

2007

# Young v. Buchanan : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

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

N. J. Bates; Attorney for Appellant.

Dilworth & Woolley; Attorney for Respondent.

---

## Recommended Citation

Brief of Appellant, *Young v. Buchanan*, No. 7844.00 (Utah Supreme Court, 2007).

[https://digitalcommons.law.byu.edu/byu\\_sc2/2683](https://digitalcommons.law.byu.edu/byu_sc2/2683)

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

DOCUMENT  
KFU  
45.9  
.S9  
DOCKET NO.

STATE SUPREME COURT  
BRIEF

1952

7844A

---

## In the Supreme Court of the State of Utah

---

W. R. YOUNG,  
Plaintiff and Respondent,  
  
ERNEST H. BARDSLEY,  
Impleaded as a  
Plaintiff  
  
-vs-  
  
RAY H. BUCHANAN,  
Defendant and Appellant.

---

### APPELLANT'S BRIEF

---

DILWORTH & WOOLLEY,  
Attorneys for Respondent.  
  
N. J. BATES,  
Attorney for Appellant.

---

---

# In the Supreme Court of the State of Utah

---

W. R. YOUNG,  
Plaintiff and Respondent,

ERNEST H. BARDSLEY,  
Impleaded as a  
Plaintiff

-vs-

RAY H. BUCHANAN,  
Defendant and Appellant.

## **APPELLANT'S BRIEF**

DILWORTH & WOOLLEY,  
Attorneys for Respondent.

N. J. BATES,  
Attorney for Appellant.

There is, in the record, testimony tending to support the following facts upon which respondent relies in support of the judgment.

On or prior to June 12, 1949 a written instrument, purporting to be a listing agreement, was executed by the plaintiff in his own name and defendant in form as set out in plaintiff's amended complaint, the material parts of the instrument being:

"In consideration of your agreement to list the property, described on the reverse side of this contract, with you during the life hereof, and to use your best efforts to find a purchaser therefor, I hereby grant you for the period of six months from date hereof, the exclusive right to sell or exchange said property or any part thereof, at the price and terms stated hereon, or at such other price, terms or exchange to which I may agree.

"During the life of this contract, if you find a buyer who is ready, able and willing to buy said property, or any part thereof at said price and terms, OR ANY OTHER PRICE OR TERMS TO WHICH I MAY AGREE IN WRITING, or if I agree to an exchange of said property or any part thereof, or if said property or any part thereof is sold or exchanged during said term, firm or corporation, I agree to pay you \$500.00 commission on such sale or exchange, or, if it is sold or exchanged within three months after such expiration to any person to whom you have previously offered it, I agree to pay you the commission above stated; and in case of the employment of an attorney to enforce any of the terms of this agreement, agree to pay a reasonable attorneys fees and all costs of collection.

Accepted June 12, 1949 by (Signed)

W. R. Young.

Dated at Richfield, Utah .....19.....

(Signed) Ray H. Buchanan, Owner."

Nothing appears in the instrument and nothing was said by plaintiff at the time of the listing as to whether or not he was a real estate broker or real estate salesman or otherwise; that Plaintiff was in fact a real estate salesman. (Trans. p. 39) Prior to the signing of the sales agreement he had a conversation with a real estate broker, E. H. Bardsley as follows: (Trans. p. 56-57) Bardsley testified.

“I had paid my state license and my bond for my commission. Mr. Young came to the office and wanted to know if he could write under my commission. I told him I only renewed my license so that the next year if I wanted to sell real estate it would only cost me half the price that it would if I let pass by, but I didn't intend to make any effort to sell real estate during the year 1949 and he asked me if he could sell under my license and I told him yes, with this understanding that he was to be responsible for all sales and that all contracts must go to an attorney, that I wasn't to be implicated in any way whatsoever through court or otherwise and he was to have all that was made as commission.”

It also appears that Bardsley did not renew his license after January 1st, 1950. (Trans. p. 50).

“After the execution of the purported listing agreement and during the year 1949 Mr. Young talked with Cecil King a number of times relative to his buying the Buchanan place but Mr. King was not interested at the price listed \$17,500.00 and nothing definite came of it.” (Trans. p. 13, 14, 15)

“In the last half of January, 1950 Mr. Young talked with Buchanan. Mr. Young testified that he told the de-

defendant that King was interested in the place but the price was too high; that he tried to get King to come. Ray asked me to continue my efforts to sell the place at \$17,500.00 (Trans. p. 19)

About the 1st to 4th of March, 1950 Ray said tell the man (Wegener) We'll take \$16,500.00" (Trans. p. 21).

Young also testified he communicated the information to King that the price had been reduced (Trans. p. 22). "King said it looked a lot better that he'd take a look at it." Young further testified that he took Wegener down to look at the place the fore part of March. Ray and his wife and Cecil King and his wife were there (Trans. p. 27) "I said to Cecil, 'Cecil are you going to buy this place'. He said, 'I think I am.' I said remember my listing is still in effect.' He said, 'I know it.'"

Mr. Buchanan sold the property to Mr. King for \$16,500.00; \$1,000.00 was paid in February 1950 and the remaining \$15,500.00 when the deed was delivered.

The following facts are controlling and entitle the defendant to a reversal of this case:

1. The listing was not with a real estate broker, neither in form nor in fact. Neither was it a listing with a real estate salesman. The contract, if any, was entered into with W. R. Young personally and without reference, either in writing or orally, to any real estate broker or real estate salesman. (Trans. p. 39)

2. Mr. Bardsley when he told Mr. Young that Young could write under his license, made it definite that Mr. Bardsley was not to be implicated in any way in Court or otherwise. That is Young could write under the Bardsley license but Bards-

*Young*

ley, the only person under bond and authorized to sell real estate and assume the responsibilities of a licensed broker, specifically refused such responsibility.

3. No sale of the property nor any contract for the sale of the property was entered into during the year 1949. The Bardsley Brokerage license expired at the end of 1949. His right to sell real estate as a broker ceased and necessarily any right of Mr. Young to sell under the license came to an end with the expiration of the license.

4. There is testimony in the record to the effect that in 1950, Mr. Young worked under a real estate brokers license issued to C. W. Powell. But that is immaterial because:

*Young*

- A. Any right existing under the Bardsley license expired with the license.
- B. There is nothing in the record to show any attempted transfer or rights to Powell of any duties accepted by him with reference to the Buchanan listing with Young personally in 1949.
- C. No sale was made or contract entered into while the Bardsley license was valid. No right could be transferred to Powell by Young and none was transferred to Powell by Bardsley. If there had been, the expiration of the Bardsley rights under his license would have the listing under his license.

*Mr. Young, in the right instance*

5. The purported listing contract expired December 12, 1949. December 31st, 1949 Mr. Young's salesmanship license under Mr. Bardsley automatically expired and there was no renewal.

6. In January Alice Buchanan told Mr. Warner, another real estate Broker, that the listing was still with Mr. Young. But in view of the fact that Young's license with or under Mr. Bardsley had expired and because of her not being party to any contract the statement is immaterial.

The entire transaction was handled in harmony with Mr. Young acting independently of any Broker.

The purported contract was signed by Mr. Young and Mr. Buchanan as individuals, nothing being said by Mr. Young about his arrangements with Mr. Bardsley, No where in the record is there any evidence of Mr. Young indicating to any one that he was a real estate salesman acting under a broker.

The complaint, the summons, the amended complaint of the plaintiff and the pleadings of the defendant, including motions and answers to complaint, are all drawn showing that Mr. Young was the only interested party in the transaction and the only party asking judgment against the defendant. The case came to trial October 3rd, 1951. The trial was conducted on the theory that Young was the only interested plaintiff and the person entitled to judgment against Buchanan. But at the conclusion of Plaintiff's testimony on the merits of the case Plaintiff interrogated Mr. Bardsley and then asked leave in open Court to amend the complaint so as to make Bardsley a party plaintiff with Young and asking that judgment be that the plaintiff Bardsley have judgment against the defendant for the use and benefit of plaintiff W. R. Young (Trans. p. 58-59). The motion was granted in open Court and on the 5th of October, 1951 plaintiff filed an amended complaint in which Mr. Bardsley was impleaded as a plaintiff praying for judgment in favor of Ernest H. Bardsley for the use and benefit of W. R. Young.

Thereafter the said Bardsley personally and by his Counsel, Carvell Mattsson, on the 8th day of November, A.D. 1951 moved the court for an order dismissing him

from the action and eliminating his name as a party thereto, and alleging that he has no interest in the subject matter; that he did not file any complaint and did not ask leave to become a party or authorize any one to make application or to act in his behalf (See motion filed Nov. 8, 1951.) The motion was denied. Findings of fact conclusions of law and judgment were entered on the 20th day of February, 1952 and a further order entered denying Bardsleys motion.

The judgment entered February 20, 1952 is that Plaintiff E. H. Bardsley, for the use and benefit of the plaintiff W. R. Young, do have and recover of and from the defendant R. H. Buchanan etc. The proceedings do not in any manner change the effect of the purported judgment. If it is anything it is Young's judgment. There is no complaint filed by Bardsley, amended or otherwise, asking for or seeking a judgment in favor of and for his benefit. Mr. Young is still the active moving party in the case and is the real beneficiary of any judgment entered and enforced against defendant and appellant.

When Mr. Bardsley talked with Mr. Young, he specifically provided under the undisputed evidence of Young and Bardsley that he was not to be implicated in any way whatsoever through Court or otherwise; that he did not intend to sell real estate in 1949, and that Young was to be responsible for all sales. The expression ("Young could sell under his license") became meaningless and the relationship is unknown to the law.

When Bardsley learned of judgment entered he employed counsel to secure a dismissal from the action. The motion was denied. He was named as another plaintiff and

thereby is made the stooge or dummy by which plaintiff proposes to enforce rights against the defendant which he did not in fact have and which he has no right to assert, legally or otherwise.

The Statute in force at the time of these transactions provided:

“It shall be unlawful for any real estate salesman to accept a commission or other valuable consideration for the performance of any of the acts herein specified from any person except his employer who must be a licensed real estate broker.”

Section 82-2-10 U.C.A. 1943.

Had Mr. Buchanan offered to pay a valuable consideration or commission to Mr. Young for the acts Young alleges and claims he performed for Mr. Buchanan, it would have been unlawful for Young to receive it. How can there be valid judgment enforcing the unlawful act. If Young could not voluntarily receive, how can he be beneficiary of judgment in his favor?

Agreements in violation of positive law are illegal and void: 17 C.J. Section 555, under “contracts”.

“Courts will not enforce a cause of action arising out of an illegal transaction nor entertain an action for a division of the proceeds of such transaction. This is undoubtedly the rule, and this Court has gone farther, holding that not only must the action fail where the evidence of plaintiff discloses that his cause is based on an illegal or immoral transaction, but that the defendant may allege and prove the illegality or immorality of the transaction and the Court will then refuse its aid to either party, leaving them where it finds them.”

Obradovitch v Walker Brothers Bankers  
80 Utah 587-602

Haddock v Salt Lake City, 23 Utah 521

“No principle of law is better settled than a party to an illegal contract cannot come into a Court of Law and ask to have his illegal objects carried out. Nor can he set up a case in which he must necessarily disclose an illegal purpose as the Ground Work of his claim.”

13 C. J. Page 492, Section 440, Contracts.

The Statutes further provide:

“Any person violating any of the provisions of this chapter is guilty of a misdemeanor, and . . . shall be punished by a fine of not less than \$50.00 and not more than \$299.00, or by imprisonment in the County jail not to exceed six months, or by both such fine and imprisonment.”

It might well be suggested that the favor Buchanan did Young in refusing to make the demanded payment probably kept him out of jail for a term for which, in equity and justice, Mr. Young might well reimburse Mr. Buchanan, at least to the amount of the fine that might have been levied on him.

It is also provided in Section 82-2-3:

“The term real estate salesman shall mean and include any person employed or engaged by or on behalf of a licensed real estate broker to do or deal in any act or transaction set out or comprehended by the definition of a real estate broker in section 82-2-2 for compensation or otherwise.”

and by 82-2-3:

“A real estate broker includes all persons..... who for another and for a fee, commission or other valuable consideration or who with the intention or expectancy or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells or offers to sell real estate . . . .”

The testimony of Mr. Young is that he was a licensed real estate salesman. As to the employment, his employer, E. H. Bardsley, testified that Young inquired of him if he could write under Bardsley's commission and Bardsley told Young he could sell under his license with the understanding that he, Young, was responsible for all sales and that he, Bardsley, was not to be implicated in any way through Court or otherwise. There is no other evidence relative to the employment of Young by Bardsley.

If that conversation constituted Young a real estate salesman under Bardsley, then it follows that Young was in fact in the employ of Bardsley and he had no right to receive compensation from Buchanan. The purported listing contract entered into by Young in his own name, if it had any effect, created a listing agreement with Bardsley and Young had no right to enforce it.

Although Bardsley stated to Young that he was to have the commissions, it could not create a privity of contract between Young and Buchanan because that would be a violation of the statutory provisions that the real estate salesman had no right to enforce.

If Young was in fact a real estate salesman employed by Bardsley, then although there is no evidence of the further facts, it would have to be assumed that he otherwise complied with the Statutory provisions relative to salesmans license; That is that he, in addition to his application, stated who his last employer was, the length of time he had been engaged, the name of the person then employing him and the name of the person whose employ he is about to enter, and that his application was accompanied by a state-

ment from Bardsley recommending that the license be granted. The license would have been issued showing the name of the real estate broker and would have been mailed to the broker and kept in the custody and control of Mr. Bardsley. When Mr. Bardsley's brokers license was revoked, as it was, at the end of 1949, Mr. Young's license was suspended pending the change of employer and the issuance of a new license. When the license of Mr. Young terminated at the end of 1949 under Mr. Bardsley as Broker, it became Bardsley's duty to deliver or mail to the commission Young's real estate salesman's license, and Mr. Bardsley's authority to deal in real estate having expired, his contract with Mr. Buchanan also expired, and Young's authority under Bardsley ceased. Section 82-2-8 U.C.A. 1943.

Again: Section 82-2-9 provides:

"The revocation of a broker's license shall automatically suspend every salesman's license granted to any person by virtue of his employment by the broker whose license has been revoked, pending the change of employer and the issuance of a new license.

Bardsley's license as a real estate broker expired December 31st, 1949 and the revocation automatically suspended Young's license, there being neither broker nor salesman. It seems to follow that the Buchanan contract which expired December 12, 1949, also lost its force.

If the listing set out in the Young-Buchanan memorandum has any effect it must be construed as a listing with the Broker. Bardsley had the power of enforcement, he was liable to Young for his compensation and Young's right of action if he had any was against Bardsley and not against Buchanan. If Bardsley had a right of action against Buch-

anan it was in his own right and not for the use and benefit of Young. The commission earned, if any, may have been the measure of Young's rights against Bardsley, but in view of Statute, his claims, if any, were against his broker, not against the owner who, under the law, had listed with the broker, if any one. In view of the statutory provisions, if Buchanan is liable to any one it is the broker and a judgment improperly rendered against Buchanan in this action would not be a bar to Bardsley bringing his action in his own right against Buchanan. In other words, if under these proceedings, this judgment is upheld, then Buchanan becomes subject to a double liability.

But Bardsley, at the time Young Claims to have inquired of Bardsley whether Young could write under his commission, stated that Young was to be responsible for all sales and that he, Bardsley, was not to be implicated in any way, in Court or otherwise. But the essence of the legal relationship created when a broker employs a salesman is that the listing is with the broker; it is the broker who represents the owner in making the sales; it is the broker who is authorized to complete and fill out such forms or legal documents as may be necessary, to which the broker is a party as agent of the vendor, not the salesman.

That Young did not purport to comply with these statutory provisions is demonstrated by the fact that he took the listing in his own name; he claimed right of compensation personally from Buchanan; he brought action to recover a fee he was not entitled to under the law; he filed an amended complaint still asking for an unlawful

recovery from Buchanan, and then to avoid the unlawful situation he asked to make Bardsley a party plaintiff and that judgment be entered in his favor for the use of Young. That is; Young merely asked the Court to make Bardsley a party plaintiff so Young could use him in enforcing the unlawful contract he had entered into.

Judgment was in fact entered that plaintiff E. H. Bardsley, for the use and benefit of plaintiff Young do have and recover of and from the Defendant etc. It is a plain case of attempting to do by indirection what cannot be done directly. If there is any cause of action pleaded or found by the Court, it is an action existing at the time of bringing the action in favor of the Broker Bardsley and not in favor of the plaintiff Young. To say it is in favor of Bardsley for the use of Young is denying the fair import of all the facts. The statutes authorize Bardsley to sell real estate for a commission. They also authorize him to employ a salesman to assist the broker in making sales and to compensate the salesman for such assistance. But the salesman has no right to ask any one other than the broker who employs him for his compensation.

If the purported listing agreement were to be given any binding effect under the law, it must be by reading into it provisions not found in the instrument and not talked of by the parties at any time to the bringing of this action, or thereafter until trial was had, that the instrument, although executed by Young, was, in fact, for the use and benefit of Bardsley. That is substituting a wholly new cause of action that could not be established by evidence establishing a cause of action in Young, had the contract not been illegal.

In Hallett vs Parrish, an Idaho Case reported in 51 pac, page 108, the Court says:

“Under the very liberal provisions of our statute, a Court should not permit a person to be substituted as plaintiff in the place of the plaintiff who brought the suit when the person substituted was the real and only party in interest at the commencement of the suit.”

For still stronger reasons, it seems to the writer, that a person ought not be brought into a cause as a substituted party, or additional plaintiff, at the request of the original plaintiff with the view of compelling the real party in interest to prosecute an action for the use and benefit of the original party plaintiff, where it develops, as in this case, that original party plaintiff had no cause of action in fact, where the claimed cause of action, as to the original party plaintiff, was illegal and unenforcible, and where, if the claimed cause of action were enforced, it would have the effect of the original plaintiff using the Courts to enforce a payment to the original plaintiff that would make him guilty of crime in accepting the payment or satisfaction of the judgment.

Finally; The law makes it illegal for the original plaintiff to enforce payment, were there an enforcible contract.

The fact that the impleaded plaintiff had no contractual rights as against the defendant, that he expressly refused to accept any responsibility as broker, and that, long prior to the sale of the property to King, Bardsley's license as a broker had expired, denies him the right to judgment,

either personally or for the use and benefit of the original plaintiff.

With All Duplications and Repetitions,

Respectfully Submitted,

N. J. BATES,  
Attorney for Appellant.

## I N D E X

STATEMENTS SUPPORTED BY EVIDENCE IN THE  
RECORD ..... 1 to 3

ARGUMENTS ..... 3 to 14

### LEGAL PROVISIONS:

SECTIONS 82-2-10 U. C. A. 1943  
82-2-17 U. C. A. 1,43  
82-2- 3 U. C. A. 1943  
82-2- 8 U. C. A. 1943  
82-2- 9 U. C. A. 1943

Obradovitch v. Walker Brothers Bankers  
80 Utah 587-602  
13 C. J. Page 492, Section 440, Contracts.

### PLEADINGS:

Complaint ..... 1 to 2  
Amended Complaint ..... 7 to 10  
Answer of Defendant ..... 12  
Second Amended Complaint ..... 14 to 17  
Decision of Court ..... 18  
Motion of Impleaded Plaintiff ..... 21 to 22  
Notice of Motion ..... 23 to 24  
Affidavit Dillworth Woolley ..... 25 to 27  
Affidavit, W. R. Young ..... 28 to 29  
Motion of Defendant ..... 30 to 31  
Affidavit Impleaded Plaintiff ..... 33 to 35  
Affidavit Naomi F. Chappell ..... 36 to 37  
Findings and Conclusions ..... 38 to 41  
Judgment of Court ..... 42  
Supplemental Findings ..... 45 to 46  
Notice of Appeal ..... 48  
Notice of Motion ..... 49  
Affidavit of Defendant ..... 50  
Order Extending Time ..... 51  
Notice of Appeal ..... 52  
Designation of Record ..... 53  
Minutes ..... 54 to 57  
Transcript on Appeal With Special Paging ..... 58 to 156  
Special Paging ..... 1 to 98