1970

Phillips Petroleum Company v. Herbert A. Hart And Mrs. Herbert A. Hart : Brief of Plaintiff And Respondent

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INDEX

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CASES

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

PHILLIPS PETROLEUM COMPANY, *Plaintiff-Respondent,* vs. HERBERT A. HART and MRS. HERBERT A. HART, his wife, *Defendants-Appellants.*	Case No. 12101

BRIEF OF PLAINTIFF AND RESPONDENT

STATEMENT AND KIND OF CASE

This is an action on a Contract for Deed for real estate located in Salt Lake City. By the terms of the contract, defendant shall keep all taxes paid. Defendant did not pay the taxes. Taxes were paid by the plaintiff. The contract provided the balance could be paid at any time and the contract gave seller option to repurchase. Defendant made a deal to sell the property and asked plaintiff for a waiver of option to purchase and for a pay-off figure, which figure was given to defendant, Mr. Hart from an amortization table without including the taxes, which taxes had been paid by the plaintiff. This is a suit to recover the taxes paid by the plaintiff and not included in the payoff figure. Defendants' defense is accord and satisfaction, and claims evidence was erroneously admitted.

DISPOSITION IN THE LOWER COURT

The Court granted judgment in favor of the plaintiff and against the defendant for the sum of $1,433.26, the amount of the taxes paid by the plaintiff, and interest.

RELIEF SOUGHT ON APPEAL

Respondent requests the court to affirm the judgment of the lower court.

STATEMENT OF FACTS

Defendants' Statement of Facts is not complete and conclusions are made in defendants' Brief which are not based on the full facts. Therefore, plaintiff makes the following Statement of Facts:

A contract entitled Contract for Deed, (Exhibit 1 P) was executed August 12, 1963, by the terms of which the plaintiff agreed to sell to defendants property on 2nd West in Salt Lake City, Utah. The conveyance was to be made by a Special Warranty Deed, a copy of which was attached to the Contract for Deed. Also, there was an Option Agreement attached to the Contract for Deed, by the terms of which the buyer granted to Phillips Petroleum Company a first refusal (option to purchase) the property at any time prior to the conveyance of title of said property to the buyer.

The defendants were to make monthly payments, the entire balance of the purchase price to be paid at any time without penalty and the contract further provided the buyer shall enter into possession and shall keep all taxes

paid. The defendants went into possession of the property, made the monthly payments, but failed to pay the taxes. Tax notices were sent to plaintiff.

In January of 1967 the defendant, Mr. Hart, talked to Mr. Gordon Wirick, District Real Estate Representative of Phillips Petroleum Company, and said he had a chance to sell the property and asked Mr. Wirick to get a waiver of Phillips Petroleum Company's first right of refusal to purchase the property as stipulated in the Contract for Deed (R. 40-41). Mr. Wirick promised he would write the home office at Bartlesville, Oklahoma, which he did (R. 51). He received the waiver of the first right of refusal option agreement. Thereafter, Mr. Wirick had a conversation with Mr. Hart in February in which Mr. Hart told Mr. Wirick that the first deal had fallen through but he had a chance to sell the property again and asked if the Phillips Petroleum Company would waive the first right of refusal (option agreement) to the second proposed sale. Mr. Wirick told him that he had the letter in his possession and that he could come and get it. He gave the letter to Mr. Hart (R. 52). At about the same time, Mr. Hart asked for the payoff figure and Mr. Wirick looked at the amortization schedule and told him that the payoff figure was $3,486.18. The amortization schedule is attached to Exhibit 7 P. (Mr. Wirick's letter to Attorney Hatch.)

At a subsequent conversation Mr. Hart called Mr. Wirick and told him that the sale had gone through and asked him for the exact payoff figure. At that time Mr. Wirick told Mr. Hart that the payoff figure was $3,501.39

which was a few dollars more than the figure he had given him before because the interest was figured to the exact date. Mr. Hart brought in a check for $3,501.39. Shortly thereafter, Mr. Wirick delivered the deed to Mr. Hart.

After Mr. Wirick delivered the deed to Mr. Hart, he realized that he had failed to include the general property taxes that had been assessed against the property during the term of the Contract for Deed, which taxes had been paid by Phillips Petroleum Co. (R. 54 and R. 65 and Exhibits P2, P7 and P8). Mr. Wirick notified the Credit Department that he had failed to include the taxes paid by Phillips Petroleum Co. on property in the pay-off figure (R. 54).

Thereafter the Credit Department of Phillips Petroleum Company sent a letter to Mr. Hart, Exhibit 2 P dated November 17, 1967 stating:

> "We find you have not paid for the property taxes for the year 1963 through 1966. These taxes were previously billed to and paid by Phillips Petroleum Company."

and the letter, Exhibit 2 P contains an itemization of the taxes by years.

Exhibit 3 P, dated December 7, 1967, a letter from Phillips Petroleum Company to Defendant, Mr. Hart, again asking for the taxes.

Exhibit 4 P, dated December 19, 1967, a letter from Phillips Petroleum Company to Defendant Mr. Hart, written by witness G. C. Wirick, asking for the taxes.

Exhibit 5 P, dated January 3, 1968, a letter from Phillips Petroleum Co. to Defendant Hart, being the second letter written by witness G. C. Wirick, asking for the taxes.

Exhibit 6 P, dated January 27, 1968, a letter from Attorney Sumner Hatch to Phillips Petroleum Co. in which he states no dispute made of the amount, but alleging accord and satisfaction.

That after the letter, Exhibit 6 P, witness Wirick talked to Mr. Hatch who wanted to know how he arrived at the figures (R. 57). That in response to this question, Mr. Wirick wrote Exhibit 7 P Letter setting out pay off and the amount of the taxes by years and how he arrived at the pay off.

Exhibit 8 P, dated April 3, 1968, letter written by Attorney Sumner Hatch in answer to letter from witness Wirick's letter dated March 25, 1968, Exhibit 7 P, in which letter Attorney Hatch states:

> "We do not disagree with your figures, but we do disagree with the reasoning. It would seem that Mr. Hart requested from your company a payoff figure, and upon receipt of that payoff figure, paid the matter, and in return received a quit claim deed. "We are forced to take the stand that there was an accord and satisfaction on this matter."

That thereafter the Complaint was filed in the above entitled case. Paragraph 4 of Plaintiff's Complaint is as follows (R. 1):

> "That the defendants have paid said contract with the exception of paying the taxes, and the plaintiff has paid said taxes and the amount of taxes due are as follows:

> "1963 taxes (pro-rated from September 12, 1963, 142 days at $.93 per day, $340.36, 1963 — $122.76, 1964 — $381.48, 1965 — $401.88, 1966 — $356.67."

That at no place in defendants' answer is there any denial of the contents of Paragraph 4 of plaintiff's Complaint. Paragraph 2 of defendants' Answer, (R. 4) Third Defense, states:

> "2. That a novation to the contract was created by the conversations and requested pay-off figure and said amount has been fully satisfied."

During the trial of the case, it was admitted that the taxes for 1963, 1964, 1965, 1966 had not been paid by the defendant, Mr. Hart.

ARGUMENT

POINT I.

THERE ARE FACTS AND EVIDENCE IN THE RECORD OF THE AMOUNT AND PAYMENT OF THE TAXES BY THE PLAINTIFF.

(1) NO ISSUE RAISED BY THE PLEADINGS AS TO THE AMOUNT AND PAYMENT OF TAXES. BOTH COURT AND PLAINTIFF'S COUNSEL WERE MISLED BY THE PLEADINGS, ACTS AND CONDUCT OF DEFENDANTS' ATTORNEY, IF THERE WAS TO BE AN ISSUE RAISED AS TO THE AMOUNT AND PAYMENT OF TAXES.

(2) LETTERS SENT BY PLAINTIFF TO DEFENDANTS SETTING OUT THE PAYMENTS AND AMOUNTS OF TAXES DUE WITH NO DENIAL, AND ADMISSION IN DEFENDANTS' ATTORNEY'S LETTERS THAT THE FIGURES ARE CORRECT AND THAT THEY DO NOT DISAGREE WITH THE PLAINTIFF'S FIGURES.

(3) ADMISSIONS, TAXES NOT PAID BY DEFENDANT HART.

(4) ORAL EVIDENCE WAS ADMISSIBLE AND PART OF IT NOT OBJECTED TO.

Defendants state no evidence of amount and payment of taxes. We submit this is not the fact and we set out the following facts which are in the record, which support the points above set out, which have heretofore been mentioned in our Statement of Facts.

In the Complaint it is set out the amount of the taxes by years of which there was no denial in the Answer or any of the other pleadings (R. 1, 4) and no issue made by the pleadings of the payment or the amount of the taxes or in the discussion with the court and counsel.

Testimony of Gordon Wirick and the statements by the Court are as follows (R. 54) :

> "Q. Now, then what was the next thing which occurred in regard to this transaction?
>
> "A. Shortly after I had delivered the deed to Mr. Hart I realized that I had failed to include the gen-

> eral property taxes that had been assessed against the property during the term of the contract for deed, and that had been paid by Phillips Petroleum Company."

Mr. Hatch objected to the testimony. His objection was overruled, (R. 54) and thereafter the following occurred:

> "THE COURT: I simply make that statement based on my own review of the file submitted to me in light of my discussion with counsel. It was my impression there was no real issue of fact in light of payment of taxes. The defense is based on novation and perhaps waiver that Mr. Hart spoke about. That's the real defense in this case.
>
> "MR. HATCH: We haven't paid them as far as that goes.
>
> "THE COURT: All right, I think that clears it up anyway. Go ahead (R. 55)."

And at R. 65 the following:

> "THE COURT: Mr. Wirick, the taxes were defaulted from 1963, '64, and so on, weren't they, by the buyer — by Hart on this contract, paid by Phillips?
>
> "THE WITNESS: They were paid by Phillips, yes."

Exhibit 2 P is a letter to Mr. Hart which states as follows:

> "SUBJECT: Prior Years' Property Taxes, Service Station 7241, Salt Lake County, Salt Lake City, Utah.
>
> "In reviewing our file on the subject station, which was sold to you on a Contract for Deed dated Aug-

> ust 12, 1963, we find that you have not paid for the property taxes for the years of 1963 through 1966. These taxes were previously billed to and paid by Phillips Petroleum Company.
>
> "An itemization of the taxes paid are as follows: 1963 $340.36, 1964 $381.48, 1965 $401.88, 1966 $356.67, total $1,480.39."

Exhibit 3 P is another letter written by W. R. Cowdrey of Phillips Petroleum Company Credit Department to Mr. Herbert Hart asking for the taxes.

Exhibit 4 P is a letter to Mr. Hart written by witness, G. C. Wirick asking for the money and Exhibit 5 P is another letter written to Mr. Hart by witness Mr. Wirick asking for the money. Exhibit 6 P is a letter from Attorney Sumner Hatch in answer to Mr. Wirick's letter of January, 1968, Exhibit 5 P, which he states:

> "If I am not mistaken, the pay-off figure quotation, the receipt of the money and the return of the deed constitute an accord and satisfaction to the agreement between your company and Mr. Hart."

No dispute as to the amount or payment of the taxes mentioned or asserted by Mr. Hatch.

Exhibit 7 P is a letter to Attorney Hatch from G. C. Wirick reviewing the entire transaction and setting out the amount of taxes that were paid and Mr. Hart's tax obligation which is the same as set out in the Complaint. The letter, Exhibit 7 P further states:

> "In accordance with our telephone conversation of March 25, 1967 * * * Since the contract for Deed became effective September 12, 1963, the 1963

> taxes should be pro-rated as follows: 1963 Taxes $340.36 (pro-rated from September 12, 1963 — 132 days at $.93 / day = $122.76. Purchaser's tax obligation: 1963 $122.76, 1964 $380.48, 1965 $401.88, 1966 $356.67, total $1,262.79). Mr. Hart paid the property taxes due for 1967.
>
> As a matter of information, the above taxes included the tax on *real estate* and *personal property.* Mr. Hart was in possession of the property during this period of time. * * *
>
> Phillips inadvertently failed to include the taxes paid on the property on behalf of Mr. Hart for the above period when the Special Warranty Deed was issued to him. We are attaching an executed copy of the Contract for Deed signed by both parties, whereby the 'Buyer' agrees to *pay all taxes* on the property, (see paragraph 3 underlined in red) during the Contract for Deed."

The amortization schedule was attached to the above letter.

Exhibit 8 P is a letter by Mr. Hatch in answer to Mr. Wirick's letter, Exhibit 7, in which he said:

> "As you requested, I called Mr. Hart in and went over the payment schedule you sent me, together with the rest of the documents in the file.
>
> We do not disagree with your figures, but we do disagree with the reasoning. It would seem that Mr. Hart requested from your company a payoff figure, and upon receipt of that payoff figure, paid the matter, and in return received a quit claim deed.
>
> We are forced to take the stand that there was an accord and satisfaction on this matter."

A certified letter, return receipt, was mailed by Phil-

lips Petroleum Co. to Mr. Hart, Exhibit 9 P, setting out that the legal department of Phillips Petroleum Co. did not think there was an accord and satisfaction and if not paid it would be placed for collection.

Attorney Hatch admitted the taxes were not paid by Mr. Hart (R. 55) and Mr. Hart testified he did not pay the taxes (R. 43).

Mr. Wirick testified nothing was said about taxes at time payoff figure was given (R. 54). When first examined as an adverse witness, Mr. Hart testified that the taxes were not mentioned. He later modified that in answer to questions from his attorney, stating that the taxes were not paid and someone he could not identify said that they would waive the taxes (R. 41).

Defendant in his brief says Mr. Wirick "has already testified that he had no personal knowledge as to the payment of the taxes." This is a misstatement. There is nothing in the record of such a statement by Mr. Wirick. Mr. Wirick testified taxes paid by Phillips Petroleum Co. (R. 54, 65). Mr. Hatch did not cross examine nor did he ask Mr. Wirick how he knew that the Phillips Petroleum Company had paid the taxes. Mr. Wirick did not testify he was told by anyone. He testified to the fact that the taxes had been paid and he wrote the letter setting out all of the figures. Exhibit P 7. The statement of Mr. Wirick was based upon the knowledge which he had acquired from the records of his company from his conversation with Mr. Hatch, and Mr. Wirick had the information and wrote the letters to Mr. Hart and to attorney Hatch.

Mr. Hart could have testified that he had paid the taxes and it would have been competent evidence. Mr. Wirick, property manager of this division of Phillips Petroleum Company, testified that Phillips Petroleum Company had paid the taxes, which we submit is competent evidence.

Even assuming it was not competent evidence, the payment of taxes was never an issue in the instant case.

The letters sent to Mr. Hart and the letters sent to Mr. Hatch amount to an account stated, the amount was never questioned by the defendant, Mr. Hart, nor by his attorney.

Defendant cites cases of *John C. Cutler Association* v. *De Jay Stores*, 279 P. 2nd 700, 3 U. 2d 107. We do not disagree with the rule of law as set out in this case and as set out in headnote 4, Appeal and Error, which is as follows:

> "Where trial court found for defendant, Supreme Court had to view evidence and every fair inference and intendment arising therefrom in light most favorable to defendant, and if and when so regarded, there was any substantial evidence or any reasonable basis in the evidence to support finding made by trial court, it would not be disturbed."

We submit that there is ample evidence in the instant case to sustain the Findings of the trial court and there were admissions and waiver as to the amount and payment of taxes. Defendant quotes from the concurring opinion written by Justice Wade in the *Cutler* case, *supra,* which discusses the question of hearsay evidence. Justice Wade concluded that the evidence in the *Cutler* case, *supra,* was not hearsay, but concurs in the result of the main opinion

on the grounds that there was no proper foundation. We contend that the oral evidence in this case was not hearsay, it was not objected to as being hearsay, and the discussion does not deal with facts similar to the instant case. The oral testimony that the taxes were paid is primary evidence and is not hearsay.

Defendant cites the case of *Lake Shore Motor Coach Lines, Inc.* v. *Welling,* 339 P. 2d 1011, 9 U. 2nd 114. This case involves the Public Service Commission granting a permit for a motor carrier. We do not disagree with the rule of law that the Public Service Commission cannot make findings of facts unless there is some competent evidence to support them. Our contention is that in the present case there was competent evidence to support the court's findings and also there was a waiver requiring any evidence both by the statements of defendant's counsel and the defendant and the defendant's counsel's pleadings and the course of dealings pertaining to the payment of the taxes.

Defendant cites the case of *Ephraim Willow Creek Irr. Co.* v. *Olson,* 70 U. 95, 258 Pac. 216. This particular part of the case deals with the statement of an alleged agent made out of court as being inadmissible to prove his agency. We do not disagree with the statement of the law as to agency. We submit it has no bearing in the instant case.

Defendant cites the case of *Stevens* v. *Mostachetti,* 167 P. 2nd 809 Cal. This is a California case. We submit that this case is not in point. That it is distinguishable on the facts. We submit that there is in the record evidence to sustain the findings, oral testimony, admissions, and issues

were not raised by the pleadings as to the amount and payment of taxes.

There is nothing in the evidence which says that anyone told Mr. Wirick the amount of the taxes and he was not examined on how he knew that the taxes had been paid. The court overruled defendants' objection to the evidence and the defendants did not attempt nor did he bring out as to how Mr. Wirick knew that the taxes had been paid.

Plaintiff objects that there is no evidence as to the amount or payment of the taxes. We submit that the letters in this case are competent and relevant evidence of the amount claimed by plaintiff and was admitted that the figures were correct by Attorney Hatch's letter.

It is admitted that the taxes were not paid by Mr. Hart and we all know that the property would have been sold at the May sale if the taxes had not been paid by the time defendant was asked to pay the taxes.

We have pointed out above that there was (1) no issue raised by the pleadings as to the amount and payment of taxes. Both court and plaintiff's counsel were misled by the pleadings, acts and conduct of defendants' attorney, if there was to be an issue raised as to the amount and payment of taxes; (2) Letters sent by plaintiff to defendant setting out the payments and amount of taxes due with no denial, and admission in defendants' attorney's letters that the figures are correct and that they do not disagree with the plaintiff's figures; (3) Admissions, taxes not paid by defendant Hart; (4) Oral evidence was admissible and part

of it not objected to, the taxes had been paid by Phillips Petroleum Company.

POINT II.

NO ACCORD AND SATISFACTION

TO HAVE AN ACCORD AND SATISFACTION, THERE MUST BE AN AGREEMENT AND CONSIDERATION AND THERE WAS NO AGREEMENT AND NO CONSIDERATION.

Under the terms of the contract, the defendant could pay off the contract at any time and if he so elected, which he did in this case, the Phillips Petroleum Company was bound to give him the deed for the amount of money then due on the contract, which was done. Mr. Hart elected to have the contract paid off and asked for a pay-off figure which was given to him, and further requested that Phillips Petroleum waive their first right of refusal (option). The amount he paid was the exact amount as due under the contract less taxes. When Mr. Hart requested the deed, Phillips Petroleum Company was bound under the terms of the contract to give it to him. There was no payment of the contract before maturity and, therefore, the law pertaining to payment before maturity does not apply to the facts in this case, but the law is as set out in the Utah cases hereinafter cited.

Mr. Wirick testified that he talked to Mr. Hart and gave him the pay-off figure. That he did not talk about the taxes when the pay-off figure was given and when he discovered he hadn't collected the taxes, he sent a letter to the

credit department, who wrote to Mr. Hart. Mr. Hart first stated that nothing further was said about taxes and then in answer to his attorney's questions he said that he didn't remember who he talked to, but it was someone at Phillips Petroleum Company and he asked him if he had paid the taxes. He said no and then he said that they would waive it. Mr. Hart would have had to talk to someone who had authority to have made the deal and the person who he had to talk to would have been Mr. Wirick who said he did not mention taxes and if Mr. Hart had mentioned the taxes, they would have been added to the pay off figure and we would not have this law suit.

To have an accord and satisfaction, there must be a contract and there must be a consideration. See the hereinafter cited cases.

The Defendant has cited Corpus Juris and American Juris Prudence, but we submit that these do not apply to the facts in this case, but that this case is controlled by the following Utah cases which are directly in point.

Browning v. *Equitable Life Assurance Soc. of the United States*, 72 P. 2d 1060, 94 U. 532, note 5. There must be consideration for an agreement of accord and satisfaction, page 1068 of the Pacific, 1st column middle of column:

> "There must be consideration for the agreement. Settlement of an unliquidated or disputed claim where the parties are apart in good faith presents such consideration. Where the claim is definite and no dispute but an admittance of its owing, the agree-

> ment to take a lesser amount even followed by satisfaction is not good unless attended by some consideration. In this case we do not see the elements of an accord and satisfaction. True, there was a claim. It was filed and paid in accordance with demand with no dispute. If a doctor sends me a bill for $20.00 when it should have been $30.00 and I pay it, it is not an accord and satisfaction. It is merely payment of less than I owe."

The contract between Phillips Petroleum and Mr. Hart provides the entire balance of the purchase price may be paid at any time without penalty. Mr. Hart made a request for the pay-off figure. Under the terms of the contract, he had a right to request it and he had a right to pay it off and Phillips Petroleum Co. was bound to convey the property. The contract was not paid before maturity. It was all due by Mr. Hart requesting the pay-off figure and requesting the Deed.

The case of *F.M.A. Financial Corporation* v. *Build, Inc.*, 404 P. 2d 670, 17 U. 2d 80, headnote 5, page 672 of the Pacific:

> "The general rule, and the rule which this court has followed, is that where a claim is for a definite and undisputed amount which is past due, an agreement by the creditor (Cook) to take a lesser amount, which is paid, does not discharge the whole debt. This is so because the creditor received only what he is entitled to and there is no consideration for the new agreement."

Under note 5 in this case they cite the following cases and authorities:

"5. See *Ralph A. Badger & Co.* v. *Fidelity Building & Loan Ass'n,* 94 Utah 97, 75 P. 2d 669 (1938); *Gray* v. *Bullen,* 50 Utah 270, 167 P. 683 (1917); Restatement, Contracts, section 417, comment c. (1932)."

In the case of *F.M.A. Financial Corp.* v. *Build, Inc.,* they cite the case of *Ralph A. Badger & Co.* v. *Fidelity Building & Loan Ass'n,* 75 P. 2d 669, 74 Utah 97, and we quote from page 676 of the Pacific 1st column:

". . . The discharge of claims by way of accord and satisfaction is dependent upon a contract express or implied; and it follows that the essentials necessary to valid contracts generally must be present in a contract of accord and satisfaction. Therefore, the following elements are essential: (1) A proper subject matter, (2) competent parties, (3) an assent or meeting of the minds of the parties, and (4) a consideration."

"[7-9] To the same effect see 1 C. J. S., Accord and Satisfaction, p. 469, 3 (a). This court in a number of cases has followed the rule thus enunciated; *Smoot* v. *Checketts,* 41 Utah 211, 125 P. 412, Ann. Cas. 1915C, 113; *Rohwer* v. *Burrell,* 42 Utah 510, 134 P. 573; *Gray* v. *Bullen,* 50 Utah 270, 167 P. 683; *Ashton* v. *Skeen,* 85 Utah 489, 39 P. 2d 1073; *Sullivan* v. *Beneficial Life Ins. Co.,* Utah, 64 P. 2d 351; *Browning* v. *Equitable Life Assur. Soc. of U. S.,* Utah, 72 P. 2d 1060, 1068. In the case last cited we said: 'An accord is an agreement between parties, one to give or perform, the other to receive or accept, such agreed payment or performance in satisfaction of a claim. The "satisfaction" is the consummation of such agreement. There must be consideration for the agreement. Settlement of an unliquidated or disputed claim where the parties are

> apart in good faith presents such consideration. Where the claim is definite and no dispute but an admittance of its owing, the agreement to take a lesser amount even followed by satisfaction is not good unless attended by some consideration.' "

Also in the *Badger* case at page 677 of the Pacific, it states:

> "Having pleaded an accord and satisfaction, the burden was upon the defendant to prove such defense." Citing cases.

Under the *Financial Corp.* case they also cite the case of *Gray* v. *Bullen,* 50 Utah 270, 167 P. 683, it states on page 684 of the Pacific at bottom and top of page 685:

> "The law is very clearly stated in 1 Cyc. 319, in the following words:
>
> "Where the debt or demand is liquidated or certain, and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given. Payment of a less amount than is due operates only as a discharge of the amount paid, leaving the balance still due, and the creditor may sue therefore, notwithstanding the agreement. A court of equity has no power to enjoin collection of the balance.
>
> "In *Smoot* v. *Checketts,* 41 Utah 211, 125 Pac. 412, Ann. Cas. 1915C, 1113, the headnote correctly reflects the decision, and it is there stated:"
>
> "When it is claimed that payment by the debtor of a sum less than is due to the creditor is a payment in full discharge of the entire amount due, a receipt acknowledging full payment is not controlling; but it must also appear that the payment was based on

a sufficient independent consideration or on a compromise of a disputed or unliquidated claim."

In the *Smoot* v. *Checketts* case, 41 Utah 211, 125 Pac. 412, at page 413 of the Pacific bottom of second column:

". . . The mere fact that, under such circumstances, the claimants executed receipts in full when they had in fact received only about one-third of the amounts then due them from the contractors for labor is of slight, if any importance. As to whether the receipt of a less sum will discharge a greater one does not depend upon the form of the receipt that is given."

"[2] When it is claimed that the payment by the debtor of a sum of money less than is due and owing to the creditor is a payment in full discharge of the entire amount due, a receipt acknowledging full payment standing alone is not controlling. If such a payment is based upon a sufficient independent consideration, or upon a compromise of a disputed or an unliquidated claim, and under such circumstances the lesser sum is received as payment in discharge of the larger one, the payment is binding upon the creditor." (Citations omitted.)

"In the foregoing cases, the doctrine of what constitutes a sufficient consideration for the discharge of a debt then due by the payment of an amount less than the whole debt is fully illustrated. Under the authority of every one of the cases referred to above, with many others which might be cited, the payment in the case at bar did not amount to either a compromise of a disputed claim or an accord and satisfaction."

The defendant's claim that it is a unilateral mistake by the plaintiff and as to the information peculiarly within

its knowledge, is a misstatement of the facts. Mr. Hart knew about the taxes and this is not the case where the parties are entering into a new contract, but they had already entered into the contract and it is a question of accord and satisfaction and is governed by the rules of law above set out.

CONCLUSION

The contract provided that the defendant was to pay the taxes. There is no reason why the defendant should not comply with the terms of the contract.

There was never any issues raised as to the amount and payment of the taxes by the pleadings, and the exact figures were set out in Mr. Wirick's letter to attorney Hatch who agreed that the figures were correct and relied solely on accord and satisfaction.

There is no dispute as to the amount due under the contract. There was no consideration given by the defendant to the plaintiff. Therefore, under the Utah cases, there is no accord and satisfaction.

We submit that the judgment of the trial court should be sustained.

Respectfully submitted,

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