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Keith L. Knight v. Ross H. Chamberlain : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

KEITH L. KNIGHT, d.b.a. Knight Realty
Company, *Plaintiff and Appellant,*

vs.

ROSS H. CHAMBERLAIN,
Defendant and Respondent.

FILED
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Clerk Supreme Court, Utah
No. 8623

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	Page
Statement of the Case	3
Statement of Facts	4
Statement of Points	12
Argument	
1. Employment of services to be paid for in the event there is no sale need not be in writing	12
2. Employment of a broker to obtain offers to sell real estate is not within the Statute of Frauds.....	17
3. Employment to obtain options to buy land is not within the Statute of Frauds.....	23
Analysis of the California cases:.....	26
a. An option to purchase real property must be in writ- ing in California	27
b. Real estate or real property refers to a freehold in- terest in land and (presumably) includes options....	32
c. Aiding or assisting in the purchase or sale of real estate, is included within the Statute of Frauds' phrase "to sell or purchase".....	34
d. It is important to avoid fraudulent claims.....	39
Summary and Conclusion	44

STATUTES CITED

Statute of Frauds	16, 32
UCA 1953, Sect. 25-5-4, subdiv. 5	3, 33
UCA 1953, Sect. 68-3-12	33

CASES AND AUTHORITIES CITED

61 ALR 1454	41, 43
55 Am. Jur. p. 492	42
Andersen v. Johnson, 108 Utah 417, 160 P. 2d 725 11, 13, 18, 37	
Baugh v. Darley, 112 Ut. 1, 184, P. 2d 335.....	13

	Page
Bovo v. Abrahamson, 100 Cal. App. 373, 280 P. 191.....	28
Case v. Ralph, 56 Utah 243, 188 P. 640.....	20
Clark v. Opp, 156 Ore. 197, 66 P. 2d 1179.....	14
Dabney v. Edwards, 5 Cal. 2d 1, 53 P. 2d 962, 103 ALR 822	32
Duckworth v. Schumacher, 27 P. 2d 919	35
Granger Real Estate Exchange v. Anderson (Texas Civil App.) 145 S. W. 262	41
Hall v. Rankin, 22 Ariz. 13, 193 P. 756	15
Harper v. Pauley, West. Virg. 1953, 81 S. E. 2d 728	44
Hicks v. Christeson, 174 Cal. 712, 164 P. 395.....	30
Hooper v. Mayfield, 251 P. 2d 330	35
Johnson v. Allen, Utah 1945, 158 P. 2d 134	18
Kramer v. Schmidt, 62 Mon. 568, 206 P. 620.....	16, 24
Kritt v. Athens Hill Develop. Co., 109 Cal. App. 2d 642, 241 P. 2d 606	31
Marks v. Walter G. McCarty Corp., 33 Cal. 2d 814, 205 P. 2d 1025	32
McGuirk v. Ward (Vermont 1947) 55 Atl. 2d 610.....	42
O'Neill v. Wall, 103 Mon. 388, 62 P. 2d 672	22, 23
Owen v. National Container Corp. of California, 251 P. 2d 765	36
Pacific Southwest Devel. Corp. v. Western Pac. R. R. Co., 301 P. 2d 825	11, 21, 25
Pacific Southwest Devel. Corp. v. Western Pac. R.R. Co., 293 P. 2d 800	28, 29
Richanbach v. Ruby, 127 Ore. 612, 271 P. 600, 61 ALR 1441	41
Shaugnessy v. Eidsmo, 222 Min. 141, 23 N.W. 2d 362, 166 ALR 435	31
Seeburg v. ElRoyale Corp., 54 Cal. App. 2d 1, 128 P. 2d 362..	31
Smith Realty Co. v. Dipietro, 77 Utah 176, 292 P. 915.....	19
Warner Bros. Pictures v. Brodel, 31 Cal. 2d 766, 192 P. 2d 949, 3 ALR 2d 691	30, 32
Williston on Contracts, Sect. 491	43
Wilson v. Bailey, 8 Cal. 2d 416, 65 P. 2d 770.....	29
Woolley v. Wycoff, 2 Utah 2d 329, 273 P. 2d 181.....	17, 33

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an appeal by the plaintiff from a ruling of the District Court of the Third Judicial District, sustaining the defendant's motion to dismiss the complaint, made at the close of the plaintiff's evidence. The motion to dismiss was "for reasons indicated in the answer. Our Code, Section 25-5-4, subdivision 5, provides as follows: * * * 'In the following cases every agreement shall be void unless such agreement or some note or memorandum thereof is in writing, subscribed

by the party to be charged therewith: every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.' "

STATEMENT OF FACTS

Most of the transcript of testimony is devoted to the testimony of the plaintiff himself. Mr. Knight testified that he is a realtor "engaged in the pursuit of buying, selling, leasing and optioning for others" and has been engaged in that business for 15 years, and a licensed broker for 12 years (Tr. 11 and 12). He had specialized in the matter of land development and subdividing (Tr. 12). He met the defendant through a business associate and proceeded that very day to take an airplane ride over and around Salt Lake County to inspect various prospective areas for subdivision development on a large scale (Tr. 13). The defendant specified that he must have a minimum of 500 acres to be optioned and preferably 1000 acres (Tr. 14). The defendant "wanted to know about water, and sewage, and as I recall, the matter of arterial highways, his relative position to areas of employment, the convenience of getting to it, the school district arrangement, all of those miscellaneous and salient details beyond the point of location." (Tr. 16). After the airplane trip the defendant showed the plaintiff his method of operation, including his control sheets and financing schedules (Tr. 17).

After an explanation that he felt he could bring this type of operation to Salt Lake City and be successful with it, he said, "Keith, I'll be glad to pay you for your services in attempting to package up * * * " (interrupted by objection).

"Well, Mr. Chamberlain said that he was desirous of my going ahead and lining up some options." (Tr. 18). "Mr. Chamberlain stated to me, he said, 'Keith, as we progress on this program', or words to this effect, 'I will be glad to pay you for your services.' It was upon the strength and integrity of that statement—(interrupted by objection" (Tr. 19).

A further trip by motor car was taken the next day to inspect the various areas seen from the air during which "I felt enthused about the possibilities of packaging up the type of acreage that Mr. Chamberlain wanted because he showed a very definite interest in these areas. I told him it was customary on the part of realtors that in the event we could get our options exercised, that we would look to the sellers for the payment of our commissions. I told Mr. Chamberlain that he would have no obligation for payment of my services, if I could exercise the option." And Mr. Chamberlain promised to send to the plaintiff the form of option he would like to use (Hr. 22).

The type of option in use by the defendant involved "around \$25.00 down and \$25.00 per acre year year rental value" (Tr. 24). There was never any money made available by the defendant for deposits on options (Tr. 25).

Between August 26, 1955, and November 14, 1955, when the plaintiff saw the defendant for the second time, the plaintiff obtained the maps and identified the areas he would be working on (Tr. 20). He also went to the Chamber of Commerce and assembled the data that was required, including pamphlets, trade data and other pertinent details (Tr. 30). The option form used by the defendant come about August 31st and is

marked Exhibit 2 (Tr. 30). The plaintiff then got ownership plats and proceeded to make personal contacts to determine whether the various owners would sell under option and discuss the form of the option with the various owners (Tr. 32). He made no offers supported by consideration. "That was part of the difficulty of the program" and his effort was to obtain signatures of the owners, to be submitted to Mr. Chamberlain when he should next come to town, and actually paid no money, not even the \$1.00 nominal consideration recited (Tr. 33). He was unable to get anyone interested in signing the defendant's option form and had no authority to modify it (Tr. 34).

A group of owners was represented by Mr. Elias Day, an attorney, who told the plaintiff that "this option will never work. We will have to talk a more positive arrangement on the purchase of the contract." To which plaintiff replied that he would like Mr. Day to get "the best type of deal and send it back so I can submit it to my client" (Tr. 36).

Mr. Chamberlain came to Salt Lake again on November 14th (Tr. 43) and the parties spent considerable time together during that visit, including inspection of all of the areas where the plaintiff had been working (Tr. 45-46).

The plaintiff informed the defendant that the activity of the Boeing people had had a tremendous impact on interpretation of values in the county and was making plaintiff's task more difficult, and told the defendant that it would take \$150,000.00 and \$25,000.00 a year to handle a 1000 acre tract (Tr. 47). And with reference to another parcel of 1000 acres the defendant said: "By all means we should definitely

option that." And as the defendant was about to leave, he said, "Knight, you go back over those areas. You bring me down some signed options, or earnest money receipts. I will spend \$15,000.00 cash and \$25,000.00 a year with you. And then you bring them to Sacramento with you and I want you to come down and look over our type of operations, so you can get a feel of how we will go into Salt Lake and as rapidly as you can put that together, you let me know and you fly down and bring them with you." But no cash was made available for option money (Tr. 48) and there was no discussion as to the form upon which the plaintiff would endeavor to obtain options (Tr. 49).

Thereupon the plaintiff proceeded "to accumulate that area" in the Dimple Dell vicinity, near Draper, Utah, and attempted to use the Intermountain Development Co. as the source of a master option, which would be supported by sub-options in favor of the Intermountain Development Co. (Tr. 72) on the assumption that \$150,000.00 down would be available. In another area he was unable to get an option or any other oral indication within the terms of Mr. Chamberlain's statement "they would sell but they wanted a cash consideration" (Tr. 75). He attempted to obtain a commitment from the Winn family, which wanted \$2,000 per acre "they weren't willing to enter into an option agreement whose performance was subject to the potential buyer's performance. They wanted a firm contract."

On November 29th, plaintiff went to Sacramento to contact the defendant and took with him such options as he had been able to obtain, such as Exhibit 7 (Tr. 77-78). By that time

it appeared that the Boeing option was not being exercised and this was discussed in passing (Tr. 78-79). The plaintiff exhibited the documents he had obtained with the signatures and after a conference out of the office the defendant returned, threw them on the desk and said they weren't acceptable (Tr. 82).

Prior to leaving, on November 29, the plaintiff said to the defendant: "Are you through with my services?" and the defendant replied: "Why don't you go back home and see what you can do about the Boeing program and see how you can line up 1000 acres on that portion of the tract that Boeing did not exercise" (Tr. 83).

The options referred to \$10.00 consideration but nothing was paid (Tr. 87). If the options contained in Exhibit 7 had been exercised, the defendant would not have been required to pay the plaintiff any compensation, as he would have been paid by the sellers (Tr. 85). These commissions would have been based on written agreements (Tr. 85).

It was the plaintiff's understanding that he was to be paid for his services whether or not he was successful in completing the defendant's program (Tr. 134 and Tr. 138, 139).

Mr. F. Orrin Woodbury testified in behalf of the plaintiff that he was experienced in commercial and industrial developments in Salt Lake City (Tr. 54), that he had a great deal of respect for the plaintiff in both his aggressiveness and ability to get a job done and intuition about doing the job or finding the job to do (Tr. 55). It is customary in Salt Lake City and under the Salt Lake Real Estate Board to obtain options for

would-be purchasers and to obtain commission based on the price paid if the options are taken up, and upon agreed compensation if they aren't taken up (Tr. 56). Rule XVI (a) and (b) of Exhibit 5 indicate the expression of the Salt Lake Real Estate Board on this matter. Unless a prospective purchaser deposits funds with which to pay for options, he refuses to work for such purchaser (Tr. 63).

The defendant called Joseph Lacey as his witness, out of order, which testimony was not transcribed in view of the granting of the motion at the close of plaintiff's evidence (Tr. 111).

Exhibit 2 was sent to the plaintiff by the defendant as being the type of option agreement the defendant wanted to use in Utah (Tr. 24, 25, 30). It is entitled an "option agreement" and calls for a down payment of \$25.00 per acre, and permits keeping the option alive for five years by paying an additional \$25.00 per acre each year.

Exhibit 3 contains some of the correspondence between the parties. The letter dated September 2, 1955 includes this paragraph:

"This is to advise that I am in the process of running down the owners of the parcels you indicated a greater interest in. As of this writing, I have not been as successful as I might have been, but feel, within the next week or ten days, I'll be able to give you something specific to pass upon."

A letter of September 26, 1955, from the defendant to the plaintiff includes this paragraph:

"In the meantime I think that we would be willing to enter into an option agreement on any of the prop-

erties you describe in your letter. If you are able to get any of them put together, do so, and if Mr. McCullough concurs, we will execute them when we are in Salt Lake City."

The letter of October 12, 1955, from the plaintiff to the defendant includes the following:

"Not having heard from you since your letter of September 26th that indicated you would be willing to enter into some of the options on the land that I have tentatively committed, and in which letter you suggested you might come into Salt Lake, meeting Mr. McCullough here, this is to advise that I have been awaiting your arrival to go over the numbers of parcels of lands that have been assembled for your consideration. * * * All of our parcels are definitely available, however, on that approach if we can commit the cash purchase of the first 40 acres in each instance. * * * I feel that I probably have rendered about as much of a service as I can contemplate at the present moment, until such time as I hear from you, preferably your dropping into Salt Lake at your convenience."

Exhibit 6 is a letter from the plaintiff to the defendant and concludes with this sentence:

"I am eager to complete my services to you to the best of my ability."

Exhibit 7 is entitled a "Contract and Option", but an examination of it indicates that it is not an option, but a contract of sale, reciting consideration of \$10.00 and calling for definite commitments of both parties to the purchase and sale through periodic installments. These documents were signed only by the seller and were taken by the plaintiff to the defendant in Sacramento, where the defendant stated: "these aren't acceptable" (Tr. 82).

Exhibit 8 consists of further correspondence between the parties and includes a letter from the plaintiff to the defendant dated December 9, 1955, which includes the two following paragraphs:

“This is to advise you that I am very appreciative for your check in the amount of \$90.50. I have taken the liberty of depositing the check, even though this amount was in excess \$13.61 of my actual cost of the round-trip air plane ticket to Sacramento. However, I am crediting this difference to Mr. Chamberlain’s account with me for other expenses and services rendered in his employment of my services here in Salt Lake Valley.

I have hesitated billing Mr. Chamberlain, in light of the fact that in the event we are able to transact any business with him on which I would be paid a selling commission, that would automatically pay for my services by virtue of the commissions that would be involved in any transactions consummated with him.”

The trial court made its ruling, granting the motion to dismiss, on the ground that Knight had been employed to obtain options for the purchase of real estate and that these must be in writing, as held by the California court (in *Pacific South West Development Corp. vs. Western Pacific Railroad Co.*, 321 Pac. 2d 825) (Tr. 152). The court apparently relied also in part on the concurring opinion of Justice Wade in *Andersen vs. Johnson*, 108 Utah 417, 160 Pac. 2d 725, wherein Justice Wade is supposed to reason that anyone who assists or contributes to dealing in or the purchase or sale of real estate, must have a broker’s license and, likewise, must see that the record of his employment is in writing (Tr. 150).

STATEMENT OF POINTS

Whether this decision is sound, may be considered and tested from consideration of three propositions:

1. Employment of services to be paid for in the event there is no sale need not be in writing.
2. Employment of a broker to obtain offers to sell real estate is not within the statute of frauds.
3. Employment to obtain opinions to buy lands is not within the statute of frauds. (This appears to be the question as the trial court saw the case.)

ARGUMENT

1. *Employment of services to be paid for in the event there is no sale need not be in writing.*

The employment contract here was in the alternative, depending on whether a sale was consummated. Mr. Knight testified that Mr. Chamberlain engaged his services to attempt to package lands in Salt Lake Valley and said he would be glad to pay for his services as they progressed on the program (Tr. 18, 19). On the next day plaintiff advised the defendant that if the options could be exercised and a transaction consummated, the plaintiff would look to the sellers of the land for his commissions and would not hold the defendant in that event (Tr. 22). And this agreement was plainly stated in the letter of December 9, 1955, contained in Exhibit 8.

It may, therefore, be fairly said that the agreement between the parties was that the defendant would employ the plaintiff

to work on the assembling of tracts of land in Salt Lake County, and would pay for his services in so doing, but it was agreed by the plaintiff, that in the event any lands were purchased by the defendant, the plaintiff's commission would be derived from the sellers of the land and not from the defendant. This then is not an agreement for compensation for the purchase or sale of real estate, but an agreement that no compensation need be paid by the defendant in the event there is a purchase or sale of real estate. The latter contingency was covered by written agreements with the owners of lands (Tr. 85) as the statute of frauds contemplates.

The appellant concedes that an action in quantum meruit is not available to a broker who is employed to purchase or sell real estate, where he fails to put the agreement in writing, as in *Baugh vs. Darley*, 112 Utah 1, 184 P. 2d 355. Appellant has no quarrel whatever with that decision.

But where the employment is to render services connected with land and not for the purchase or sale of land, a recovery for the reasonable value of services can be had, even though there is no memorandum in writing.

In *Andersen vs. Johnson*, 108 Utah 417, 160 P. 2d 725, 729, the plaintiff brought an action against a real estate broker pursuant to an oral agreement that the plaintiff could have one-third of the defendant's commissions on properties listed by the defendant with the help of the plaintiff. The court disposed of the defendant's claim that the statute of frauds barred recovery by holding: "the contention of respondent that plaintiff cannot recover because his agreement was oral, is untenable. The contract was one of employment and not involving any

right or interest in land. See *Johnson vs. Allan*, Utah 1945, 158 P. 2d 134. The proposition that a contract for fee or commission may be recovered by agent from broker, though not in writing, is upheld in *Arbuckle vs. Clifford F. Reed*, 118 Cal. App. 272, 4 P. 2d 978, (and other cases)."

A case of value on this point is *Clark vs. Opp*, 156 Ore. 197, 66 P. 2d 1179. At page 1180 the court thus stated the question:

"The propriety of the court's instructions upon the subjects of agency and ratification is also challenged.

In paragraph IV of his complaint, plaintiff alleges: "That on or about the 1st day of May, 1931, it was agreed by and between the plaintiff and the defendants that if the plaintiff would go upon said mining property, tunnel, timber and develop the said property and expose and sample the ore bodies thereon so that the same could be advantageously exhibited to one John M. Price, a prospective lessee, and would show said property to said prospective lessee, the defendants would pay unto the plaintiff ten per cent of any and all royalties which they might receive from any lease of said premises made by the defendants with said John M. Price, until the sum of \$10,000.00 had been paid plaintiff."

The court easily disposed of this question under the Statute of Frauds as follows:

"The distinction between a contract for the services of a real estate broker or agent and the contract alleged in plaintiff's complaint, as herein above set out, is recognized in the following cases: *Bates v. Oregon-American Lumber Company* (D. C.) 285 F. 666; *Hall v. Rankin*, 22 Ariz. 13, 193 P. 756; *Wilson v. Morton*, 85 Cal. 598, 24 P. 784; *Sherman v. Clear View Orchard Co.*, 74 Or. 240, 145 P. 264."

Another such case is *Hall v. Rankin*, 22 Ariz. 13, 193 P. 756 and 757. There the oral agreement was as follows:

'I have been trying to sell the Henrietta mine to the Big Ledge people, but the mine must stand the inspection of Mr. Shockey, their engineer. I have had a 'racket' with him and I canont get them to go out and look over the property. You know these people, and I want you to get their engineer on the ground, and if I get \$150,000 for it I will pay you \$25,000 for your services, and if I sell it for less I will pay you very liberally, and in any event I will pay you for your trouble and expense.'

The court thus reasoned this portion of that case:

"We construe the contract as one of employment or agency rather than one to "sell real estate, mines or other property, for compensation or commission", Statute of Frauds, paragraph 3272, subdiv. 7, Rev. Stat. Ariz. 1913, as amended by chapter 135, Session Laws Ariz. 1919. We would not be justified in straining the terms of the contract so as to bring it within the statute of frauds and thus do a great injustice to the plaintiff. It is a familiar canon of construction to construe a contract, if it may consistently be done, to be effective, rtaher than ineffective. 'Where a * * * contract as a whole is susceptible of two meanings, one of which will uphold the contract or render it valid and the other of which will destroy it or render it invalid, the former will be adopted so as to uphold the contract.' 13 C.J. 539; *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940. The statute of frauds, of course, is binding upon us and must be obeyed and enforced whenever a case falls within its provisions, but it was remarked by Chief Justice Buchanan in delivering the opinion in *Lamborn v. Watson*, 6 Har. & J. (Md.) 255, 14 Am. Dec. 275, where the defense under the statute was successfully relied on, for the protection

of a dishonest defendant, that the statute "probably generates as many frauds as it prevents." The subdivision of the statute referred to was clearly designed to protect owners of real estate against unfounded claims of brokers (*Gorham v. Heiman*, 90 Cal. 346, 27 Pac. 289) and contemplates a transaction between parties contracting with each other as principals."

This case also involves the interesting point that the commission being sued for was not commission or compensation within the statute, but the reasonable value of services. The court held: "the suit is not one to recover 'compensation' or 'commission' for the sale of real estate, but to recover the reasonable value of the services of the plaintiff as the agent of the defendant." The Arizona statute apparently related to either "compensation" or "commission."

The Utah Statute of Frauds relates only to employment of agents "for compensation." In line with the Arizona case this word could reasonably be limited to a fixed percentage of a sale price and not applicable at all to an action for reasonable value of services.

In *Kramer vs. Schmidt*, 62 Mont. 568, 206 P. 620 and 621, there was an oral agreement between the plaintiff and defendant relating to transfer or assignment of an option to buy land at a specified price. With reference to option, the case will be later considered, but on the question of compensation for services, as distinguished from a commission, the Montana court said:

"The agreement between the plaintiff and the defendant did not amount to an employment of the former as a broker or agent to buy land or an interest in land, which by the statute is required to be in writing,

but to an engagement by him to perform a service which could be lawfully made by oral contract.”

Under the evidence in this case, it is obvious that if the appellant had been asked by an owner of land whether he was authorized to purchase or sell real estate in behalf of the respondent, Mr. Knight could have replied only that he was engaged to attempt to package parcels of land so that the respondent could consider the advisability of a purchase. The appellant's testimony and the written documents speak plainly of the employment of his services and not of his authority to purchase for the respondent and hold him for a commission.

2. Employment of a broker to obtain offers to sell real estate is not within the statute of frauds.

As this point is stated, it can hardly be questioned that it is not within the statute of frauds. In *Woolley vs. Wycoff*, 2 Utah 2d 329, 273 P. 2d 181, the court held that where a broker obtained a lease of real estate, the contract does not fall within the statute of frauds, and in so holding said: “It certainly must be conceded that the first blush impression is that mere rental of property should not be considered as a ‘purchase or sale of real estate’ ”. And so here the first blush impression is that a contract employing a broker merely to obtain offers to sell land is not employment for the purchase or sale of real estate.

This point is stated separately from point 3, for the reason that the evidence in the case indicates that appellant was not actually employed to obtain options on land, because he had no money with which to pay for an option, and that all that he actually did was obtain offers from the owners of land to

sell to the respondent. Exhibit 2, which was supplied by the respondent, is a form of option which requires \$25.00 per acre to obtain the option. Since the tracts involved and considered by the respondent were from 500 to 1000 acres (Tr. 14), it would have taken from \$12,500.00 to \$25,000.00 to enable appellant to proceed in the respondent's behalf. The appellant testified that he never, at any time, had any money whatever with which to tie up any land (Tr. 25, 33, 48 and 84). It is, therefore, plain that the appellant was not employed to obtain options on land, but to determine whether land could be purchased, either on an option basis or on an outright purchase basis, such as Exhibit 7 constituted.

It is true that the appellant obtained agreements in writing from the owners of lands, that in the event of sale they would pay a real estate commission to the appellant (Tr. 85) but that is not the agreement in action here. Respondent agreed to pay appellant for his services in working on these various properties, and at no time either empowered, enabled, or authorized the appellant to purchase a single acre for the respondent.

This point also has significance in that it was suggested by the trial judge that employment which looks to, or aids, or assists in the purchasing or sale of real estate, comes within the spirit of the statute of frauds because of the case of *Andersen vs. Johnson*, 108 Utah 417, 160 P. 2d 725. This case will be considered more fully under point 3, and is equally applicable to point 2.

In *Johnson vs. Allen*, *supra*, at page 139 of 158 P. 2d, the court considered the terms of a contract employing a broker

to sell real estate which must be contained in the written memorandum. The court said:

"The terms of the employment, the amount of compensation, and the length of time the listing was to run, were all certain. It is not disputed that the lands sold were the lands listed in the contract. * * * The contract was not void under the statute of frauds. * * * And though it employed plaintiff to procure a purchaser for lands located in Idaho, the sale did for that reason not have to be consummated in Idaho. Under its terms plaintiff was authorized to sell the land to anyone who was willing to pay the agreed purchase price. Under its terms the contract could have been performed anywhere."

The failure to give the appellant any authority, is additional evidence that the appellant was not employed to sell real estate, but only to obtain offers to be submitted to the respondent.

In *Smith Realty Co. v. Dipietro*, 77 Utah 176, 292 P. 915, 918, the plaintiff, a real estate broker, was awarded a judgment for real estate broker's commission, which was reversed on appeal because there was no allegation or proof of an express contract of employment. This court held:

"If it had been alleged that the appellants had employed respondent to procure from the Campbells a binding agreement for the exchange of their respective properties, it might well follow that the broker had earned his commission when he had procured such a contract, even though the properties, for some reason, are not actually exchanged. *Jennings vs. Jordan*, 31 Cal. App. 335, 160 Pac. 576. But that is not this case. Here there is no allegation of any express contract of employment, either to sell or exchange, or to bring about

the execution of a binding agreement for exchange or properties. The present case is controlled by Case v. Ralph, supra, so we have no alternative but to reverse the judgment. * * * "

Thus it appears that specific employment either to purchase or sell or to bind the principal, is a necessary part of the employment of a broker in order to comply with the statute of frauds. Conversely, if the employment does not authorize the purchase or sale and does not authorize the agent to bind the principal, there is no employment for the purchase or sale of real estate and the statute of frauds is not applicable at all.

Case v. Ralph, 56 Utah 243, 188 P. 640, 643, was also an action by a broker to recover a commission in which he relied upon a written agreement and the case was reversed because the written agreement was not sufficiently specific. At page 642 the court stated:

"The courts generally hold, that under such a statute a real estate broker or agent cannot recover commission for services rendered in either selling or procuring a purchaser for real property, unless it appears: 1. That there is an express contract or agreement of authority in which the terms and conditions of his employment, if any, and the amount of his commission, etc., are stated; 2. That such contract be in writing; * * * ."

And at page 643: "It is very clear, therefore, that up to this point no express contract authorizing the defendant to sell or to procure a purchaser is alleged in the complaint. While it is true that an express agreement to pay commission is alleged, yet that is clearly insufficient to constitute a cause of action in view of the provisions of our statute. What the statute requires is that the employment of authority of the agent to

sell or procure a purchaser, must be evidenced by an express agreement in writing. * * * All those statements may be true, precisely as by the demurrer they must be conceded to be, and yet there is not an intimation, even that what is alleged was done by virtue of an express contract, authorizing plaintiff to procure a purchaser."

Again we point out that appellant was not authorized to purchase any land for the respondent, he was given no authority to bind the respondent in any particular, he was given no money with which to make a down payment, and he was authorized, only, to solicit owners of land to determine their willingness to sell, and if possible, to get written offers to be submitted to the respondent, either in Salt Lake City or in Sacramento, California. It is not the failure to get the agreement in writing that is important, but the fact that there was no express agreement of authority, and no means whereby the appellant was empowered to act for the respondent, as his broker or agent, in making a purchase. This just was not employment for the purchase or sale of real estate. If a sale had been made, the appellant would have looked elsewhere for his commission, but his action here is against the respondent for that which alone he was empowered to do, namely, attempt to package a parcel of property so that it could be submitted to the respondent for his investigation and approval.

In *Pacific South West Development Corp. vs. Western Pacific Railroad Co.* (Cal. 1956), 301 P. 2d 825, 829 to 830, where the court held that employment of a broker to obtain an option is within the statute of frauds, the court inquired also into the sufficiency of the contract which will support an action for commission. The court said:

“The chief element required to be shown in writing, is the fact of employment of the broker to act for the principal in the transaction. * * * The above letter merely states the terms and conditions on which defendant was willing to negotiate for the property, but it does not show employment of plaintiff to act for defendant. * * * Furthermore, the last sentence of the letter indicates that various details yet remained for consideration in completing any transaction. * * * But such writing by Nelson and subsequent meetings with Stratton in attempting to work out a suitable arrangement for purchase of the Lenfest property cannot satisfy the statutory requirement of a writing, ‘subscribed by the party to be charged, or his agent.’ ”

And, likewise, in *O’Neil vs. Wall*, 103 Mont. 388, 62 P. 2d 672 and 674, where the court held that an agreement employing a broker to obtain an option is not employment to buy or sell an interest in land, the court went on to consider the essential terms of such an employment contract. The court stated:

“The contract which was entered into by the defendant, was an agreement to sell and purchase real estate, but such an agreement does not amount to a sale of real estate. It is an executory agreement which would become a sale of real estate when fully performed, that is, when all of the payments have been made. *Wright Land & Investment Co. vs. Even*, 57 Montana 1, 186 Pac. 681. That particular contract had to be in writing, in order to be valid (subdiv. 5, sec. 7519); and if plaintiff had purported to sign such an agreement on behalf of the defendant, her authority by the terms of the section was required to be in writing; but the defendant did not act in the execution of this agreement through his representative, but did execute it in person. * * * The contract sued on was not required to be in writing by the statute pleaded.”

3. Employment to obtain options to buy land is not within the statute of frauds.

There is no evidence whatever in this case that the appellant was employed to make an outright purchase of land in behalf of the respondent. There was conversation between the parties as to the obtaining of options and the documents which were used (Exhibits 2 and 7) both were denominated options. Even if this court should hold that the appellant was employed by the respondent to obtain options to buy land, the judgment of the district court should be reversed.

In *O'Neill vs. Wall*, 103 Mont. 388, 62 P. 2d 672, the plaintiff brought action to recover compensation for services rendered by her in inducing one or more of certain persons to enter into a contract to purchase mining property from the defendant. Action was on express contract and also quantum meruit. Recovery was had on an express contract. The agreement was that the plaintiff was to secure with certain persons either a lease and option or a lease or option that was acceptable to the defendant with certain terms being specified, and the evidence established that an agreement was entered into by the defendant and one or more of such persons, on the terms specified. The Montana Supreme Court held:

"The question is thus presented: Is a contract employing a broker or agent to induce others to enter into an option or lease, or a lease and option, required by the statute to be in writing?

"It will be noted that the statute relates to the purchase or sale of real estate. It was definitely decided by this court in the case of *Kramer vs. Schmidt*, 62 Mont. 568, 206 Pac. 620, that a contract to secure an option

need not be in writing. Since the holder of an option acquires nothing but a personal privilege to purchase, which does not ripen into an interest in the land until he chooses to exercise the privilege conferred by the option, and complies with the terms on which he purchased it, an agreement employing a broker to procure or negotiate an option does not amount to an employment of a broker or agent to buy or sell an interest in land."

The court then considered whether a lease was an interest in real estate and concluded that it was not and held:

"The contract sued on was not required to be in writing by the statute pleaded."

The question as to an option was squarely raised in *Kramer vs. Schmidt*, 62 Mont. 568, 206 P. 620. In that case one Bain had executed and delivered to one Awberry an option contract for sale of land at a specified price. Knowing of this, the defendant orally agreed with the plaintiff that if the plaintiff would procure the assignment of the option contract to the defendant, so as to give the defendant the right to purchase the land under the option, he would pay the plaintiff a commission of one dollar per acre, or 5% of the entire purchase price. The plaintiff induced Awberry to assign the option to defendant and the defendant subsequently purchased the land, but refused to pay the commission of \$3,600.00. The defendant raised the defense of the statute of frauds, which requires that a contract employing a broker to purchase or sell real estate must be in writing. The court squarely held that an option to buy real estate is to be distinguished from the purchase or sale of real estate and that the statute of frauds is not applicable. It thus reasoned its decision:

"Counsel insists that, since it appears from the evidence that the agreement by which plaintiff was employed by defendant was not embodied in a writing signed by the latter, it came within the provision of the statute of frauds and was invalid. This contention proceeds upon the assumption that the plaintiff was employed as a broker or agent to purchase real estate on a commission. The evidence does not justify this assumption. It discloses that the contract gave to Awberry a mere option to purchase the land within a specified time. Counsel falls into error in failing to distinguish between a contract of purchase and sale, and one granting a mere option to buy. In the early case of *Ide vs. Leiser*, 10 Montana 5, 24 Pac. 695, 24 American State Reporter 17, Mr. Justice DeWitt defined an option as follows: ' * * * An Option * * * is neither a sale, nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property at a fixed price, within a time certain. He does not sell his land, he does not then agree to sell it; but he does then sell something, viz., the right or privilege to buy at the election or option of the other party. The second party gets in praesenti, not land, or an agreement that he shall have land, but he does get something of value, i.e., the right to call for and receive land, if he elects. The owner parts with his right to sell his land (except to the second party) for a limited period. The second party receives this right, or rather, from his point of view, he receives the right to elect to buy.' (p. 621).

Pacific Southwest Development Corp. vs. Western Pacific Railroad Co., 301 P. 2d 825, was an action upon an alleged contract for payment of a commission and is against appellant. The court found that the agreement was not established by the

evidence and could have rested its decision on that ground; but it went further and determined that even if the plaintiff had established its agreement, it could not have prevailed because the agreement to obtain the option was not in writing. Negotiations by the plaintiff at \$2500.00 per acre broke down and the defendant then obtained directly from the owner an option to purchase the land at \$2,750.00 per acre and this option was subsequently reduced to writing and then exercised by the defendant. A controversy arose as to whether the plaintiff was entitled to a half commission or a full commission and plaintiff brought the action for the full 5% commission.

The court observed that: "In California an option to purchase real property has been held to come within the statute of frauds and so must be in writing."

The court then finds that the term real estate as used in the California Statute is the common law definition of real property and excludes estates for years.

The court at page 829 then states that California decisions have already held that the phrase "to sell or purchase" includes "to aid or assist in the purchase or sale" of real estate, and "to hold otherwise would open the door to the assertion of unfounded claims by brokers and others on the pretense of oral employment in real estate transactions, relative to options, and so frustrate the purpose of the statute."

Thus there are four basic premises for the decision of the California Court:

A. An option to purchase real property must be in writing in California.

B. Real estate or real property refers to a free hold interest in land and includes options.

C. Aiding or assisting in the purchase or sale of real estate is included within the statute of frauds' phrase "to sell or purchase."

D. It is important to avoid fraudulent claims.

Given these premises, and given also the fact that in this case the plaintiff sued only for its full commission, and did not allege any contract or services spent in bringing the parties together or in furthering the interests of the would-be buyer, the conclusion of the California court would not be persuasive in Utah without examining those premises.

Let us consider, separately, the four premises which were held established in California and which led to the conclusion that employment to obtain an option is within the statute of frauds.

a. An option to purchase real property must be in writing in California. We have previously cited the Montana cases which hold clearly that an option is not an interest in land and that the employment of a real estate broker to purchase or sell an option is not within the statute of frauds.

The Pacific South West Development Corporation case says:

"In California, an option to purchase real property has been held to come within the statute of frauds, and so must be in writing. *Bovo vs. Abrahamson*, 100 Cal. App. 373, 383, 280 Pac. 191. The property of this holding was recognized in *Wilson vs. Bailey*, 8 Cal. 2d 416, 65 Pac. 2d 770, 772, where the enforcement

of an oral extension of a written option to repurchase certain real property was in question."

It should be noted that this was a four to three decision and that the dissenting justices adopted the opinion of Mr. Justice Fournier in the District Court of Appeals in this case, reported at 293 P. 2d 800, including the holding of the lower court that an option is personal and not real property.

Bovo vs. Abrahamson, supra, was a decision of the District Court of Appeal. It involved an action to compel a purchase of property in accordance with provisions of a trust deed executed by the plaintiff. The plaintiff contended that defendant was trustee for the plaintiff and plaintiff had the right to redeem the property. The court found that the only agreement was that plaintiff could repurchase the property within a period of 18 months from the date, and that this agreement was without consideration and had long since expired before the commencement of the action. The court held:

"That the agreement to convey was without consideration, was oral, and constituted a mere option to purchase, and that the cause of action, if any ever existed, was barred by subdivisions one and five, sections 16 and 24, of the Civil Code, and by subdivisions 1 and 5 of Section 1973 of the Code of Civil Procedure, and by Sections 318, 320, 323 and 363 of the Code of Civil Procedure, and was also barred by laches." (p. 193).

It, therefore, appears that the holding that an option must be in writing was not necessary to the disposition of this case, although it was one of the grounds upon which the decision was placed. Subdivision 1 of these sections provides that an agreement that by its term is not to be performed within a

year from the making thereof, must be in writing. And section 318, 320, 323 and 363 are limitation of action sections relating to real property and possession thereof.

Wilson vs. Bailey, *supra*, is not a holding that an option to purchase the real estate must be in writing. In that case there was an option in writing and an oral extension was given under such circumstances as to constitute an equitable estoppel against claiming that the option was void. The court assumed that the extension would otherwise have had to be in writing and the court also held at 774 that the plaintiff had a clear right to redeem the property as a deed given merely as security, in which event there would have been no problem in the foreclosure.

Thus, neither of the cases relied on was persuasive.

The District Court of Appeals decision in the Pacific South West Development case (293 P. 2d 800, 801), which was adopted by the three dissenting Justices, was as follows:

"An option to purchase real property is a contract containing an irrevocable and continuing offer to sell at a specified price and a specified time. It conveys no interest in land to the optionee, but vests in him only a right in personam to buy at his election. Hence, an option contract relating to the sale of land is not a sale of property, but of a right to purchase. Hicks vs. Christeson, 174 Cal. 712, 716, 164 P. 395; Warner Bros. Pictures v. Brodel, 31 Cal. 2nd 766, 772, 192 P. 2d 949, 3 A.L.R. 2d 691; Seeburg v. El Royale Corp., 54 Cal. App. 2d 1, 4, 128 P. 2d 362; Kritt v. Athens Hills Development Co., 109 Cal. App. 2d 642, 646, 241 P. 2d 606. It follows that an option contract not being a contract for the purchase or sale of real estate, a contract employing a broker to obtain

the option does not fall within the provisions of Section 1624, subdivision 5, of the Civil Code, or Section 1973, subdivision 5 of the Code of Civil Procedure."

Hicks vs. Christeson, *supra*, was an action for a commission brought by a real estate broker against the owner of land on the theory that the plaintiff had found a purchaser ready, able, and willing to buy. The plaintiff had, in fact, obtained a written option for the sale of the land from the defendant, and the question was whether he had found a buyer for the land under the option. The case stands for the proposition that a contract for the sale and purchase of property must be in writing and the plaintiff failed because he could not show the written agreement of the would-be purchaser to take up the option. But the court does say in that decision:

"The agreement, which is the fountain head of any authority possessed by plaintiff, gave him the right to contract for sale. An option is by no means a sale of property, but is the sale of a right to purchase (quoting other California cases.)"

In Warner Brothers Pictures vs. Brodel, *supra*, the court held that the giving of an option for personal services constituted, in effect, a contract to perform or render services, as an actor or actress. The court reasoned that the option constituted a continuing and irrevocable offer which could be accepted by the optionee within its terms and thereby bind the optionor, and that, therefore, provision of the statute against disaffirmance was satisfied as being a "contract to perform or render services". The court quoted the above language from Hicks vs. Christeson and said:

"An option contract relating to the sale of land is,

therefore, 'by no means a sale of property, but is a sale of a right to purchase.' "

and quoted approvingly from *Shaughnessy vs. Eidsmo*, 222 Minn. 141, 23 N.W. 2d, 362, 363, 166 ALR 435:

" * * * A contract conferring an option to purchase is * * * an irrevocable and continuing offer to sell, and conveys no interest in land to the optionee, but vests in him only a right in personam to buy at his election."

Seeburg vs. El Royale Corp., supra, was an action by plaintiff to recover \$5,000.00 paid for an option to purchase an apartment house on the theory that the option had been rescinded and made nugatory. The court again stated that an option is not a sale of property but only of a right to purchase and that it is a right acquired by contract to accept or reject a present offer within its terms.

"On acceptance the option becomes the contract of sale, binding on both parties. * * * This does not mean, however, that a new contract is in fact made by and at the time of the acceptance. The contract has already been made, as far as the optioner is concerned, but it is subject to conditions which are removed by the acceptance."

The case does not purport to decide whether an option falls within any provisions of the statute of frauds.

Kritt vs. Athens Hill Development Co., supra, is a square decision that the obtaining of an option was not the making of a sale within the meaning of the contract by brokers to obtain a commission on the sale of lots. The case does not involve the statute of frauds, but only the question of when a broker is entitled to his commission under a contract for payment of commission upon sale of a lot. The option contract took a

deposit and provided for forfeiture of all but \$50.00 in the event the option was not taken up.

It, therefore, appears that the law in California on options under the statute of frauds was quite uncertain prior to the Pacific South West decision and that that decision being four to three invites careful scrutiny of the matters involved, including the California precedents, before acceptance by this court.

b. Real estate or real property refers to a freehold interest in land and (presumably) includes options.

The California court cited two earlier cases: Dabney v. Edwards, 5 Cal. 2d 1, 6-7, 53 P. 2d 962, 103 ALR 822, and Marks v. Walter G. McCarty Corp., 33 Cal. 2d 814, 819, 205 P. 2d 1025. Dabney v. Edwards simply holds that sale of oil and gas leases is not the sale of real estate and a contract employing a broker to sell them need not be in writing, and Marks v. Waletr G. McCarty Corp. holds that employing a broker to purchase or sell real estate is within the statute of frauds. The court cites no holding that an option is an interest in land, and the court itself does not so state.

The California law appears to be contrary and to be that an option is not an interest in land, and the Pacific South West Development case must be rested on the ground that taking an option is aiding or assisting in the sale.

In Warner Brothers Pictures v. Brodel, 31 Cal. 2d 766, 772, 192 P. 2d 949, 3 ALR 2d 691, 696, the court says an option is not an interest in land.

The question whether an option falls within subdivision

5 of the statute of frauds (UCA 1953 25-5-4) seems pretty well settled by the case of Woolley vs. Wycoff, 2 Utah 2d 329, 273 P. 2d 181. In that case a real estate broker was employed, orally, to procure a tenant on a ten year lease for a certain warehouse. The plaintiff procured the tenant and Wycoff then failed to complete his purchase of the property and therefore, of necessity, was unable to enter into the lease. The plaintiff's action was for a commission of the negotiated lease. The court said:

"It certainly must be conceded that the first blush impression is that mere rental of property should not be considered as a 'purchase or sale of real estate'. This is in accord with the common law principle that a lease was personal property, and under modern statutes it is generally held that the term 'real estate' does not cover leases or rental agreements." (p. 182).

The defendant there urged that section 68-3-12 UCA 1953 dealing with construction of statutes, uses a different phrase as to real estate and that this should be the measure of interpretation of the term "real estate" in the statute of frauds. Subsection 10 of the section is:

"The terms 'land', 'real estate' and 'real property', include land, tenements, hereditaments, water rights, possessory rights and claims."

The court then considered at considerable length how the statute of frauds language should be interpreted and rejected the suggestion of this statutory aid and the possibility that the lease was a possessory right and then concluded with this language:

"However, even if we should concur with the defendant in making the doubtful assumption that a rental

agreement is "real estate" on the ground that it is a "possessory right", we are still met with the clear language of section 25-5-4(5) upon which the defendant relies. It declares void only agreements to ' * * * Purchase or sell real estate * * * '. A sale is certainly something fundamentally very different from rental of real property. The defendant did not employ plaintiff to procure a purchaser, but a lessee. Therefore, the transaction did not involve a contract authorizing plaintiff to 'purchase or sell'.

"Although it may be that there is a good reason why the legislature should have included agreements for rental of property in the statute requiring such agreements to be in writing, as there is for sale, they did not do so. They announced the policy; we interpret it. For us to so interpret the statute that the words 'purchase or sell' are equivalent to 'rental', is inconsistent with the manifest intent * * * ' expressed by the statute and would amount to extending its coverage by judicial legislation."

And the court held that the contract employing a broker to procure a lessee for real property was not within the statute of frauds.

It thus appears that this court would use the definition of section 68-3-12, if it were consistent with the language of the statute of frauds. Nothing in the definition of real estate suggests that an option should be considered real estate, and it would seem to follow, almost a fortiori, that an option is not real estate within our statute of frauds.

c. Aiding or assisting in the purchase or sale of real estate, is included within the Statute of Frauds' phrase: "to sell or purchase."

The California case of Pacific South West Development Corp. cites two California decisions in support of this holding. These were Hooper v. Mayfield, 251 P. 2d 330, and Duckworth vs. Schumacher, 27 P. 2d 919.

In Hooper v. Mayfield action was brought by a broker to recover full commission on a sale of real estate. He had conversations with the owners of the real estate and with a prospective purchaser, and there was some conversation with the purchaser about splitting a commission; but such purchaser later dealt directly with the defendant and completed the purchase. The plaintiff attempted to show that he was employed as a middle-man and not as a broker and, hence, was not under the statute of frauds. The court held that there was no proof of employment as a middle-man and, therefore, rejected the distinction between a middle-man and the agent of either buyer or seller, on the facts of the case. The decision quoted from Duckworth vs. Schumacher without any indication that the cases were analogous.

Duckworth vs. Schumacher holds that employment for the purpose of aiding or assisting in the sale of real estate is within the statute of frauds. In that case:

“According to the complaint, the plaintiff was to assist and aid the defendant in laying out for subdivision and subdividing for sale certain lands of the defendant and to act as defendant’s general sales manager in charge of the advertising of said subdivision, and devising ways and means of promoting the sale of said tract and superintending the sale thereof at a stated salary per week, until the employment should be terminated, and alleging certain payments made thereon.”

From this the court concluded: "The employment had to do with the sale of real estate." And at page 921 the court said, in distinguishing earlier cases:

"In the case at bar, the plain intendments of the parties to the contract were that the plaintiff was to aid and assist in preparing a certain tract of land belonging to the defendant for sale, by laying the same out for subdivision and subdividing it; to act as sales manager; to promote the sales by a plan of campaign of advertising; and to superintend the sale thereof. * * * Such employment, therefore, had for its sole object and purpose the sale of the real property, and such an employment is within the inhibition of section 1624 of the Civil Code. To hold otherwise would give rise to a practice of ingenious forms, without substance in fact, and thus avoid the very salutary rule of law as declared in section 1624 of the Civil Code, and open the door to fraud, long closed by said statute, and would, in effect, abrogate such statute of frauds."

These cases do not suggest at all that anything which is done by a real estate broker calculated to aid or assist in making a purchase or a sale comes within the statute of frauds. The cases hold and mean that a real estate broker cannot call himself something else, such as a middle-man or a sales manager, when, in fact, his duties are to act as agent for the sale or purchase of real estate, and still claim that he is not within the statute of frauds relating to purchase or sale of real estate. This is made plain by the case of *Owen v. National Container Corp. of California*, 251 P. 2d 765, decided after both of the cases relied on under this portion of the decision in *Pacific Southwest Development Corp.* and not disturbed or distinguished by the *Pacific Southwest* case. The *Owen* case was an

action for the usual five percent commission, based upon the cost of the building for services connected with finding the location and assisting in the planning of the building. The lower court sustained a demurrer to the complaint on the ground that the contract alleged violated the statute of frauds. On appeal the court held that the complaint stated a cause of action for a valid oral agreement and that the proof would have to determine whether there was an agreement for special services or an agreement incident to the purchase of real estate. The allegations of the complaint were that plaintiff worked during a period of three years to assemble information for the defendant as to a suitable factory site, sending information concerning a number of properties which were eventually found unsuitable. Plaintiff also submitted information concerning the site actually purchased and concerning the plans, specifications, and estimates for a factory building to be erected on the site. At page 768 the court held:

"A valid oral agreement could be made for the special services alleged, consisting of the surveys made, the furnishing of plans, specifications and estimates, and the negotiations carried on for the construction of a building by Central Manufacturing District."

And at page 769, concluded:

"We may say, however, in conclusion, that if the court should find that the services alleged were merely incidental to plaintiff's efforts to bring about a sale of real property to defendant, *and that there was no express agreement of defendant to pay for the same*, plaintiff cannot prevail in this action, either upon contract or in quantum meruit." (Emphasis supplied.)

Andersen vs. Johnson, *supra*, 160 P. 2d 725, was an action

against a real estate broker for a one-third commission for services rendered in obtaining listings and helping the defendant make sales. The defendant stood on a general demurrer to the complaint, contending that the plaintiff was acting as a real estate salesman without a license and could not maintain the action, and also because the agreement for compensation was void as within the statute of frauds, requiring employment of a broker to be in writing. Most of the court's opinion is an analysis of the sections of the statute regulating the real estate brokers and salesmen, and defining as a broker one who buys or sells real estate for another or who "assists or directs in the procuring of prospects, or otherwise assists in transactions 'calculated to result in the sale, exchange, leasing or renting of any real estate.' "

The court held that the work of the plaintiff in assisting in the sale of real estate did not constitute him a real estate broker, and as to the statute of frauds held:

"The contention of respondent that plaintiff cannot recover because his agreement was oral, is untenable. The contract was one of employment and not involving any rights or interest in land. See *Johnson vs. Allen*, Utah 1945, 158 P. 2d 134."

It thus appears from the California decisions as well as from the Utah case, that simply aiding or assisting in the purchase or sale of real estate does not place the activities or the employment contract within the statute of frauds; the real test is whether there is a bona fide and valid agreement to do something other than purchase or sell real estate, for which the parties bargained and for which the plaintiff brought action.

d. *It is important to avoid fraudulent claims.*

The Pacific Southwest case cites no authorities to support this observation, but states: "To hold otherwise would open the door to the assertion of unfounded claims by brokers and others on the pretense of oral employment in real estate transactions relative to options, and so frustrate the purpose of the statute."

If plaintiff were here suing for a real estate commission on the theory that he had found lands suitable to defendant's directions, which defendant had capriciously refused to purchase, the above language would be very apt. Defendant did not employ plaintiff to purchase real estate and the evidence of plaintiff was that, were sales to be consummated, the plaintiff would look to the owner for his compensation, and would claim nothing from the defendant. Defendant was a stranger to plaintiff and came here as a big time building contractor from California, who was interested in a very large development in Salt Lake County at the time the rumors concerning the building of a Boeing plant here were rife. The defendant offered to pay plaintiff for his services if he would get busy and package up a parcel or several parcels for him. But he gave plaintiff no authority to buy or tie up any land, and no money upon which to operate or obtain options. Plaintiff simply took the defendant at his word and spent a large amount of time attempting to put attractive acreage together for the defendant, and in the hope of realizing a substantial commission from the sellers, in the event the sales should be consummated.

The witness, Orin Woodbury, testified that the usual

practice is to work for such a prospect and obtain payment on a time basis if no deal is consummated, and that this is the rule of the Salt Lake Real Estate Board; but that he, personally, would not undertake such work for any prospect who made no option money available.

Was the plaintiff too credulous, too trusting, too willing to accept a substantial business man at his word? Mr. Woodbury was of the opinion that unless option money is put up, there is no guarantee of good faith, and perhaps the plaintiff should not have worked for the defendant. But he did proceed to work diligently, made many reports by letter and by telephone to the defendant, in an honest endeavor to satisfy the defendant and to package a parcel which would suit his requirements. He now asks the court to require the defendant to live up to his promise to pay for plaintiff's services, and as the court observed, the plaintiff is a reliable broker and the compensation requested appears to be reasonable (Tr. 152).

We have attempted to analyze the Pacific Southwest case and the authorities upon which it rests rather carefully, for the reason that the trial court relied primarily, if not solely, on that case. It is based, in part, upon law peculiar to California and was an effort to go beyond the required scope of the case, in order to settle conflicting and confusing decisions in the state. It found a lack of employment to purchase or sell real estate and did not need to go any further in reaching a decision. It was a suit for a commission on the sale of real estate, and was based on the theory of employment to obtain an option with authority so to do. In all of these respects it is distinguishable from the case at bar, is contrary to the indicated

Utah decisions on what is an interest in real estate, and whether an option is the purchase or sale of real estate and should not be followed by this court. Perhaps the Pacific Southwest case has been given more attention than it deserved.

Many other authorities have considered the question of whether an option must be in writing to comply with the statute of frauds. Some of these decisions are controlled by the language of the statute and some have statutes similar to the Utah statute.

Richanbach vs. Ruby, 127 Ore. 612, 271 P. 600, 61 ALR 1441, p. 1447, is a square holding that an option to purchase land is not an interest in land and need not be in writing within the meaning of the statute of frauds. An annotation following the case at page 1454 states that only two cases raise the question squarely, one being the Richanbach case and the other being Granger Real Estate Exchange vs. Anderson (Texas Civil Appeals) 145 S. W. 262, which reached a contrary holding. In the Texas case the real estate broker sued for his commission on the sale of land, alleging that he had found a buyer who was ready, able, and willing to buy. The case turned on whether or not the owner had given the plaintiff's prospect an oral option for two days within which to decide whether he would pay the interest rate. The court held that this option was void, both because it was without consideration and because it was not in writing and fell under that provision of the statute of frauds requiring that a "contract for the sale of real estate must be in writing."

A Minnesota case, decided in 1946, lines up squarely behind Richanbach vs. Ruby, supra. Shaughnessy, et al, vs.

Eidsmo, et al, 23 N. W. 2d 362, 365. The court there held that an oral agreement to lease premises with an option to buy was specifically enforceable, holding:

"This option, prior to execution or acceptance, did not of itself contribute anything to bring the agreement under the statute of frauds. In the first place, the contract conferring an option to purchase, is nothing more than an irrevocable and continuing offer to sell, and conveys no interest in land to the optionee, but vests in him only a right in personam to buy at his election. At best it is but an irrevocable right or privilege of purchase and does not come within Minnesota statute 1941, section 513.04."

The court upheld an order, giving specific performance to the plaintiff of the option to purchase real estate at the expiration of the lease.

In McGuirk vs. Ward, (Vermont 1947), 55 Atl. 2d 610, the court considered whether an option to purchase land was within the Vermont statute of frauds, requiring to be in writing "a contract for the sale of lands or an interest in or concerning them." The court considered the cases for and against holding that an option is an interest in land, including the following citation from 55 Am. Jur. p. 492, Section 27:

"An option to purchase real property may be defined as a contract by which an owner of real property agrees with another person that the latter shall have the privilege of buying the property at a specified price within a specified time, or within a reasonable time in the future, and which imposes no obligation to purchase upon the person to whom it is given. Until the holder or owner of an option for the purchase of property exercises it, he has nothing but a mere right to acquire

an interest, and has neither the ownership of nor any interest in the property itself.”

The court also referred to the annotation at 61 ALR 1454 and found additional cases on both sides of that proposition, but distinguished one line of cases on the ground that the statutes involved were similar to the Vermont statute, requiring that a contract be in writing when it is for the sale of lands or for “an interest in or concerning them” and held that since the Vermont statute was like those others and since an option appeared to be a contract concerning lands, it would have to be in writing in Vermont.

Williston on Contracts, Section 491, page 1416, finds the authorities to be divided on this question. The text says:

“In regard to an oral option given by an owner of land, Montana and Oregon hold that an option creates no interest in land until it is accepted and a binding contract is formed, while a number of states hold an interest in land is immediately created and require the option to be in writing.”

It is interesting to note that the 1956 Cumulative Supplement gives an instruction to change this sentence to read as follows:

“In regard to an option given by an owner of land, some states hold that an option creates no interest in land until it is accepted and a binding contract is formed, while others hold an interest in land is immediately created and requires an assignment of rights under the option to be in writing”, citing one additional case for the last proposition.

This seems to change the holding that an option is not an interest in land from a two state rule to the preferred view,

and at least indicates that in the opinion of the author that view became stronger between the time of the text and the time of the supplement. The one case cited, Harper vs. Pauley, West Virginia 1953, 81 S. E. 2d 728, is of no assistance. In that case there was a written option which was finally held to be insufficient as to the description of land and in a suit for specific performance it was held that the description was insufficient to satisfy the statute of frauds, but without any apparent consideration of whether the option created an interest in land.

If an option is not an interest in land, it follows that employment to obtain an option is not employment to purchase real estate and need not be in writing under the statute of frauds.

SUMMARY AND CONCLUSION

The agreement between appellant and respondent was that respondent would pay for appellant's services in packaging or putting together some large tracts of land in Salt Lake County for respondent's consideration, but if any were purchased, appellant would look to the sellers for his compensation. This was not employment for the purchaser of real estate for compensation. Appellant had no authority to bind respondent, had no money from respondent and was unable to obtain anything more than offers to sell for respondent's consideration. The word "option" was used but appellant was not empowered to obtain a valid option and obtained none. And if he had been employed to obtain a valid option that

would not be the obtaining of an interest in land in Utah and would not be employment for the purchase or sale of land for compensation.

The order dismissing the complaint should be reversed and the district court should be directed to enter judgment for the appellant as prayed in the complaint.

Respectfully submitted,

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