

1955

Wallace R. Smith dba Smith Realty Company v. C. Taylor Burton : Brief of Respondent and Cross-Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

APR 14 1965
Clerk, Supreme Court, Uts

WALLACE R. SMITH, dba SMITH
REALTY COMPANY

Plaintiff and Appellant

— vs. —

C. TAYLOR BURTON,

*Defendant, Respondent, and
Cross-Appellant.*

**BRIEF OF RESPONDENT AND
CROSS-APPELLANT**

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- (a) *A transfer of the duplex to plaintiff was the entire commission for sale or exchange of the remaining two duplexes, unless a cash sale were made, in which event plaintiff could retain such excess of money over \$17,000.00 as further commission. No cash sale was made and no money received, which could be retained. Hence, no further commission became due plaintiff* 13

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IN THE SUPREME COURT of the STATE OF UTAH

WALLACE R. SMITH, dba SMITH
REALTY COMPANY,

Plaintiff and Appellant,

— vs. —

C. TAYLOR BURTON,

*Defendant, Respondent and
Cross-Appellant.*

Case No. 8302

BRIEF OF RESPONDENT AND CROSS-APPELLANT

PRELIMINARY STATEMENT

Respondent and cross-appellant, C. Taylor Burton, is cross-appealing to the Supreme Court of the State of Utah from that part of the Findings of Fact, Conclusions of Law, and Judgment of the Honorable Joseph C. Jeppson dated the 17th of November, 1954, which award to plaintiff the sum of \$2,000.00, together with interest and costs and this Brief is

filed in support of such cross-appeal and as an answer to appellant's Brief hertofore filed on his appeal.

Throughout this Brief, appellant will be referred to as plaintiff and respondent and cross-appellant will be referred to as defendant. All italics are ours.

STATEMENT OF FACTS

To the extent that defendant does not disagree with the Statement of Facts made in plaintiff's Brief, he will refrain from repeating such facts, and will confine his statement to facts as to which he may disagree with plaintiff or which he feels were omitted by plaintiff.

On January 31, 1953, plaintiff, as broker negotiated an exchange of seven duplexes and certain personal property, subject to outstanding indebtedness, belonging to defendant, for a certain ranch belonging to Elder, subject to a mortgage, Exhibit No. 1. No values of any properties are mentioned therein, but a value of \$19,000.00 per duplex, for *trade purposes only* was assigned by defendant, (R.243), which was a *fictitious value and greatly in excess of the real or cash value* (R.25, 28, 29, 30, 31, 40, 46, 49, 69, 243).

There existed no listing on the Elder property prior to the exchange (R.44, 45) and instead of the usual brokerage charge, plaintiff and defendant entered into a special written agreement, written in ink on the reverse side of Exhibit 1, and later an

amplification thereof, Exhibit 2, under which it was agreed that plaintiff should be paid for his services on the exchange with Elder, Exhibit 1, and for the sale of two remaining duplexes, by transfer of defendant's equity in a third remaining duplex, provided that title to the duplex should be given only when plaintiff should have disposed of the two remaining duplexes. This Agreement, Exhibit 2, also provides that "In the event the broker shall *sell* first party's duplexes for a *sum* greater than \$17,000.00 *net*, then and in event the broker shall be entitled to *retain* such *excess of money* as further Commission compensation for his efforts".

The parties discussed the terms of Exhibit 2 before signing it and it was understood that plaintiff would be entitled to *retain any excess* over \$17,000.00 only if *cash sale*, that *cash sale* was contemplated and not a trade (R. 10, 33).

Being anxious to obtain title to his duplex, (R. 181, 184), on May 1, 1953, plaintiff presented to defendant a proposition to exchange the two remaining duplexes, together with other personal and real properties, subject to mortgages owing on them, plus \$3,000.00 cash, for a ranch adjacent to the Elder property, owned by Frank W. Toone. Plaintiff and defendant discussed the matter and the question of how such commission would become due from defendant to plaintiff for such exchange, including the two duplexes, and how and under what conditions it would become payable. Plaintiff told defendant he could rent the pasture on the ranches for at least \$4,000.00 for the season and since Bur-

ton was short of cash, (R.94) it was agreed that Smith would take the responsibility of renting the property and accept one-half of the rental, not exceeding \$2,000.00, plus the horse, saddle, and bridle as payment in full for the commission on the Toone exchange Exhibit 3, including the two duplexes (R. 34, 35, 193, 194, 191, 229).

Having satisfied himself that he would not have to raise any money for commission, that plaintiff, who wanted to make the deal so he could get title to his duplex, would accept one-half of what he could get as rental, not exceeding a maximum of \$2,000.00, as his commission, *then and only then*, did defendant sign the commission agreement, Exhibit 7. It was signed ahead of the Toone exchange agreement, Exhibit 3, (R. 15, 38).

On May 12, 1953, plaintiff presented to defendant a new commission agreement, prepared by plaintiff for defendant's signature, Exhibit 8, which defendant refused to sign, explaining that it did not conform to their agreement, as it would impose on him an obligation to pay the \$2,000.00 commission, whether plaintiff rented the pastures or not, which was contrary to their understanding and to their written agreement embodied in Exhibit 7. This proposed agreement made no mention of any commission other than the \$2,000.00 as being due Smith (R. 17, 18, 36, 189, 190).

Plaintiff never made claim or even mentioned to defendant the \$4,000.00 or any other amount as additional commission due him under Exhibit 2,

until this action was commenced in December 1953 (R. 37, 231, 232), more than seven months after the last transaction.

The only sale or exchange ever negotiated by plaintiff of the two duplexes was the exchange to Toone under Exhibit 3 (R. 41, 44, 188, 189, 191, 193).

Plaintiff did not lease or rent the pastures to anyone during the 1953 season or at all, nor present a definite offer of lease, and no rental was realized therefrom. (R. 215).

The lower court correctly found that there became due plaintiff, as commission, under the terms of Exhibit 2 (R. 253, Finding No. 5) a duplex subject to an outstanding mortgage, which was later deeded to plaintiff, but that no further commission was earned or became due plaintiff thereunder, since he failed to make a cash sale for more than \$17,000.00.

The court found that defendant and plaintiff entered into the agreement of May 1, 1953, Exhibit 7, and that it was the understanding of the parties at the time of its execution that if plaintiff did not receive \$2,000.00 commission from the rental of the pasture by November 1, 1953, that said sum would be due and payable from defendant to plaintiff, that no part thereof had been paid and that defendant was indebted to plaintiff for the sum of \$2,000.00 (R. 253, in Finding No. 6). Based on said finding the court entered its Conclusions of Law (R. 254) and Decree (R. 255), granting judgment

to plaintiff, for \$2,000.00 with interest at 6% from November 1, 1953 and costs. The court, in Finding #8, (R. 254) found that the commission agreements, Exhibits 2 and 7, did not merge but remained separate and distinct agreements throughout the dealings between plaintiff and defendant.

It is from the finding that it was the understanding of the parties at the time of the execution of Exhibit 7 that if plaintiff did not receive \$2,000.00 commission from the rental of the pasture by November 1, 1953 that said sum would then be due and payable by defendant to plaintiff, and the Conclusions of Law based thereon and the Decree of the court awarding plaintiff said judgment, that defendant and cross-appellant appeals.

Defendant also appeals from Finding #8 (R. 254) aforementioned.

Defendant's chief objection is to the Finding in paragraph 6 of the Findings of Fact that "it was the understanding of the parties at the time of the execution of Exhibit 7, that if plaintiff did not receive his \$2,000.00 commission from the rental of the pasture by November 1, 1953, that said sum would be due and payable from defendant to plaintiff", and to the Conclusions of Law and Decree based thereon.

STATEMENTS OF POINTS RELIED UPON.
FIRST AS TO THE CROSS APPEAL.

POINT I.

COMMISSION AGREEMENT, EXHIBIT 7, DEFINITELY LIMITS PLAINTIFF'S COMMISSION FOR SERVICE IN THE TOONE EXCHANGE DEAL, EXHIBIT 3, TO ONE-HALF OF RENTAL FEE FOR PASTURE FOR 1953 SEASON, UNTIL \$2,000.00 IS SO REALIZED, PLUS A HORSE, SADDLE AND BRIDLE, PLAINTIFF TO RENT THE PASTURE.

- (a) *It was a contingent fee.*
- (b) *The contingency never occurred, the pastures were never rented, and no commission became due.*
- (c) *There is no competent evidence to support the finding and judgment of the lower court against defendant, and such judgment should be reversed and set aside.*

ARGUMENT

POINT I.

COMMISSION AGREEMENT, EXHIBIT 7, DEFINITELY LIMITS PLAINTIFF'S COMMISSION FOR SERVICE IN THE TOONE EXCHANGE DEAL, EXHIBIT 3, TO ONE-HALF OF RENTAL FEE FOR PASTURE FOR 1953 SEASON, UNTIL \$2,000.00 IS SO REALIZED,

PLUS A HORSE, SADDLE AND BRIDLE, PLAINTIFF TO RENT THE PASTURE.

(a) *It was a contingent fee.*

Fortunately, this agreement was committed to writing, signed by both parties, and couched in such clear, unmistakable language as to leave no need or room for parole testimony to explain or construe its terms. It would be difficult for anyone, even a lawyer, in so few words to write a more clear or understandable agreement. Nothing is left in doubt.

The law, in such cases, is elementary, holding as stated in the syllabus of the Utah case of Fox Film Corporation v. Ogden Theatre Company, 1932, 17 P. 2d, 294; 90 A.L.R. 1299:

“In the absence of fraud, or mistake, parole evidence is not admissible to contradict, vary, add to, or subtract from the terms of a valid written instrument which purports to set forth the entire contract of the parties”.

To the same general effect see 20 Am. Juris. 958, 963, 964, 968, 989, 990. At page 991 the following:

“A written agreement dealing with the amount, time, and manner of payment is ordinarily conclusively to be presumed to embody all that element of the oral negotiation.”

Furthermore, plaintiff, if he is to recover at all, must, as stated by this court in Case v. Ralph, 188 P. 640, base his claim on a written instrument covering all terms of his employment, showing his authority to sell, the amount, terms, and conditions upon which his commission is to be paid. The court

there construed a section of our Statute of Frauds, which is now Section 25-5-4, Utah Code Annotated, 1953, which provides:

“Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation”

shall be void unless in writing.

In this case, the entire problem of commission is covered by special agreements, Exhibits 2 and 7. It is not a case of paying the usual broker's commission on values of property sold. All testimony given at the trial on these subjects was clearly incompetent and irrelevant and contrary to the parole evidence rule. In its final determination of the case, the lower court seems to have recognized this and confined itself to construing the two commission agreements, Exhibits 2 and 7. Plaintiff testified that he was accustomed to making special contracts for commission on transactions involving exchange of properties (R. 186, 197, 223). Plaintiff, Smith, was accustomed to handling large ranch deals involving exchanges and to making unusual arrangements for commission, sometimes getting more than the usual commission and sometimes less, sometimes payable in cash and sometimes in property, as in Exhibit 2.

Here, plaintiff was anxious to negotiate a disposition of defendant's two remaining duplexes because only by so doing could he get title to the duplex which was commission for the Elder transaction and on the two duplexes. Remember, he had already collected full commission of \$4,050.00 from Elder

and later also \$2,628.00 from Toone, besides the duplex, with an equity value placed by Smith at \$7400.00, from defendant (R. 210) or a total, including the horse, saddle and bridle, conveyed to him by defendant, value at \$150.00, of \$13,214.45 (R. 211).

Should plaintiff recover what he asks in this action, he would, in effect, be collecting from defendant *three commissions on the two duplexes*, besides collecting in full from the other parties to the exchanges:

1st, \$7400.00 equity in duplex, which covered commission on Elder deal and on two duplexes, which figures considerably over a 5% commission;

2d, the \$4,000.00 plaintiff seeks under Exhibit 2, which would be over a 10% commission on plaintiff's own trade value set on the two duplexes, but over 12% of the real value of approximately \$32,000.00; and,

3rd, The \$2,150.00 cash, a horse, saddle and bridle under Exhibit 7, which would be at a rate of more than $5\frac{1}{2}\%$ of the \$38,000.00 value of the Toone property, or a total commission on the two duplexes of over $22\frac{1}{2}\%$ of their value.

He really hadn't done so badly, and it wasn't unusual or unlikely that he would enter into the contingent fee agreement, Exhibit 7, providing that he would get one-half of the rental on the ranches for the 1953 season until he had realized \$2,000.00 more, and that he would assume the responsibility of renting the ranches. Only by such an arrangement could

he get title to his duplex (R. 181) and besides, he was an old hand at dealing in ranches. He told defendant that he could rent the pasture for \$4,000.00 or \$5,000.00 for the 1953 season (R. 228, 229). He was very confident. Besides he had everything to gain and nothing to lose. He and defendant had full discussion and only after plaintiff agreed to this contingent fee arrangement, did defendant agree to the exchange. (R. 229). There was no discussion about the commission becoming due on November 1, 1953, or at all, if \$2,000.00 were not realized as rent. It would have been pointless for defendant to have written and signed this agreement, limiting his obligation and commission to one-half of the rents collected if in fact he had agreed to unconditional payment by November 1. One looks in vain for any date of November 1, 1953 in Exhibit 7 or for any statement indicating that the commission of \$2,000.00 was to be paid in any event, whether realized from the pasture or not. On the contrary, it is a clear, logical, unambiguous, contingent fee agreement, needing no clarification, entered into by two experienced businessmen with their eyes wide open, and for the distinct advantage of the plaintiff. It is not within the prerogative of the court to attempt to write a new contract for the parties. One might just as well cut the heart out of the human body and expect to have anything left as to cut out of this agreement the contingency element, limiting the amount of commission to one-half of the rent received for pasture, and to substitute therefor an unconditional agreement to pay the commission by No-

vember 1. The agreement of the parties would be completely emasculated and annihilated, bearing no resemblance to their understanding. This the court cannot do.

Every day attorneys are entering into contingent fee agreements on accident and other types of cases. So are real estate brokers. Every time they take a listing on real estate they enter into such a contingent commission agreement. If they sell, they are paid. If not, they get nothing. In this case, if plaintiff rented the pasture for \$4,000.00 he would be paid \$2,000.00. If not, he would get just one-half of all rent received.

Later on May 12, 1953, after thinking it over for nearly two weeks, he concluded to get a better agreement, so presented Exhibit 8 to defendant, providing that he would get his \$2,000.00 in any event. Defendant promptly declined to execute it, telling plaintiff it didn't correspond to their previous agreement (R. 17, 18, 36).

(b) *The contingency never occurred and no commission became due.*

Having established that the commission agreement, Exhibit 7, was a contingent fee agreement, entitling plaintiff to a commission *only out of rent received for pasture during 1953 season*, it simply remains to determine what amount was collected as rent, and what plaintiff's one-half share is.

There is no conflict in the evidence to the effect that no rent was received (R. 215). Since the contingency never occurred, which would entitle plain-

tiff to a commission under Exhibit 7, he was entitled to none, except the horse, saddle and bridle which were conveyed.

- (c) *There is no competent evidence to support the finding and judgment of the lower court against defendant, and such judgment should be reversed and set aside.*

We submit that there is no competent evidence to support the Finding and Decree entered against defendant and that the lower court erred in its finding that defendant owed plaintiff \$2,000.00 and in entering judgment for that amount, and we urge that the judgment be reversed and set side.

SECOND: NOW, AS TO PLAINTIFF'S APPEAL.

POINT II.

THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFF WAS NOT ENTITLED TO \$4,000.00 OR ANY OTHER AMOUNT OF ADDITIONAL COMMISSION FROM DEFENDANT, BEYOND THE DUPLEX, UNDER THE COMMISSION AGREEMENT OF FEBRUARY 17, 1953, EXHIBIT 2.

- (a) *A transfer of the duplex to plaintiff was the entire commission for sale or exchange of the remaining two duplexes, unless a cash sale were made, in which event plaintiff could retain such excess of money over \$17,000.00 as further commission. No cash sale was made and no money received, which could be retained. Hence, no further commission became due plaintiff.*

ARGUMENT

POINT II, AND PARAGRAPH (a) THEREOF.

We think the trial court erred in finding, Finding #8, (R. 254), that the two agreements, numbers 2 and 7, did not merge but remained separate and distinct agreements throughout the dealings between plaintiff and defendant. In our opinion, Exhibit 2 merged in Exhibit 7 or was superceded and replaced by it as to the part involving any additional commission which might become due for sale of the two duplexes, but that will be argued later in this Brief. The court did find that Exhibit 2 provided for additional commission for sale of the two duplexes *only if sold for more than \$17,000.00 cash each; that no such sale was made and therefore no additional commission became due.* We shall limit this part of our argument to support of the court's finding in this respect and in opposition to plaintiff's appeal therefrom.

The trial court based its decision, denying plaintiff additional compensation on an interpretation of the memo on the back of Exhibit 1 and the agreement of February 17, 1953, Exhibit 2. We think it was correct in this interpretation. As plaintiff says in his Brief, these must be considered together. The first memo nowhere refers to "exchange", but only to "sale". No reference is made to any additional commission to plaintiff beyond the duplex. The addition of the words "will accept reasonable terms", does not imply an exchange, but merely that the cash might be accepted on reason-

able terms. Plaintiff certainly can get no comfort or support from this original agreement. Plaintiff cites, at page 8 of his Brief, as authority to show that this is a sale rather than an exchange, the Utah case of Blackburn vs. Bozo, but this case is clearly distinguishable on its facts, from the one at bar. There, after providing for sale for cash, it said:

“Or any other terms that may be agreeable to me”.

The court held the broker was entitled to commission. That was clearly different from our case. Exhibit 1 referred only to “*sale*”, which necessarily must be presumed to be for cash, and merely adds: “Will accept reasonable terms”, which clearly means cash terms, and our parties passed on to Exhibit 2, seventeen days later, to fortify defendant’s position by again referring to “*sale*” and saying that “*excess of money*” could be *retained*. That clearly reaffirmed that a *sale for money* was mandatory as a condition for additional commission. The cases are entirely different.

After plaintiff had had seventeen days to think it over, he prepared and had signed by defendant Exhibit 2. Therefore, in interpreting the contract “it must be construed most strongly against him” as stated in the Utah case of Mifflin v. Shiki, 293 P. 1.

Now what does this greatly disputed document, Exhibit 2, really provide? It seems to us that it really divides itself off into two rather well defined parts. First, it provides for the transfer to plaintiff

by defendant of a duplex as commission for the Elder transaction and future disposition, yet to be made, of defendant's two remaining duplexes. And, second, it provides that if plaintiff sells the two duplexes for a sum greater than \$17,000.00 net each, "then and in event the Broker shall be entitled to *retain such excess of money* as a further commission".

It should be observed that whenever the term "exchange" is used alone or the words "sale or exchange" are used together in said agreement, they refer to the requirement that defendant transfer to plaintiff, title to the duplex and fix the time when and conditions under which he shall do so. In other words, on a *sale or exchange* of the duplexes for \$17,000.00 net, the deed must issue, but,—and this is important—in the part of the agreement referring to possible additional commission, we find no use of the word "exchange", but only the words "sale" and the provision that such commission shall be realized by permitting plaintiff to "*retain such excess of money*". Plaintiff must look to this one sentence alone for his rights. These words, taken together, can mean only a "*sale*" and not an "*exchange*".

One can retain only something which has theretofore come into his possession. He could retain only "*such excess money*". No money had come into plaintiff's possession. How then could he retain it? Fortunately we are not left in the wilderness by the courts on this distinction between "*sale*" and "*exchange*."

Perhaps our best Utah case on the subject of broker's commission defining "*sale*", which is based upon facts quite similar to ours, is *Watson v. Odell*, 198 P. 772. It says:

"A sale is ordinarily understood to mean a transfer of property for money".

Further, "No commission was payable except in the event of a consummation of a sale, and no commission was payable except as the purchase price was paid. These contracts required more from the plaintiff than merely to find a purchaser able, willing, and ready to buy. The actual payment of the purchase price was required, and only after the purchase price was paid were the commission installments due and payable * * *. Under our statute the plaintiff could recover his commission only by virtue of his contract. He could not recover on quantum meruit".

In our case, plaintiff could recover, if at all, only under a special contract and only by retaining part of *money* collected. He collected none. There was no money to retain.

In the case of *Mifflin v. Shiki*, *supra*, a case very similar to this one it is said, in the syllabus and body,

"Contract must be construed more strongly against one preparing it".

"Broker effecting exchange of properties, instead of sale, cannot recover commission unless written contract specifically provides therefor".

Again,

"Neither did the court err in considering the contract as being one for sale rather

than for an exchange, and that the commission of 10% (which is much higher than the usual commission charged by real estate brokers for such service) was payable to the broker only upon procuring a purchaser for a *money consideration*".

Plaintiff's Brief, at page 11, cites the California case of Robbins vs. Pacific Eastern Corporation as authority for claiming that an exchange is in fact two sales. That case is no authority in the case at bar, because it is based entirely on a California statute. Utah has no similar statute.

The Wyoming case of Murphy v. W & W Livestock Company, 189 P. 857 holds:

"Where by the contract of employment, the commission is made upon certain conditions and contingencies, as upon the actual consummation of the sale, or the full payment of the purchase money * * * these stipulations will govern, and a fulfillment of performance of the prescribed conditions is generally essential to the right to compensation".

In Lindley v. Fay, 119 Cal. 239, 51 P. 333, we find:

"Under the contract of March 7, the commission was to be paid out of proceeds of sale, when received, and unless a payment be made, no commission would be due".

Apple v. Henry, 213 P. 444, a Montana case, quotes with approval from Williamson v. Berry, 12 L. Ed. 1170, wherein the Supreme Court of the United States says:

"Sale is a word of precise legal import, both at law and in equity. It means at all

times a contract between the parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the things bought or sold."

Finally the Colorado court in *Thompson v. Alley*, 238 P. 62 held:

"Broker, suing on contract to pay commission for sale of property, cannot recover thereon, where parties exchanged properties encumbered on both sides, but is limited to compensation on quantum meruit for services performed, such transaction not being a sale".

Nothing was received by the plaintiff for the two duplexes and the only thing received by defendant for them, other ~~than~~ personal and real property and \$3,000.00 cash, was a ranch, one indivisible piece of property. No part of that could be retained by plaintiff and the only way he could get his claimed \$4,000.00 additional commission, would be for defendant to advance that much cash, a burden he might not be able to discharge. Plaintiff testified that defendant didn't have any money, because of the two big subdivisions he was developing, (R. 94) and wanted him to take his commission in other than money. Burton testified that the agreement in Exhibit 2 to pay extra commission was based on a cash sale and that a trade or exchange was not contemplated. (R. 10, 33).

Defendant actually received less, even in property, than \$17,000.00 real value or cash equivalent for his two duplexes in the trade with Toone, Exhibit 3. Toone had placed an inflated, fictitious value,

for trade purposes, of \$52,578.00 on his ranch, (R. 25, 29). The real value was only \$38,400.00. (R. 28). The parties were merely trading equities on higher than cash value. (R. 29, 243). He didn't receive as much as \$17,000.00 real value for the duplexes (R. 31, 40). Burton figured the real value of each duplex \$15,250.00 (R. 49). He increased his fictitious trade value on each Toone duplex at least \$3,000.00, to meet Toone's inflated value (R. 29), and the trading price of each of the Elder duplexes was boosted about \$3500.00 (R. 36). Toone finally sold his two duplexes for \$14,750.00 and \$15,000.00 gross, respectively, from which he had to pay 5% commission (R. 30, 69). Smith offered the duplex which he received for \$16,000.00 (R. 31). So, it is conclusively shown that Burton got less than \$17,000.00 real value, even in property, for his duplexes and that the \$19,000.00 fictitious trade value meant absolutely nothing. This destroys all plausibility that he would have made such a deal, if in doing so he would subject himself to the necessity of going out and raising \$4,000.00 spot cash to pay additional commission.

The courts hold that the chief object in construing contracts is to ascertain the intention of the contracting parties and subsequent actions and conduct of the parties may be considered, in arriving at the intention. See *Gladys Belle Oil Company v. Clark, et al*, 296 P. 461, an Oklahoma case, decided in 1931.

Brockway v. Blair, 53 Mont. 531; 165 P. 455.

Burroughs v. Petroleum Development Co. 184 P. 5; 181 Cal. 253.

Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co. 116 P. 707, 16 Cal. App. 198.

Utah Con. Co. v. McIlwee, 266 P. 1094, 45 Idaho 707.

Crowell Elevator Co. v. Kerr Gifford & Co. 236 P. 1047; 114 Ore. 675; Johnson v. Geddes, 161 P. 910; 49 Utah 137.

In this case, when the Toone exchange was being written up and Exhibit 7 executed and later when plaintiff prepared Exhibit 8 he made no mention whatever about being entitled to the \$4,000.00 or any additional commission. It is inconceivable that he would have ignored this if in fact he felt he was entitled thereto, especially since Exhibit 7 clearly states that \$2,000.00 is to be the entire commission for the Toone exchange, which included the two duplexes in question. The testimony is conclusive that this matter was discussed before Burton would agree to the Toone exchange, and it was definitely agreed that defendant was not liable for any more commission for sale of the two duplexes beyond the \$2,000.00 contingent fee referred to in Exhibit 7, and then, and only then, did defendant consent to sign Exhibit 7, and Exhibit 3. (R. 35, 191, 193, 194, 229).

Between February 17, 1953, when Exhibit 2 was executed, and December 1953, when the complaint was filed, not one word was said by plaintiff to defendant about this supposed \$4,000.00 additional commission or about any more commission due except the \$2,000.00 claimed under Exhibit 7

(R. 37, 231-2). Yet he was hounding defendant constantly about the \$2,000.00. If he had really claimed or felt he was entitled to an additional \$4,000.00, he most certainly would have mentioned it and demanded payment of that also. Clearly, this is an afterthought with him.

This should dispose of plaintiff's claim as it was disposed of by the lower court, and the court's decision on this particular matter should be affirmed.

POINT III.

BOTH COMMISSION AGREEMENTS, EXHIBIT 2 AND EXHIBIT 7, REFER TO AND COVER THE COMMISSION TO BE PAID PLAINTIFF FOR THE ONLY SALE MADE OF THE TWO DUPLEXES. THEIR TERMS ARE INCONSISTENT. THEREFORE THE LATTER ONE, EXHIBIT 7, SUPERCEDES AND RESCINDS THE EARLIER ONE, EXHIBIT 2, AND CONSTITUTES THE ONLY AGREEMENT UPON THE SUBJECT ENFORCEABLE BETWEEN THE PARTIES.

- (a) *Exhibit 7 was a contingent fee agreement. The contingency never occurred, and no commission became due plaintiff thereunder.*

ARGUMENT

POINT III AND PARAGRAPH (a) THEREOF.

There is no dispute whatever in the testimony to the effect that there was only one sale of the two

duplexes by plaintiff, ie: the Toone exchange, Exhibit 3, and that no rental was received from the pasture during the 1953 season.

Furthermore, no one can question that Exhibits 2 and 7 both refer to the same subject, ie: the commission to be paid plaintiff for the sale of the two duplexes, and that they are inconsistent on that subject. The first one, Exhibit 2, provides that plaintiff shall be entitled, in the event of a “sale” to “*retain the excess of money*” over \$17,000.00 net, while the second one, Exhibit 7, which refers to the only disposition ever made of the two duplexes, ie: the Toone exchange, Exhibit 3, says that as payment in full for the exchange of, among other property, the two duplexes, plaintiff shall receive a contingent fee of \$2,000.00.

To the extent of this inconsistency, the law is well settled that the later one rescinds and supercedes the earlier one and to that extent the earlier one is merged in the later one.

Our own Supreme Court has settled this so far as Utah is concerned in the case of Orpheus Vaudeville Co. v. Clayton Inv. Co. 128 P. 575, in the following language:

“In support of the first ground, counsel for respondent vigorously insist that the transaction between the parties to this case is governed by the following rule, to-wit: That where the parties to an existing agreement subsequently enter into a new one completely covering the same subject-matter contained in the first and the later agreement contains terms inconsistent with the first one

so that the two cannot stand together, the legal effect of the later agreement is to release and supercede the former, and the later one constitutes the only agreement upon the subject enforceable between the parties.

The rule that there cannot be two inconsistent, enforceable agreements between the parties covering the same subject-matter is elementary."

See to the same effect: The Idaho case of Bruce v. Oberbillig, 268 P. 35; Housekeeper Pub. Co. v. Swift (C.C.A.) 97 F. 290; Bourn v. Dowdell, 50 P. 695; Youngberg v. Warehouse Company 171 P. 97.

It is well put in the syllabus to Gladys Bell Oil Company v. Clark, *supra*,

"A written contract may be discharged, rescinded, altered, or changed at anytime before performance thereof is due, by the execution of a new agreement in writing and, when such is done, the terms and provisions of the new agreement govern as to the rights of the parties thereto".

The Washington Supreme Court has thus spoken, in Smith v. Cadillac Motor Car Company, 277 P. 453:

"It is undoubtedly the law that the legal effect of a subsequent contract between the same parties and covering the same subject matter as an earlier agreement between them containing terms inconsistent with the prior contract so that the two cannot stand together is to rescind the earlier contract".

Sherman v. Sweeney, 29 Washington 321, 69 P. 1117.

Having heretofore, in this Brief, analyzed the evidence having to do with the execution of Exhibits 2 and 7, and surrounding circumstances, including the conversation at the time of the execution of Exhibit 2, to the effect that the additional commission on the two duplexes was based on a cash sale; the conversation which preceded the signing of Exhibit 7 and then Exhibit 3, to the effect that defendant would not agree to the Toone exchange until it was thoroughly understood and agreed that the \$2,000.00 contingent fee provided in Exhibit 7 was the total commission to be paid for sale of the two duplexes and other property in said transaction; and the fact that plaintiff never once referred to or demanded the \$4,000.00 or any other commission except the \$2,000.00 until this action was filed, we shall refrain from repeating same and simply refer the court thereto in support of this point in our Brief.

We maintain that the trial court was correct in its interpretation of Exhibit 2, so far as it applies to the necessity of a *cash sale* or *sale for money*, to entitle plaintiff to the commission he seeks and since none was made, plaintiff became entitled to none.

However, we go further, and say that plaintiff has a further and insurmountable hurdle which he cannot negotiate, ie: even if he could, by any stretch of the imagination, be held, except for Exhibit 7, to have performed under Exhibit 2, so as to be entitled to an additional commission, he is estopped to claim it, because, before he disposed of the two duplexes, he entered into the agreement, Exhibit 7, covering the same subject; that the two agreements are in-

consistent, and that the later one prevails and rescinds and supercedes the earlier one and he can look alone to Exhibit 7.

As is pointed out in great detail in Point I of this Brief, plaintiff never performed the contingency which would entitle him to a commission under Exhibit 7.

CONCLUSION

Defendant respectfully submits:

(a) *That the lower court erred in its findings and decree awarding plaintiff a \$2,000.00 judgment under Exhibit 7, and that the decision on this point should be reversed.*

(b) *That the trial court correctly construed Exhibit 2, to require a sale for cash or money to entitle plaintiff to further commission, and correctly found that no such sale was made and that therefore no commission became due plaintiff under Exhibit 2. The judgment on this point should be affirmed.*

(c) *That the lower court erred in its finding #8, that Exhibit 2 and Exhibit 7 did not merge but remained separate and distinct agreements throughout the dealings between plaintiff and defendant. That on the contrary, Exhibit 2 was rescinded and replaced by Exhibit 7 and to the extent of this inconsistency, merged with Exhibit 7, and that plaintiff never performed under Exhibit 7 so as to entitle him to any further commission, either the*

*\$4,000.00 claimed under Exhibit 2 or the \$2,000.00
claimed under Exhibit 7.*

Respectfully submitted,

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Received three copies of the foregoing Brief
this day of April, 1955.

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By.....