

# Property: Commission for Sale of Farm After Listing Contract Has Expired

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man's last and usual place of abode is his present usual place of abode. This ruling was assailed in a federal court case<sup>30</sup> but never expressly overruled. Then in the *Cashey v. Peterson* case,<sup>31</sup> the court held that the usual place of abode of an emancipated boy who was working on and living at a farm away from his parents was at the farm and not at his present home. This decision interpreted the Wisconsin statute<sup>32</sup> on substituted service and seemed to follow the *Earle v. McVeigh* rule<sup>33</sup> that the usual place of abode is the place where the defendant is usually and actually living. However, Wisconsin rulings<sup>34</sup> differ from the *Rowe* case rulings<sup>35</sup> in that Wisconsin has held that all statutes on substituted service should be strictly construed.

The writer believes that the *Ingerton* case is an unnecessary enlargement of the temporary residence doctrine of earlier federal court cases. While its doctrine of liberal construction is not available under the facts in the *Ingerton* case as such, the policy of the decision of the *Rowe* case and the reasoning of the dissenting judge appear to this writer to be the sounder view on this problem and would be more in keeping with the other federal decisions on this question.<sup>36</sup>

DONALD GRIFFIN, JR.

**Property—Commission for Sale of Farm after Listing Contract Has Expired**—The plaintiff, Butterworth, an agent for the United Farm Agency, in pursuance of his listing agreement for the property, offered to lease the farm for a year with an option to buy during the year. This arrangement was acceptable to defendants and plaintiff ceased all efforts to find a purchaser. Five months after the brokerage contract expired, but during the life of the option, Mrs. Harrison persuaded one Vanadore to exercise his option and purchase the farm at the original price of \$12,500. Agent now sues for his 10% commission. *HELD*: the defendants, by executing a sales contract with Vanadore (the purchaser produced by plaintiff) before the lease option contract had expired, in effect agreed to an extension of the listing agreement since it is clear that the lease option contract was a direct result of the listing agreement which Mrs. Harrison signed. Justice McFadden in his dissent claims that the broker is not entitled to any commission in this case because: (a) the sale was not made within the time stated

<sup>30</sup> *Swift v. Meyers*, 37 Fed. 37 (1888).

<sup>31</sup> *Cashey v. Peterson*, 220 Wis. 690, 263 N.W. 658 (1935).

<sup>32</sup> WIS. STATS. (1951) §262.08 (4).

<sup>33</sup> *Supra*, n. 4.

<sup>34</sup> *Pollard v. Wegener*, 13 Wis. \*569 (1860), *Mechlem v. Blake*, 19 Wis. \*397 (1865).

<sup>35</sup> *Supra*, n. 9.

<sup>36</sup> *But see*; *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950) and 34 MARQ. L. REV. 120.

in the brokerage contract; (b) no bad faith is involved here; and (c) the owners did no act to extend or waive the time limit set out in the broker's contract of employment. *Harrison et al v. United Farm Agency*, 262 S.W. 2d 293 (1953).

In this case there are three grounds upon which recovery might be predicated: (1) express contract; (2) contracts implied in fact; or (3) quasi-contracts. There can be no recovery under an express contract since the written contract expired five months before the owner sold the land.<sup>1</sup> Thus the written contract was ended and if plaintiff is going to recover he will have to show either that a new hiring can be implied from the facts of the case or that the defendant has been unjustly enriched at the expense of the plaintiff.

Contracts implied in fact consist of obligations arising from mutual agreement and intent to promise where the agreement and promise have not been expressed in words.<sup>2</sup> In order to create an implied contract facts and circumstances must be shown from which a hiring can be implied. In order to give rise to such an implication it must appear that the plaintiff was rendering service on behalf of the defendant with his knowledge and consent.<sup>3</sup> In this case the plaintiff agency exerted no efforts whatsoever after the expiration of the listing agreement, and what the plaintiff did previously was done in reliance upon the written listing agreement which has since become a dead letter. The fact that the broker rendered these services without compensation is irrelevant when we consider that the broker is paid on the basis of his results and not on the amount of effort expended.<sup>4</sup> Certainly the plaintiff has not been damaged in any way. He did not produce a buyer within his contract time, and therefore, he is not being paid for producing one. After the written contract had lapsed, there was no further contract between plaintiff-broker and defendant. Therefore, upon what grounds could a contract be implied in fact?

Justice McFadden in pointing out the folly of implying a contract under these facts says:

"In allowing the broker to recover in this case, the majority of this court is saying that if a broker, who has a time limit for completing a sale, can inveigle the owner into leasing the property for any length of time under a contract containing an option for the lessee to buy, then the landowner must pay the broker the commission on the sale if the lessee ever exercises the option."

So far we have considered this problem only in light of the com-

<sup>1</sup> *Nordale Realty Co. v. Havel*, 251 Wis. 136, 28 N.W. 2d 245 (1947); 2 C.J.S. Brokers, §88,

<sup>2</sup> 1 WILLISTON, CONTRACTS 9 (1936).

<sup>3</sup> *Hug v. Theilacker*, 192 Wis. 330, 212 N.W. 671 (1927).

<sup>4</sup> *Estate of Keyser*, 190 Wis. 189, 206 N.W. 895 (1926).

mon law. Arkansas has no statute which requires all listing or brokerage contracts to be in writing,<sup>5</sup> but Wisconsin Statutes (1949) §240.10 does set up such a requirement. Could an extension of a written listing agreement be implied by the facts and circumstances of the case in Wisconsin? The Supreme Court of Wisconsin declared in 1947, in a case also involving an implied extension of a prior written listing agreement:<sup>6</sup>

"Section 240.10 Stats. provides that every contract to pay a commission to a real estate broker is void unless in writing. Under this statute there is no room for a so-called implied contract."

There is one last ray of hope accorded the real estate agent. Can he convince the court that the demands of justice necessitate implying a contract here as a matter of law? If a quasi-contractual relationship could be imposed there need be no reference to the intentions of the parties.<sup>7</sup> All of the courts at one time or another have enforced contracts, even when they were void under the statute of frauds, on the theory that the defendant is being unjustly enriched at the expense of the innocent plaintiff and, therefore, the plaintiff is allowed to recover the reasonable value of his services. In this case the plaintiff performed no services for which compensation was not provided had the results been attained with the provisions of the contract. Had the agent personally completed the sale there might be a different result. Even then, though, he would be subject to the accusation that he was a mere volunteer and nothing more. By how much then have the plaintiff's actions enriched the defendants?

The problem is much simpler in states that have statutes which require such contracts to be in writing. In fact there is no problem. The legislative intent of this statute is to protect the owner of real estate from the unfounded claims of real estate agents and now and then to protect the agent from being cheated out of his commission. If the court, under such a statute, would allow recovery on *quantum meruit* it would in effect be nullifying the law as laid down by the legislature. The court therefore laid down this rule in *Hale v. Krisel*:<sup>8</sup>

"To hold that there can be recovery upon quantum meruit is to open the door to the very abuses the statute (240.10) was enacted to prevent and defeat its manifest purpose."

In conclusion the dissenting opinion of Justice McFadden seems to be by far the more logical solution to the question under common law, and under existing Wisconsin Law it is the only answer.

PATRICK H. BRIGDEN

<sup>5</sup> See *Kempner v. Gans*, 87 Ark. 221, 111 S.W. 1123 (1908); *Vanemurg v. Duffy*, 177 Ark. 663, 7 S.W. 2d 336 (1928).

<sup>6</sup> *Leuch v. Campbell*, 250 Wis. 272, 26 N.W. 2d 538 (1947).

<sup>7</sup> 1 WILLISTON, CONTRACTS 9 (1936).

<sup>8</sup> 194 Wis. 271, 215 N.W. 227.