

1957

Mathew J. McCormick v. Life Insurance Corporation of America : Brief of Respondent

Utah Supreme Court

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In the Supreme Court
of the State of Utah

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MATHEW J. McCORMICK,

Respondent,

vs.

LIFE INSURANCE CORPORATION OF
AMERICA, a corporation,

Appellant.

Clerk, Supreme Court, Utah

Case No. 8593

Appeal from the District Court of Salt Lake County, Utah
Martin M. Larson, Judge

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MATHEW J. McCORMICK,

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vs.

LIFE INSURANCE CORPORATION OF
AMERICA, a corporation,

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Case No. 8593

Appeal from the District Court of Salt Lake County, Utah
Martin M. Larson, Judge

STATEMENT OF THE CASE

The statement of facts made by appellant in its brief is so incomplete, and inaccurate in many respects, that the court cannot properly understand or adjudicate the issues involved without a more complete statement.

This is an action to recover for commissions on the sale of defendant's stock under a written contract (Ex. 13). The trial court held that defendant could not be required to pay 20% commissions as the contract provided, but plaintiff could recover 15% and that defendant could not recover back any

amounts paid at the 20% rate (Finding No. 15, R. 44, Conclusion No. 3, R. 46).

Defendant appealed on the theory that certain testimony was erroneously stricken, said testimony being offered in alleged support of defendant's theory that it could set off the 5% purportedly overpaid to plaintiff against the amount due (Appellant's brief, Point I-A) and that commissions were erroneously allowed on a part of the transactions involved. Respondent respectfully asks the court to consider Point IV of this brief to the effect that commissions should have been awarded at the 20% rate on all transactions. Some amplification of the facts is required to present the legal problems in their context.

On September 25, 1952, Life Insurance Corporation of America filed an application with the Utah State Securities Commission for authority to offer for sale 20,000 shares of capital stock of the par value of \$10.00 per share for a price of \$20.00 per share. It represented that commissions would be paid at the rate of 20% on the stock sold and that it planned on using a trust agreement with respect to the sale of said shares (Ex. 5). The defendant did not file any application for a solicitation permit, it being the opinion of the insurance commissioner of the state of Utah that a conversion of a company from a mutual benefit company to a stock company did not require a solicitation permit under the Insurance Code but that registration was required under the Securities Code (Ex. 4). An agreement was executed with Utah Savings and Trust Company providing in substance that all cash received from purchasers of stock in connection with the proposed sale thereof

in the defendant company would be deposited in escrow with the bank until there was on deposit the sum of \$200,000.00. If that amount was not on deposit within the time provided in the agreement, all of the purchasers of stock would be entitled to have their money refunded to them (Ex. 10). A copy of the said agreement was filed with the State Securities Commission (R. 108-109).

In September, 1952, Cleo H. Bullard, the president, and Harry Pugsley, counsel, both being directors of the defendant company, conferred in San Francisco with the plaintiff about the possibility of his accepting an offer to sell the stock of the defendant company on a commission basis. Defendant also conferred with Ashby D. Thatcher, executive vice president and a director of the defendant company. Mr. McCormick has never had any legal training (R. 235) and prior to his time of conversation with defendant's officers and directors he had never had any occasion to examine the laws of the state of Utah with respect to insurance matters (R. 235). His experience with organization of life insurance companies had been very limited (R. 236). Particularly he had not had any occasion to look into the laws of the state of Utah for any rulings of the Insurance Commissioner with respect to requirements incident to the issuance of solicitation permits (R. 236).

Mr. McCormick's first conversation with Ashby D. Thatcher was in San Francisco between the 1st and 10th of September, 1952 (R. 237). Mr. Thatcher was introduced as an authority on insurance and it was represented that he had been the examiner for the state of Utah and other states for many years. Mr. Thatcher stated directly that he was executive vice president

of the defendant and a director and that he was instrumental in organizing the company; that he had been an examiner for the states of Utah, Nevada and other states (R. 237). Mr. Thatcher stated that the company could and would pay plaintiff 20% commissions on the \$400,000.00 worth of stock being offered for sale (R. 239).

A similar conversation was had with Cleo H. Bullard in San Francisco a few days after plaintiff's conversation with Mr. Thatcher (R. 239-240). Mr. Bullard was president of the defendant company and represented that he had had a great amount of experience and made a great study with respect to insurance laws. Mr. Bullard explained his experience in the insurance business generally and with respect to the Utah insurance commission requirements and stated that the defendant had employed an attorney of outstanding experience who was formerly connected with the Attorney General's office and was "very competent as an insurance attorney." Mr. Bullard represented that the company could pay to Mr. McCormick 20% commission on sales (R. 240-241).

Harry D. Pugsley, legal counsel and a director of the defendant company, represented to Mr. McCormick in San Francisco prior to the execution of the contract that he had formerly been connected with the Attorney General's office and "had a vast amount of experience as an insurance attorney." Mr. Pugsley assured the plaintiff that the defendant could pay 20% commission to him on stock sales and that he would draw a contract to that effect (R. 243).

Mr. McCormick relied on the statements of Mr. Thatcher, Mr. Bullard and Mr. Pugsley that the company could and

would pay 20% commission. On reliance of their representations, he executed the contract in evidence here as Exhibit 13, moved to Salt Lake City, and commenced performance under the contract. In December, 1952, an amendment to Exhibit 13 was executed by the parties and it is in evidence as page 4 of that exhibit.

The agreement between the parties provides in substance that the plaintiff has the exclusive right to the sale of the stock of the defendant for eighteen months (Ex. 13, para. 5); that he will receive a commission of 20% on the total amount of sales procured by him, such amounts to be based upon "the bankable receipts delivered by said McCormick to insurance company in the form of cash, negotiable checks, promissory notes or collateral that have been prior approved by insurance company and which notes or collateral are acceptable to established banking institutions in Salt Lake City, Utah" (Ex. 13, para. 4). Defendant agreed to pay said amounts within ten days after receipt of the same and in the event of checks, after they had cleared the bank (*ibid*). The contract provides that the defendant would exercise reasonable efforts in furthering the sale of stock, procurement of subscriptions and "will cooperate with McCormick in all reasonable matters and assist him in his work" (Ex. 13, para. 7). The contract also provided that "in the event that it becomes necessary for action to be brought to enforce any of the terms, obligations set forth herein, the defaulting party agrees to pay all costs of court including reasonable attorneys' fees (Ex. 13, para. 11).

The trial court found that plaintiff substantially performed his contract with defendant and accounted to defendant for all stock sold (Findings 18 and 19, R. 45).

During the period of time covered by plaintiff's contract, 13,794 shares of defendant's stock were sold. These transactions are summarized in Schedule I attached to the findings and conclusions of the trial court (R. 49-57). The defendant received in payment for these shares \$142,729.86 in cash, \$32,961.71 in ordinary negotiable notes (referred to by defendant and sometimes in this brief as personal notes, see Point I-B of this brief, *infra*); \$41,180.00 in real estate mortgages and contracts (see Point I-C of this brief, *infra*), and \$91,646.08 in so-called "subscription notes", of which \$59,008.43 remained unpaid at the time of their cancellation (see Point I-D *infra*).

On June 22, 1953, the defendant wrote a letter in evidence as plaintiff's Exhibit 19 to the State Insurance Commissioner enclosing a purported audit report by the accounting firm of Birrell, McGee, Zimmerman and Thomas in which the representation was made in substance that the company had sufficient assets to satisfy the requirements of the escrow agreement (Ex. 10) and that the company had sufficient assets to satisfy the requirements of the Insurance Code. Many of these assets consisted of notes and mortgages given to the company in payment for shares of stock. Based upon this letter from the company, the Insurance Commissioner, on July 7, 1953, authorized Utah Savings Bank and Trust Company to release to the company all of the funds held by the bank in escrow under the agreement (Ex. 19). The assets reported to the Insurance Commissioner were carried by the defendant on its books until sometime in approximately February or March, 1954. At that time, acting upon the recommendation of Robert L. McGee, an accountant, the defendant arbitrarily cancelled

the obligations of all of the persons who had agreed to pay, and in most instances were in fact paying for the shares of stock in defendant.

The trial court found that "various of the conventional (personal notes) as detailed in Column 5 of the aforesaid Schedule I and various of the real estate mortgages and contracts as detailed in Column 7 of Schedule I and all of the subscription notes as detailed in Column 8 of Schedule I were cancelled by the defendant during the month of February and March, 1954, and defendant made no attempt to enforce the provisions of said agreements nor was plaintiff given an opportunity to enforce them." (Finding of Fact No. 10, R. 42.) All the amounts payable to the defendant from the purchasers of defendant's stock were cancelled at that time, whether the form of the promise to pay was a note with a real estate mortgage or real estate contract which had been assigned to defendant as security, a conventional type negotiable promissory note or a so-called subscription note (see testimony of Robert L. McGee, R. 299-306 and see Exhibits 42 and 53). The court found "The circumstances surrounding the cancellation of the various obligations to pay the defendant for the stock . . . compel the court to find specifically that the said cancellations were not in good faith toward plaintiff and that said cancellations were made in bad faith so that the principle stated by the Restatement on Agency, Vol. 2, Sec. 454, is applicable." (Finding 13, R. 44.)

Said finding is not challenged by appellant here.

Defendant issued stock to subscribers for the amounts paid. (There is no dispute on this point, it is admitted in appellant's

brief, p. 9). Between the time of the purported "cancellation," (February and March, 1954, R. 42), and the stockholders' meeting, May 10, 1954 (R. 71, 72), defendant issued stock to and collected payments from 32 of the identical persons whose obligations were "cancelled." This figure can be substantiated by comparing defendant's stockbook (Ex. 22) and stock ledger (Ex. 23) with the cancellations.

Plaintiff had been paid commissions in the amount of \$24,720.00 for stock sold by him at the rate of 20%. The trial court held that said amount "includes all charges properly made against plaintiff during the term of the aforesaid agreement between the parties" (R. 44, Finding No. 15). The trial court held that Sec. 31-16-17 of the Utah Code Annotated, 1953, prevents the plaintiff from recovering any amount in excess of 15% of the amount of stock sales upon which plaintiff had not received any commissions, said amount being \$152,290.00 (R. 44-45). The court held, however, that the defendant could not use any amounts paid at the rate of 20% as a credit on the 15% which the trial court held was lawfully due to plaintiff. In other words defendant could not recover back any commissions paid in excess of the amount allowed in the statute (R. 44-45). The \$24,720.00 charged to plaintiff includes all promotion and organization expense such as filing fees, license fees for plaintiff and plaintiff's salesmen and items of that kind (R. 361-367). The trial court held that the defendant could not charge against plaintiff the defendant's "estimate" of general administrative expenses (R. 369-370).

The court held that the defendant "had a duty to plaintiff to attempt in good faith to enforce said notes, mortgages and

real estate contracts according to the terms and provisions thereof so that the plaintiff could receive his lawful share of the cash which the defendant company was entitled to receive pursuant to the provisions of all of said instruments. Cancellation of all of said notes, subscription notes, mortgages and contracts as were cancelled by the defendant without giving plaintiff an opportunity to collect or enforce them was a violation of the duty which the defendant owed to plaintiff and effectively precluded plaintiff from obtaining the amount of cash as commissions to which he was entitled pursuant to law as a result of the contract with the defendant company" (Finding No. 10, R. 42).

The appellant does not challenge any of the findings of the trial court on the material facts. Much of the evidence in the trial court was tabulated from the evidence, and summarized by schedules and nearly every point of fact was disputed.

The respondent takes the position in this brief that the rulings of the trial court were not prejudicial to appellant in any manner and that the matters complained of by the appellant in this court are, for the most part, immaterial and collateral points in any event. The respondent respectfully asks the court to consider the respondent's position to the effect that the trial court erred in failing to allow the plaintiff a full 20% commission as provided by the contract under the theory argued in Point IV of this brief.

ARGUMENT

POINT I.

ASSUMING THAT COMMISSIONS WERE PAYABLE TO PLAINTIFF "AS AND WHEN RECEIVED" BY DEFENDANT, AS DEFENDANT CLAIMS, DEFENDANT'S CANCELLATION OF THE OBLIGATIONS BY PURCHASERS OF STOCK CONSTITUTED A VIOLATION OF THE DUTY DEFENDANT OWED TO PLAINTIFF TO ENFORCE THE PROVISIONS OF THE INSTRUMENTS WHICH DEFENDANT ACCEPTED.

Defendant implies in Point I and particularly Point I(b) of its brief that the only obligations which it cancelled were personal notes and so-called subscription notes (Brief 7). Defendant states that plaintiff received commissions on the cash receipts and real estate contracts to the date of the termination of plaintiff's agreement (Appellant's Brief pg. 6-7). Neither of these statements is true. Cash receipts were in the amount of \$142,792.86 (R. 41, Findings of Fact No. 7). Defendant Company received and accepted real estate contracts and mortgages from purchasers of stock of the value after discounts in the amount of \$41,180.00 (R. 41). The total of these figures is \$183,792.86. If plaintiff had been paid commissions at the rate of 20% on these sales, as stated by defendant, he would have received \$36,794.57. In fact he received \$24,720.00, including all charges properly made against plaintiff during the term of the agreement between the parties (R. 41, Findings of Fact No. 15).

Appellant's misstatement goes farther than that. Not only

were personal (conventional, negotiable) notes and so-called subscription notes cancelled in January and February, 1954, but defendant cancelled all amounts payable to the defendant from purchasers of defendant's stock whether the form of the promise to pay was a note with a real estate mortgage which had been assigned to the defendant, a conventional type negotiable promissory note or a so-called subscription note. (See the testimony of Robert L. McGhee, R. 299-306, Exs. 42 and 53. In Exhibit 39, Schedule 6, defendant admits that real estate contracts and negotiable notes were arbitrarily *reclassified* as "subscription notes.") After cancellation of all of these instruments the defendant refused to pay commissions to plaintiff on the amounts that were then due on the various obligations on the theory that defendant was liable to plaintiff only for cash "as and when received" by defendant from stock purchasers. The trial court held that while Section 31-6-7 U.S.C. 1953 was a condition of plaintiff's contract so that commissions were payable only on funds "as and when received", the cancellation of all of the agreements of the purchasers to pay defendant money for stock effectively deprived plaintiff of his commission. The court held that the defendant could not itself complain of the failure to satisfy the condition precedent when defendant's own action prevented the condition from occurring. In other words, the court held that the defendant could not by its own act make impossible the performance of the condition precedent upon which it is liable to plaintiff depended and then defeat plaintiff's claims for collections on the ground that the condition had not been satisfied. In order to properly fit defendant's arguments on appeal into the context of the lawsuit it is necessary to consider this basic law

of the case as applied to the various classes of instruments which defendant cancelled.

A. Defendant had a duty to plaintiff to enforce the provisions of all of the instruments secured and unsecured which defendant accepted from purchasers of stock in connection with stock purchase transactions.

The trial court found in its Finding No. 5 (R. 40, 41) that Schedule 1 attached to the findings (R. 49-57) contained an accurate and complete statement of the shares issued and purchased or contracted for and the consideration received therefor during the period of time covered by the plaintiff's agreement. In its Finding No. 10 the trial court found, and it is undisputed in the evidence, that various of the conventional notes, various of the real estate mortgages and contracts as detailed in Column 7 of Schedule 1 and all of the subscription notes as detailed in Column 8 were cancelled by the defendant during the months of February and March, 1954, "and defendant made no attempt to enforce the provisions of said agreements, nor was plaintiff given an opportunity to enforce them. The defendant had a duty to plaintiff to attempt in good faith to enforce said notes, mortgages and real estate contracts according to the terms and provisions thereof so that the plaintiff could receive his lawful shares of the cash which the defendant company was entitled to receive pursuant to the provisions of all of the said instruments. Cancellation of the said notes, subscription notes, mortgages and contracts as were cancelled by the defendant without giving plaintiff an opportunity to collect or enforce them was the violation of the duty which the defendant owed to plaintiff and effectively precluded

plaintiff from obtaining the amount of cash as commissions to which he was entitled pursuant to law as a result of the contract with defendant company.” (R. 42.) It is to be observed, parenthetically, that the defendant and appellant does not challenge on this appeal the Finding of Fact or the Conclusions of Law comparable thereto (Conclusions No. 5 and 6, R. 46, 47).

Nor can the correctness of the principle be doubted. It is stated by Williston on his work on contracts as follows:

“It is a principle of fundamental justice that if a promisor is himself the cause of failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.” (Williston on Contracts, Vol. III, Sec. 677, p. 1952).

The principle is universal. It has been applied in several cases in point where the contract itself provided that an agent or broker was to obtain commissions “as and when” moneys were received, or contained language of substantially similar meaning. The apparent leading case in Utah also involved an obligation to pay on notes accepted by a life insurance company.

In *Reed v. Union Cert. Life Ins. Co. of Cincinnati*, (1900) 21 Ut. 295, 61 P. 21, plaintiff’s agreement with defendant life insurance company provided that plaintiff would be paid when cash was paid to defendant upon the premium procured by plaintiff. Defendant accepted notes from one Beck, as payment on premiums and then cancelled the notes. The court held that plaintiff could recover his commission:

"The facts show that plaintiff had performed his part of the contract, and obtained an application for insurance that was satisfactory to the defendant; that, after full examination, defendant accepted Beck's application, and delivered a policy to him and gave its receipt in full payment of the first year's premium. *Having accepted the Beck notes, a legal obligation, as between the defendant and the plaintiff, rested upon the defendant to collect the notes when they became due, and out of the proceeds when they became due, and out of the proceeds thereof pay the agreed commission.* * * * The company could not thus (by surrendering the notes) relieve itself from such liability to the plaintiff for the commission earned by voluntarily placing beyond its power the right to collect the cash on the unmatured notes, because it had purchased the policy, and in part consideration thereof had surrendered the notes out of which the commissions should have been paid. * * * Having sold them to Beck, it is estopped from denying liability on the contract simply because it refused to collect the cash on the notes, as it should have done, or should have attempted to do, unless excused from that duty by the plaintiff. By receiving back the policy, the defendant may have received a full equivalent for the notes. The contract does not provide that the defendant, after having accepted the risk shall have the right to buy a surrender of the policy, and thereby relieve itself from its duty to collect the notes in payment of the premiums. *A principal who agrees that his agent shall receive a percentage of money or commissions to be paid upon a contract secured through such agent for the benefit of both cannot dispose of his own right to receive the fund, and thus deprive the agent of the reward for his services. Otherwise the principal might receive a full equivalent for the original fruits of the agent's labor, and yet not pay him a dollar. The principal cannot do this without the*

agent's express consent, and in this case the evidence does not show that consent was given.

“The defendant voluntarily placed itself in a position whereby it had no power to collect the notes, as it was in duty bound to do or endeavor to do, and therefore, it cannot now be heard to say that the maker was insolvent when the notes were surrendered.” (Emphasis supplied.)

The rulings on similar factual situations unanimously reach similar conclusions.

In *Jordan v. Busch, et al.* (App. Ct. of Ill. 3rd Div., 1936) 1 N.E. (2d) 745, the plaintiff performed services for the defendant in connection with a proposed organization of the Rock Island Brewing Company. The agreement between plaintiff and defendants provided, among other things, that the payment to the plaintiff was to be made only from the salaries and dividends received by the defendants on their interest in the brewery property in Rock Island, Illinois. Plaintiff performed his contract but the defendants traded and sold their securities in the corporation and then claimed that they did not owe anything to the plaintiff. They contended the contract was not an absolute agreement to be paid but an agreement to pay out of a particular fund, namely, salaries and dividends; therefore, they were only indebted to plaintiff in the amount of some \$409.70 because of the alleged impossibility of receiving further salary or dividends as provided in the agreement. Plaintiff, however, took the position that when the defendants disposed of their interest in the corporation they, in effect, alienated the sources of funds from which the payments were to be made and that by their own conduct made impossible the performance of the conditions precedent upon which their

liability by the terms of the agreement was made to depend. The court said:

"The rule of law is that when a party agrees to pay out money from a fund which is derived only from a certain source, this condition is for the benefit of the promissor, and, if he alienates the source of that fund, he cannot escape liability. It is a principle of fundamental justice that if a promissor himself is the cause of a failure of performance either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure. One who agrees to pay for goods on delivery cannot set up the lack of delivery when caused by his own act. Williston on Contracts, Vol. II, Sec. 677. In *St. Louis Beef Co. v. Casualty Co.*, 201 U. S. 173, 26 S. Ct. 400, 50 L.Ed. 712, the court said: 'In general, when one party, by his fault presents the other party to a contract from entitling himself to a benefit under it according to its terms, the former is liable for the value of that benefit, less the value or cost of what the plaintiff would have had to do to get it.' . . .

"In *City of Chicago v. People ex rel. Norton* 56 Ill. 327, at page 333, the court said: *"If a person promise to pay a sum of money when he shall collect his demands of another, then if it appear that he had no demands, or if he have and fail to use due diligence to collect them, in either case the promise may be enforced as absolute."* . . .

"It seems clear that where a contract is made which is performable at the time of the occurrence of a future event, the law imputes to the promisor an agreement that he will put no obstacle in the way of the happening of that event, and that he will hold himself in readiness to co-operate where his co-operation is a necessary element. If, in violation of this implied covenant on his part, he does something which prevents the happening of the event, the contract becomes absolute and

must be performed as though the event had occurred. *Marvin v. Rodgers*, 53 Tex. Civ. App. 423, 115 S.W. 863, 865.

“We are of the opinion that the payments under the contract became due upon the sale by the defendants of their stock in the company and the surrendering of their control of the same, and we are further of the opinion that the amount of damages found to be due and owing to plaintiff was correctly decided by the trial court.” (Emphasis supplied.)

A similar case is *Hayes v. Beyer* (Mich. 1938) 278 N. W. 764, 284 Mich. 60. In this case the defendant agreed to pay to plaintiff the commission in the event of the sale of a certain tract of land. The buyer had agreed to pay a certain portion of the purchase price to the seller in the future, and the agreement between the plaintiff and defendant provided that the defendant was to pay to plaintiff his commission

“ . . . as and provided said payments (from the purchaser) are made to me, and only in case said payments are paid to me, until said Bertha Hayes shall have received \$2182.50, which amount is the balance due under this agreement . . . ”

About a year later the defendant took the property back from the purchaser and the trial court held that it appeared that the defendant had repurchased the land from the purchaser and placed beyond the purchaser his duty to make the payments due under the contract so that the contract of the plaintiff could be carried out when the payments were received under the land contract. Judgment for plaintiff was vigorously affirmed.

“In 13 C.J. p. 658, Sec. 722, the rule is well stated: ‘Where a contract is performable on the occurrence

of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability. * * * Hence, the performance of a condition precedent is discharged or excused, and the conditional promise made an absolute one, where the promisor himself * * * waives the performance.' . . ." (Citing many cases.)

In *Walker v. Chancey* (Sup. Ct. Florida 1928) 117 S. 705, the defendant entered into a contract with the plaintiff whereby defendant agreed to pay plaintiff a commission of ten per cent on the sale price of certain real estate "payable out of the first cash payment." Defendant entered into a contract with a W. M. Toomer to sell the tract of land. The defendant subsequently was offered a higher price than Toomer agreed to pay, so he refused to perform his Toomer contract and prevented Toomer from making any further payments as stipulated in that agreement.

The court held that the defendant obligated himself in his agreement with the plaintiff to pay the commission and that he could not evade liability by making the fulfillment of the condition precedent impossible by failing to perform on the Toomer contract. The court ruled:

"The rule as stated in 6 R.C.L. 945 is as follows:

" 'However, one who prevents or makes impossible the performance or happening of a condition precedent, upon which his liability, by the terms of a contract, is made to depend, cannot avail himself of its non-performance. Likewise, where the promise is to pay out of a fund to be realized in a certain way, there is an

implied obligation to use reasonable diligence in performing the act upon which payment is contingent. In default of such diligence, payment becomes due without performance of the condition.'

"The agreement to pay the commission is a distinct obligation. The agreement that the commission should be paid out of a certain fund is another obligation and this latter obligation may be dispensed with or made inapplicable by the conduct of the obligor."

The court cites with approval cases from Florida, Kentucky, California, New York, Iowa, Washington, Alabama and the United States Supreme Court.

In 17 C.J.S. *Contracts*, Sec. 468, particularly Sub-section (b), the law is summarized as follows (pp. 969, 970):

"For example, in the case of a promise to pay when the promissor collects certain moneys, there is an implied promise that the promissor will use diligence to make such collection. The same rule applies where he has waived performance of a condition precedent."

The ensuing subsections of this point demonstrate how defendant similarly violated its duty to plaintiff in the case at bar.

B. Commissions are payable on conventional type negotiable notes accepted by defendant.

Appellant admits in its brief (Appellant's brief, p. 7) that in February or March 1954, it cancelled all of the instruments identified in Column 5 of Schedule 1 (R. 49-57). The trial court made the following finding concerning said notes:

"The Court finds that the plaintiff presented to the defendant conventional or personal notes for shares issued or to be issued equal or the principal amount of \$32,961.71. Said notes are tabulated in Column 5 of

Schedule I attached hereto. Said notes were accepted by the defendant company as its assets; said notes satisfied the requirements of the contract and satisfied the requirements of the Insurance Code; all of said notes were in negotiable form and said notes were interest-bearing or income-bearing, were not in default at the time they were presented and accepted by the defendant company, and the defendant was entitled to receive for its exclusive account the benefit of the interest or income accruing therefrom. At no time did defendant attempt to sell or discount to any bank or other person any of said notes." (Para. 6, R. 41.)

Appellant does not complain that the Finding is not supported by the evidence. However, in view of the fact that the appellant asserts that cancellation of the obligations evidenced by these instruments did not constitute a breach of duty to plaintiff, it is necessary to explain to the court the facts with respect to them.

On June 22 ,1953, the accounting firm of Birrell, McGee, Zimmerman and Thomas wrote a letter to the defendant company following a study of the defendant's corporate records with respect to the assets which the defendant had at that time. The letter is in evidence as part of Exhibit 19. It refers to certain assets of the company as "personal notes" in the amount of \$32,961.71. The accountant's letter was transmitted by the defendant to the insurance commission as an "audit" and the requests were made that the commission issue defendant a license to do business as a stock insurer, and that the commissioner authorize the release of the cash on deposit at the Utah Savings and Trust Company (Ex. 19). The defendant here, in its answer to plaintiff's interrogatories, stated that the names of the makers of the notes and the amount

thereof referred to in said letter with respect to the item "personal notes other than subscription notes" are the names and amounts contained in plaintiff's Schedule I, (R. 49-57) Column 5. (Defendant's answer to plaintiff's interrogatories number 2(f) R. 21). Defendant's witness, McGee, admitted that these same negotiable notes that were represented by the defendant to the insurance commissioner as assets of the company in June, 1953 (Ex. 19) were reclassified by him to "notes cancelled," and that said notes were in fact cancelled by the defendant (R. 299-306, and see his work sheet received as Ex. 42, R. 306, showing these notes to be the same ones referred to in defendant's letter to the insurance commissioner.) The question is whether defendant violated any duty to plaintiff when it voluntarily discharged the obligations described in these notes and released the makers from liability thereon.

(1) *The notes were accepted by the company as its assets.* Cleo H. Bullard, the president of the company at the time of the filing of the June 22 letter with the State Insurance Commissioner, testified that the Board, acting as a Board, made such investigation of the assets referred to in the letter as they deemed necessary acting in a fiduciary capacity (R. 121, 122). They specifically made such examination as to the personal notes (R. 123). They examined the form of the note and satisfied themselves that the maker could pay according to its terms (R. 123). Members of the Board, of course, knew that the notes were negotiable in form. (Ex. 16 is the form of note identified by Mr. Bullard.) The Board also knew that unless the company had assets equal in amount to \$200,000.00, it could not obtain the money placed in escrow with the Utah Savings and Trust Company under the terms of the agree-

ment which the defendant had with that company concerning its qualification to do business as a stock insurance company. (See the letter of the president of the company to the insurance commissioner of June 22, 1953, part of Ex. 19.) The defendant's June 22, 1953 letter to the insurance commissioner was an express representation that the defendant had the assets referred to, and no other interpretation is possible than that it had accepted the notes. The notes were carried on defendant's books as assets until they were cancelled.

(2) *The notes satisfied the requirements of the insurance code and the contract.* The trial court found and concluded expressly that these instruments satisfied the requirements of the contract (Ex. 13, paragraph 4) and were securities eligible for investment by insurers. Under the code, securities are eligible which are (1) interest bearing or income producing, (2) not in default, and (3) the insurer is entitled to receive for its exclusive account and benefit the interest or income therefrom (Sec. 31-13-2 U.C.A. (1953)). In the trial court defendant vigorously disputed whether the notes were income bearing and plaintiff was required to demonstrate to Judge Larson from defendant's own records that each of these requirements was satisfied. Plaintiff could make the same demonstration here but it does not appear to be required since appellant concedes that the Findings and Conclusions are supported.

Commissions were payable on these notes when defendant accepted them. It is to be observed, parenthetically, that the key word in Section 31-6-7 U.C.A. 1953 is "funds" and not "cash." That is, the limitation is upon "funds" . . . as and

when actually received.” The word funds is derived from the Latin word “fundus” and means “bottom” or “ground” and is not the equivalent of the word “cash.” A fund is a deposit or accumulation of resources. Webster’s Unabridged Dictionary 1949. *In re Sevinanzi’s Estate* (Sup. Ct. Nev. 1948) 190 P.(2d) 842 at 848. It includes choses in action as well as cash. *Dickson v. Commonwealth Trust Co. of Pittsburgh*, 65 Atl. (2d) 408, 409, 361 Pa. 612. It includes notes, bonds and, in a broad sense, property of every kind. *State v. Finney* (Kan. 1935) 40 P.(2d) 411 at 421.

That these notes were actually ‘funds’ and were “received” by defendant cannot be disputed.

Since the assets satisfy the requirement of the insurance code, the commissions were payable when they were accepted and the trial court was more than generous to the defendant to allow interest from the date of the expiration of the contract.

Clearly the arbitrary reclassification of these assets to subscription notes and cancellation thereof without any reasonable efforts toward their collection as found by the trial court (Findings of Fact, R. 42, and such finding is not disputed here) was a clear violation of defendant’s duty to plaintiff (see authorities in Point I (A) of this brief).

C. Commissions were payable on real estate contracts and mortgages accepted by defendant.

Column 7 of Schedule I (R. 49-57) contains a tabulation of real estate mortgages and contracts upon which plaintiff is entitled to commissions. While appellant claims in its brief at page 7 that commissions were paid on such transactions,

it has already been demonstrated that that statement is not true. Defendant's statements undoubtedly constitute a judicial admission that commissions are payable on these transactions. Nevertheless, it is important for the court to know the facts concerning them.

The arguments made in Point I (B) are applicable to a large extent in the same manner to said instruments. Defendant's letter to the insurance commissioner of June 22, 1953 reported that defendant had received real estate contracts and mortgages in the amount of \$30,380.00 at that time (Ex. 19). The particular real estate contracts and mortgages referred to were identified by defendant in its answer to plaintiff's interrogatory 3(b) (R. 23). In June 1953, prior to the June 22 letter, the board of defendant company, acting as a board, considered the form of the contracts and the financial status of the obligor thereon. The members of the board satisfied themselves that the instruments were in the possession of the company; that the obligors could pay according to the terms of the instruments (R. 122, 123). It is undisputed that the defendant reported to the insurance commissioner that it had acquired said assets and that the insurance commissioner accepted the same at the time he authorized the withdrawal of the escrowed cash at Utah Savings and Trust Company (Ex. 19). Mr. Bullard and Mr. McGee both testified that these transactions involved first mortgages and purchase contracts on real property and that the real estate contracts were discounted in accordance with the practice of discounting equities thereon. There is nothing in the record in this case to indicate or suggest in any manner that these contracts and instruments could not have been negotiated or sold to other banks or

business institutions at the full value for which they were accepted by the company, and the defendant admitted its liability for commissions on these transactions by paying commissions on many transactions of this kind (Ex. 31).

At the time of the cancellation of the other instruments involved in the lawsuit, defendant reclassified the unpaid balances on all of these mortgages and contracts as "subscription notes" and they were cancelled. (See testimony of Robert L. McGee, R. 299-306). Comparison of McGee's working sheet, Ex. 42 and Exhibit 39, Schedule A, demonstrates conclusively that many of the very transactions represented to the insurance commission as being secured by real property in June were arbitrarily cancelled the next February or March. Schedule 5 of Ex. 31, which exhibit was prepared and offered by defendant, admits that defendant cancelled real estate contract balances in an amount of approximately \$34,000.00.

The court found as follows concerning the real estate mortgages and contracts:

"8. The defendant company received and accepted real estate mortgages and real estate contracts for stock issued or to be issued during said period of time of the value of \$41,180.00. Said amount takes into account the discounts on said real estate mortgages and contracts and said amount is the sum for which the defendant agreed to issue certain shares of capital stock as reflected in the aforementioned Schedule I. Said real estate mortgages and contracts are tabulated in Column 7 of Schedule I attached hereto. Said real estate mortgages and contracts were interest bearing or income bearing, not in default on the dates they were accepted by the

defendant company and the defendant was entitled to receive for its exclusive account the benefit of interest or income accruing therefrom. At no time did defendant attempt to sell or discount any of said contracts or mortgages to any bank or any other person.” (R. 41).

Said Finding is not challenged by appellant in this court.

Certainly it must be apparent that commissions are payable on the transactions in this category. They satisfied the contract—commisisions were payable at the time of the transaction; defendant admitted liability by paying commissions on many of the transactions of this character. They satisfied the requirements of the code and of the contract, and even if they had not satisfied such requirements, defendant violated its duty to plaintiff by cancelling the secured obligations and failing to enforce their provisions.

It is further clear that the appellant attempts to mislead this court when it states on page 7 of its brief that commissions were paid on the real estate and first mortgage transactions. Defendant’s obvious liability for commissions on these transactions, and its admission of such liability here, should be considered in connection with Point II of this brief.

D. Commissions are payable on subscription notes accepted by defendant.

We come now to the so-called subscription notes. The appellant would have this court believe that all of the obligations which were cancelled in January and February fell into this category. The trial court found, however, and it is not disputed on this appeal, that at the time of their cancellation the amount due on the subscription notes was \$59,008.43

(Finding No. 9, R. 42). Commissions were payable on \$152,280.00 (Finding No. 16, R. 45). As found by the trial court "said subscription notes were distinguishable from the convention notes in that they contained a provision to the effect that the only remedy on the instrument in the event of default was to retain the amounts paid as liquidated damages" (R. 42). In other words it is not true that the defendant could simply cancel the subscription notes and issue stock therefor. There was a kind of security in the instrument. If the note was not paid the remedy of the payee was that it could retain the amounts paid as liquidated damages. *The defendant did not enforce this provision.* Instead, the defendant cancelled the obligations of the makers of the instruments to pay the balance, in tacit consideration of the maker's acceptance of stock in an amount equal to the payments made by the maker at \$20.00 per share.

Defendant, in effect, "bought off" the purchasers by issuing stock for the amounts paid, advising the purchasers their contracts were "cancelled" so that stock could be sold to other persons, and not suggesting in any manner whatever that the forfeiture provisions would be invoked. Note the similarity between defendant's actions here and those of the sellers in *Reid v. Life Ins. Co.*, (1900) 21 Ut. 295, 61 Pac. 21 (Point IA, *supra*), and *Hoyt v. Wasatch Homes, Inc.*, (1953) 1 Ut. (2d) 9, 261 P.(2d) 927, (Point II, *infra*.)

Analysis of the so-called subscription notes demonstrates the importance of defendant's failure to enforce the forfeiture provisions and demonstrates defendant's lack of good faith toward plaintiff and complete disregard of plaintiff's rights in cancellation of the instruments.

(1) *Enforcement of subscription notes according to their terms would have required forfeiture or enforced payment in approximately 90%, money-wise, of the instances involved.*

In the trial court plaintiff prepared a schedule *from the defendant's own records* analyzing the so-called "subscription notes" which are itemized in Schedule I (R. 49-57) attached to the Findings and Conclusions. The schedule was not received as an exhibit, as such, but in argument to the court. Defendant did not contest the accuracy of said analysis below, and cannot here. The figures contained in this section of the brief are verifiable primarily from Exhibits 23 and 31. If appellant should deny their accuracy, respondent can reproduce the schedule used below and substantiate it from the record.

The total of the instances where no payment was made is \$9,010.00. In other words, some payment was made on notes totalling \$82,636.08, or more than 90% in amount of the total. In more than 90% of the instances, if defendant had enforced the provisions of the note to the effect that failure to pay would result in forfeiture of the amount paid, a forfeiture of the amount paid, a forfeiture would have resulted, *or defendant would have collected the balance.*

A total of \$32,637.65 was received. In other words approximately 36% of the total amounts of these notes was actually paid to the company notwithstanding defendant's failure to attempt to enforce the notes. Yet defendant issued stock for all amounts paid and cancelled the balances rather than enforcing the provisions.

It is interesting to observe how defendant reverses its

field in discussing the public policy considerations in Points I(A) and I(B) of its brief. In Point I(A) it argues that to pay more than 15% commissions would reduce the assets of the defendant and thereby injure the rights of stockholders and policyholders. But in Point II(B) it argues in effect that the defendant was justified in cancelling the obligations of stock purchasers to pay into the company approximately \$150,000.00. It says in effect that to enforce the obligations of subscribers would hurt the company because it might be more than two years before company received all the assets subscribers agreed to pay into it (Appellant's brief, p. 12). Here indeed is a specious argument. Certainly the company had an obligation both to its policyholders and stockholders to protect its assets. That corporation assets constitute a trust fund for creditors and stockholders is known to any first year law student. Defendant had an obligation, if any of its assets were technically inadmissible under the insurance code, to take reasonable action to convert such inadmissible assets to admissible ones. The defendant has never suggested yet in this lawsuit how the cancellation of the obligations of the makers of subscription notes discharged that duty. The only way the company could have received the cash which the obligors agreed to pay into the company was to enforce the forfeiture provisions of these notes. Their cancellation therefore constituted a violation of duty the company owed to stockholders and policyholders of the mutual company just as it constituted a violation of the duty that defendant owed to the plaintiff.

The authorities cited in Point I-A of this brief are applicable in full measure to the subscription note transactions.

Moreover, the obligations of these persons was cancelled by the defendant in bad faith insofar as the plaintiff was concerned. (See argument made in Point II of this brief.) It is submitted that the Findings and Conclusions of the trial court concerning the subscription notes are sufficient, accurate and correct. The defendant's arguments to excuse their admitted cancellation are inconsistent and specious. The trial court's rulings to the effect that commissions are payable, especially in view of the supporting and supplementary reasons discussed in Point II of this brief, should be affirmed.

(2) *That the subscription notes may have been inadmissible assets under the insurance code neither prevents their enforcement nor justifies their cancellation.*

The trial court found that the provisions of the subscription notes to the effect that in the event of default the remedy of the company to retain the amounts paid as liquidated damages "was for the benefit of the subscribers or purchasers of the stock in the defendant company and not for the benefit of the defendant company. Such terms and conditions are not self-executing. They did not prevent or excuse the defendant from making reasonable effort to collect the various instruments or from enforcing the subscription notes according to the terms and tenor thereof . . . (they) do not constitute any valid or legal excuse for defendant's violation of its duty to plaintiff to attempt in good faith to collect all of said subscription notes" (R. 43).

It should be noted that the limitation upon the liability of the makers of these notes is of very questionable validity. Subscribers to corporate stock in this state have been held

liable to creditors of the corporation for the full amount of the subscription under Article XII, Sec. 5 of the Constitution. *Rolapp v. Ogden & N.W.R.R. Co.* (1910) 37 Ut. 540, 110 P. 364. The makers of these notes all signed subscription agreements in the full amount of the note (R. 171, 172. The subscription contracts still in defendant's file were produced and received as Exhibit 17). Whether there can be any valid contractual, regulatory or even statutory limitations upon the constitutional liability is open to question.

The point is that the corporation made no reasonable effort to collect from subscribers. It failed to enforce the forfeiture provisions of these subscription notes. It failed to make the 45-day demand which it now argues should have been given (Appellant's brief, pp. 12, 13, citing 31-6-14 UCA, 1953). It failed to assert any legal position which reasonable collection effort would have dictated. It, in effect, "bought off" the purchasers by issuing stock in the amount paid for in cash rather than enforcing the provision of the subscription note. And, of course, it concedes here, in effect, that cancellation of these notes was in bad faith toward plaintiff (See Point II of this brief).

Appellant appears to take comfort in the code provision to the effect that a solicitation permit would expire in two years (Appellant's brief, pp. 12, 13). How that provision helps it out is far from clear. In the first place defendant didn't get a solicitation permit (Ex. 4). In the second place, it has nothing to do with defendant's violation of its duty to plaintiff, and in the third place, nobody has ever claimed in this lawsuit that defendant was liable for commissions on

transactions dated two years after the date of plaintiff's contract (the period covered by Schedule I, Appendix A is 18 months) or even two years from the date of the sale of stock by defendant. Even if such permit had been obtained and had expired, the obligations of subscribers would not have expired.

Appellant's arguments in Point I-B of its brief simply do not go to the roots of the matter. They are certainly no answer to the trial court's Findings and Conclusions.

POINT II.

PLAINTIFF IS ENTITLED TO RECOVER ON ALL THE STOCK TRANSACTIONS INVOLVED BECAUSE THE DEFENDANT'S CANCELLATION OF THE OBLIGATIONS TO PAY FOR ITS STOCK WAS NOT IN GOOD FAITH.

This court has held in a long series of cases that a broker is entitled to a commission on a sale where he has procured a written, binding *offer or agreement* signed by a ready, willing and able purchaser. See, for example, *Curtis v. Mortenson* (1954) 1 Utah (2d) 354, 267 P.(2d) 237; *Ogden Savings Bank & Trust Co. v. Blakely* (1925) 66 Utah 229, 241 P. 221; *Little and Little v. Freishman*, (1909) 35 Utah 566, 101 P. 984; *Hoyt v. Wasatch Homes*, (1953) 1 Utah (2d) 9, 261 P.(2d) 927.

It is settled in this state that the commission is earned when the broker produces the offer to purchase; that the buyer's default thereafter is no defense to a broker's claim

against the seller. *Ogden Savings and Trust Co. v. Blakely et al.* (1925) 66 Utah 229, 241 P. 221.

And it is clear that where a principal terminates the employment contract in bad faith, the agent is entitled to recover. 2 Restatement on Agency, Sec. 454, is as follows:

“An agent to whom the principal has made a revocable offer of compensation if he accomplishes a specified result is entitled to the promised amount if the principal, in order to avoid payment of it, revokes the offer and thereafter the result is accomplished, the agent’s prior efforts being the effective cause thereof.”

Illustrations 1 and 2 to the Sections are as follows:

“1. P lists Blackacre with A for sale. A introduces T, who agrees to meet T’s terms, except as to one or two minor matters, agreeing to thing it over until the next day. P telephones A that he is dismissed and the deal is off, but the next day seeks T, who agrees to the terms which P had required the day before. It may be found that P has terminated A’s employment in bad faith and that A is entitled to his commission.

2. P lists Blackacre with A, a broker, for sale. A advertises, and several persons apparently desirous of purchasing respond. P immediately telephones A that his services are no longer required, intending to effect a sale personally with one of such persons and complete the transaction. Two days later, P effects a sale to one of the persons who responded to A’s advertisements. It may be found that P terminated his relations with A in bad faith and that A is entitled to his commissions.”

This principle is applicable where the cancellation occurred *before* a contract was entered into between the seller and

purchaser. *A fortiori*, it is applicable where the cancellation occurred after an agreement was made between the seller and purchaser.

The trial court found that: "The circumstances surrounding the cancellation of the various obligations to pay defendant for the stock, said obligations being cancelled in the months of February and March, 1954 compel the Court to find specifically that the said cancellations were not in good faith toward plaintiff and that said cancellations were made in bad faith so that the principle stated by the Restatement on Agency, Volume 2, Section 454 is applicable." (R. 44, para. 13).

The conclusion of law on the same theory is: "Plaintiff is entitled to commissions on the unpaid balances due to defendant under the obligations described in Schedule I with respect to personal or conventional type notes, real estate contracts and mortgages and subscription notes, whether said instruments and obligations satisfied the requirements of the contract between the parties or the Insurance Code because the defendant failed to act in good faith toward plaintiff in cancelling all of said obligations." (R. 46, para. 4.)

These Findings and Conclusions are not challenged here. The facts are directly within the rule and illustrations.

In 32 different instances, defendant issued stock to persons and received payments therefor *after* the obligations from these persons to pay for their stock were purportedly cancelled by defendant. (Compare the cancellations, Schedule I, R. 49-57 with defendant's stock book and defendant's tabulation of proxies at the stockholders' meeting May 10, 1954, Ex. 48.)

These instances are directly within the rule stated in Section 454 of the Restatement, and they are important to further demonstrate defendant's unconscionable lack of good faith in cancelling all the securities in question.

For the most part the very obligations that were represented to the Insurance Commissioner on June 22, 1953, as being proper assets in all respects for investment by the defendant were cancelled in February and March, 1954. Defendant gave no consideration as to whether the obligation was secured or unsecured and no attempt whatever was made to sell the securities to a bank or any other person.

Forfeiture provisions of the so-called stock notes were entirely disregarded. The negotiable instruments were treated the same as non-negotiable notes. Plaintiff was given no opportunity to enforce the instruments. Among the obligors whose promises to pay were arbitrarily cancelled were attorneys, practicing physicians, well-known real estate brokers and other highly respected business people of the state. The only documents in evidence with respect to defendant's enforcement of the terms of the notes and other evidence of indebtedness are in Exhibit 29. Defendant stipulated that these were the only demands for payment or notices pertaining to defendant of which defendant had copies (R. 152, 153). They do not request payment in any form whatever. They simply announce that the stock transaction is cancelled and that defendant's stock is issued for the amount paid. It is hardly coincidental that the cancellation of these securities and obligations occurred at the time when a proxy battle was pending concerning the control of the Board of Directors of defendant company (R.

309). Obviously, purchasers of stock whose obligations were cancelled would have played a major role in that proxy contest.

It is little wonder that the defendant does not challenge the sufficiency of the court's findings and conclusions that the cancellation of the obligations to pay for defendant's stock was not in good faith.

Factors involved in this point must be considered in connection with the principles discussed in Point I of this brief. Even if it be admitted that the so-called stock notes were not assets which qualified under the Insurance Code as eligible by insurance companies, it can hardly be doubted that they are bona fide offers to purchase stock. In 32 different instances defendant issued stock to persons and received payment therefor after cancelling the stock notes only approximately 60 days prior thereto.

With respect to failure to enforce the forfeiture provision of the so-called stock notes, the court's attention is invited to *Hoyt v. Wasatch Homes, Inc.* (1953) 1 Utah (2d) 9, 261 P. (2d) 927. There the plaintiff brought an action to recover money defendant had retained from the commission for arranging real estate transactions on property owned by plaintiff and defendant filed a counterclaim for a real estate commission. \$1,000.00 had been deposited as earnest money pursuant to the provisions of an ordinary earnest money receipt which provided that the Seller could retain the deposit as liquidated damages. After the earnest money receipt was signed the Sellers changed their minds and declined to proceed. The

\$1,000.00 deposited by the Buyers was being held by the defendant. The court held that the broker was entitled to his commission because the Seller had defaulted and that the broker had a right to look to the Seller to enforce the liquidated damage provision of the agreement. Failure to enforce said provisions would have rendered the Seller liable for wilful failure to complete the contract.

A fortiori Section 454, *supra*, is applicable where the Seller makes a direct deal with the Buyer after failing to enforce the forfeiture provisions.

The argument made on this point is a complete and direct answer to Point I(b) in defendant's brief. Plaintiff is entitled to his commissions based on defendant's lack of good faith in terminating the obligations. Certainly when the additional arguments considered in Point I are added to the force of the arguments in this point and it is realized that the defendant does not dispute Findings of the trial court with respect to its lack of good faith, it is obvious that the decision of the trial court allowing commissions upon all the transactions in Schedule I (R. 49-57) should be affirmed.

POINT III.

THE TRIAL COURT COMMITTED NO ERROR IN STRIKING CERTAIN TESTIMONY CONCERNING ADMINISTRATIVE EXPENSES OF DEFENDANT AND DENYING DEFENDANT'S OFFER WITH RESPECT THERETO.

Defendant contends that the trial court committed error in striking certain testimony concerning the defendant's claim that certain of its administrative expenses such as stenographic and office equipment were chargeable against the plaintiff under the agreement. Defendant assumes in its argument that such testimony was relevant and that proper offers of proof thereof were made. Neither assumption is accurate.

A. The stricken testimony concerned general administrative expenses, not "promotion and organization" expenses.

During the period when Mr. McCormick was selling stock for the defendant company, the defendant charged the plaintiff with all the ordinary usual expenses incident to stock sales. Included was such items as filing fees for the registration of the sale with the state Securities Commission, the expenses incident to the obtaining of the licenses for salesmen's commissions, advances made to salesmen on any such sales and similar items of that kind (R. 361-368). The defendant at the trial attempted to introduce evidence on the theory that the defendant's "estimate" of the amount of office space and stenographic and other office help and services used by defendant was and should be charged to plaintiff. Upon completion of the testimony of the president of the defendant corporation on these matters, a motion was made to strike the same on the ground that it was incompetent, irrelevant and immaterial and represented conclusions of the witness, that no proper foundation was laid and that it was remote insofar as the issues of the lawsuit are concerned (R. 357).

The court interrogated counsel on both sides in some detail as to the items claimed by the various parties with respect to

such indirect costs involved in the testimony (R. 361-368). It was clearly apparent that the offered testimony and the stricken testimony of Mr. Bullard was to support defendant's theory with respect to items such as rent, secretarial service and office expenses. The court then made the following order:

“THE COURT: Just before adjournment last night, the plaintiff made a motion to strike from the record all the testimony of the witness, Bullard, received yesterday afternoon, with respect to the matter of rents, secretarial service and office expenses, and that motion is granted, and the testimony of Bullard with respect thereto stricken from the record.

“ * * * I don't concede that the law would say, and, if it attempted to, I don't think the law would have any constitutional validity if it were to be construed as saying that a company, desiring to sell stock, could employ the salesmen at a lawful commission to sell that stock, and then be heard to say that, 'We as a company are only allowed to expend fifteen per cent of the receipts in promotion and those things, and, in the manipulation of our business, we actually expended fifteen per cent over and above the agents' commission, and, therefore, the agent has nothing coming to him. We could deprive him of his commission entirely by spending that much, fifteen per cent of money on other things that we manipulate with respect to organization.'

“I don't think the law contemplated that any such—any such construction could be put on the statute. If it did, I think it would be definitely and clearly unconstitutional and void.”

The ruling of the trial court was not only proper but it was well considered and clearly reflected the law on the subject. The testimony stricken concerned ordinary administrative ex-

penses of the defendant company. There was not one word of evidence to the effect that one single employee was added as a result of the stock sales program. Moreover the position of the defendant contemplates that defendant itself could have expended more than 15% which defendant claims was the amount allowed by the code for the promotion and organization expenses for administrative expense unconnected with its stock program and then deny to McCormick the fruits of his labor. Certainly the Insurance Code contemplated no such interpretation. It is respectfully submitted that the ruling of Judge Larson on this point was in no way prejudicial to any proper interests of the defendant in the lawsuit.

The only authority counsel has been able to find was in the Bureau of Tax Appeals. Under Section 280 of the Revenue Act of 1926, organization expense of a corporation was deductible upon dissolution.

In *James Van Keuren v. Com. of Int. Rev.*, (1933) 28 B.T.A. 480, it was held that expenses for salaries, rent, advertising, telephone and telegraph did not constitute "organization" expense.

Appellant's authorities are not in point. None of them hold or even infer that a share of the general *administrative* expenses are to be considered as "organization and promotion" expenses.

B. The stricken testimony is so indefinite, uncertain and speculative on the points for which it was claimed by the defendant as to be inadmissible.

Even assuming for the purpose of argument that a proper

division of administrative expenses would be chargeable to the plaintiff (a wholly gratuitous assumption) the evidence introduced was entirely improper to accomplish the purpose. It was speculative and represented pure guesswork. No proper foundation was laid for it and it was so remote and indefinite as to be unworthy of judicial consideration. With respect to secretarial assistance, for example, the question and answer was as follows:

“Q. Can you state how much secretarial assistance was devoted to Mr. McCormick, or provided?

“A. On secretarial service alone, it would be hard to give an exact figure.” (R. 344.)

With respect to office facilities generally the following question and answer appear in the record.

“Q. Now directing your attention to the use of office facilities, was there any—was any part of the rest of the office facilities of the company devoted or used in the handling of stock transactions and the promotion and organization of the stock company?

“A. Yes.

“Q. Do you recall approximately—or do you recall how much that was?

“A. Not in exact detail, no.” (R. 346.)

He then testified that the printing department was used “quite a little bit on and off.”

Mr. Bullard admitted that as far as rent was concerned that the insurance salesmen used the same space which plaintiff was using and Mr. McCormick was not furnished space that

was exclusively devoted to the sale and promotion of stock (R. 347).

He could not even make an approximate guess as to the legal fees incurred by the company which he claimed should be allocated to the organization and promotion (R. 347, 348). As to all of these matters he testified that the general books of the corporation reflect the exact figures (R. 348) but at no time did the defendant company offer these general corporate records in evidence.

A finding cannot be based upon conjecture, guess or speculation. *Dern Investment Co. v. Carbon Co. Land Co.*, (1938) 94 Ut. 76, 75 P(2d) 660; *Higley v. Ind. Comm. et al.*, (1930) 75 Ut. 361, 285 P. 306.

C. Defendant cannot recover from plaintiff any amount paid in excess of the amount provided by the statute.

Defendant argues in Point I-A and by inference through Point I of its entire brief that it was entitled to recover the difference between the 15% allowable under Section 31-6-7 U.C.A. 1953 and the 20% which defendant paid (including all proper credits) to plaintiff. It argues that the evidence to establish a 5% or any additional amount erroneously paid was wrongfully rejected.

Vol. II, Section 598 of the Restatement on Contracts provides in substance that an amount paid in violation of a statute cannot be recovered by a party except under the conditions referred to in Sections 599 through 609, none of which is applicable to the defendant in this lawsuit.

The rule is so widely accepted as to not require citation of additional authorities. Not being an innocent party and having itself, according to its own theory, failed to comply with the statute, the defendant is in no position to ask the court for relief.

POINT IV.

THE COURT ERRED IN DENYING TO McCORMICK COMMISSIONS ON THE STOCK TRANSACTIONS INVOLVED AT THE RATE OF 20% AS PROVIDED BY THE AGREEMENT BETWEEN THE PARTIES.

The Restatement of the Law on Contracts, Vol. II, Sec. 599, is as follows:

“Where the illegality of a bargain is due to

“(a) facts of which one party is justifiably ignorant and the other party is not, or

“(b) statutory or executive regulations of a minor character relating to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law,

the illegality does not preclude recovery by the ignorant party of compensation for any performance rendered while he is still justifiably ignorant, or for losses incurred or gains prevented by non-performance of the bargain.”

Illustration 3 under the Section (page 1114) is very close to the case at bar.

See also Volume II, Section 604, Restatement of Contracts, as follows:

“Where the parties to an illegal bargain, though both blameworthy, are not in *pari delicto*, and one of them has not been guilty of serious moral turpitude, he can repudiate the bargain, and if he has rendered any performance thereunder, recover it or its value.”

The facts of this case are squarely within the principles announced in the said sections. Prior to September, 1952, the plaintiff, M. J. McCormick, had never had any occasion to examine the laws of the state of Utah with respect to insurance matters (R. 235). He has never had any legal training (R. 235). He had very limited experience prior to that time in connection with the organization of any life insurance company (R. 236). He has never had any occasion to look into the laws of the state of Utah for any rulings of the Insurance Commissioner with respect to any requirement incident to the issuance of the solicitation permit (R. 236). Prior to and incident to the execution of the agreement between the parties, Mr. McCormick had conversations with three directors and officers of the defendant company. Mr. Ashby Thatcher was represented to him as being an authority on insurance and an examiner for the Insurance Commissioner in Utah for several years (R. 238). Mr. Thatcher himself represented that he was executive vice president of the defendant company and a director and that he was instrumental in organizing the company and seeing that it was a success. He further represented that he had been an examiner for the Insurance Commissioner in Utah for a number of years and for some other states (R. 238). Mr.

Thatcher represented explicitly that the defendant company could pay plaintiff commissions at the rate of 20% (R. 239).

Mr. Cleo Bullard was introduced to the plaintiff as president of the defendant and he stated that he had a great amount of experience in insurance matters and had made a "great study with reference to the insurance business" (R. 240). He told Mr. McCormick that Harry Pugsley was one of the outstanding attorneys in Utah formerly connected with the Attorney General's office and "was very competent as an insurance attorney." Mr. Bullard represented to Mr. McCormick that he could be paid 20% commissions (R. 241). Harry Pugsley represented to plaintiff that he was an attorney from Salt Lake City representing the defendant company, that he had formerly been connected with the Attorney General's office and "had a vast amount of experience as an insurance attorney" (R. 242). Mr. Pugsley drafted the contract and presented it to plaintiff (R. 243). Mr. McCormick relied on the statements of Mr. Thatcher, Mr. Bullard and Mr. Pugsley that the company could and would pay 20% commissions (R. 243).

The defendant itself held out these officers and directors to be men of experience and training in the insurance business. Exhibit 11 is an offering circular which defendant produced from its own files and of which a copy was filed with the Securities Commission of the state of Utah. It states that its president, Cleo H. Bullard, has had many years of executive experience in the insurance business in the states of Arizona, Nevada, Utah and Colorado. The exhibit states: "His experience is working closely with the state insurance departments of

the Western States has been invaluable in the progress of the Life Insurance Corporation of America.”

Ashby S. Thatcher, the vice president of the company, is described as “a man widely recognized in the insurance field. For many years he was Chief Examiner for the Utah department of insurance. He has served many of the western states in a similar capacity.”

Harry D. Pugsley, a director and “legal advisor” of the defendant, is described as a Salt Lake City attorney “devoting a major portion of his practice to corporation, insurance . . . law.” The other directors and officers of the corporation are similarly held out to have had experience in the insurance business (see Ex. 11). The defendant’s own records demonstrate that defendant’s officers and directors who prepared and executed the agreement between the parties were held out as being experienced persons with specialized knowledge concerning the insurance business and the requirements of the Utah insurance department.

It is clear, moreover, that the Utah State Securities Commission itself issued its permit to sell the stock in question on the assumption that 20% commission was to be paid as commissions on defendant’s stock (see Ex. 5, pg. 3 and see Ex. 7). Exhibit 5, page 10, question 10(a) states that the department of insurance, state of Utah, has passed upon the securities subject to the sale described in the application. Exhibit 12, a letter to the Insurance Commissioner from the defendant company, dated June 17, 1953, represents that the application to the Insurance Commissioner was filed upon the

advice of defendant's counsel, Harry D. Pugsley. In that letter Mr. Bullard states: "I believe you will find all the legal steps in perfect order and that the entire program, from the beginning, has been on a completely sound basis" (Ex. 18). It is to be observed that Peter M. Lowe, Deputy Attorney General of the state of Utah, similarly passed upon the legality of the issue (Ex. 21).

At no time prior to his execution of the contract did Mr. McCormick ever inquire into the provisions of the Utah statute concerning commissions payable on the sale of insurance stock (R. 244). Mr. McCormick left San Francisco, came to Salt Lake City for the purpose of performing his contract with defendant (R. 245).

Throughout the period of the sales referred to in Schedule I, all of the parties involved assumed that plaintiff was entitled to receive 20% of the amount of the sales commission and he was paid on this basis. The reasonableness of the assumption may well be compared to the policy of the Insurance Commissioner himself to the effect that where companies were being converted from a mutual benefit to a stock company, compliance with the requirements of the Securities Code allowing 20% as commissions rather than the Insurance Code was the proper procedure (Ex. 5). Certainly the action taken by the Insurance Commissioner, the Securities Commissioner and the officers and directors of the defendant company themselves demonstrate that the plaintiff was reasonably ignorant of the requirements of the law. He was justified in assuming special knowledge by the defendant of these requirements and that the defendant had complied with them.

The court expressly found that the plaintiff substantially performed all of the provisions and promises contained in the agreement (R. 45, Finding 19). There is no suggestion in appellant's brief that such finding is not amply supported by the evidence herein.

It is respectfully submitted that the facts in this case fall squarely within Section 599 of the Restatement of the Law on Contracts and the general equitable principles applicable thereto. Plaintiff was "reasonably ignorant" of a special statute. He relied upon the knowledge and experience of defendant's officers and directors who were acting within the scope of their authority. The plaintiff should have been allowed to recover at the rate of 15% rather than 20% on the amounts referred to in Schedule I. It is respectfully submitted that the Findings, Conclusions and Judgment herein should be amended accordingly.

The only case cited by defendant in its brief, *Anchor Life and Accident Insurance Co. v. Taylor*, Ct. App. Ohio (1928) 163 N.E. 631, is distinguishable from the principle announced by the Restatement in the following particulars:

1. The plaintiff in that action was employed by a trustee of the defendant and not by the defendant company.
2. There is no evidence in that case that the plaintiff relied on the special knowledge of the defendant in the execution of the agreement.
3. It appears that in the *Anchor Life* case the contract was invalid as such under the terms of the statute. In the case at bar, Sec. 31-6-7, U.C.A. 1953, does not prohibit contracts

of the kind in question. That section is only applicable with respect to the procedures to be followed in obtaining a solicitation permit. The sins of the defendant in this action, if indeed there be any in failing to comply with Section 31-6-7, should not be heaped upon the head of the plaintiff.

Moreover, if the *Anchor Life* case is in conflict with the Restatement section, it is respectfully submitted that the Restatement rule more aptly and justly applies the equities in the situation.

The argument in this point assumes that the trial court was correct in holding that a solicitation permit should have been obtained by defendant. If defendant and the Insurance Commissioner were correct in supposing that no such permit is required when a mutual company converts to a stock company, then, of course, Commissions are recoverable at the 20% rate without dispute.

There is no dispute in this lawsuit that the plaintiff is entitled to recover on all transactions for which commissions are due in the amount of at least 15%, as found by the trial court. In the event the court agrees with respondent that the rate should be 20% under the authorities presented in this point, then the judgment should simply be increased from \$22,842.00 plus interest and attorney's fees (15% of \$152,280, the amount on which commissions remain unpaid, Finding 16, R. 45) to \$30,456.00 (20% of \$152,280), plus interest and attorney's fees as computed and allowed by the trial court.

CONCLUSION

Defendant's violation of its duty to plaintiff renders it liable to him under the theories referred to in Points I and II. The only real question is whether he can recover at the rate of 15% as determined by the trial court, or at the 20% rate under the authorities presented in Point IV herein. In either event, no purpose would be served by a new trial since the facts presented in Point IV cannot be seriously controverted.

The objections made by appellant are clearly without merit and should be rejected by this court.

Respectfully submitted,

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