carter, 19 Utah 2d 288, 431 P.2d 123, 125 (1967). It remains to be decided whether we should take judicial notice of the record in the prior proceeding for the first time, as a matter of discretion.

For us to take notice of the record in the first proceeding would permit the concept of judicial notice to be used to get around the rule precluding raising issues for the first time on appeal. Utah courts have consistently followed a policy strongly opposed to the raising of issues for the first

3. This rule is the federal rule, verbatim. See Advisory Committee Note, Utah R. Evid. 201. The rule "'governs only judicial notice of adjudicative facts,' and does not deal with instances in which a court may notice legislative facts, which is left to the sound discretion of trial and appellate courts." Id. See Utah R. Evid. 201(a).


time on appeal. See, e.g., Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 654 (Utah 1988) (rule applies even where facts are not disputed and issue raised is one of law); Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983); James v. Preston, 746 P.2d 799, 801 (Utah Ct. App. 1987). Ebbert v. Ebbert, 744 P.2d 1019, 1023 (Utah Ct. App. 1987). There are only very limited exceptions to that sound policy. One such exception allows an appellate court to affirm trial court decisions on proper grounds other than those which the trial court cited in making its decision. Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 894-95 (Utah 1988).⁴ Another limited exception exists when to do otherwise would permit deviation from a legislative scheme. Cox Rock Products v. Walker Pipeline Constr., 754 P.2d 672, 676 (Utah Ct. App. 1988). We see no compelling "countervailing principle" to be served by making an exception in this case, see id., even though under Rule 201 we would have the power to take judicial notice for the first time and, indeed, might do so in an appropriate case. See Note 4, supra. We therefore decline to take notice of the record in the prior proceeding for the purpose of looking behind the Supreme Court's opinion and evaluating the district court's decision in light of information not presented to it.

CONCLUSION

A plain reading of the Supreme Court's opinion in the earlier case shows that Trimble's claim to any commission has already been litigated and decided adversely to Trimble. Since the parties all but conceded that the opinion alone would permit the district court to make an informed decision on the applicability of collateral estoppel, the trial court did not err in failing to review the record of the prior proceeding on its own motion. It is not mandatory that we take notice of the record in that proceeding for the first time on appeal, and we decline to do so as a matter of discretion in view of the strong policy in this state against consideration of arguments

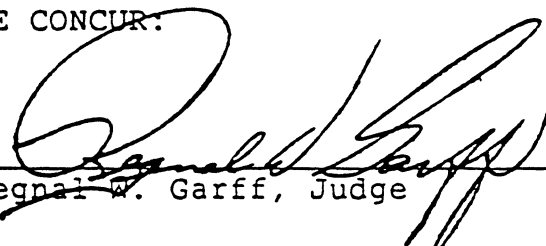
4. Under Buehner Block, it might be appropriate to take notice for the first time on appeal if doing so would permit affirmance. Cf. 21 C. Wright & K. Graham, Federal Practice and Procedure § 5110 at 525 (1977) ("most facts that are noticed for the first time on appeal will undoubtedly be noticed in order to avoid a reversal"). However, we are asked here to notice matters not raised before the trial court for the purpose of reversing the trial court.

and issues for the first time on appeal. The judgment appealed from is accordingly affirmed.

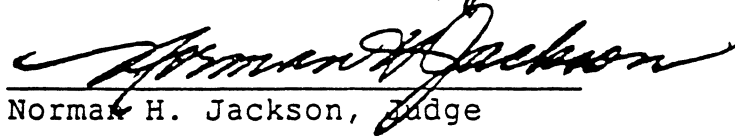


Gregory K. Orme, Judge

WE CONCUR:



Reginald W. Garff, Judge



Norman H. Jackson, Judge

EXHIBIT B

MEL TRIMBLE REAL ESTATE, and
Cal Florence, Plaintiffs and
Appellants,

v.

Leland A. FITZGERALD, Defendant
and Respondent.

No. 16746.

Supreme Court of Utah.

Feb. 13, 1981.

Broker and sales agent brought action against purchaser for real estate sales commission. The Third District Court, Salt Lake County, Bryant H. Croft, J., entered judgment in favor of purchaser, and plaintiffs appealed. The Supreme Court, Harding, District Judge, held that: (1) in case in which earnest money agreement between vendor and purchaser provided "Buyer to be responsible for all real estate commissions," instruction given by the court fairly and adequately covered the contentions of the parties as they were presented to the court, and there was no error in refusing to give requested instruction on theory that broker was a third-party beneficiary in earnest money agreement, and (2) issues as to sales commission claimed by broker and whether there should have been any sales commission at all were for the jury.

Affirmed.

1. Contracts ⇐187(1)

It is essential for a third-party beneficiary claimant to prove that contract was intended to benefit him directly; one incidentally benefited by performance of a promise to a third person may not maintain an action against the promissor.

2. Contracts ⇐187(1)

Terms of agreement and facts circumstances that surround its making can be examined to determine whether supposed third-party beneficiary of contract was in fact intended to be such.

3. Brokers ⇐88(7)

In action against purchaser for real estate sales commission in case in which earnest money agreement between vendor and purchaser provided "Buyer to be responsible for all real estate commissions," instruction given by the court fairly and adequately covered the contentions of the parties as they were presented to the court, and there was no error in refusing to give requested instruction on theory that broker was a third-party beneficiary in earnest money agreement.

4. Brokers ⇐88(1)

In action by broker and sales agent against purchaser for real estate sales commission, issues as to sales commission claimed by broker and whether there should be any sales commission at all were for the jury.

Robert J. DeBry and Dale F. Gardiner,
Salt Lake City, for plaintiffs and appellants.

Lawrence E. Corbridge, Salt Lake City,
for defendant and respondent.

HARDING, District Judge:

This appeal is from an adverse judgment on a claim for a real estate sales commission.

Appellants were in the business of selling real estate. Mel Trimble was a licensed real estate broker, and Cal Florence was employed by Trimble as a sales agent. The appellants will be referred to herein jointly as Florence.

The ranch property involved in this action is located in Cedar Valley, Utah, and was under the management and control of Wallace Ohran. Respondent Leland A. Fitzgerald was a rancher.

Two or three years prior to December, 1977, Florence allegedly obtained an oral listing from Ohran to sell the ranch property. The terms of the oral listing allowed Florence to seek offers, and if any offer was accepted by Ohran, a six percent commission would be paid on the sale.

In October, 1977, through the efforts of Florence, Fitzgerald became interested in a part of the ranch and an offer was made to Ohran. The offer was unacceptable to Ohran. About December 1, 1977, there was a meeting of Ohran, Fitzgerald and Florence in which Ohran told Fitzgerald he would sell the ranch for \$2,000,000, and that he would pay the sales commission of six percent from the proceeds of the sale. During the course of their discussion, Ohran said that he would reduce the sale price of the ranch to \$1,875,000 if Fitzgerald would pay the commission. Fitzgerald agreed to this proposal. Nothing was put in writing at this time.

On December 7, 1977, Ohran, Fitzgerald, Florence and other interested persons met in American Fork, Utah, in an effort to effect a final sales agreement and to reduce it to writing. Up to this time, there had been no binding contract for a real estate listing, a sales commission, nor for the sale of any property. At this meeting, further discussions ensued. A sales commission for \$125,000 to Florence was mentioned. Florence asked that there be two earnest money agreements: one for Fitzgerald's part of the ranch, and the other for Florence's part of the ranch. Ohran said there would have to be one entire sale. Fitzgerald and Florence retired to another room to discuss the matter between themselves. The testimony is conflicting as to what was discussed at this private conference. About one-half hour later, when they rejoined the others, Fitzgerald said that he would take title to the property and would take care of Florence.

Thereupon, an earnest money agreement was made and executed between Monte Vista Ranch, Inc. (Ohran's principal) and Fitzgerald for the sale of the ranch for \$1,875,000. The agreement had a provision stating, "Buyer to be responsible for all real estate commissions." No further particulars were discussed at the meeting nor stated in the earnest money agreement with respect to a real estate sales commission.

Later that evening, Fitzgerald and Florence had a discussion concerning the purchase that had been made of the ranch, but their testimony is conflicting as to any determination. However, Fitzgerald did give Florence a check for \$5,000. Their testimony is in conflict as to what the check was for.

On August 7, 1978, appellant filed a complaint, alleging that he and Fitzgerald had jointly purchased the assets of the Monte Vista Ranch, Inc., that he was entitled to an accounting, and demanded judgment for his share of the assets. The theory upon which the original complaint was based was later abandoned, and an amended complaint was filed praying for a sales commission in money only of \$125,000. The case went to trial with a jury on the latter theory. A verdict against appellant was returned, upon which judgment was entered. The court denied appellant's motions for judgment notwithstanding the verdict and for a new trial.

[1, 2] Appellant contends that the court erred in failing to give a requested instruction, No. 23, on the specific theory that he was a third-party beneficiary in the earnest money agreement between the seller and Fitzgerald, the buyer of the ranch property. In this regard, it is essential for a third-party beneficiary claimant to prove that the contract was intended to benefit him directly. One incidentally benefited by the performance of a promise to a third person may not maintain an action against the promisor. The terms of the agreement and the facts and circumstances that surrounded its making can be examined to determine whether the supposed beneficiary was in fact intended to be such.¹

The court gave Instruction No. 8, to which appellant excepted. The portions of this instruction relevant here are as follows:

The controversy centers around an earnest money receipt and offer to purchase agreement dated December 7, 1977, by which the corporate owner of the ranch agreed to sell it to defendant for the price stated therein. Among other

1. *Kelly v. Richards*, 95 Utah 560, 83 P.2d 731 (1938); 129 A.L.R. 164.

things, this agreement contained a provision that defendant, Laland [sic] A. Fitzgerald, as buyer was to be responsible for all real estate commissions. . . .

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

Normally, the amount of any such commission would have been as fixed by agreement between the real estate salesman and the parties to the earnest money agreement and should your determination from the evidence be that in this case such was done and agreed to at the time of the execution of that agreement, no one could unilaterally change the agreement, and you should return your verdict accordingly; but should your determination be that while defendant agreed with the seller to be responsible for all real estate commissions at the time the agreement was signed, but that at that time Cal Florence and Leland Fitzgerald were still negotiating with each other with respect to the nature of the transaction as between themselves and how and in what manner and in what amount any such commission was to be paid, you are instructed that they could between themselves make an agreement thereon by which each would be bound irrespective of the intent or belief of the seller, and once such agreement was made, neither could change that agreement without the consent of the other.

Thus, it is your responsibility to determine from the evidence what amount, if any, is owed by defendant to plaintiffs. The burden is upon the plaintiffs to prove by a preponderance of the evidence the basis for, and the amount of, their claim.

[3] After reading the transcript of the trial proceedings, including the testimony of the witnesses, and considering the theories of the parties and the applicable law, we think Instruction No. 8 fairly and adequately covered the contentions of the parties as they were presented to the court. We find

no error in giving Instruction No. 8, and in refusing to give appellants' requested Instruction No. 23.

[4] Appellants' assertion of error in failing to direct a verdict of liability against the defendant is without merit, since there were sharp conflicts in the testimony on the issue of the sales commission claimed by Florence, or whether there should have been a sales commission at all.

The record shows that the verdict of the jury was based on competent, relevant, and admissible evidence; that the trial judge supported the verdict by his denial of appellants' motions for judgment notwithstanding the verdict and for a new trial; and that he accorded to the litigants a fair and full trial, without prejudicial error.

Affirmed. Costs to respondents.

HALL, STEWART and CROCKETT,* JJ., and HENRIOD, Retired Justice, concur.

MAUGHAN, C. J., and HOWE, J., do not participate herein.

HENRIOD, Retired Justice, and HARDING, Retired District Judge, sat.



Lisa WATTERS, Plaintiff and Appellant,

v.

Clayton N. QUERRY, Jean C. Querry, Charles L. Querry, Elizabeth Hemingway, and David E. Hemingway, Defendants and Respondents.

No. 16897.

Supreme Court of Utah.

Feb. 17, 1981.

Plaintiff sued defendant, whose car had rear-ended plaintiff's, and codefendant,

* CROCKETT, J., concurred in this case before his retirement, January 5, 1981.

EXHIBIT C

1985 JUN -4 PM 3:43

In the Fourth Judicial District Court WILLIAM F. HUGHES, CLERK
JP DEPUTY

of the State of Utah

In and For Utah County

MEL TRIMBLE REAL ESTATE

Plaintiff

MONTE VISTA RANCH, INC., A UTAH
CORPORATION, WALLACE D. OHRAN,
RAY E. NELSON, HOWARD D. SHERWOOD
JOYCE T. RICE AND NELDON WILLIAMS
Defendant

MINUTE ENTRY

CASE NUMBER 60,784

DATED June 3, 1985

David Sam

JUDGZ

This case is before the court on Defendants' Motion to Dismiss and is considered pursuant to Rule 2.8, Rules of Practice of the District Courts.

R U L I N G

When examined under the doctrine of res judicata, it is apparent the case at bar rests on the same state of facts and evidence of the same character as were presented in Mel Trimble Real Estate et al v. Leland A. Fitzgerald, Civil No. C-78-4944. The trial court in that case, after hearing the witnesses who would appear and viewing the documents that would be introduced in this suit, ruled as a matter of law, that Fitzgerald was solely liable for any real estate commission that may have been owed Florence. The jury sitting in that action was so instructed after the court explicitly rejected an instruction related to third party beneficiary contracts. Undoubtedly,

AGE TWO

60,784

he precise issue at bar was fully and finally litigated in the our day trial which resulted in a verdict that no commission was ue Florence. On appeal, the Utah Supreme Court upheld the ecision finding no error in the trial court's ruling or instruction. lel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (1981). This court clearly lacks jurisdiction to review the application of law or findings of fact in that case and consequently lacks jurisdiction to relitigate the issue of liability for the alleged commission. Therefore, the instant action is barred under the doctrine of res judicata.

Moreover, even if this suit could be characterized as arising from a cause of action different from that previously tried, it is barred under the doctrine of collateral estoppel as adopted by the Utah Supreme Court in Schaer v. State of Utah, 657 P.2d 1337, 1340, 1341 (1983). Clearly, the "issue decided in the prior adjudication was identical with the one presented in th[is] action. . . ." Id. at 1340. ~~The issue at the first trial and the present issue are essentially the same, that is, whether a real estate commission was due Florence from the sale of Monte Vista Ranch, Inc. (Monte Vista), and if so, who should pay the commission.~~ The record shows that defendant Ohran testified at that trial and was present for cross examination, and that evidence of the event surrounding the transaction was fully presented. This court is unaware of any occurrence

PAGE THREE

60,784

subsequent to the previous trial or appeal that would lead to the introduction of evidence not fully considered in the previous action.

Secondly, the previous case was "decided on its merits." Id. at 1341. Although the Utah Supreme Court was unable to determine from the record the exact nature of the dealings between Florence and Fitzgerald, the court noted several facts that cast serious doubt on whether any money that passed or would have passed between them should be characterized as a commission. Apparently, even after defendant Ohran, as seller, reduced the sales price offered by the amount of the claimed commission (upon Fitzgerald's agreement to pay it), Fitzgerald and plaintiff Florence were still negotiating as to their possible joint purchase of the assets of Monte Vista. Irrespective of the actual agreement that emerged between Fitzgerald and Florence, this court is persuaded, as were the courts hearing the previous action, that liability for the commission cannot be imputed to the defendant Ohran.

Thirdly, there can be no serious claim that the issue in the first case was not "competently, fully, and fairly litigated." Id. As stated above, the Utah Supreme Court found no reversible errors in the previous jury trial that lasted four days and included testimony from and opportunity to cross examine all the witnesses relevant to this action. Finally, the Utah Supreme Court has abandoned the rule requiring mutuality of the parties in a collateral

PAGE FOUR

60,784

estoppel case. "The established rule is that a stranger to a judgment may assert a judgment against one who actually litigated an issue that was necessarily decided by the judgment and thereby preclude the relitigation of the same issue." Searle v. Searle, 588 P.2d 689 (Utah 1978). The exception to the requirement of mutuality is particularly just in the case at bar where defendant Ohran seeks to use the prior judgment as a shield to avoid liability in this suit because his alleged liability would depend on fact and law previously determined and applied. Therefore, even if this suit could be treated as arising from a cause of action different from that underlying the previous action, plaintiff is barred, under the doctrine of collateral estoppel, from bringing its claim against defendants.

Based upon the foregoing, it is clear to this court that plaintiff is barred from bringing this action against the instant defendants.

Accordingly, defendants' Motion to Dismiss is granted, and plaintiff's complaint is dismissed with prejudice. Costs to defendants.

Dated this 3rd June, 1985.



DISTRICT JUDGE

cc: Robert B. Hansen
M. David Laffs

EXHIBIT D

SUPPLEMENTAL FACTS

Plaintiff brought this action against Monte Vista Ranch, Inc. and its former shareholders to collect a real estate commission (R. 1-4). The shareholders sold the corporation's assets (consisting mainly of real property) to Leland Fitzgerald by selling their stock in Monte Vista (R. 182-195). Plaintiff procured the sale (R. 152). The Earnest Money Agreement between Monte Vista and its former shareholders and Leland Fitzgerald required Fitzgerald to pay plaintiff's real estate commission (R. 152). In a prior action, plaintiff sued Fitzgerald for his commission. Plaintiff first alleged that he had some kind of a joint purchase agreement with Fitzgerald (R. 153, 253). Plaintiff later amended that pleading to simply sue for a commission (R. 153).

Plaintiff lost the prior action against Fitzgerald. The record does not show what Fitzgerald's specific defense to plaintiff's claims was (R. 253). The trial court in this case acknowledged that the basis of the decision against plaintiff on his claim against Fitzgerald was unclear (Id.)

In its memorandum decision, the trial court refers to Wallace Ohran. Mr. Ohran was Monte Vista's president and a major shareholder before the sale to Fitzgerald. The other individual defendants are Monte Vista's other former shareholders (R. 182-195). Neither Monte Vista Ranch, Inc.

nor its former shareholders were sued by plaintiff in the prior action (R. 17).

SUMMARY OF ARGUMENT

Defendants did not introduce any evidence of what the prior case was all about. They relied solely on the reported appellate decision of the prior case. That decision does not reveal what the underlying issues really were in the prior case. Thus, defendants did not meet their burden of showing that no material issue of fact on the res judicata and collateral estoppel claims. The trial court relied upon defendants' incomplete submission and reached the wrong result.

The determination that the trial court erred can be made from the materials of record in this case.

The State of Frauds does not preclude recovery because Ohran admitted the existence of plaintiff's contract in court and because the "contract was fully performed. Additionally, the sale ultimately became a sale of stock to which the Statute of Frauds does not apply rather than a sale of real property.

POINT I

THE RECORD IN THIS CASE DEMONSTRATES THAT THE TRIAL COURT'S RULING WAS BASED UPON AN INCORRECT ASSUMPTION

Defendants admitted plaintiff did not file any
complaint against Monte Vista Ranch or its former sharehold-
ers in the prior action (R. 17). Defendants admitted that

Fitzgerald filed a third-party complaint against Monte Vista's former shareholders (R. 17). Fitzgerald's third-party complaint in the prior action was for indemnification from Monte Vista's former shareholders if plaintiff recovered from Fitzgerald (R. 17).

The issues in Fitzgerald's third-party indemnification suit were completely different than the issues plaintiff asserted against Fitzgerald. (See plaintiff's original brief, pp. 14-16). The indemnification suit was based upon language in the stock purchase agreement between Fitzgerald and Monte Vista's former shareholders to the effect that each party would reimburse the other for any liability for commissions (R. 189). Such an arrangement was circular. Under those terms, ultimate payment would depend on whom plaintiff sued first. But the Earnest Money Agreement between Fitzgerald and Monte Vista's former shareholders clearly stated that as between Monte Vista's former shareholders and Fitzgerald, Fitzgerald would be responsible (R. 152). Thus, the court in the prior action ruled that Fitzgerald would be liable to plaintiff (R. 155).

This ruling was referred to in a jury instruction (R. 155). Both in its ruling on res judicata and in its ruling on collateral estoppel, the trial court assumed that one result of the prior action was that "the courts hearing the previous action" were persuaded "that liability for the commission cannot be imputed to the defendant Ohran" (R.

51-254, quoting from 253). A copy of the trial court's order is attached as Exhibit "A".

As against plaintiff, the courts in the prior action could not and did not make that determination because plaintiff did not bring any claim against Monte Vista or its shareholders in that prior action (R. 17). The trial court's ruling was based upon an assumption that was clearly erroneous.

POINT II

THE RECORD IN THIS CASE DEMONSTRATES THAT THE COURT DID NOT HAVE ANY ADEQUATE RECORD OF THE PRIOR CASE BEFORE IT

Defendant argues that the rule that the court must independently examine the record of a prior case before making a res judicata or collateral estoppel ruling is not applicable because there was a reported appellate decision of the case against Fitzgerald. Defendants did not cite any authority for their argument. Further, collateral estoppel and res judicata require a showing that the issues in the prior case and the pending one are the same. Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978). Even if defendants could rely on a reported decision, any such opinion would have to be complete enough to make that determination. It is not enough to just show plaintiff lost.

The record in this case demonstrates that the reported decision, Mel Trimble Real Estate v. Fitzgerald, 26 P.2d 453 (Utah 1981), was not complete enough to make a proper determination of collateral estoppel. The reported

decision mentioned plaintiff's contention that the verdict should have been directed in his favor. But the court disposed of that argument without specifying what the actual claims of the parties were. The majority of the reported decision simply dealt with the adequacy of a jury instruction. The appellate decision did not go into significant detail on specific allegations or specific conclusions.

The trial court admitted in its memorandum decision that it did not know what the actual arrangement was between plaintiff and Fitzgerald:

Although the Utah Supreme was unable to determine from the record the exact nature of the dealings between Florence and Fitzgerald, the court noted several facts that cast serious doubt on whether any money that passed or would have passed between them should be characterized as a commission (upon Fitzgerald's agreement to pay it), Fitzgerald and plaintiff Florence were still negotiating as to their possible joint purchase of the assets of Monte Vista.

(R. 253).

After expressing this uncertainty, the trial court clearly showed that its decision on collateral estoppel as well as res judicata was based on its assumption that the court made a determination that Monte Vista's former shareholders did not owe anybody (including plaintiff) anything:

Irrespective of the actual agreement that emerged between Fitzgerald and Florence, this court is persuaded, as were the courts hearing the previous action, that liability for the commission cannot be imputed to the defendant Ohran [Monte Vista's former shareholder].

(R. 253).

As we have shown, that conclusion was wrong. Defendants admitted plaintiff did not bring an action against Monte Vista or its former shareholder in the prior action (R. 17). Thus determination that Monte Vista and its former shareholders owed nothing to plaintiff could not possibly have been made.

POINT III

DEFENDANTS DID NOT MEET THEIR BURDEN OF PROOF

Defendants argue that plaintiff is, nevertheless, collaterally estopped from asserting any claims against Monte Vista or its former shareholders because the prior action at least determined that Fitzgerald did not owe plaintiff anything. But, before collateral estoppel could apply, we would need to know why the prior court made that decision. We would need to know what the precise issues were. Schear v. State, 657 P.2d 689 (Utah 1983).

The fact that plaintiff did the work which procured the sale is not disputed. The Earnest Money Agreement establishes that fact by specifying that plaintiff's commission should be taken care of (R. 152). The record also establishes that plaintiff was only paid \$5,000 (R. 154) on what was at least a \$1,400,000 sale (R. 185).

By specifying that plaintiff's real estate commission was to be paid, defendants acknowledged plaintiff procured the sale and earned a commission of some kind (R. 152). The record also contains a six page transcript from

Wallace Ohran's deposition in the prior case (R. 81-87), a copy of which is attached as Exhibit "B" hereto). In that transcript, Ohran admits that the shareholders at one time agreed to pay plaintiff a 6% commission (R. 81).

The trial court did not understand the basis for the decision in the prior case (R. 253). We have shown that it could not have been based on failure to perform, or payment which would be the usual reasons. The record in this case shows that plaintiff and Fitzgerald were negotiating some kind of a joint purchase of the subject property that never took place (R. 146-147, 154, 253).

It was defendants' burden to show that collateral estoppel applies. Rule 56, Utah Rules of Civil Procedure. FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332 (Utah 1979). Mere assertions that no genuine fact question exists are no more valid than mere assertions that a fact question exists. See Webster v. Sill, 675 P.2d 1170 (Utah 1983).

For collateral estoppel to apply, defendants would have to show what the precise issues in the prior case were -- not just that plaintiff lost. Defendants did not introduce any evidence on what the underlying contentions and facts were in the prior case and relied solely on the incomplete reported decision. (See plaintiff's original brief, pp.11-14). Defendants did not meet their burden.

After reviewing defendants' authorities, plaintiff acknowledges that defendants are probably right when they

argue the material not in the record (Exhibits C and D to Plaintiff's brief in chief) cannot be considered on appeal. At the trial court erred by ruling without considering similar material. The record in this case demonstrates that defendants did not meet their burden of showing that no material fact issue exists concerning the application of res judicata or collateral estoppel. The court does not have to consider materials not in the record to make that determination.

POINT IV

THE STATUTE OF FRAUDS DOES NOT APPLY BECAUSE OHRAN ADMITTED THE EXISTENCE OF A CONTRACT

The trial court properly refused to base its decision on the Statute of Frauds (R. 251-254). An admission in pleadings, depositions, or in open court satisfies the Statute of Frauds. Bentley v. Potter, 694 P.2d 617 (Utah 1984). Defendants admitted that a contract existed.

Ohran admitted on page 528, lines 10-14 of the prior cases' transcript that Monte Vista's shareholder's agreed to pay plaintiff a 6% commission. The relevant testimony came in as follows:

Q: (By Mr. DeBry) The question was: "Tell me, to the best of your recollection, what was said during this conversation." And do you recall at that time that you testified: "I told Mr. Florence that we would agree to sell the property to his buyers and to pay him a six percent commission." Was that your testimony at this time we gave the deposition?

A: (By Wallace Ohran) That was my testimony, that is right. (R. 234-235).

Defendants assert that this admission is not sufficient because the term "we" allegedly does not identify the promisors. In context, however, it clearly refers to Monte Vista and its former shareholders. Moreover, it is well established that ambiguities in the materials used to satisfy the Statute of Frauds can be resolved by parol evidence. Johnson v. Allen, 158 P.2d 134 (Utah 1945); Johnson v. Ogle, 181 P.2d 789 (Mont. 19); 72 Am Jur.2d "Statute of Frauds" §296. This includes the identity of a party. 72 Am Jur.2d "Statute of Frauds" §297 n.45, n.46.

Defendants further protest on the grounds that plaintiff merely referred the court to the admission and did not set it out fully for the trial court. But defendants themselves set the quote out fully in their own memorandum to the trial court (R. 234-235). They did not assert that plaintiff's citation was wrong or argue that plaintiff needed to do more to place the issue before the court. (Id.). The matter was presented to the trial court with defendants' approval as to the form of submission. They cannot complain now. Board of Education of Salt Lake City v. Bothwell & Swanor, 400 P.2d 568 (Ut. 1965).¹

¹Additionally, the contention that plaintiff should have borne the burden of setting forth the actual testimony is raised from the first time on appeal. Even if there were merit to this argument, it should not be considered for that reason alone. Edgar v. Wagner, 572 P.2d 405 (Utah 1977).

Defendants also ignore other writings and admissions. Admittedly, the phrase in the Earnest Money Agreement that makes Fitzgerald responsible to pay plaintiff's commission (as between Monte Vista's former shareholders and Fitzgerald) does not specify the amount of plaintiff's commission. Arguably, that could be supplied by custom. Richards v. Hodson, 485 P.2d 1044 (Utah 1971); Nev v. Harrison, 299 P.2d 1114 (Utah 1956); 72 Am Jur.2d "Statute of Frauds" §297. At the minimum, the Earnest Money Agreement (R. 152 and attached as Exhibit "C") together with the Stock Sale Agreement (R. 182-195), conclusively shows that Monte Vista's former shareholders are the "we" referred to in Ohran's admission. The material necessary to satisfy the Statute of Frauds need not be contained in one writing but may be pieced together from several sources. Fritsch v. Hess, 162 P. 70 (Utah 1916); 72 Am Jur.2d "Statute of Frauds" §371.

Ohran's actual deposition testimony referred to in his in-court admission is attached as Exhibit B. It is part of the record (R. 81-87). Using the term "we," Ohran admits to an agreement to pay plaintiff a 6% commission on the sale of the property (R. 81). It is clear from the transcript that the "we" refers to Monte Vista and its former shareholders. (See, for example, R.84, lines 23 and 24; R. 85, line 13, and the entire context of the admission).

POINT V

THE STATUTE OF FRAUDS DOES NOT APPLY
BECAUSE THE CONTRACT WAS FULLY PERFORMED

Part performance generally satisfies the Statute of Frauds. 73 Am Jur.2d "Statute of Frauds" §405, et. seq. Utah follows the general rule. Greenwood v. Jackson, 128 P.2d 282 (Utah 1942). In the present case, plaintiff fully performed. This is not just a part performance case.

Defendants rely heavily on Smith Realty Co. v. Dipietro, 292 915 (Utah 1930) and Case v. Ralph, 188 P. 40 (Utah 1920) to support their conclusion that the doctrine of part performance does not apply in situations where a real estate broker seeks his commission when no written contract for that commission exists. Both Smith Realty Co. v. Dipietro, supra and Case v. Ralph, supra were decided before the Rules of Court Procedure were liberalized to permit notice pleading. A close reading of both those cases shows that they were each decided on the basis that the plaintiffs did not adequately allege that any kind of a contract for a commission existed.

Defendants also cite Young v. Buchanan, 259 P.2d 876 (Utah 1953) and Watson v. Odell, 198 P. 772 (Utah 1921). Neither of these cases actually held that full performance does not satisfy the Statute of Frauds in real estate commission cases. Watson v. Odell, supra, held that the real estate agent could not recover under the specific wording of his contract where the underlying sale did not occur. Young v. Buchanan, supra held that an unlicensed

real estate agent could not use a licensed broker's license when he was acting as an independent contractor rather than an employee. To be sure, the cases defendants cite hold that a real estate commission cannot be recovered under a quantum merit theory. But they do not establish any rule that full performance of an express contract cannot satisfy the Statute of Frauds in real estate commission cases.

To plaintiff's knowledge, the only Utah case which has squarely decided whether full performance satisfies the Statute of Frauds in real estate commission cases is Kerr v. Hillyard, 170 P. 981 (Utah 1918). That case held full performance would satisfy the Statute of Frauds. Like Kerr v. Hillyard, the pending case does not involve a situation where the agent found a willing buyer but the sale did not go through. The contract was not just partly performed, it was fully performed. That satisfies the Statute of Frauds.

POINT VI

PLAINTIFF DID NOT ACT AS A SECURITIES BROKER DEALER

The sale in this case was finally effected as a sale of stock (R. 182-195). Thus, the Statute of Frauds should not apply at all.

The argument that the Statute of Frauds still applies because plaintiff was not a licensed securities broker is without merit. First, plaintiff never intended to arrange a stock sale (R. 152). He always felt he was selling property. He did not take part in changing the form

of the transaction and did not even learn that the form of transaction had been changed until well after the Stock Purchase Agreement had been executed (R. 197-198).

Secondly, the transaction was an isolated one. The Securities Laws in effect at that time defined a securities "broker-dealer" as a person "engaged in the business of effecting transactions in securities for the account of others or for his own account." Section 61-1-13 Utah Code Annotated. Because the transaction was an isolated one and because plaintiff did not play a part in changing the form of the deal, plaintiff was not "in the business" of dealing in securities. He was not a securities "broker-dealer" and did not have to be licensed as such.

Yet the sale was consummated as a sale of stock (R. 182-195). Thus, the transaction does not fall within the literal wording of the Statute of Frauds.

CONCLUSION

The real issue in this case is not res judicata, collateral estoppel, or the Statute of Frauds. The real issue in this case is whether plaintiff intended to release Monte Vista and its former shareholders from all liability when he tried to secure payment from Fitzgerald. That issue is a fact question that has never been addressed. The case should be remanded for determination of that issue.

DATED this 3 day of January, 1986.

ROBERT J. DEBRY & ASSOCIATES

By: 15/
DAVID M. JORGENSEN

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing APPELLANT'S REPLY BRIEF (Appeal from the Summary Judgment of the Fourth Judicial District Court, Utah County, Honorable David Sam) (Trimble v. Monte Vista Ranch, Inc., et al.), was mailed this 3 day of Jan, 1985, to the following:

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

151

EXHIBIT E

YOUNG, BACKLUND, HARRIS & CARTER
ATTORNEYS AT LAW
350 EAST CENTER
PROVO, UTAH 84601
(801) 375-9801

JOHN C. BACKLUND
YOUNG, BACKLUND, HARRIS & CARTER
Attorneys for Defendants
350 East Center
Provo, Utah 84601
Telephone: 375-9801

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

--ooo0ooo--

MEL TRIMBLE REAL ESTATE, :
Plaintiff, : STATEMENT OF POINTS AND
vs. : AUTHORITIES IN SUPPORT OF
MONTE VISTA RANCH, INC., a : Civil No. 60784
Utah corporation, WALLACE :
OHRAN, RAY E. NELSON, HOWARD :
D. SHERWOOD, JOYCE T. RICE, :
and NELDON WILLIAMS, :
Defendants. :

--ooo0ooo--

COME NOW defendants, Wallace Ohran, Ray E. Nelson, Howard D.
Sherwood, Joyce T. Rice and Neldon Williams, by and through their
attorney of record, and hereby submit this statement of points
and authorities in support of their Motion to Dismiss the complaint
on file herein.

On or about June 1982, plaintiff in this matter filed a
complaint naming, among others, Wallace Ohran, Ray E. Nelson,
Howard D. Sherwood, Joyce T. Rice and Neldon Williams as defen-
dants. In Count I of the complaint, plaintiff maintains that Cal
Florence, a real estate agent for the plaintiff, prior to December
1977, allegedly entered into an oral agreement with the defendant
Wallace Ohran as President of Monte Vista Ranch, Inc., a Utah
corporation, to pay a real estate commission to plaintiff of 6% in
the event that plaintiff could obtain a purchaser for the Monte
Vista Ranch. Plaintiff seeks judgment against all defendants,
severally and jointly, in the sum of \$88,750.00 plus interest.
The complaint also contains a cause of action entitled Count II

1 based upon a claim sounding in quantum meruit. Plaintiff alleges
2 that its agent, Cal Florence, expended time, energy and assets in
3 putting together a transaction involving the sale of the Monte
4 Vista Ranch and is entitled to be compensated for the reasonable
5 value of such time, energy and assets.

6
7 ARGUMENT

8 POINT I

9 PLAINTIFF'S CLAIM IS BARRED BY THE STATUTE OF FRAUDS OF THE
10 STATE OF UTAH.

11 Utah Code Annotated Section 25-5-4 states as follows:

12 25-5-4--Certain Agreements Void Unless Written and Sub-
13 scribed--In the following cases, every agreement shall be
14 void unless such agreement, or some note or memorandum
thereof, is in writing subscribed by the parties to be
charged therewith:

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

17 The above statutory language is clear and unambiguous. The
18 Utah State Legislature has imposed a requirement upon real estate
19 brokers and agents to obtain in writing any authorization or
20 employment agreement authorizing or employing an agent of broker
to purchase or sell real estate for compensation.

21 In this matter, Monte Vista Ranch, Inc., by and through
22 Wallace Ohran as President and Howard Sherwood as Secretary, on or
23 about December 7, 1977, entered into an Earnest Money Receipt and
24 Offer to Purchase with a potential purchaser of the property,
25 Leland A. Fitzgerald. A copy of said Earnest Money Receipt and
26 Offer to Purchase is attached hereto and designated Exhibit "A".
27 Said agreement clearly provides on line 22 that: "Buyer to be
28 responsible for all real estate commissions." The language of this
29 agreement is clear and unambiguous. It cannot be argued in good
30 faith that by signing said agreement through its corporate
31 officers that Monte Vista Ranch, Inc. agreed to be responsible to
32

1
2 or pay a commission to Cal Florence, the real estate agent, or
3 the plaintiff therein as the real estate broker, a real estate
4 commission in connection with that transaction.

5 In fact, Mel Trimble Real Estate and Cal Florence as plain-
6 tiffs filed an action against Leland A. Fitzgerald as defendant in
7 the Third Judicial District Court in and for Salt Lake County,
8 State of Utah, Civil No. C-78-4944, making a claim in that action
9 that they were entitled to receive and recover a real estate
10 commission from Leland A. Fitzgerald. Leland A. Fitzgerald there-
11 after filed a third-party complaint against Wallace Ohran, Ray E.
12 Nelson, Howard D. Sherwood, Joyce T. Rice and Neldon Williams
13 alleging that he was entitled to recover from those third-party
14 defendants an amount equal to any judgment that would be entered
15 against him as defendant in the Salt Lake County matter. The
16 matter was tried to a jury and plaintiffs in that matter failed to
17 recover judgment against the purchaser. It is noteworthy that
18 plaintiff in this action failed to file a claim against Monte
19 Vista Ranch, Inc. or any of the other defendants in this matter
20 alleging that these defendants owed a real estate commission to
21 Mel Trimble Real Estate or Cal Florence. Now, more than four
22 years later, plaintiff seeks to bring an action against these
23 defendants having lost in its previous action against Leland A.
24 Fitzgerald.

25 Certainly these defendants must be considered indispensable
26 parties to the prior action and plaintiff having failed to state a
27 cause of action against them or to have joined them as defendants
28 in the prior action has waived his right to bring a subsequent
29 action against them.

30 In conclusion on this point of the argument, these defendants
31 respectfully submit that plaintiff's claim herein is barred by
32 failure to comply with the Statute of Frauds and further by failure

YOUNG, BACKLUND, HARRIS & CARTER
ATTORNEYS AT LAW
300 EAST CENTER
PROVO, UTAH 84601
(801) 378-9801

1
2 to join an indispensable party to the prior action.

3 POINT II

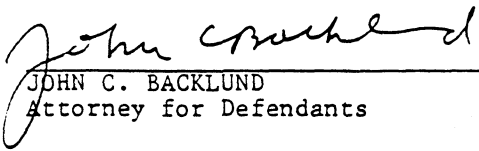
4 A REAL ESTATE BROKER OR AGENT MAY ONLY RECOVER BY VIRTUE OF A
5 WRITTEN CONTRACT AND CANNOT RECOVER ON A BASIS OF QUANTUM MERUIT.

6 The Utah State Supreme Court held in the cases of Watson v.
7 Odell, 58 Utah 276, 198 P. 772, and Case v. Ralph, 56 Utah 243,
8 188 P. 640, cited with approval on the case of Young, et al v.
9 Buchanan, 259 P.2d 876, that a broker or agent may recover only by
10 virtue of contract and cannot recover upon basis of quantum
11 meruit. The Court also cited with approval 20 ALR 280 for the
12 same point. The Buchanan case clearly stands for the proposition
13 that a broker or agent cannot recover upon the basis of quantum
14 meruit and therefore Count II of the complaint should be dismissed.

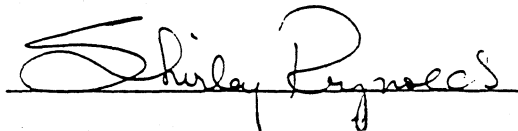
15 CONCLUSION

16 Plaintiff in this matter has not satisfied the Statute of
17 Frauds and Count I of the complaint should be dismissed. Plain-
18 tiff does not have a listing signed by any of the defendants in
19 the above case authorizing or employing plaintiff or plaintiff's
20 agent, Cal Florence, to purchase or sell the Monte Vista Ranch for
21 compensation. With respect to Count II, Utah law is clear that a
22 real estate broker or agent cannot recover upon the basis of
23 quantum meruit and Count II should be dismissed.

24 DATED this 15th day of July, 1982.

25
26 
27 JOHN C. BACKLUND
28 Attorney for Defendants

29 I HEREBY CERTIFY that I mailed a copy of the foregoing to
30 Valden P. Livingston, Attorney for Plaintiff, 965 East 4800 South,
31 Suite 2, Salt Lake City, Utah 84117, postage prepaid, this 15th
32 day of July, 1982.





EARN MOST MONEY RECEIPT AND OFFER TO PURCHASE

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

TO American Fork Name of Buyer Company December 7, 1977

IN CONSIDERATION OF your agreement to use your efforts to procure this offer to the Seller: Leland A. Fitzgerald

hereby deposit with you as earnest money the sum of \$ 25,000 Twenty-five Thousand Dollars

in the form of personal check

to secure and apply on the purchase of the property situated at: All that property sold by Co-operative Securities

Corporation to Wallace Ohren more commonly known as the Cedar Valley Ranch,

including all improvements, water rights, sprinkling systems, and equipment.

This offer excludes the South 1/4 of Section 26, Range 2 West sold on Uniform Real Estate

contract to Blue Grass Turf Farms, Inc., David Pennington, President.

City Utah County, State of Utah

including any of the following items if at present attached to the premises: pump and heating fixtures and equipment including stoves and oil tanks, water heaters, air conditioners, etc.

light fixtures including bulbs, bathroom fixtures, toilet shades, curtain rods and fixtures, window blinds, window and door screens, linoleum, all shrubs and trees, and any other items.

EXCEPT no exceptions

The items, being described, shall also be included as part of the property purchased NONE

The offer purchase price of \$ 1,875,000 One Million Eight Hundred Seventy-Five Thousand

shall be payable as follows: \$ 25,000 which is non-refundable, and the balance of which is hereby acknowledged by you

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

and which shall be in or before January 15, 1978, and equal annual installments over xxxxxxx

a period of ten years from date of sale

Buyer to be responsible for all real estate commissions.

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

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

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

for dry land acreage.

until the total of \$ 1,375,000 together with interest is paid, provided, however, that Buyer at his option, at any time, may pay amounts in excess of the amount

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

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

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

be paid as of date of possession. All other taxes and assessments, mortgages, chattel liens and other liens, encumbrances or charges against the property of any nature shall be paid

by the seller except real estate taxes to be apportioned

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

vement ☐ Street Street Lighting ☐ Culinary Water (City ☐ Other Community System ☐ Connected ☐ Private ☐ (Lease: Yes (x) No ())

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

to be determined prior to closing date

This payment is received and offer is made subject to the written acceptance of the offer and/or herein within 45 days from date hereof, and unless

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

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

be returned as liquidated and agreed damages.

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

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

acceptance of this earnest money receipt and offer to purchase

Agent By Monte Vista Bank One

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

execute a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed or

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

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

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

Dec 7, 1977 by Wallace Ohren Pres.

Dec 7, 1977 by Edward Sherwood Sec.

RECEIPT

(State law requires brokers to furnish copies of this contract bearing all signatures to buyer and seller. Dependent upon the method used, one of the following forms must be completed.)

RECEIVED

ROBERT J. DE BRY
VALDEN P. LIVINGSTON
Attorneys for Plaintiffs
2040 East 4800 South, Suite 203
Salt Lake City, Utah 84117
Telephone: (801) 278-4439

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MEL TRIMBLE REAL ESTATE)	
and CAL FLORENCE,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
LELAND A. FITZGERALD,)	<u>TRIAL BRIEF</u>
)	
Defendant and)	Civil No. C 78-4944
Third Party Plaintiff,)	
)	
vs.)	
)	
WALLACE OHRAN, RAY E. NELSON,)	
HOWARD D. SHERWOOD, JOYCE T.)	
RICE and NELDON WILLIAMS,)	
)	
Third Party Defendants.))	

INTRODUCTION

*P22144
eye like case*

Plaintiffs seek to recover from defendant pursuant to a third-party beneficiary contract. Plaintiffs believe that the evidence will show that the contract was in writing. As such, the Statute of Frauds would not apply to this case. However, the defendant has pleaded that the contract is oral and therefore subject to the Statute of Frauds.

Of necessity this brief must deal with both theories-- written or oral contract. However, it may be useful to give the court a "key" to show which issues relate to the written contract theory, which issues relate to the oral contract theory, and which issues overlap.

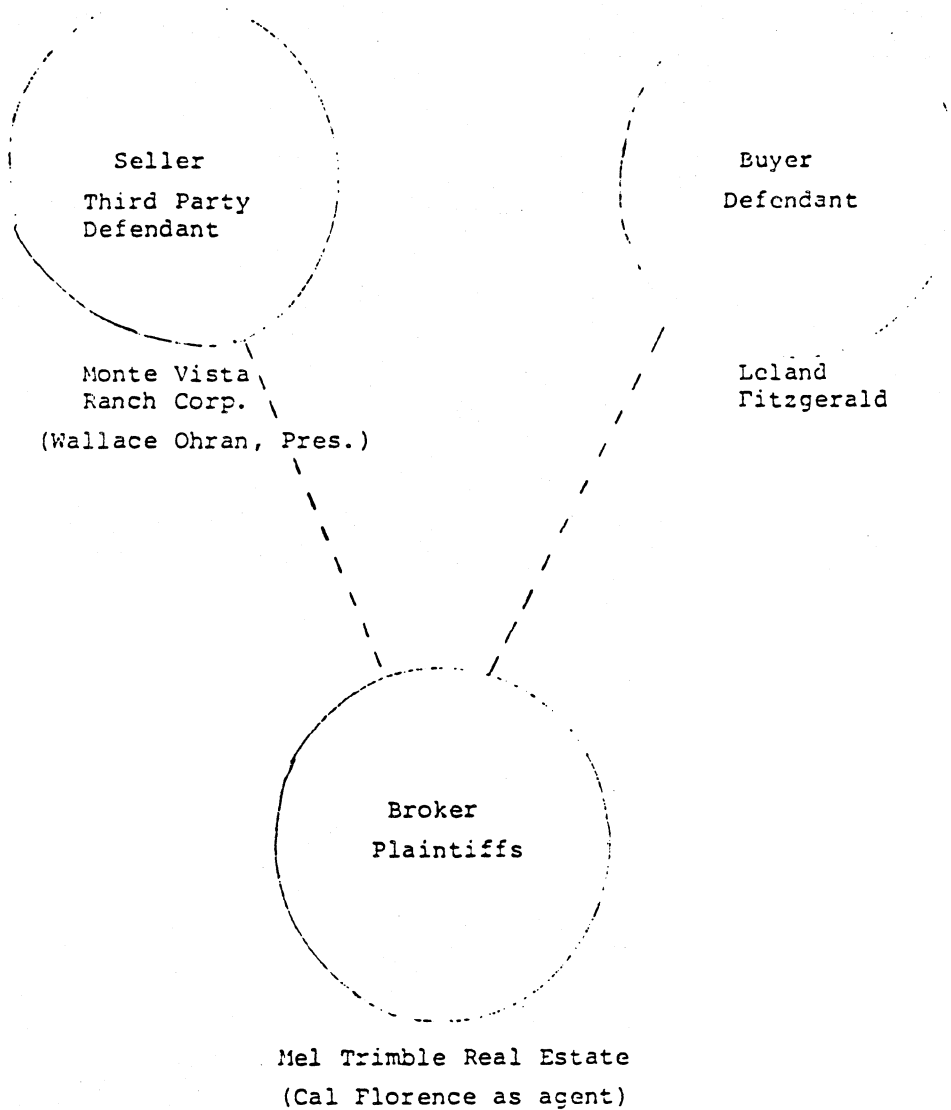
Written Contract Theory

Point I
Point II
Point III
Point IV
Point V

Oral Contract Theory

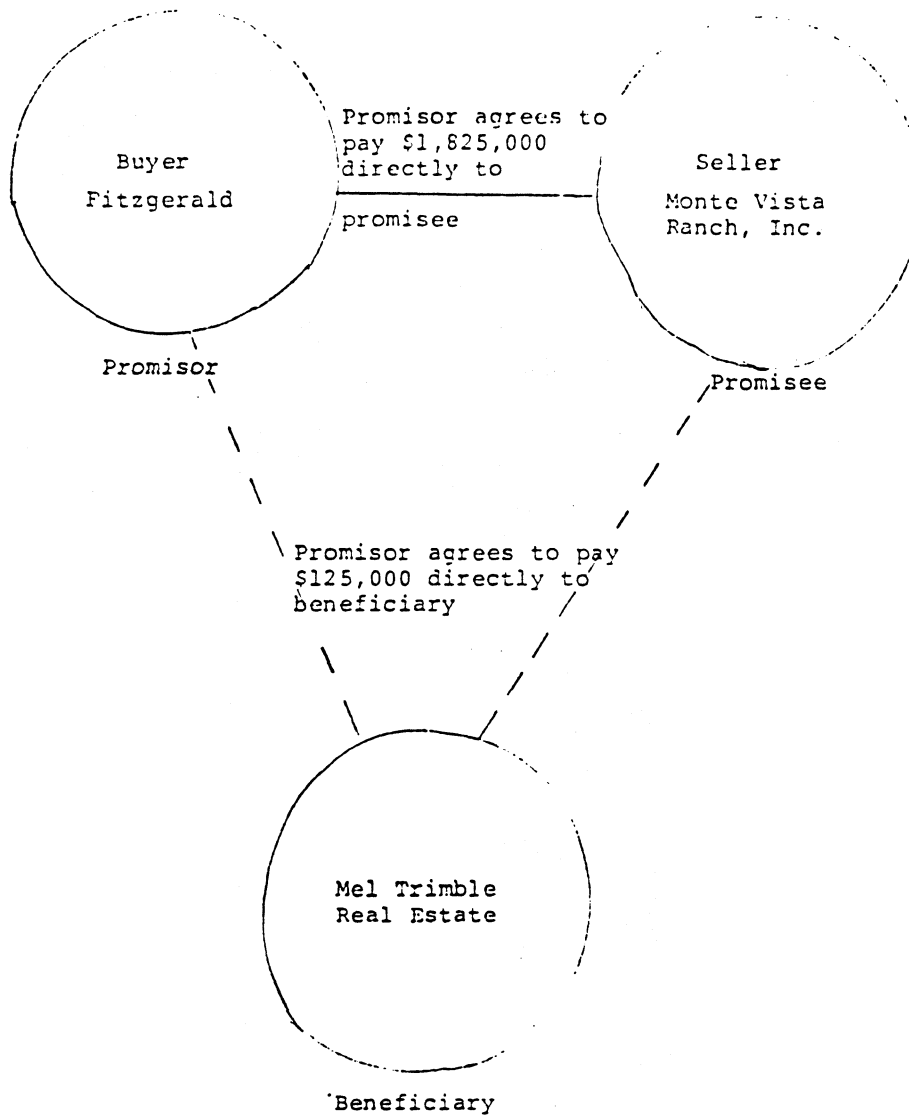
Point I
Point III
Point IV
Point V
Point VI
Point VII
Point VIII

Throughout this brief the plaintiffs will generally be referred to as the broker, the defendant will generally be referred to as the buyer, and the Monte Vista Ranch Corp. and its officers and directors will generally be referred to as seller. The following diagram will familiarize the court with the relationships:



A major portion of the brief will be devoted to concepts of a third-party beneficiary contract. Under that

theory, the relationships change somewhat and the following diagram may be helpful:



FACTS

Although contested, the facts of this case are relatively simply.

Some years ago broker entered into an oral arrangement with Mr. Ohran to sell a ranch known as Monte Vista Ranch. The seller was president of the corporation that owned the ranch.

The broker placed advertisements and showed the ranch to a number of potential purchasers. One day the buyer noticed

the advertisements and called broker. They discussed the ranch by telephone and went together for an inspection of the property.

After some protracted negotiations, buyer, seller and broker met at Gene Fullmer's restaurant to finalize their deal. At that time seller quoted a sales price of \$2,000,000. However, seller said he would reduce that price to \$1,875,000 on the condition that buyer would pay a commission of \$125,000 directly to the broker. Everyone agreed.

Thereafter the parties met at an accountant's office in American Fork. The arrangement was reduced to a standard Earnest Money Contract which was executed by both buyer and seller. That Earnest Money Contract is attached hereto as Exhibit "A".

The Earnest Money Contract specifically provides that: "Buyer to be responsible for all commissions."

The ~~following~~ ^{same} day buyer gave broker a \$5,000 payment toward the commission. Thereafter, buyer and seller met separately and made some minor changes in their arrangement. The primary change had to do with tax planning. Instead of conveying just the ranch, seller conveyed the entire corporation to buyer. However, the sole asset of the corporation was the ranch. The final Stock Sale Agreement between buyer and seller is attached hereto as Exhibit "B".

Broker has made repeated demands for buyer to pay the balance of the commission. Buyer has refused to pay any further commission.

Broker filed this lawsuit to enforce a third-party beneficiary contract under which the buyer was obligated to pay a \$125,000 commission as part of the purchase price.

POINT I

PLAINTIFFS ARE THE BENEFICIARIES
OF A THIRD-PARTY BENEFICIARY
CONTRACT WHICH THEY MAY ENFORCE

In this action, seller orally promised to pay broker a commission if he found a purchaser for the Monte Vista Ranch. Pursuant to that arrangement, broker found a buyer. However, seller's obligation was subject to the defense of the Statute of Frauds because his promise was oral. Utah Code Ann. § 25-5-4(5).

In the final negotiations, seller transferred his obligation to pay a commission to buyer. Seller had originally agreed to sell the ranch for \$2,000,000 and to pay broker his 6% commission. After some negotiations, the purchase price was lowered from \$2,000,000 to \$1,875,000 on the condition that buyer would pay broker a commission of \$125,000.

When two parties enter into a contract with the intent to benefit a third party, a third-party beneficiary contract is formed which the beneficiary may enforce. See, e.g., Walker Bank & Trust Co. v. First Security Corp., 9 Utah 2d 215, 341 P.2d 944 (1959); Fisk v. Stevens, 33 P. 248 (Utah 1893); Moran v. Audette, 217 A.2d 653 (D.C.Cir. 1966); Continental Bank and Trust Co. v. Stewart, 4 Utah 2d 228, 291 P.2d 890 (1955); 4 Corbin on Contracts §§ 821-22.

The early Utah case of Brown v. Markland, 52 P. 597 (Utah 1898) demonstrates the principle of a third-party beneficiary contract. In that case defendant purchased a mine. As part of the purchase contract, defendant agreed to pay certain "claims of persons who have performed labor upon or furnished material" to the mine. Plaintiff had performed labor on the mine and sued for payment. Defendant refused to pay. The Utah Supreme Court held that the plaintiff was a beneficiary to the third-party beneficiary contract between the purchaser and seller of

the mine and as such could enforce his claim:

The contract thus made, for a valuable consideration, inured to her benefit, and the grantee of the premises became the promisor. She thereafter had a right to look to him for payment of her claim, under the rule that 'where a promise or contract has been made between two parties for the benefit of a third, an action will lie thereon at the instance and in the name of the party to be benefited, although the promise or contract was made without his knowledge, and without any consideration moving from him.' [Citations omitted.]
52 P. 597 at 599.

The case most exactly on point is Peter's Grazing Ass'n' v. Legerski, 544 P.2d 499 (Wyo. 1976). In that case the seller of a ranch had agreed to pay a real estate commission. During the negotiations for the purchase of the ranch, the sales price was lowered from \$2,060,000 to \$2,030,000 on the condition that the buyer would pay the real estate commission of \$30,000. The buyer agreed and purchased the ranch, but he refused to pay the commission. The Wyoming Supreme Court held that the real estate agent was a beneficiary of a third-party beneficiary contract and the buyer was ordered to pay the commission:

In examination of all the circumstances, we repeat what has previously been inferred. This was a contract arrangement whereby the defendant agreed to pay plaintiff a broker's commission, owed to plaintiff by the Peters estate, under a settlement agreement between the plaintiff and the executor. The amount of the consideration agreed to be paid for the ranch took this into account. What actually exists contractually is a third party beneficiary contract. It was not necessary that plaintiff perform any services for the defendant.

It is a well settled rule of law that where one person agrees with another, on a sufficient consideration, to do a thing for the benefit of a third person, the third person may enforce the agreement, and it is not necessary that any consideration move from the latter. It is enough if there is a sufficient consideration between the parties who made the contract.

* * *

It would be inequitable to permit defendant to avoid payment of plaintiff's claim. It would result in a windfall to that organization and amount to unjust enrichment. Its

offer for the ranch was \$2,060,000.00. The lesser price of \$2,030,000.00 was agreed upon solely for the purpose of shifting the obligation of payment to the defendant. There is a lack of any suggestion in the record of any offer to pay the Peters estate the \$30,000.00 by which the sale price was reduced. It would unjustly gain not only at the expense of the plaintiff but at the expense of the Peters estate as well. As noted, when we slash through the underbrush, we find that the \$30,000.00 was actually part of the consideration for the ranch

544 P.2d at 457-58.

POINT II

THE THIRD-PARTY BENEFICIARY
CONTRACT WAS REDUCED TO WRITING,
AND THE STATUTE OF FRAUDS IS
THEREFORE INAPPLICABLE

The parties discussed their oral arrangement in detail. However, it is not necessary for the broker to rely on any oral conversation or oral contract. On December 7, 1977 the arrangement was reduced to writing in the form of a standard Earnest Money Contract (Exhibit "A"). That writing is sufficient within its four corners to constitute a complete contract between the parties.

The seller has raised the affirmative defense of Statute of Frauds. That statute states in part:

In the following cases every agreement shall be void unless such agreement ... is in writing subscribed by the party to be charged therewith:

Since the Earnest Money Agreement is in writing, it is by definition outside the Statute of Frauds.

Buyer's only conceivable argument is that the written Earnest Money Agreement is somehow incomplete. That is to say it doesn't contain all of the terms between the parties. Therefore, it is arguably a non contract. If the Earnest Money Agreement is a non contract, broker would be forced to rely on some oral contract to establish liability.

However, the terms of the Earnest Money Agreement are spelled out in great detail. Broker submits that the Earnest Money Agreement is a complete written third-party beneficiary contract which can be enforced by the beneficiary.

To begin with, note what is included in the agreement:

1. Date;
2. Where the contract was made;
3. Name of the buyer;
4. Name of the seller;
5. The amount of earnest money deposit;
6. The form of earnest money deposit;
7. Description of the land to be sold;
8. Description of the equipment to be included in the sale;
9. The total purchase price;
10. The total down payment;
11. The terms for handling the installment contract;
12. Lot release provisions;
13. Arrangement for pro-rating the taxes;
14. Possession date;
15. Date of closing;
16. Provision for conveyance of title and title insurance;
17. Provision for liquidated damages;
18. Provision for attorney fees;
19. Provision for the buyer to pay real estate commissions;
20. Signature of the parties.

Admittedly, some matters are not spelled out in detail. For example, the document does not spell out who will get the real estate commission; nor does the document set the amount of

the real estate commission.

However, such details hardly make the Earnest Money Agreement a non contract. Indeed, there is probably not a contract in existence that spells out all details.

See, e.g., Blackhawk Heat & P. Co. v. Data Lease Fin. Corp., 302 S.2d 404, 408-9 (Fla. 1974):

Even though all the details are not definitely fixed, an agreement may be binding if the parties agree on the essential terms and seriously understand and intend the agreement to be binding on them. A subsequent difference as to the construction of the contract does not affect the validity of the contract or indicate the minds of the parties did not meet with respect thereto.

* * *

The contract should not be held void for uncertainty unless there is no other way out. As was stated by Justice Cardozo in Heyman Cohen & Sons, Inc. v. M. Lurie Woolen Co., Inc., 232 N.Y. 112, 133 N.E. 370, 371, 'Indefiniteness must reach the point where construction becomes futile.'

Again turning to Professor Corbin, he states at § 95, page 400:

'If the parties have concluded a transaction in which it appears they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and filling of some gaps that the parties have left.'

* * *

Professor Corbin again states at § 95, page 396:

'In considering expressions of agreement, the court must not hold the parties to *some impossible, or ideal, or unusual* standard. It must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty.'

See also: J.W. Knapp Co. v. Sinas, 172 N.W.2d 867 (Mich.App. 1969);

S. Jun Kreedman & Co. v. Meyer Bros., 130 Cal.Rptr. 41 (Cal.App. 1976).

True, the broker's name was not included. However, that matter may be supplied by the doctrine of practical construction:

Under the doctrine of practical construction, when a contract is ambiguous and the parties place their own construction on their agreement and so perform, the court may consider this as persuasive evidence of what their true intention was. The parties, by their action and performance, have demonstrated what was their meaning and intent; the contract should be enforced by the courts.
534 P.2d at 90.

See also: Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 268;
Bullough v. Simons, 16 Utah 2d 304, 308;
Vernon v. Lake Motors, 26 Utah 2d 269, 275.

Everyone knew who the broker was. Indeed, the day following the execution of the Earnest Money Agreement, buyer delivered \$5,000 to broker toward the commission. As a matter of practical construction, the parties clearly knew and intended that Mel Trimble Real Estate was the person who should receive the real estate commission.

It is further true that the written contract does not state the amount of the commission. Again, that is no reason to find a non contract. The recent case of Ferris v. Jennings, 595 P.2d 857 (Utah 1979) is squarely in point. In that case defendant (and counter-claimant) sought to enforce an oral purchase agreement. Defendant contended that there was no binding contract because the amount of the commission was specified-- "a fair commission." The court ruled that the failure to specify an exact amount for commissions did not defeat the contract.

A contract is not fatally defective as to price if there is an agreement as to some formulae or method for fixing it.

* * *

Where the transaction with respect to the main subject matter of a contract is definite, an agreement for fixing

reasonable compensation for some
adjunctive service in connection
therewith does not render the contract
so indefinite as to be unenforceable.
595 P.2d at 859.

The court may let in parol evidence to assist in the interpretation and construction of the Earnest Money Agreement. However, it is important to note that such parol evidence would come in as an aid in interpreting an existing written contract. The parol evidence does not come in to establish an independent oral contract.

The Utah Statute of Frauds covers situations where the existence of a contract must be proven by parol evidence. The statute is not intended to cover every circumstance where parol evidence is used to help interpret an existing written contract.

POINT III

THE THIRD-PARTY BINEFICIARY
CONTRACT CANNOT BE ABROGATED
OR RESCINDED BECAUSE PLAINTIFFS
HAVE ACCEPTED IT AND ACTED UPON IT

Broker claims a commission under the terms of the Earnest Money Contract (or at least under the terms of some companion oral contract). However, buyer contends that the Earnest Money Contract somehow expired or was abrogated. Defendant contends that buyer and seller executed a Stock Sale Agreement some months later that did not include any provision for a real estate commission. Seller contends that broker's claim for a commission died when the Earnest Money Contract was cancelled.

However, even if the parties made a new contract, the court should not allow seller to escape payment of a commission. Seller agreed to pay that real estate commission under a third-party beneficiary contract. Where the beneficiary to such an agreement accepts, adopts, or acts upon the agreement,

the promisor and promisee cannot rescind or modify it without his consent so as to deprive him of his rights unless they have specifically reserved the right to do so.

Plunkett v. Atkins, 371 P.2d 727 (Okla. 1962);

Rhodes v. Rhodes, 266 S.W.2d 790 (Ky.Ct.App. 1953);

Pitzer v. Wedel, 165 P.2d 971 (Cal.App. 1946);

Oman v. Yates, 422 P.2d 489 (Wash. 1967);

Restatement of Contracts § 142;

4 Corbin on Contracts § 815 at 256.

The rule is correctly stated in Oman as follows:

It is undoubtedly true that once a contract has been completely formed for the benefit of a third party the promisor and promisee may not get together and mutually rescind, unless the contract, by its terms, reserves the right so to do; nor may the promisee (Rhodes) unilaterally revoke.
422 P.2d 495.

In addition, Corbin has stated:

In a much greater number of cases, however, it has been definitely held that the promisor and the promisee can rescind their contract at any time before the creditor beneficiary has "assented" or "accepted" or acted in reliance upon the contract.

No general statement has been agreed upon by the courts as to the exact moment when the promisee first loses his power to discharge. There seems to be no doubt that such power is lost as soon as the beneficiary has begun to act in reliance upon the contract; and the rule is generally stated to the effect that the power of discharge is gone as soon as the third party has expressed his assent. (Emphasis added.)

4 Corbin on Contracts § 815 at 256-58.

The case of Rhodes v. Rhodes, *supra*, illustrates the point that once the third party accepts, adopts or acts upon the contract, the parties thereto cannot rescind or modify it to deprive the third party of his rights thereunder. In that case, Rhodes entered into an employment contract. Among other

things, the contract stated that if Rhodes died before reaching age 65, annuity payments would be made to his infant son. Several years later Rhodes divorced his wife and remarried. The employment contract was rescinded and a new one entered into with the same company. Several changes were made in the terms, including the substitution of his new wife as the beneficiary of the annuity payments rather than his son. The Kentucky Court of Appeals held that the son was a beneficiary to a third-party beneficiary contract which could not be rescinded because he had accepted it prior to the substitution of Rhodes' new wife therein.

In this case broker was present when buyer agreed to purchase the ranch for \$1,875,000 plus payment of \$125,000 commission to the broker. In fact, the broker helped negotiate that agreement and even brought the parties together. Broker never objected to it. He accepted it as the manner in which he would be paid and he looked to buyer for payment. Shortly after the agreement was made, broker accepted \$5,000 from the buyer as part payment of the third-party beneficiary obligation. Any rescission or modification of that agreement by buyer and seller occurred several weeks after the agreement was reached and several weeks after the \$5,000 payment was made. It is apparent that broker accepted, adopted and acted in reliance upon the third-party beneficiary contract prior to the time of any rescission or modification thereto. As such, any rescission or modification cannot be used by seller or buyer to prevent broker from collecting his commission.

POINT IV

THE PROMISOR OF A THIRD-PARTY
BENEFICIARY CONTRACT MUST PAY
THE BENEFICIARY EVEN IF THE
PROMISSEE HAD NO OBLIGATION
TO THE BENEFICIARY

For the sake of clarity, we repeat here the scenario. Seller orally promised to pay a 6% commission to broker. That original parol agreement would have fallen squarely under the statute of frauds (Utah Code Ann. § 25-5-4(5)). Thus, we might assume arguendo that the original contract between seller and broker was unenforceable. However, at a later time the seller made a new oral agreement directly with the buyer. Under that oral agreement, buyer promised to purchase the ranch by delivering \$1,875,000 directly to seller and \$125,000 to the broker.

The buyer now seeks to avoid payment of that \$125,000. Buyer contends that the seller had no obligation to pay a commission in the first place because of the statute of frauds. The buyer argues that he should not be obligated to pay a debt which never existed or which was barred by the statute of frauds. However, it is completely immaterial whether or not seller was originally obligated to pay the \$125,000 to the broker. The buyer is not entitled to the benefit of defenses which might have originally existed between the seller and the broker.

This principle is explained in Peters Grazing Ass'n v. Legerski, 544 P.2d 449 (Wyo. 1976) as follows:

Where the promisor agrees to pay a sum of money to a third party, to whom the promisee says he is indebted, it is immaterial whether the promisee is actually indebted to that amount at all, and defenses which promisee might have had available against third party are not available to the promisor.
544 P.2d at 458.

See also: 4 Corbin on Contracts § 821-22.

It is also illustrated by two cases, McKay v. Ward, 20 Utah 149, 57 P. 1024 (1899) and Lane v. Davis, 342 P. 267 (Cal.App. 1959). In McKay, the buyer of a piece of real estate,

as part of the purchase price, promised the seller to pay the mortgage thereon held by the bank. The seller had purchased the real estate from a third person taking it subject to the same mortgage. The seller had never agreed to pay the mortgage, being subject only to a foreclosure sale of the property if he did not. When the buyer failed to pay the mortgage, the bank foreclosed and sued the buyer for the deficiency. The bank sued for the deficiency as a third-party beneficiary to the contract for the purchase of the real estate. The issue in the case was whether a third-party beneficiary could collect from the promisee under a third-party beneficiary contract when the promisor was himself not obligated to the beneficiary. The Utah Supreme Court held that the promisee still had to pay the mortgage even if the promisee was not obligated to do so:

Utah, and some other states, hold that a purchaser is liable on his assumption and agreement to pay the mortgage, although the agreement to assume and pay it be in a deed from a grantor who was under no personal liability to pay the mortgage. In these states it is held that the price of the land is a sufficient consideration for the agreement to pay the mortgage debt, and that, where the amount of the mortgage is withheld for the purpose of satisfying the obligation, a vendor may rightfully direct how, when and to whom the purchase price of property he sells may be paid; that he may rightfully receive it to himself, donate it to public charity, or make such other disposition of it as may best meet his views; that where a promise or contract has been made between two parties for the benefit of a third, action will lie thereon at the instance of the third party to be benefited, although the promise, or contract was made without the knowledge of the third party, and without any consideration moving direct from him; that, if the vendee agrees to pay in accordance with such directions of the vendor, he cannot set up as a defense that his vendor was under no duty to apply and pay the fund in the manner agreed. (Emphasis added.)

57 P. at 1025

In Lane v. Davis, supra, a real estate broker was orally engaged to sell real property for a 5% commission. The broker found a buyer who eventually purchased the property. The escrow agreement stated that the broker was to get one-half of the commission and the other one-half was to go to another person. The court held that the oral agreement was invalid under the statute of frauds but that the broker should be allowed to amend the complaint to state a claim as a beneficiary to the escrow agreement which was a third-party beneficiary contract.

If the promisor places no conditions on his promise, then it matters not what defenses are available to the promisee against the beneficiary. Of course, the promisor may promise to pay the beneficiary only if the third party's claims against the promisee are enforceable and not subject to some defense, such as the statute of frauds. This principle is explained by Corbin:

There is nothing to prevent a promisor from undertaking a larger duty than the duty owed by the promisee to the beneficiary. He can make his own promise unconditional, although the duty of the promisee to the beneficiary is conditional upon an uncertain event. If he promises to pay a third party a sum claimed by him against the promisee, irrespective of defenses that the promisee may have, he is bound by his promise in the teeth of those defenses, so long as the contract does not run afoul of some principle of public policy. Promises of this sort are often made; a grantee from a mortgagor who assures the debt usually cannot question the validity of the mortgage or the debt that he promises to pay.

* * *

A promise may be void for illegality or lack of sufficient consideration. It may be voidable because of infancy, fraud, or duress. It may be unenforceable by reason of the statute of limitations, discharge in bankruptcy, or non-compliance with the statute of frauds. This is not intended to be a list including all such possible cases. As in the preceding section, so here the promisee may contract for either a conditional or an unconditional promise.

If it is the latter, the facts that would operate as a defense to the promisee when sued by the third party will not so operate when the promisor is sued. (Emphasis added.)

4 Corbin on Contracts, §§ 821-22.

See also: Williston on Contracts, § 361 and Restatement of Contracts, § 131 (1)(b).

In this case buyer placed no conditions on his promise. He agreed to pay all real estate commissions. (Earnest Money Agreement, line 22, attached hereto as Exhibit "A".) The statute of frauds is, therefore, not available to him as a defense. He should be compelled to pay the commission.

POINT V

THE FACT THAT DEFENDANT PURCHASED
STOCK RATHER THAN LAND DOES NOT
AVOID HIS OBLIGATION TO PAY A
COMMISSION UNDER THE THIRD-
PARTY BENEFICIARY CONTRACT

Where a broker is engaged to sell the assets of a corporation for a commission, he is entitled to a commission where the final sale is one of stock rather than assets. This is so because the sale of all of the corporation's stock is in substance and effect a sale of the assets. The buyer gets what he is after--control of the corporate assets. Feldman v. Fiat Estates, Inc., 268 N.Y.S.2d 949, 25 App.Div.2d 750 (1966); Morad v. Haddad, 110 N.E.2d 364 (Mass. 1953); Rubin v. M.S.W. Hotels, Inc., 89 N.Y.S.2d 241, 275 App.Div. 829 (1949).

As stated in Morad:

The transfer of stock by Haddad effected the sale of the corporate property for which Morad had been employed to find a customer. The corporation was owned by Haddad. It was used by him as an agency through which he conducted business. The sale of all of the stock of the corporation was in legal effect a sale of all of its assets, and the mere fact that the parties found it more convenient to transfer all of the stock rather than to make a conveyance of its assets does not change the substance of the transaction. Benedict v. Dakin, 243 Ill. 384, 388, 90 N.E. 712. See Seward v. M. Seward & Son Co., 91 Conn. 190, 99 A. 887; Mills v. Miller, W.Va. 64 S.E.2d 111. Morad was entitled to the same commission which he would have earned had the corporate property been directly conveyed. (Emphasis added.)
110 N.E.2d at 367.

POINT VI

EVEN IF THE CONTRACT WAS ORAL,
IT WOULD NOT FALL UNDER THE
STATUTE OF FRAUDS' SECTION ON
BROKERAGE COMMISSIONS

The Utah Statute of Frauds states in part:

Certain agreements void unless
written and subscribed. - In the follow-
ing 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.

Utah Code Ann. § 25-5-4.

At one time the broker had an oral contract to sell the ranch on behalf of the owner. Of course, that parol contract would fall squarely under § 25-5-4(5), Utah Code Ann. quote above. However, the parties later changed their arrangement to a third-party beneficiary contract. Specifically, seller entered into a direct and independent contract with the buyer. In that contract the seller agreed to reduce the purchase price from \$2,000,000 to \$1,875,000 on the condition that the seller would pay the real estate commission of \$125,000.

This new arrangement was a classic third-party beneficiary contract. Buyer is the promisor and the seller is the promisee. The broker is the beneficiary. The nature of the contract is simply an arrangement between buyer and seller on the method or mechanics of handling the payment.

In other words, seller says in substance:

I have a ranch worth \$2,000,000. I will sell it to you if you will give \$1,875,000 directly to me and \$125,000 directly to the beneficiary (broker) designated by me.

In response, the buyer agrees in substance that:

I agree to purchase your ranch for \$2,000,000. I will deliver \$1,875,000 to you and I will deliver \$125,000 to the beneficiary (broker) designated by you.

It is obvious on its face that this is not "an agreement ... employing a broker to purchase or sell" Utah Code Ann. § 25-5-4(5). Here no one is asking, telling, or expecting the broker to sell or purchase anything. Indeed, the broker has no duties. For the purposes of the third-party beneficiary contract, the broker is a passive bystander.

The legislature could have covered this type of arrangement under the Statute of Frauds. It chose not to do so. The court should not expand the coverage of the statute by judicial legislation.

POINT VII

EVEN IF THE THIRD-PARTY
BENEFICIARY CONTRACT WAS
ORAL, IT COULD NOT FALL UNDER
THE STATUTE OF FRAUDS' SECTION
REGARDING THE "DEBT, DEFAULT
OR MISCARRIAGE OF ANOTHER"

The Utah Statute of Frauds states in part:

Certain agreements void unless written and subscribed. 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:

(a) Every promise to answer for the debt, default or miscarriage of another.
Utah Code Ann. § 25-5-4.

Here the buyer agreed to pay a commission, thereby relieving the seller of that burden. However, that promise does not fall within the language of the statute.

As a part of the purchase price, buyer agreed to pay \$1,875,000 to the seller and \$125,000 to the broker. Thus, when the buyer pays \$125,000 to the broker he is not paying another person's debt. He is paying his own debt. The doctrine is explained by Professor Williston:

In other words, although a promise is in form one to pay the debt of another and the performance thereof may incidentally have the effect of extinguishing the liability of another, if the main purpose and object in making the promise is not to answer for another, but directly to subserve the interest of the promisor, the promise is not within the Statute. The theory underlying these decisions is that if the promisor is himself acquiring property or other pecuniary benefit, he is engaging not to pay the debt of another, but his own.

* * *

If, as between himself and the original promisor, the debt really ought to be paid by the latter, whatever may be the other elements of the transaction, the new promisor is on principle and in fact promising to answer for the debt or default of another. Though he is led to do this by considerations of his own advantage, the ultimate fact that the debt is another's is none the less true. On the other hand, if, as between the original debtor and the new promisor, the latter ought to pay the debt, he is promising to answer for his own debt, not that of another.

Williston on Contracts § 472 at 432 and 448.

The case of Gunnison v. Kaufman, 72 N.W.2d 706 (Wisc. 1955) is illustrative. In that case, a corporation was sold. As part of the purchase, the buyers promised to assume certain debts of the corporation. Thereafter the buyers refused to pay the debts. The Supreme Court of Wisconsin held:

With respect to the application of the statute of frauds: The alleged promise which Kaufman made to get Gunnison 'off the hook' and personally take care of the two obligations at the Reedsburg Bank was not a promise to answer for the debts of Gunnison to the bank. It was a promise made as part of a purchase deal in which Kaufman, the purchaser, and Gunnison, the seller, agreed that Kaufman's undertaking to pay those existing obligations was to be part of the purchase price for the property he (Kaufman) received. In other words, the promise merely specified the method by which the promisor (Kaufman) was to pay off his own obligations to the promisee (Gunnison) for the transfer of the corporation property to him (Kaufman). The statute of frauds clearly does not apply to such a situation.

72 N.W.2d 710.

See also: Campbell v. Hickory Farms of Ohio, 190 S.E.2d 26 (S.C. 1972); cf. Thompson v. Cheesman, 15 Utah 43, 48 P. 477 (1897).

Therefore, the Statute of Frauds provision regarding "debts of another" is not applicable. Here the buyer promised to pay the 6% commission. He is being asked to pay his own debts--not the debts of another.

POINT VII

EVEN IF THE THIRD-PARTY
BENEFICIARY CONTRACT WAS ORAL,
THE EARNEST MONEY CONTRACT OF
DECEMBER 7, 1977, IS A SUFFICIENT
MEMO TO TAKE THE PROMISE OUTSIDE
THE STATUTE OF FRAUDS

Broker seeks to enforce an agreement under which
buyer promised to pay a commission of \$125,000. If that
contract was oral ^{1/}it would be void unless there was a
"written note or memorandum thereof." Section 25-5-4(5) of
the Utah Code states:

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. (Emphasis added.)

Plaintiffs rely upon the Earnest Money Agreement of
December 7, 1977, as a sufficient memorandum to take the oral
agreement outside the statute of frauds. That Earnest Money
Agreement will be submitted as an exhibit at the trial and is
attached hereto as Exhibit "A".

^{1/} Plaintiffs argue elsewhere in this brief that the promise was
not oral at all. It was in writing (Earnest Money Agreement)
and, therefore, not subject to the statute of frauds.

A. Difference Between an Oral Contract and a Memorandum or Note Evidencing the Oral Contract.

In analyzing this issue, it is important to note that there is a difference between the oral contract and the written memorandum:

The difference between a contract in writing and a memorandum of a parol contract is important The memorandum need not itself constitute a contract, and apart from its effect as a memorandum, it need have no legal operation. There must be a valid oral contract, however, of which the memorandum is an accurate statement. 'Except as evidence of the oral contract, the memorandum has no force or effect unless and until the oral contract has been established by a preponderance of the evidence. Then if accurate and complete, it prevents the interposition of the statute of frauds as a bar to the enforcement of the oral contract. The memorandum, however, need not be made with that intent.

Williston on Contracts § 567A.

The Earnest Money Agreement (Exhibit "A") is in writing and is subscribed to by defendant Fitzgerald. The only issue remaining is whether the Earnest Money Agreement is a "sufficient" memorandum to take the oral agreement beyond the statute of frauds.

B. Philosophy and Purpose of the Statute.

Any analysis of this issue must begin with a look at the history and purpose of the statute of frauds:

An effective aid in arriving at the requisites and meaning of 'a note or memorandum in writing' is an enlightened awareness of the origin and fundamental purpose of the Statute of Frauds.

Preoccupied with numerous and oft conflicting precepts and decisions involving the clauses provided for a note or memorandum, some students of the Statute fail to see the beacon for the buoys.

The Statute of Frauds was not enacted to afford persons a means of evading just obligations; nor was it intended to supply a cloak of immunity to hedging litigants lacking integrity; nor was it adopted to

enable defendants to interpose the Statute as a bar to a contract fairly, and admittedly, made.

...

In brief, the Statute 'was intended to guard against the perils of perjury and error in the spoken word. Therefore, if after a consideration of the surrounding circumstances, the pertinent facts and all the evidence in a particular case, the court concludes that enforcement of the agreement will not subject the defendant to fraudulent claims, the purpose of the Statute will best be served by holding the note or memorandum sufficient even though it be ambiguous or incomplete.

Williston on Contracts § 567A.

C. Parol Evidence Admissible to Show Surrounding Circumstances.

The landmark case in Utah on this issue is Hawaiian Equipment Co. v. Eimco Corp., 207 P.2d 794 (Utah 1949). In that case plaintiff and defendant entered into an oral agreement for the purchase of surplus war equipment. Defendant raised the statute of frauds as a defense. The only "memorandum" of the oral agreement was a telegram which stated:

Hawaiian Equipment, Honolulu
"Reference hammers bid maximum
24 dollars each scalars 17.50
each Honolulu will take all
"Eimco"

The issue on appeal was whether the foregoing (admittedly vague) cable was a "sufficient" memorandum to take the matter outside the statute of frauds.

The court first set forth the guidelines for its analysis. The court 'quoted with approval the following language from Restatement of the Law, Contracts, § 207, which states:

'A memorandum, in order to make enforceable a contract within the Statute, may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty,

'(a) each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and

'(b) the land, goods, or other subject-matter to which the contract relates, and

'(c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.

'Comment:

'a. A written memorandum of a contract is not identical with a written contract. A written contract will indeed serve as a memorandum, but a memorandum includes also any writing which states the terms agreed upon, though not intended or adopted by the parties as a final complete statement of their agreement. The degree of particularity with which the terms of the contract, the names or descriptions of the parties must be set out cannot be reduced to an exact formula. There must be 'reasonable' certainty and there must be accuracy, but the possibility need not be excluded that some other subject-matter or person than those intended will also fall within the words of the writing.'

The court then quoted that the bare words of the cable were incomplete and contained any number of ambiguities. However, the court resolved the ambiguities by resort to parol evidence. The court said:

The principle that the goods must be identified and the other terms and conditions set forth with reasonable certainty, must be considered in connection with the knowledge and relationship of the parties and trade usages to determine whether the contents of the memorandum sufficiently conveyed to the parties involved an identity of the subject-matter and a reasonable certainty of the other terms and conditions. ... While the use of abbreviated phrases may render the writing unintelligible to an uninstructed person, the phrase may still have meaning when viewed in the light of circumstances surrounding the sending of the cablegram. When this court scrutinizes the language of the cablegram, it gives to the words used the meaning ascribed to them by merchants who are familiar with their usage and have occasion to deal with them in the commercial world. If, by giving the words such meaning, the subject-matter is intelligently identified and the terms and conditions are fairly disclosed, then parol evidence is admissible for a limited purpose. While this type of

evidence is not competent to contradict or vary the terms of a memorandum to show what is intended, the situation of the parties and the surrounding circumstances at the time the contract was made may be shown by such proof to apply the memorandum to the subject matter. The cablegram is not so lacking in details as to amount to a nullity and when it is interpreted in the light of the surrounding facts and circumstances, any deficiencies are supplied and the instrument then becomes certain in all of its terms. The conditions are not changed or modified; they are explained

207 P.2d at 797-98.

The doctrine of permitting parol evidence to explain or clarify the written memorandum was again followed by the Utah Supreme Court in the case of Guinand v. Walton, 22 Utah 2d 196, 450 P.2d 467 (1969). In that case plaintiff sought to enforce a contract to recover for services rendered. Defendant (among other defenses) raised the Statute of Frauds. The only "writing" in the case was a letter from defendants to plaintiff which set forth some, but not all of the conditions of the alleged contract.

In analyzing the issue the court concluded that parol evidence would be permitted:

Inasmuch as the letter was silent on an important aspect of the agreement, that is, what if anything the defendants received for what they granted, the only fair and sensible thing to be done was what the trial court did: Admit other evidence to show what the arrangement between the parties was. This was necessary to get at the justice of the case, whether the letter in question amounted to a binding obligation ... or even if it did not

450 P.2d at 469.

As stated in Stanchack v. Cliffside Park No. 1527 L.O.M. Inc., 282 A.2d 775, 779 (N.J.App. 1971):

[T]he writing need not expressly use the language of authorization [of a broker]

In determining whether such implication is warranted from the words used in

the writing, however, it is permissible, and sometimes, as here essential to scrutinize the surrounding circumstances.

Brookes v. Adolph's, 339 P.2d 879

Johnson v. Ogle, 181 P.2d 789

D. The Earnest Money Agreement Confirms the Existence of a Separate Oral Contract.

Based upon the foregoing principles, we now turn to an analysis of the December 7, 1977 Earnest Money Agreement. To begin with, it was executed by the buyer--"the party to be charged." Thus, that portion of the statute is clearly satisfied.

We turn now to the phrase: "Buyer to be responsible for all real estate commission." Note that the contract could have, but did not say, "Buyer to be responsible for all real estate commissions, if any." Thus, the writing clearly confirms an existing obligation to pay real estate commissions. The writing does not say what duties the real estate agent had to perform in order to receive the commission. However, that is not necessary. The parties obviously knew and agreed what duties the agent would have. Further, the parties obviously knew and agreed that the duties had all been satisfied. The Earnest Money Agreement acknowledged that the broker's duties were satisfactorily provided and that payment was now due. In other words, the Earnest Money Agreement serves as a written memorandum that the broker orally agreed to undertake the certain duties and that he had satisfactorily performed those duties.

E. The Earnest Money Agreement Confirms that Buyer Was one Party to the Oral Contract.

We know at least one of the parties to that oral agreement. We know from the writing that the buyer will pay the real estate commissions.

F. The Earnest Money Agreement with Surrounding Circumstances
Confirms the Amount of the Commission.

At first blush it is not apparent from the Earnest Money Agreement how much money defendant agreed to pay as a real estate commission. However, with the aid of parol evidence, the agreement does contain sufficient information to establish the amount of the commission.

Note that the contract says that the buyer is to be responsible for "all real estate commission. We are told by Hawaiian Equipment Co. v. Eimco Corp., 207 P.2d 794 (Utah 1949) that:

[T]he situation of the parties and the surrounding circumstances at the time the contract was made, may be shown by such [parol] proof to apply the memorandum to the subject matter.

Here the parol evidence will show that the designated price of \$1,875,000 had a special meaning which was well known to the parties. The parties had agreed that the actual purchase price was to be \$2,000,000. The parties further agreed to reduce the purchase price to \$1,875,000 with the express stipulation that buyer would pay the commission of \$125,000. With a knowledge of these surroundings, the words of the Earnest Money Agreement take on new life and meaning. From the surrounding circumstances we know that the intent of the parties was that seller would receive a net of \$1,875,000 directly, and that the buyer would deliver \$125,000 to broker as a commission (thereby relieving the seller of any obligation or claim to pay those commissions).

Taken together with the surrounding circumstances, the Earnest Money Agreement shows the formulae used by the parties to set the commission:

1. Sales price - \$2,000,000 with seller
to pay commission;

2. Price reduced to \$1,875,000 with
buyer to pay commission;
3. Commission equal to difference
between \$2,000,000 and \$1,875,000;
4. Commission equal to \$125,000.

Although there is authority contra, a number of cases have held that parol evidence may be used to determine the amount of the commission:

Moore v. Borgfeldt, 273 P. 1114 (Cal. 1929);

Caminetti v. National Guarantee Life Co.,
132 P.2d 318 (Cal. 1972);

Brunner v. Van's Markets, 229 P.2d 56
(Cal. 1951);

Herring v. Fisher, 242 P.2d 963 (Cal. 1952).

cf: Ferris v. Jennings, 595 P.2d 857 (Utah 1979).

H. Expiration or Abrogation of the Earnest Money Agreement
Does Not Nullify its Effect as a Note or Memorandum of
a Separate Oral Contract.

Defendant might contend that the Earnest Money Agreement somehow expired or was abrogated by the parties. Even if that is so, the Earnest Money Agreement could still be valid for the sole purpose of satisfying the Statute of Frauds. That exact issue was faced in the case of Carey v. McGinnis, 321 P.2d 626 (N.Mex. 1956).

In that case the broker had an oral agreement to sell real estate. An earnest money agreement was signed between buyer and seller. The earnest money agreement contained a reference to brokerage commissions. The broker contended that the agreement was a sufficient memorandum to take the transaction outside of the statute. The defendant contended that the property was never sold and that the earnest money agreement was a nullity. The court responded that:

It is immaterial as between the plaintiffs
and the defendant that no enforceable

contract was ever consummated between the owner and the prospective purchaser. The fact remains that defendants' written binder contained all the essential terms and conditions of their agreement with the plaintiffs, including the commission to be paid and to whom. The instrument is signed by both the defendants and the plaintiffs. It is a 'memorandum or note' meeting fully the foregoing statute [of frauds].
321 P.2d at 627-28.

I. The Identity of the Broker Was Well Understood By All Parties.

The Earnest Money Agreement does not identify plaintiffs Mel Trimble Realty or Cal Florence as the broker. However, that is not fatal. As stated by the Court of Appeals for the District of Columbia:

The absence in the contract of the name of the broker is not fatal to his claim. There was only one broker associated with the transaction
Moran v. Audette, 217 A.2d 653, 654 (1966).

J. Utah Cases Generally Support Plaintiffs' Claim Under the Statute of Frauds.

The Utah case most nearly in point is Ney v. Harrison, 5 Utah 2d 217, 299 P.2d 1114 (1956). In that case the court was faced with an identical issue--that is, whether notations on an earnest money agreement constituted a sufficient memorandum to take the contract outside the statute of frauds.

In Ney at 218, the court held that the following language satisfied the Statute of Frauds:

The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission equal to the minimum recommended by the Salt Lake Real Estate Board. In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force and effect.

* * *

Wasatch Homes is to receive a commission of 2 1/2% which is Total Commission.

The court then went on to explain its analysis:

We are cognizant that decisions of courts have varied widely as to the sufficiency of writings which will suffice to meet the Statute of Frauds. Many of the decisions are explainable on the basis of substantial differences in the statutory provisions and terminologies, and in factual distinctions. But the explanation of other decisions lies only in which of the two policies implicit in the statute the particular court felt was paramount: The protection of the landowner from the imposition of spurious claims by real estate brokers, or the necessity of protecting the broker, who has rendered a bona fide service, from being refused just compensation for his work by the landowner.

In assaying whether the particular writing meets the requirements of our statute, the problem is considerably simplified if we carefully observe that our statute, unlike that of many states, does not call for the contract itself to be in writing; it is enough if there is 'some note or memorandum thereof' which evidences the contract. (Emphasis added.)

5 Utah 2d 217, 299 P.2d 1114

fifteen years later our Supreme Court suggested by way of dictum that an earnest money agreement might satisfy the Statute of Frauds even if the name of the broker and the amount of the commission were omitted. Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044 (1971).

Other Utah cases in non-broker matters have taken a similar view. In the case of Peterson v. Hendricks, 524 P.2d 321, the plaintiff sought to enforce an oral agreement. The parol contract was admittedly within the Statute of Frauds. However, plaintiff produced certain letters which were claimed to be a sufficient memorandum to take the case outside of the statute. In that case the letters were very sketchy. Plaintiff relied upon the following letter to take the promise outside the Statute of Frauds:

I think we should go ahead as fast as possible on a government loan, however,

if Slim gets the necessary money to reach our objective

... Then if we hit and form a company. If there is only two of us then you shall have a half interest and myself a half interest We don't have anything yet going in order to form a company, and I know I trust you and you trust me, but keep this letter as a legal paper because this is written down in my handwriting and everyone wants something written down spelling out their interest. Once we can really start mining I think it will make us well off and it might make us rich. Until then, we will have to keep plugging away.

Note that the letter only talked about a possible agreement in the future "... if we hit and form a company." The court expressly noted that:

[T]hese letters do not precisely set forth the agreement nor do they describe the claim

Nevertheless the Utah Supreme Court held that they were a "sufficient" memo to satisfy the statute. In this case the Earnest Money Agreement (Exhibit "A") is far more complete and detailed than the memo approved in Peterson.

In summary, plaintiffs suggest that there is no mechanical formulae which the court can apply to determine whether any given note or memorandum will satisfy the Statute of Frauds. However, Utah courts have generally followed the spirit of Williston on Contracts § 567A that:

Therefore, if after a consideration of the surrounding circumstances, the pertinent facts and all the evidence in a particular case, the court concludes that enforcement of the agreement will not subject the defendant to fraudulent claims, the purpose of the Statute will best be served by holding the note or memorandum sufficient even though it be ambiguous or incomplete.

DATED this 11th day of September, 1979.

ROBERT J. DE BRY
VALDEN P. LIVINGSTON
Attorney for Plaintiffs
2040 East 4800 South, Suite 203
Salt Lake City, Utah 84117
Telephone: (801) 278-4439

not an appropriate defense when the underlying contract is completed.

Thus, in light of facts supporting the allegation of a sufficient written memorandum and of a fully executed contract, defendants' motion to dismiss based on the Statute of Frauds should not be granted. At the very least, plaintiff is entitled to have the Court consider the issue interpreting facts most favorable to plaintiff's claim.

POINT III

DEFENDANTS HEREIN WERE NOT
INDISPENSABLE PARTIES TO THE
PRIOR CASE AND PLAINTIFF SHOULD
NOT BE PROHIBITED FROM BRINGING
A SUBSEQUENT ACTION AGAINST THEM

Defendants argue in their Statement of Points and Authorities in Support of Their Motion to Dismiss that these defendants must be considered "indispensable parties" to the prior action and that plaintiff has waived his right to bring a subsequent action against them, having failed to join them previously.

However, defendants' argument fails for the reason that had the defendants truly been "indispensable" to the prior action, the court would have been unable to resolve the issues without their joinder. Inasmuch as the court could resolve the issues in their absence, their joinder was not required. Rule 19 of the Federal Rules of Civil Procedure is instructive on the issue of "indispensable parties".

These defendants would appear to be proper but not necessary parties with the effect that failure of their joinder in the previous case would not preclude action against them now, but only with the effect that the prior judgment would not affect their rights and liabilities.

POINT IV

QUANTUM MERUIT IS A PROPER REMEDY
IN THIS CASE ON THE THEORY OF SALE
OF SECURITIES

Plaintiff's Complaint includes an alternative cause of action based upon quantum meruit for compensation for services performed in connection with the sale of the stock of Monte Vista Ranch, Inc. from Ohran and others to Fitzgerald. This Second

already submitted in this case. In this case, plaintiff has indicated that a sufficient memorandum exists in the form of defendant Wallace Ohran's in-court admission of the existence and terms of the contract.

Plaintiff's prior Statement of Points and Authorities pointed out several authorities for this position, but further authority is found in the case of the Estate of Meledandri, 437 N.Y. Supp. 2d 996 (1981). In addition, statements made by a defendant in depositions may satisfy the Statute of Frauds. URSA Farmers Cooperative Co. v. Trent, 58 Ill. App. 3d 930, 374 N.E. 2d 1123 (1978); Young v. Tuck, 178 S.W. 2d 86 (Tenn. 1943); Huffine v. McCampbell, 149 Tenn. 47, 257 S.W. 80 (1923).

Also, in this case the parties partially executed the contract. The only unexecuted part of the contract was payment to the plaintiff. This partial execution acts as an exception to the Statute of Frauds.

POINT III

PLAINTIFF IS ENTITLED TO RELIEF

UNDER QUANTUM MERUIT

In this case, a sale of securities (the stock and assets of defendant Monte Vista Ranch) may allow the plaintiff, as agent, to recover in quantum meruit for its time and expenses involved in arranging the sale. Such recovery is not precluded by the Young case cited by defendants.

POINT IV

PLAINTIFF MAY BRING THIS

ACTION AGAINST DEFENDANTS HEREIN

Defendants argue that plaintiff should have sued the defendants in the prior action. Perhaps it would have been appropriate for plaintiff to name the defendants in the prior action. However, it is a time honored rule of law that a plaintiff is entitled to his day in court and should not be denied an opportunity to be heard so long as he follows proper procedures. Any joinder of the defendants in the prior action