

1959

## George A. Chase, Jr. v. Nicholas G. Morgan, Sr., Charitable Foundation : Brief of Respondent

Utah Supreme Court

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Willard R. Huntsman; Elias Hansen; Attorneys for Respondent;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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GEORGE A. CHASE, JR.,     *Appellant,*

vs.

NICHOLAS G. MORGAN, SR.,  
CHARITABLE FOUNDATION,  
*Respondent.*

Case No.  
8981

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On Appeal from the District Court for Salt Lake County, Utah

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BRIEF OF RESPONDENT

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WILLARD R. HUNTSMAN and  
ELIAS HANSEN

721-726 Continental Bank Building  
Salt Lake City 1, Utah

*Attorney for Respondent*

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# IN THE SUPREME COURT of the STATE OF UTAH

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On Appeal from the District Court for Salt Lake County, Utah

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## BRIEF OF RESPONDENT

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### ADDITIONAL STATEMENT OF FACTS

The statement of facts contained in Appellant's Brief is so incomplete that the Court will be unable to make an application of law to the facts disclosed by this record. We have, therefore, deemed it necessary to direct the attention of this Court to a number of facts which we deem of controlling importance.

The Appellant here, plaintiff below, in support of his action, produced testimony which in substance is as follows:

William A. Brown testified that in the months of March, April and May, 1957, he contacted Mr. Nicholas G. Morgan, Sr., and Virgil Peterson to find out if they had any oil or gas leases for sale (Tr. 20). That he met them in their office in the Walker Bank Building, and they gave the witness some plats of some acreage; that they set a price on the acreage and said they would pay a compensation if a buyer were secured. Counsel for defendant objected to this line of testimony as being incompetent, in that, it was an attempt to show an oral agreement contrary to the provisions of *Utah Code Annotated*, 1953, 25-5-4, *subdivision 5 thereof* (Tr. 21). The objection was overruled. Objection was also made to such testimony because of the provisions of *Utah Code Annotated*, 1953, 6-2-1, which requires a Real Estate Broker to have a license. Such objection was also overruled (Tr. 22).

Mr. Brown further testified that Mr. Peterson gave the witness a plat of the leases that were for sale. The plat was offered and received in evidence as Exhibit 2 (Tr. 23-4). That there were 13,826.54 acres shown on the plat. That at the time the witness was in the office of Morgan and Peterson he told them he was representing Mr. Baird and Mr. Chase; that the witness, together with Mr. Baird and Mr. Chase, had an office in the Judge Building, and that they were trying to get some leases and find buyers for such leases (Tr. 24). That Mr. Chase and Mr. Baird were to get the buyers; that was their department, and the witness was to find the leases; that witness is no longer connected with Baird and Chase; that in September

witness had a further contact with Mr. Peterson (Tr. 25). That he talked to Mr. Peterson and asked if the deal on the Thompson acre deal had gone through, and if Chase and Baird had received any money, and that Peterson and Morgan would be out of the deal about the 11th or 16th of October, and Baird and Chase would then start receiving their money (Tr. 26).

Mr. Brown also testified that he did not have a real estate license at the time concerning which he testified (Tr. 29).

Mr. Chase, the Appellant here, plaintiff in the court below, in substance testified as follows:

That Mr. Virgil Peterson (Mr. Morgan's associate) came to the office of Chase in April, 1957, about a matter of acreage of oil and gas leases (R. 49). That Mr. Peterson asked how witness was getting along in securing a buyer for the acreage that Mr. Brown had secured a plat for; that witness explained to Mr. Peterson:

"That we were contacting various people whom we knew that was in the market for acreage in this area—and at that time we had been in touch with Mr. MacDonald, the Sierra Madre Oil Company."

That sometime later in the same month witness went to see Mr. Morgan and Mr. Peterson at their office in the Walker Bank Building (Tr. 50). That Peterson and Morgan were there, and witness explained to them that he had a client or a buyer, a tentative buyer, for their acreage. That witness told Mr. Morgan and Mr. Peterson:

"That the term—that the buyer wished to purchase this property, their lease with, or on at least, was a

dollar a month, a dollar down and a dollar down for seven months, granting the override that they had requested and request what drilling commitments on the property.” (Tr. 51).

That in the first part of May, 1957, they (Morgan and Peterson) told witness:

“that they would accept four dollars an acre on the first four payments that were made by the buyers and that they would give us the next three payments, a total of seven payments for our services in finding the buyer.”

That several people were contacted, among them, Dr. McDonald, (Tr. 52); that in the middle of May, 1957, witness arranged for an appointment with either Mr. Morgan or Mr. Peterson to meet Dr. McDonald and Arch McDonald (Tr. 55). That the meeting arranged for was held, and that soon thereafter a contract for the sale and purchase of the leases was drawn up. That witness was not present when the contract was drawn up (Tr. 57).

Pursuant to Rule 33 of the Utah Rules of Civil Procedure, plaintiff was asked this question:

“You have alleged that you and Merton E. Baird rendered service to the Nicholas G. Morgan Charitable Foundation during the months of March, April, May and June of the year 1957. Will you detail just what services you and Mr. Merton E. Baird rendered the above defendant during the months of March, April, May and June of the year 1957, and specifically state any and all persons contacted by you at the special instance and request of defendant.”

To the foregoing interrogatory plaintiff, under oath, answered:

"Mr. Donald McDonald, president of Sierra Madre Oil Company, employed us to find oil and gas acreage suitable for development. In the course of finding such acreage, we contacted the defendant corporation, Nicholas G. Morgan Sr., and Mr. Virgil Peterson, who, acting on behalf of the defendant corporation, advised us of acreage block which they agreed to sell for the sum of \$4.00 per acre, and agreed to pay us a commission of whatever we could sell said acreage for, in excess of said \$4.00 per acre. Subsequent negotiations culminated in a sale for the sum of \$7.00 per acre, payable in seven installments of \$13,826.45 per installment, with the further agreement that the first four payments would be received by defendant corporation for land payment and that the last three installments would be paid the plaintiff and his assignee as his commission. Other persons contacted were Arch MacDonald, Jack Darrough and Marcellus Palmer." (R. 9 and 10).

The following are among the claims made by the parties as stated in the Pretrial Order:

"It is the contention of plaintiff that he is entitled to recover \$41,479.62 representing the last three monthly payments on the land sold pursuant to an oral agreement which he had with the defendant and which is evidenced by the letter under date of August 8, 1957, from the defendant to the plaintiff. The plaintiff will further contend that it had no agreement with the defendant for the payment by the defendant to plaintiff and his assignor, that he had an agreement with the Sierra Madre Oil Company for a broker's fee of the amount claimed and that the defendant knew of the agreement and held any money paid by the Sierra Madre Oil Company to the defendant for the account of the plaintiff and his assignor."

In the Pretrial Order it is further stated:

"The defendant denies that it held any money in trust for and on behalf of the plaintiff (R. 30).

"It is the contention of the defendant that there was no agreement to pay either George A. Chase, Jr., or Merton E. Baird any sum of money whatsoever, that they had no agreement for the plaintiff or Merton E. Baird to do any work for the defendant, and the defendant further contends that even if there was an agreement, it would be void by reason of the statute of frauds.

"The defendant will further contend that any contract of services rendered by the plaintiff as a broker would be void for the reason that neither the plaintiff nor his assignor had a license to do business as a broker or as a broker's salesman in the State of Utah. Defendant will further contend that it makes no claim to the last three monthly payments but that under its agreement at the time of the contract of sale of the oil and gas leases it had agreed with the purchaser that the last three payments would be paid to Donald McDonald, and two of said payments were made to the said Donald McDonald before this suit was instituted, and the last of the payments is now held in escrow by Security Title Company, the escrow agent between the purchaser and the seller of the gas lease" (R. 30-31).

That prior to the trial of this cause defendant made a Motion for Summary Judgment.

Among the grounds upon which the Motion for Summary Judgment was made are the following:

1. That the Complaint, when viewed in the light of the

Answers to the interrogatories, fails to state sufficient facts upon which relief may be granted.

\* \* \*

3. That the Complaint, when viewed in the light of the answer to interrogatory number 10, said employment, if any, was performed by reason of an oral agreement.
4. That if any agreement was entered into, as alleged, then such agreement is null and void by reason of the provisions of the Utah Code Annotated, 1953, section 25-5-4, which provides: "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" (R. 24).

A Motion of similar import was made at the conclusion of plaintiff's testimony (Tr. 96).

The following are among the Findings of Fact made by the Court below in this case:

5. That neither George A. Chase, Jr., nor Merton B. Baird at any time material herein had a license to do business as a real estate broker in Utah, or to act as a salesman for a licensed broker in Utah.
6. That the money paid to the Escrow Agent was paid for and on behalf of the Sierra Madre Oil Company.
7. That defendant has been paid in full the first four payments as by the above mentioned agreement provided, and defendant does not claim any right, title or interest in the other three installment payments.

8. That two of the installment payments of \$13,826.54 each have been paid by the Escrow Holder to the Sierra Madre Oil Company, and the last installment payment of \$13,826.54 is being held in escrow by the Security Title Company.
9. That the Sierra Madre Oil Company claims the other \$13,826.54 installment so held by the Escrow Holder.
10. That on or about the 24th day of May, 1957, defendant orally agreed with plaintiff and Merton E. Baird that they should have the last three installment payments of \$13,826.54 each for services to be rendered in selling the Leases held by defendant with the United States Government above mentioned, and that said plaintiff and Merton E. Baird did render services in the sale of said Leases. By the Pretrial Order made on April 9, 1958, it is made to appear that plaintiff claims the right to a judgment against defendant for the sum of \$41,479.62, and defendant claims that plaintiff is not entitled to a judgment for that, or any other amount, because, among other reasons, the alleged contract is null and void because such a contract is null and void by reason of the provisions of Utah Code Annotated 1953, Section 25-5-4, and because neither plaintiff nor his assignor Merton E. Baird at any time material had a license to do business as a real estate broker in Utah, or to act as a salesman for a licensed broker in Utah as provided in Chapter 2 of Title 61, Utah Code Annotated 1953 (R. 44-46).

As Conclusions of Law the Court below concluded:

1. That the provisions of Utah Code Annotated 1953, 25-5-4, are not available as a defense to the action of plaintiff for the reason that by the letter dated August 8, 1957, defendant ratified and became bound by the oral agreement theretofore entered into.

2. That plaintiff is not entitled to recover any judgment against defendant because neither he nor his assignor at the time complained of had a license to do business as a real estate broker in Utah, or to act as a salesman for a licensed broker, as required by Chapter 2, Title 61, Utah Code Annotated 1953 (R. 47).

Appellant in his appeal does not attack any of the Findings of Fact, but confines his attack to the above mentioned Conclusions of Law No. 2.

Defendant offered, and there was received, testimony on its behalf which is in direct conflict with the foregoing testimony offered and received in behalf of plaintiff.

However, it is respondent's contention that evidence received in support of plaintiff's claim, even if believed in its entirety, the same fails to show that he is entitled to the relief prayed for or to any relief.

It should be noted that the leases which form the subject matter of this controversy contain this provision:

"The lessee is granted the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits, except helium gas in the land leased, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipelines, reservoirs, tanks, pumping stations, on other structures necessary to the full enjoyment thereof, for a period of 5 years, and so long thereafter as oil or gas is produced in paying quantities."

## ARGUMENT

### ANSWER TO POINT I.

A. THE FOREGOING EVIDENCE AND RECORD SHOWS THAT THE PLAINTIFF WAS A REAL ESTATE BROKER AND NOT A MIDDLEMAN IN PERFORMING THE ACTS WHICH HE CLAIMS TO HAVE PERFORMED IN CONNECTION WITH THE SALE OF THE LEASES INVOLVED IN THIS CONTROVERSY.

The testimony, the Answers to the Interrogatories submitted to plaintiff, the Pretrial Order and the Findings of Fact show that plaintiff and his assignor's claim for compensation for services rendered in the sale of the leases owned by plaintiff were those of a Real Estate Broker, and in no sense those of a middleman. The functions of a real estate broker are to secure a purchaser who is ready, able and willing to purchase the property which the broker is authorized to sell. *Curtis v. Mortensen*, 1 Utah (2d) 354, 267, Pac. (2d) 237; *Hoyt v. Wasatch Homes, Inc.*, 1 Utah (2d) 9, 161 Pac. (2d) 927. It is when, and only when, he has accomplished that result pursuant to a written contract as provided by U.C.A. 1953, 25-5-4, *subdivision 5 thereof*, that he is entitled to a commission. It is there provided that:

"Every agreement authorizing or empowering an agent or broker to purchase or sell real estate for compensation must be in writing."

Appellant in his Brief has cited a number of cases, which, it is claimed, show that plaintiff was a mere middleman. Counsel has not in his Brief seen fit to direct attention to the facts which form the basis for the claims that appellant was

a mere middleman. We shall, therefore, content ourselves with the statement that none of the cases there cited support or tend to support the claim that appellant and his associates were mere middlemen. Quite the contrary. The only case cited by Appellants which sheds light on the question as a middleman is that of *Vander Sluys v. Finfrock*, 103 S. 730. (La. 1925).

Other cases and authorities dealing with the question where one who performs services in connection with the sale of property belonging to another is a broker is discussed in 8 *Am. Jur.*, Sec. 14, page 997, *et seq.* It is there said:

"The essential and basic feature underlying the relation of a broker to his employer is that of agency, and the principles of law applicable to principal and agent govern their respective rights and liabilities throughout. The mere fact that by the terms of his employment a broker is to receive as compensation for his services all that he can secure above a fixed price placed upon the property to be sold does not render his undertaking a joint venture with his principal or otherwise change the character of his relation to the latter.

"A contract by a landowner giving another an option on land at a stipulated price, under which the landowner agrees to show the land to any customer secured by such other person and to pay him as a commission whenever he furnishes a customer far over the stipulated price is a contract to pay a commission, not an option to buy."

Of similar import is the text in 12 *C.J.S.*, page 6, under the heading: "Real Estate Broker or Agent." Numerous cases are cited in footnotes to the text.

An examination of such cases shows that Appellant was at the time here involved a real estate broker. No useful

purpose will be served by analyzing the numerous cases there cited. We direct the attention of the Court to the case of *Goody v. Maryland Casualty Co.*, 25 Pac. (2d) 1045, 53 Idaho 523, as showing the trend of judicial authority. The act there construed is similar to the provisions of *U.C.A.* 61-2-1 and 61-2-2. The Idaho statute also has a provision similar to *U.C.A.* 1953, whereby one act of buying or selling for compensation shall constitute one so buying or selling a real estate broker.

#### B. THE UTAH STATUTES APPLY TO TRANSACTIONS HAD IN OIL AND GAS LEASES.

It will be noted from the Utah Statute which is quoted on page 7 of Appellant's Brief that almost all conceivable transactions that have to do with real estate are expressly included within the definition of a real estate broker. It includes transactions when a fee or commission is to be paid for services rendered in the sale, exchange, purchase, rent, lease or listing, or offer or attempt or agreement to list, or auctions, or offers or attempts or agrees to collect rentals for the use of real estate or who advertises or holds himself . . . out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate or assists or directs in the procuring of prospects or the negotiating or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate.

Appellant cites in his Brief at page 9 thereof and quotes from the provisions of 12 *C.J.S.* 14, wherein it is provided that the statute was enacted to protect the public in the handling by agents of important and valuable transactions relating to

real property. We can conceive of no reason why people who are the owners of gas and oil leases are not in need of and entitled to protection the same as other people who are the owners of other kinds of real estate. If there should be any doubt of such need, the evidence in this case should dispel any such doubt. Here plaintiff is seeking to recover \$41,479.62 founded upon a claim of an oral agreement to which he, at most, rendered service of a value of a few dollars.

Appellant cites in support of his claim the case of *Anderson v. Johnson*, 108 Utah 417, 160 Pac. (2d) 725. The facts in that case are not comparable to the facts in this case. In the *Anderson v. Johnson* case, *supra*, the agreement was between a broker and his employee. The broker was not the owner of the property there involved. Johnson merely agreed to pay Anderson for securing the listing of property for sale. In this case it is claimed by Appellant that he should recover compensation from Respondent, who was the owner of the leases. It is readily understandable that the statute was not intended to protect a real estate broker touching a contract for services rendered by his employee. In this case Appellant is not seeking to recover for services rendered to a broker who does not own the property involved, but he seeks to recover from the owner of the property. It is apparent that the act is intended to protect the property owner and not brokers.

C. THE INTERESTS OF RESPONDENT IN THE OIL AND GAS LEASES HERE INVOLVED ARE REAL ESTATE, AND EVEN IF THE SAME ARE NOT REAL ESTATE, ONE DEALING IN SUCH LEASES IS WITHIN THE PROVISIONS OF U.C.A. 1953, 61-2-1 AND 61-2-2.

In the case of *Dabney v. Edwards*, 5 Cal. (2d) 1, 53 Pac. (2d) 962, there is a lengthy discussion of when an oil and gas lease is real estate. Numerous cases are there cited and analyzed from the State of California and elsewhere. It is there held that a lease which provides for a definite term of years is not included in the term real estate, but that when a lease contains the further provision that the lease is to continue so long thereafter as oil and gas, or either of said substances is produced therefrom, in quantities sufficient to pay to pump or otherwise secure and save them, in such case the lease is real property. See: *Pac. Rep. page 966*. Such, it is said, is the common law. Some of the other cases cited by Appellant are to the same effect. None of such cases hold to the contrary. It will be noted that the leases here involved were to continue so long as gas or oil was being secured in paying quantities.

We shall not discuss such other cases because one dealing in leases is a real estate broker, if and when he sells a lease for the owner thereof without regard to whether or not such lease is real property as that term is defined at common law.

As a further ground for sustaining the judgment of the lower Court Respondent contends that:

THE TRIAL COURT ERRED IN HOLDING THAT THE PLAINTIFF BELOW, APPELLANT HERE, IS NOT BARRED FROM RECOVERY BECAUSE OF THE PROVISIONS OF UTAH CODE ANNOTATED 1953, 25-5-1 AND 25-5-4, SUBDIVISION 5.

*Utah Code Annotated* 1953, 25-5-1, in substance provides that no estate or interest in real estate other than leases for

a term not exceeding one year shall be granted except by an instrument in writing subscribed by the party granting the same, or his agent, authorized in writing.

*Utah Code Annotated* 1953, 25-5-4, subdivision 5, provides that every agreement authorizing or empowering an agent or broker to purchase or sell real estate for compensation must be in writing. It is a well settled principle of statutory construction that words dealing with the same subject matter must be given the same meaning. 50 *Am. Jur. sec.* 349, page 345, *et seq.*, and cases cited in footnotes.

Applying this principle in this case, the use of the term "real estate" as used in the various statutory provisions cited in Appellant's Brief and in this Brief should be construed to mean the same kind of property. The leases here involved contained a provision that the same should extend "for a period of five years and so long thereafter as oil or gas is produced in paying quantities." (See copy of Lease).

This Court is committed to the doctrine that before recovery may be had for services rendered in the sale of real property, such services must be rendered pursuant to a written agreement. *Chase v. Rolph*, 56 Utah 243, 188 Pac. 640; *Smith Realty Co. v. Diepietro*, 77 Utah 176, 292 Pac. 915; *Miffin v. Shikki*, 77 Utah 190, 293 Pac.; *Bernard v. Hardy*, 77 Utah 218, 293 Pac. 12. Other cases from other states will be found cited in the foregoing Utah cases.

During the course of the trial of the case below the case of *Ney v. Harrison*, 299 Pac. (2d) 1114, 5 Utah (2d) 217, was cited as having overruled the other Utah cases above cited.

As we read that case it does not overrule the doctrine that there must be a written memorandum pursuant to which the service is rendered. The case of *Ney v. Harrison, supra*, does not, as we read it, cast any doubt upon the law to the effect that to recover a broker's fee for services rendered, that such services must be performed pursuant to a written contract. It is made to appear in the case of *Ney v. Harrison, supra*, that the plaintiff in that case had a written agreement signed by the owner of the property there involved at the time he rendered the service.

It is submitted that the judgment in his case should be affirmed with costs.

Respectfully submitted,

WILLARD R. HUNTSMAN and  
ELIAS HANSEN

721-726 Continental Bank Building  
Salt Lake City 1, Utah

*Attorney for Respondent*