

SUPREME COURT OF NOTRE DAME

TAYLOR VS. BLANCHETT

Affirmed.

No. 11

Broker's Contract—Commission—Procuring Cause of Sale—Purchaser, Ready, Able and Willing—Reserved Right to Revoke—Good Faith—Revocation—Sale Completed by Principal—Construction of Contract.

1. Where, by the terms of a real estate broker's contract, the principal agrees to pay the broker a stipulated commission if he sells certain real estate, or if he procures a purchaser, or if he assists in any way to effect a sale, and such contract expressly reserves to the principal the right at any time to withdraw such land from sale or exchange, if the broker procures a customer, introduces him to the principal, inspects the land and is negotiating for a sale, and then the principal revokes the agency and concludes the sale with such customer without the aid of the broker, the principal is liable for the stipulated commission.

2. In this case the facts and circumstances sustain the inference that the principal did not act in good faith in revoking the agency, but did so to avoid payment of commission.

3. In procuring a customer and negotiating for a sale, the broker is the procuring cause, although the principal revokes the agency and alone concludes the sale with such customer.

4. The fact that the purchaser procured by the broker was ready, able and willing to buy, is conclusively established by the fact that the principal concluded the sale with such purchaser.

5. Where the contract specifies no time limit for the broker's performance a reasonable time is implied. And where the principal revokes the agency and effects a sale with the purchaser procured by the broker and with whom the broker has begun negotiations, the principal cannot claim that the contract was not performed within a reasonable time.

6. Where the principal by the terms of his contract agrees to pay the broker a commission (1) if he sells the property, or (2) if he finds a purchaser, or (3) if he assists in any way to effect a sale, the broker is entitled to the commission if he performs any one of the considerations enumerated.

Henry W. Fritz, Edmund J. Meagher and George M. Witteried for appellant.

William S. Allen, Frank Francescovich and Frank Coughlin, for appellee.

VULPILLAT, J. The appellee, Earnest M. Blanchett, brought action in special assumpsit on a real estate broker's contract to recover two hundred dollars commission alleged to have been earned under that contract on account of the sale of appellant's farm. The second and third counts of declaration upon which the case was tried are founded upon the following written contract between the parties:

"This agreement, made and entered into this first day of September, 1920, witnesseth, that Albert B. Taylor of St. Joseph County, Indiana, has this day placed with Earnest M. Blanchett of South Bend, Indiana, a real estate agent, for sale or exchange the following described property (description) containing in all two hundred acres.

"The said Taylor agrees to pay to said Blanchett One Dollar per acre of said real estate commission out of the first funds received in payment on account of such sale or on the exchange of said property in case a purchaser is found, or said property is sold or exchanged through said Blanchett or through his influence, or if he assists in any way in the sale or exchange of said property.

"The said Albert B. Taylor reserves the right to withdraw said property from sale or exchange at any time by giving ten days notice in writing, and this agreement to re-

Special assumpsit action in the Notre Dame Circuit Court by Earnest M. Blanchett against Albert B. Taylor. From a judgment for the plaintiff the defendant appeals.

main in full force until such notice is given and expires.

"It is further agreed that if said Albert B. Taylor shall secure a purchaser without the aid or assistance of said Earnest M. Blanchett, while the property is still in his hands under this contract, said Blanchett is not to receive any compensation for his services rendered. (Signed)

"Albert B. Taylor,

"Earnest M. Blanchett."

To the declaration, the appellant, Taylor, filed plea in two counts: the general issue traverse, and a confession and avoidance plea avering that the defendant, in accordance with his contract, terminated the agency in good faith, serving the plaintiff with written notice of revocation for ten days, and thereafter, without the aid of plaintiff, himself disposed of his farm. Upon these issues the case was submitted to the court for trial, a jury being waived. The court found for the plaintiff and rendered judgment accordingly. A motion for a new trial was overruled and this appeal perfected.

The errors assigned for reversal of the judgment are the overruling of the motion for a new trial; that the judgment is contrary to the evidence, is not supported by sufficient evidence, and is contrary to law. The court is not disposed to consider the assigned errors based on the evidence. The trial court considered the evidence in arriving at the finding, and again considered the sufficiency of the evidence to sustain that finding when ruling on the motion for a new trial. It is not the province of the appellate court to consider the evidence *de novo* with a view to substituting its finding for that of the trial court. And it is only upon a clear showing that the evi-

dence is contrary to the finding or that it is insufficient to support it that an appellate court would be warranted in disturbing the trial court's finding or the jury's verdict. *Duff-Pioneer Stock Powder Co. vs. Kóontz*, Notre Dame Law Reporter, Nov., 1920, pg. 2. Furthermore, the appellant does not sufficiently set forth and discuss in his brief the record evidence to present the errors assigned thereon, and these assignments must therefore be regarded as waived under the rule of court.

The theory upon which the appellant seeks to prevail on this appeal is that set out in his confession and avoidance plea, namely: that because appellee had not effected a sale of the real estate before appellant in good faith exercised his stipulated right to terminate the agency, appellee is entitled to no commission. This involves two propositions: (1) that appellant acted in good faith in revoking appellee's agency, and (2) that appellee had not earned his commission under his contract beyond the power of the appellant by good faith revocation to avoid liability therefor.

The general power of the principal at any time to revoke his agent's authority is not questioned. The principal has the right to revoke the agency at any time before the broker finds a customer ready, able and willing to buy upon the principal's terms. *Young vs. Trainor*, 158 Ill. 428-42 N. E. 139; *Provident Trust Co. vs. Darrough*, 168 Ind. 29-78 N. E. 1030; *Benton vs. Brown*, 145 Iowa 604-124 N. W. 815; *West vs. Demme*, 128 Mich. II-87 N. W. 95; *Donovan vs. Weed*, 182 N. Y. 43-74 N. E. 563. And a broker is not ordinarily entitled to a commission for a sale made by the principal after the principal

has in good faith revoked the agency, even if the sale be to the very person with whom the broker has been negotiating. *Sibbald vs. Bethlehem Iron Co.*, 83 N. Y. 378-38 Am. Rep. 441; *Alden vs. Erl*, 121 N. Y. 688-24 N. E. 705; *Neal vs. Lehman*, 11 Tex. C. A. 461-34 S. W. 153; *Earnest vs. Cahill*, 166 Cal. 493-137 Pac. 256; *Blogett vs. Sioux City R. Co.*, 63 Iowa 606-19 N. W. 799; *Stedman vs. Richardson*, 100 Ky. 79-37 S. W. 259; *Staehlin vs. Kramer*, 118 Mo. App. 329-94 S. W. 785. But the principal, in revoking such agency, must act in good faith and not merely for the purpose of avoiding liability to the broker for commission. *Uphoff vs. Ulrich*, 2 Ill. App. 399; *O'Connell vs. Casey*, 206 Mass. 520-92 N. E. 804; *Friedenwald vs. Welch*, 174 Mich. 399-140. N. W. 564; *Bowe vs. Cage*, 132 Wis. 441-112 N. W. 469-12 L. R. A. (NS) 265; *White vs. Hollman*, (Texas C. A.) 180 S. W. 286; *Branch vs. Moore*, 84 Ark. 462-105 S. W. 1178-120 Am. St. Rep. 78.

The proposition that appellant acted in good faith in revoking appellee's agency, and not merely to avoid payment of commission, presents an issue of fact which was determined adversely to appellant by the trial court. But appellant earnestly maintains that there is no evidence of bad faith in the record, and that his own testimony establishes his good faith. In such cases as this the fact of good or bad faith of the principal in revoking the agency must be determined almost wholly by inference from the facts and circumstances proven in the case. The facts of appellant's case tend strongly to sustain the inference that appellant's revocation of appellee's agency was not made in good faith but was made to avoid payment of commission to

appellee under the contract. Courts have sustained such inference upon fewer facts than appear in appellant's case. In *Cadigan vs. Crabtree*, 179 Mass 474-61 N. E. 37-88 Am. St. Rep. 397-55 L. R. A. 77, the court said: "It perhaps might be assumed that a broker's authority is revoked in bad faith where negotiations had been carried on by the broker for his principal and had progressed so far that he was found to be the efficient cause in fact (as in appellant's case) of a trade subsequently struck between the principal and customr." To the same effect is the decision of the court in the case of *Dodge vs. Childers*, 167 Mo. App. 448-151 S. W. 749.

Appellant testified that the purchaser, procured by the appellee and with whom the appellee had negotiated the terms of sale upon which appellant, after revoking the agency, closed the deal, had refused to conclude such sale through the appellee as agent. This could furnish no legal excuse for revocation of the agency and avoidance of liability for commission under the contract. In a similar case the Texas Civil Court of Appeals declared that bad faith or intent of the principal to defeat the broker's right to a commission may be inferred from the fact that the parties took the matter up directly with each other, when both knew the efforts of the broker to effect a sale, and from the further fact that the purchaser had previously made an effort to eliminate the broker. *Anderson vs. Crow*, 151 S. W. 1080. We cannot disturb the finding of the trial court on the issue of appellant's alleged good faith revocation of appellee's agency.

Even if it were conceded that appellant acted in good faith in revoking the agency, we are of opinion

that appellee's commission had been earned under his contract so as to be wholly unaffected by such revocation. To have avoided liability for commission appellant must not only have acted in good faith in the revocation of appellee's agency but he must have notified appellee of such revocation before he had performed his contract. *Bash vs. Hill*, 62 Ill. 216; *Stiwell vs. Lally*, 89 Ark. 195-115 S. W. 1134; *Clements vs. Stapleton*, 136 Iowa 137-113 N. W. 546. Where the principal terminates the agency after the broker has found a person ready, able and willing to buy on terms acceptable to the principal, the broker is entitled to his commission, especially where the principal subsequently sells the property to such person. *Weisels-Gerhart Real Estate Co., vs. Epstein*, 157 Mo. App. 101-137 S. W. 326; *New Kanawaha Coal Co., vs. Wright*, 163 Ind. 529-72 N. E. 550; *Reishus-Reme Land Co. vs. Berner*, 91 Minn. 401-98 N. W. 186; *Day vs. Porter*, 161 Ill. 235-43 N. E. 1073; *Birdsell vs. Fraenzel*, 154 Wis. 48-142 N. W. 274; *Smith vs. Plant*, 216 Mass. 91-103 N. E. 58; *McGovern vs. Bennett*, 146 Mich. 558-109 N. W. 1055; *Maddox vs. Harding*, 91 Nebr. 292-135 N. W. 1019.

In general there are three different methods for earning a commission as a real estate broker: (1) by effecting a binding contract of sale for the principal under authority to the broker to make a sale; (2) by producing a purchaser to whom a sale is in fact made; (3) by producing a purchaser ready, able and willing to buy on terms specified in the broker's contract or acceptable to the principal. *McDermott vs. Mahony*, 139 Iowa, 292-115 N. W. 32-116 N. W. 788; *Godfrey vs. Weisner*, 169 Cal. 667-147 Pac. 952. In appellant's

case the appellee procured the purchaser to whom appellant sold his farm. Appellee was the procuring cause of the sale, notwithstanding the appellant concluded the transaction himself without the further aid of appellee. A broker may be the procuring cause of the sale whether he concludes the transaction in the principal's behalf or the principal does so himself. *Doran vs. Bussard*, 18 N. N. App. 36-45 N. Y. Sup. 387; *Loud vs. Hall*, 106 Mass. 404; *Lewis vs. McDonald*, 83 Nebr. 694-120 N. W. 207; *Jennings vs. Trummer*, 52 Oreg. 149-96 Pac. 874-132 Am. St. Rep. 680-23 L. R. A. (NS) 164. "Where the parties are brought together as a result of the broker's efforts, and a sale, lease or exchange results, the broker becomes entitled to a commission, although he is not present during the negotiations following the introduction or takes no part therein." 9 *Corpus Juris* 615, Sec. 97, note 25; *Tucker vs. Hawley*, 23 Cal. A. 460-138 Pac. 358; *Tonkin-Clark Realty Co. vs. Hedges*, 24 Idaho 304-133 Pac. 669; *Henry vs. Stewart*, 185 Ill. 448-57 N. E. 190; *Hafner vs. Herron*, 165 Ill. 242-46 N. E. 211; *Gouge vs. Hoyt*, 127 Iowa 340-101 N. W. 463; *Douville vs. Comstock*, 110 Mich. 693-69 N. W. 79; *Willard vs. Wright*, 203 Mass. 406-89 N. E. 559; *Burdon vs. Briquetet*, 125 Wis. 341-104 N. W. 83; *Wolverton vs. Tuttle*, 51 Oreg. 501-94 Pac. 961.

That the purchaser procured by the appellee was ready, able and willing to buy is conclusively established by the fact that he actually bought upon terms negotiated by appellee and accepted by appellant. *Coffman vs. Dyas Realty Co.* 176 Mo. App. 692-159 S. W. 842; *Handley vs. Shaffer*, 177 Ala. 636-59 So. 286; *Ketcham vs. Alexander*, 160 Iowa 455-142 N.

W. 62; *Hutchinson vs Plant*, 218 Mass. 148-105 N.E. 1017; *Schlegel vs. Fuller*, (Okla.) 149 Pac. 1118. Where such sale is concluded by the principal or upon report by the broker to the principal is confirmed, it is not necessary to prove that the purchaser was ready, able and willing to buy. *Kolp vs. Brazer*, (Tex. Civ. A.) 161 S. W. 899; *Stoutenburg vs Evans*, 142 Iowa 239-120 N. W. 59.

If it be a fact that the purchaser was unwilling to conclude the sale through the appellee, this is no evidence of unwillingness to purchase appellant's land. That the purchaser procured by appellee was willing to purchase the land is clearly established by the evidence that he accompanied appellee to the appellant's farm and with him made an inspection thereof with a view to purchasing; that he was introduced to appellant by appellee; that he entered into negotiations with the appellee and virtually agreed to the terms of purchase upon which appellant himself subsequently effected the sale. Unwillingness of the purchaser in this case, if any, went to the matter of concluding the sale through the appellee and not at all to the matter of purchasing appellant's farm. But this is not the element of willingness that, in contemplation of law, makes a principal liable to a broker who procures a purchaser, ready, able and willing to buy. Neither the principal nor the customer can break off negotiations and defeat the broker's right to a commission by concluding the transaction without his aid, after the broker has found a customer and begun negotiations under his contract, 9 *Corpus Juris* 619, Sec. 99; *Church vs. Dunham*, 14 *Idaho* 776-96 Pac. 203; *Rigdon vs. Move*, 226 Ill. 382-80 N. E. 901; *Gibson vs.*

Hunt, (Iowa) 94 N. W. 277; *Treacy vs. Gilman*, 161 Ky. 513-171 S. W. 153; *Malcoon vs Barrett*, 192 Mass. 552-78 N. E. 560; *Hubbard vs. Leiter*, 145 Mich. 387-108 N. W. 735.

The case of *Fultz vs. Weimer*, 34 Kan. 576-9 Pac. 316, cited and stressed by appellant, gives no support whatever to appellant's case. The following decisions of the Supreme Court of Kansas sustain the right of the appellee to recover commission from appellant under their contract: *Morros vs. Francis*, 75 Kan. 58-16 Am. St. Rep. 512; *Stephens vs. Scott*, 43 Kan. 285-23 Pac. 555; *Putnam vs. King*, 96 Kan. 109-150 Pac. 559; *Beaughers vs. Clark*, 81 Kan. 250-106 Pac. 39-27 L. R. A. (NS) 198. The *Fultz vs. Weimer* decision merely supports the proposition that where the parties stipulate that an agency to sell real estate is limited to a definite period, the contract terminates at the expiration of that time, leaving the principal free to negotiate a sale to anyone, even to the person with whom the broker negotiated. This is for the reason that the broker contracted to sell the land, and to do so in sixty days. He did neither and his contract terminated by its own terms. In appellant's case appellee did not contract to sell the land for his commission, nor does the contract specify any limit of time within which performance must be made. In such case a reasonable time is implied. *Geiger vs. Keiser*, 47 Colo. 297-107 Pac. 267; *Harris vs. Moore*, 134 Iowa, 704-112 N. W. 164. In the case of *Burd vs. Webster* 128 Wis. 118-107 N. W. 23, a delay of four months was held reasonable. Where the broker finds a purchaser and is negotiating with him for a sale, and the principal himself completes the transaction, such principal cannot

claim that the sale was not negotiated within a reasonable time. *Morgan vs. Keller*, 194 Mo. 663-92 S. W. 75; *Moore vs. Boehm*, 45 Misc. 622-91 N. Y. Sup. 125.

In the *Fultz vs. Weimer* case the principal contracted to pay a commission upon the sole consideration that the broker sell the real estate; the appellant, however, by the express terms of his contract agrees to pay appellee the stipulated commission upon any one of three considerations, (1) the sale or exchange of the property, (2) for finding a purchaser, and (3) for assisting in any way to effect a sale or exchange. Both the second and third considerations were furnished before appellant attempted to revoke the agency, and, as we have seen, appellee is entitled to credit for the sale negotiated by him but completed by appellant himself. If appellee did any one of the things he contracted to do he is entitled to his commission. *Walker Mfg. Co., vs. Knox*, 136 Fed. 334; *Sill vs. Caschi*, 167 Cal. 698-140 Pac. 949; *Bartow vs. Parsons Pulp Co.* 208 Mass. 232-94 N. E. 312. And the revocation of his agency did not affect his right to recover for the services rendered in the transaction ultimately completed by appellant. *Smith vs. Anderson*, 2 Idaho 537-21 Pac. 4121; *Martin vs. Holly*, 104 N. C. 36-10 S. E. 83; *New Kanawha Coal Co. vs. Wright*, 163 Ind. 529-72 N. E. 550; *Mechem on Agency*, 63.

The contract in appellant's case as firmly establishes his liability to pay the appellee the commission which he earned, as did the contract in the *Fultz vs. Weimer* case exonerate the principal from liability for commission which the broker did not earn. The principle of that case is that where the contract by its express

terms determines the rights and liabilities of the contracting parties, such contract is conclusive upon both principal and broker; and that principle must be applied against appellant in this case. Appellant's contract is impossible of such a construction as would enable him to defeat appellee's right to a commission upon the mere arbitrary exercise of appellant's reserved right to revoke the agency at any time.

The trial court's finding is fully sustained by the evidence and is in complete accord with the law; and this sustains the ruling of the court on the motion for a new trial. Finding no error in the record, the lower court's judgment is in all things affirmed.

DAVENPORT* vs. REILLY

No. 12

Tort—Negligence—Civil Action for Damages—Violation of City Ordinances Contributory Negligence—Efficient Cause or Condition—Proximate Cause—Instruction Construed and Sustained.

1. Although R. parks his limousine at the street curb in violation of the city ordinance, he is entitled to recover the damages caused by the negligence of D. in driving his car into the limousine, unless the parking of the limousine actually contributes as a proximate cause to effect the damage.

2. If the conduct or omission constituting a violation of a statute or ordinance is part of the *res gestae* or transaction complained of, such conduct or omission is negligence per se, as a matter of law, and the court should so instruct the jury.

3. Negligent acts amounting to a violation of a city ordinance held to be a mere condition and not an efficient or proximate cause for the damage, and therefore not constituting contributory negligence in bar of plaintiff's right of action.

Civil action for damages to plaintiff's limousine on account of the alleged willful and negligent conduct of defendant. From a judgment for plaintiff defendant appeals. *Affirmed.*

John J. Buckley and Franklyn E. Miller or appellant.

Bernard Vincent Pater and Aaron H. Huguenard for appellee.

VURPILLAT, J. This is a civil action in which the plaintiff recovered a judgment against the defendant for \$650 damages alleged to have sustained through the negligent and willful conduct of the plaintiff in driving his automobile into the limousine of the plaintiff while said limousine was parked at the curbing in Michigan Street in the city of South Bend, Indiana. Plaintiff's complaint is in two paragraphs; the first based on the theory that the damage was caused by the defendant in carelessly and negligently operating and driving his automobile at and against the limousine of the plaintiff while such limousine was parked in the street named, and without the fault or negligence of plaintiff; the second paragraph alleges that the defendant wantonly and willfully drove his car into the limousine of plaintiff. The defendant answered in general denial to each of these paragraphs of complaint, and upon the issues so formed the case was submitted to a jury for trial. The jury returned a verdict for the plaintiff in the sum of \$650. Motion for new trial on the alleged ground of erroneous instructions and that the verdict is contrary to the law and the evidence was overruled. Judgment was then entered on the verdict and this appeal taken.

Appellant assigns as error the overruling of the motion for a new trial, and that the verdict and judgment are contrary to the law and the evidence. As a reason why a new trial should be granted it is contended that the court's instruction number nine, given to the jury of the court's own motion, is erroneous.

The instructions are properly in the record and the particular instruction complained of is as follows:

"It has been admitted that at the time of the collision complained of the plaintiff's limousine was parked in violation of a city ordinance of the City of South Bend. The defendant contends that this constitutes contributory negligence on the part of the plaintiff which precludes recovery. Upon this issue the court instructs you that, if you find it to be a fact that the plaintiff's limousine was actually parked in violation of the city ordinance, this would in law constitute negligence *per se*, but the court instructs you that that fact alone does not constitute contributory negligence and bar plaintiff's right to recover for the damages caused proximately by the negligence of the defendant, if such is found, but, notwithstanding such unlawful parking of the car, it still would remain for the jury to determine from a preponderance of the evidence whether such negligent parking of the car also proximately contributed to cause the damages alleged. And in determining whether such negligent parking of plaintiff's car was a contributing proximate cause with that of defendant's alleged negligence, you should apply the rule already stated as to what is proximate cause for injury or damage. Was the alleged illegal parking of plaintiff's car, in itself, an efficient cause for the collision, actually causing or contributing to cause proximately the damage complained of; or was it a mere condition not capable of being an efficient cause, or not necessarily nor proximately contributing as a cause to produce the damage alleged to be due solely to the negligence of the defendant. If the illegal parking of the

car was a mere condition, or if it was not a proximate cause, then your verdict should be for the plaintiff, notwithstanding such illegal parking of the car, providing you find that the damage was due to the defendant's negligence as alleged. If you should find that the car as illegally parked did in fact contribute as a proximate cause to produce the damage complained of, then your verdict should be for the defendant."

It is well settled as an abstract proposition of law that the violation of a city ordinance, no less than of a statute, may constitute negligence *per se*, or as a matter of law. Butz vs. Cavanaugh, 137 Mo. 503-38 S. W. 1104-59 Am. St. Rep. 504; Smith vs. Milwaukee Bldrs' Exch., 91 Wis. 360-64 N. W. 1041-51 Am. St. Rep. 912-30 L. R. A. 504; Louisville etc. R. Co., vs. Davis, 7 Ind. App. 222-33 N. E. 451; Wabash R. Co. vs. Kamradt, 109 Ill. App. 203. And the violation of a city ordinance by the injured party may constitute contributory negligence in bar of recovery. Boshart vs. Little, 59 Conn. 1-21 Atl. 925-11 L. R. A. 33; Weller vs. Chicago etc. R. Co., 120 Mo. 635-23 S. W. 1061-25 S. W. 532. It must appear, however, that the acts or omissions which constitute a violation of the ordinance are part of the *res gestae* or transaction of the case, that is, enter into the negligence or contributory negligence alleged to have caused the damage. Ubelman vs. American Ice Co., 209 Pa. St. 398-58 Atl. 849. In this case the parking of plaintiff's limousine is alleged not only to have been in violation of the city ordinance but also to have constituted such negligence as contributed proximately to cause the damage sustained. It was therefore the duty of the court to instruct the jury, as was done, that

plaintiff's parking of his limousine, if found to be in violation of the city ordinance, was negligence *per se*. Lloyd vs. Pugh, 158 Wis. 441, 149 N. W. 150; Smith vs. M. B. & T. E., 91 Wis., 360, 64 N. W. 1041, 30 L. R. A. 504, 51 A. M. St. Rep. 912.

But, as stated by the court in the instruction, the fact of parking the car at the street curb in such manner as to be in violation of the city ordinance, and *per se* negligence on the part of the plaintiff, was not sufficient of itself to constitute contributory negligence in bar of plaintiff's right of recovery, for, notwithstanding such negligent and unlawful parking of the car, it still would remain for the jury to determine from a preponderance of the evidence that such negligent parking of the car proximately contributed to cause the damage. Steele vs. Burkhardt, 104 Mass. 59, 6 Am. Rep. 191, where a wagon parked in violation of an ordinance held not proximate cause; Railroad Co. vs. Buck, 116 Ind. 566, 19 N. E. 453; Tacket vs. Taylor, 123 Iowa 149, 98 N. W. 730; Southwick vs. Hall, etc. Co., 59 Conn. 261, 21 Atl. 924, 21 Am. St. Rep. 104, 12 L. R. A. 279; Flynn vs. San Francisco R. Co., 40 Cal. 14, 6 Am. Rep. 695.

The court further instructed the jury that, in determining whether the negligent parking of plaintiff's car was a contributing proximate cause with that of defendant's alleged negligence, they should apply the rule already stated as to what was proximate cause as applied to defendant's negligence. This rule was correctly stated in the instruction referred to. Indeed, no complaint is made of such instruction. In applying the same test to both parties for determining whether the negligence of each was a proximate or remote cause of

the damage, the trial court committed no error. As said in one case "plaintiff's (contributory) negligence must be the proximate cause in the same sense in which the defendant's negligence must have been a proximate cause in order to give him a right of action." *Rider vs. Syracuse Rapid Tr. Co.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; *Boyce vs. Wilbur Lmbr. Co.*, 119 Wis 642, 97 N. W. 563.

The instruction was also correct in directing the jury to return a verdict for the plaintiff, if they found the alleged illegal parking of plaintiff's limousine was in itself a mere condition and not capable of being an efficient cause, or not contributing proximately to cause the damage, providing they found such damage to be due solely to the defendant's alleged negligence; but that the verdict should be for the defendant if the jury should find that the plaintiff's limousine as illegally parked did contribute as a proximate cause to the alleged damage. No injured party may recover damages where his own illegal or wrongful act is necessarily involved in the proof of his own case; such, for instance, as a plaintiff's own trespass or contributory negligence. *Oates vs. Metropolitan St. R. Co.*, 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447; *Bittner vs. Tract. Co.*, 23 Ohio Cir. Ct. (NS.) 604; *Evansville etc. R. Co. vs. Duncan*, 28 Ind. 441, 92 Am. Dec. 322; *Hasper vs. Kopp*, 24 Ky. L. Rep. 2342 73 S. W. 1127; *Lehigh Valley R. Co. vs. Greiner*, 113 Pa. St. 600, 6 Atl. 246. On the other hand, if plaintiff's wrongful or illegal act does not enter into the proof of his case he may recover. *Schultz vs. Paul*, N. D. Law Rep., Apr. 1920, pg. 10; *Cranford vs. Dressler*, N. D. Law Rep. Apr.

1921. pg. 2.

Whether or not the illegal parking of plaintiff's limousine contributed proximately to cause the damage of which plaintiff complained, was a question of fact for the jury to determine. See *Milwaukee & St. P. Ry. Co. vs. Kellog*, 94 U. S. 469, 24 Law Ed. 256; *Schumacher vs. St. P. etc. R. Co.*, 46 Minn. 39. 48 N. W. 559, 12 L. R. A. 257. And we cannot disturb the verdict of the jury on this issue of fact. The trial court refused to do so upon consideration of the motion for a new trial, and the trial court is much better qualified to pass upon issues of fact determined on the trial than is the appellate court.

The instruction complained of is not erroneous in any particular. The verdict is amply supported by the evidence in the record, and the motion for a new trial was therefore properly overruled. We may say, however that we have examined the record particularly with reference to the evidence that might tend to sustain the appellant's contention that plaintiff's negligent and illegal parking of his limousine was a contributing proximate cause of the damage sustained. There is little evidence of the condition of the street at the point where the collision occurred as to its width, narrow or cramped condition, heavy and continuous street car service and general traffic, particularly at the time of the collision, which would operate concurrently with the parked condition of plaintiff's limousine so as to make such negligence of the plaintiff a proximate cause with the negligence of the defendant to occasion the damage sustained.

The verdict and judgment are not contrary to law; there is no error in the record. Judgment is affirmed.

**BRIEF OF HENRY W. FRITZ IN CASE OF
TAYLOR vs. BLANCHETT.**

In the Supreme Court of Notre Dame

Albert B. Taylor, Appellant

vs.

Earnest M. Blanchett, Appellee

NATURE OF ACTION.

This is an appeal brought by Albert B. Taylor against the appellee, Earnest M. Blanchett, from a judgment rendered in favor of the appellee, in the Notre Dame Circuit Court. The appellee as plaintiff, a broker employed by defendant, brought action in special assumpsit to recover from Taylor a commission which he claimed he was entitled to for the sale of a certain tract of land owned by Taylor and sold to one Hardesty. The court entered judgment in the sum of two hundred dollars, (\$200) principle and interest, in favor of the plaintiff and against the defendant from which judgment the defendant prosecutes his appeal to this court.

WHAT THE ISSUES WERE

The issues formed consisted of a declaration in three counts. The defendant filed a general demurrer to the first count which was sustained, and the plaintiff went to trial on the last two counts of his declaration.

The defendant filed an amended plea consisting of two counts: (1) general issue (2) confession and avoidance alleging that the defendant in accordance with the terms of the contract terminated the agency in good faith, serving the plaintiff with a written notice of the discontinuance of the agency. The trial was had, both parties waiving the right to a trial by jury.

The defendants filed a motion for a new trial on the following

grounds: (1) The finding is contrary to the law; (2) The finding is contrary to the evidence.

Errors relied on for reversal: (1) The judgment is contrary to law. (2) The judgment is contrary to evidence. (3) The judgment appealed from is not supported by sufficient evidence. (4) The court erred in overruling the appellant's motion for a new trial.

**CONDENSED STATEMENT OF
THE EVIDENCE**

The attorneys for Blanchett by the evidence introduced relied wholly upon the fact that their client introduced the purchaser to Taylor and that he was the procuring cause of the sale which was made by Taylor. The plaintiffs first exhibit consisted of the following: (Contract of parties. See Courts opinion *ante*.)

The second exhibit introduced into evidence by the plaintiff consisted of a notice of revocation sent to Blanchett by Taylor revoking his agency dated Sept. 30, 1920. By additional evidence the date of the sale of the land by Taylor to Hardesty was established, namely, October 15, 1920, this being fifteen days after the date that the notice of revocation was delivered to Blanchett.

A. B. Taylor's testimony showed that he was desirous to have the plaintiff effect a sale and that he revoked the agency only when he was convinced that Blanchett would not be able to close the deal. The plaintiffs made no effort and in fact did not show, either by cross examination or by any direct evidence, that Taylor acted in bad faith or revoked the agency merely to defeat Blan-

chett in the collection of his commission.

POINTS AND AUTHORITIES

1. The terms of a contract must govern and courts can only enforce contracts as the parties themselves made them. *Fultz vs. Wimer*, 9 Pac. 316. *Bacon vs. Cobb*, 45 Ill. 47.

2. The broker cannot claim commissions upon a subsequent sale made by his principal, even to the identical individual introduced by him if he cannot show that he brought the parties to an agreement. *Ropes vs. John Rosenfelds Sons*, 79 Pac. 354. *Hay vs. Platt* 66 Hun. 488. *Baker vs. Thomas*, 12 Misc. 432. *Gaty vs. Foster*, 18 Mo. App. 639. *Ames vs. McNally*, 6 Misc. 93. *Wylie vs. Maine Nat'l. Bank*, 61 N. Y. 416.

3. One broker who is unsuccessful in effecting a sale does not become entitled to a commission upon the success of another. *Ward vs. Fletcher*, 124 Mass. 224. *Crook et al vs. Forest et al*. 116 Ala. 375.

A man's authority to a broker to sell his property or to find him a purchaser is revokable at any time. *Donovan vs. Weed*, 182 N. Y. 43-74 N. E. 563. *Chambers vs. Seay*, 73 Ala. 372. *Coffin vs. Landis*, 46 Pa. 426. *Gardner vs. Pierce*, 116 N. Y. Supp. 155.

5. A lack of good faith must be shown on part of principal in the evidence to prevent him from revoking the agency. *Neal vs. Lehman*, 34 S. W. 153. *Fultz vs. Wimer*, 9 Pac. 316. *Sibbald vs. Bethlehem Iron Co.* 38 Am. Rep. 441.

6. The duty of a broker consists in bringing the minds of the vendor and vendee to an agreement. *Barnard vs. Monnot*, 34 Barb. 90. *Pott vs. Turner*, 6 Bing. 702.

7. A broker earns his commissions by making a sale on the terms fixed

by the principal while his authority continues. *Satterthwaite vs. Vreeland*, 3 Hun. 152.

8. A procuring cause, as used in the sense of a real estate broker procuring for a client a purchaser, means the original discovery of the purchaser by the broker, and the starting of the negotiations by him, together with the final closing by or on behalf of his client with the purchaser *through the efforts of the broker*. See "Procuring Cause" Words and Phrases. *Ware vs. Don Passos*, 38 N. Y. Supp. 673.

ARGUMENT

The appellant believes that no more satisfactory general rule can be laid down than to ascertain: (1) What did the broker undertake to do? (2) Has he completed that undertaking within the time and upon the terms stipulated? (3) If not, is the default attributable to his own act or to the interference of the principal.

The plaintiff in this case, under the terms of a written contract, agreed to procure a purchaser for the lands of the defendant. By a purchaser in the law of brokerage is meant one who is ready, willing and able to buy. *Fultz vs Wimer*, 9 Pac. 316. *Dowling vs. Morrill*, 165 Mass. 491. The above two cases are cited for the purpose of establishing one of the essential elements of a purchaser namely that of willingness. The plaintiff did not procure a purchaser who was willing to buy the land for the reason that he failed to reach an agreement with Blanchett as regards the purchase of the property, and after notice of revocation was given to Blanchett he had ten days in which to close the deal which he was unable to do. If Hardesty were willing to buy the land he would

have effected an agreement with Blanchett during this time.

He did not complete the undertaking within the time and upon the terms stipulated. It was stipulated in the contract that the defendant reserved the right to revoke the agency upon a ten days written notice. The defendant gave such notice. This fact is admitted by the plaintiff. It has also been proven that the property was sold by defendant five days after the plaintiff's authority was revoked.

The principal did not interfere in any way with Blanchett while he was making negotiations. This fact was never raised during the trial, so it may be disposed of without further comment.

The defendant contends that where there is a contract in writing the contract itself must govern. The contract is complete and is not ambiguous; for this reason it is not necessary that the court interfere with its terms, and those terms as they stand should govern the case.

The celebrated case of *Fultz vs. Wimer*, 9 Pac. 316, analagous to the present case, supports our contention. This action was commenced by the plaintiff G. R. Fultz against the defendant David J. Wimer, to recover the sum of \$65, which the plaintiff claimed was due him from the defendant for services rendered by him in selling the defendant's farm. Fultz who was a real estate agent entered into a written contract with the owner of land (namely, D. J. Wimer) that his farm should be left with him for sale for the term of two months, and that in case of a sale within that time, whether made by the agent, the land owner, or others, the agent is to receive a commission of five per cent. Fultz took one C.

Galli out and showed him Wimer's land, and tried to sell it to him at two different times. Fultz also introduced Galli to Wimer informing him that Galli wanted to buy his farm. Galli agreed to buy the farm during the time allotted Fultz to make the sale but did not actually buy the land until the expiration of that time. The court held: Upon the pleadings, the plaintiff is bound by the special contract. Courts can only enforce contracts as the parties themselves made them. It is doubtless true that Fultz was instrumental in enabling the defendant to sell his land; but as Fultz and Weimer had entered into a written stipulation as to the terms upon which Fultz was entitled to commission, these stipulations must control. Fultz, failed to find or produce a purchaser who was willing to take the farm and pay the money within the time prescribed.

In this case the parties were not brought to an agreement through the efforts of the broker. True Hardesty was introduced to Taylor through the efforts of Blanchett, but this is all that was done by him toward effecting an agreement as all his efforts failed. It is therefore a well established fact in law that the broker cannot claim his commissions on a sale of realty where he has not brought the parties to an agreement even though his principal sells to the same man with which he had been negotiating. A similar situation arose in the case of *Sibbald vs. Bethlehem Iron Co.*, reported in 38 Am. Rep. 441. Here the defendant employed the plaintiff to sell the steel rails of the former's manufacture to the Grand Trunk Ry. Co. Plaintiff negotiated with the Grand Trunk Ry. Co., and during such negotiations was discharged by the defendant.

The defendant knowing of the previous negotiations between plaintiff and aforesaid railway company secured one Evans who later sold steel rails to the railway company. Plaintiff brought suit for his commissions. The ruling of the court was: "That the plaintiff had not made a bargain, he failed to bring buyer and seller to an agreement and therefore is not entitled to his commissions. A broker is never entitled to his commissions for unsuccessful efforts. This is a well established rule. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interest of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. And in such event it matters not that after his failure, and the termination of his agency, what he had done proves of use and benefit to the principal."

It is our contention that the principal had the authority to revoke the agency under the terms stipulated in the contract and that such agency was revoked at the time of the sale of the land in controversy and that the agent is not entitled to his commission. In the case of *Donovan vs. Weed* reported in 182 N. Y. 43 and 745 N. E. 563, the New York Court held: "A man's authority to a broker to sell his property or to find him a purchaser is revocable at any time."

It is only logical to assume that had the property been left in the agents hands for an unreasonable length of time there would have been a sale. But is the principal bound to tie up his property in the hands of an agent just because the agent happens to be negotiating with some person and

creating no noticeable results as regards the sale of the property? We think not, and we feel that the learned court will agree with us upon this question. In the case of *McClare vs. Paine* 49 N. Y. 561 also 10 Am. Reports 431, the ruling of the court was: "If the broker fails to effect a sale within a reasonable time, and his agency is terminated in good faith by his principal, who afterwards consummates the sale, he will not be entitled to commissions on such sale, even though the broker may have originally introduced such purchaser."

It is impossible to conceive of a case where a person of sound mind would hire a broker merely to procure an introduction to some person who might buy some lands he has for sale. Or the broker merely by introducing a prospective purchaser to his principal, and in no way effecting a sale, to cause the principal to become liable to him for commissions. The law as regards the duties of a broker has been well stated in the case of *Barnard vs. Monnot*, reported in 34 Barb. 90. In this case the court held: "The duty of a broker consists in bringing the minds of the vendor and vendee to an agreement."

The evidence in this case clearly establishes the fact that Blanchett did nothing to aid Taylor in closing the deal for the sale of his realty after his discharge. Previous to his discharge he was unsuccessful in closing the deal. For the above reasons we, the appellant, contend that Blanchett was not the procuring cause of the sale of Taylor's real estate. Under the words "Procuring Cause" in "Words and Phrases," we find the following definition, which is also supported by the case of *Ware vs. Don Passos*, a New York case re-

ported in 38 N. Y. Supp. 673: "A procuring cause, as used in the sense of a real estate broker procuring for a client a purchaser, means the original discovery of the purchaser by the broker, and the starting of the negotiations by him, together with the final closing by or on behalf of his client with the purchaser *through the efforts of the broker.*"

In concluding, the appellant believes that he is entitled to a reversal of the judgment of the trial court on the following three grounds: (1) That the broker undertook to procure a purchaser and failed to do so. (2) That the broker did not complete the undertaking within the time and

upon the terms stipulated. (3) The broker's default can in no way be attributed to an interference of the principal. Our contention is that the trial court erred grossly in overruling the appellant's motion for a new trial.

Wherefore the appellant prays that the learned Supreme Court of Notre Dame will remand the case to the trial court with instructions to grant a new trial.

Respectfully submitted to the Honorable, the Supreme Court of Notre Dame, Indiana, for just consideration and solution.

Henry W. Fritz,
Att'y. for Appellant.

BRIEF OF WILLIAM S. ALLEN IN CASE OF TAYLOR VS. BLANCHETT

State of Indiana,
County of St. Joseph, ss

In the Supreme Court of Notre Dame

Albert B. Taylor, Appellant,
vs.

Earnest M. Blanchett, Appellee.

Brief for Appellee.

NATURE OF THE ACTION

This is an action in special assumpsit by which the appellee, plaintiff below, sought judgment against the appellant, defendant below, on a contract which he alleged he performed, thereby entitling him to commissions he earned acting under that contract.

WHAT THE ISSUES WERE

The plaintiff filed a declaration in the three counts to which the defendant filed a general and special demurrer. The court sustained the demurrer to the first count and overruled it as to the other counts.

The second count alleged that the plaintiff entered into a contract in writing with the defendant, which provided that defendant placed his land with the plaintiff for sale; that defendant agreed to pay the plaintiff one dollar per acre of said real estate commission out of the first funds received in payment on account of such sale or on the exchange of said property, in case a purchaser is found of said property is sold or exchanged through plaintiff, or through his influence, or if he assists in any way in the sale or exchange of said property; that defendant reserved the right to withdraw property at any time by giving a ten day notice in writing; and that under this contract Blanchett had introduced one Hardesty to the defendant who was ready, willing and able to buy and that the property was sold by the defendant to Hardesty but the commission was refused.

The third count alleged all that the second count alleged and also that the price has been paid to the defendant by Hardesty.

The defendant then filed his plea in two counts. The first count was a general traverse. In his second count the defendant alleged that he had given notice to the plaintiff in writing of the revocation of the agency and was therefore not bound to pay any commission under the contract, since the sale took place after such revocation.

To the second count of the plea the plaintiff filed a demurrer which the court overruled and the plaintiff then filed a replication in general denial. After the trial, the Court returned a finding for the plaintiff. Defendant filed a motion for a new trial which was denied by the court. Judgment was rendered and this appeal was brought.

POINTS AND AUTHORITIES

1. The general rule—subsequent negotiation through the owner does not affect commission since the broker showed that the land was for sale. *Corum vs. Arnold*, 137 S. W. 622, Missouri. *Heaton et al. vs. Edwards*, 51 N. W. 544, Michigan. *Graves vs. Baines*, 14 S. W. 256, Texas. *West Bros. vs. Thompson & Greer*, 106 S. W. 1134, Texas. *Pierce vs. Nichols*, 110 S. W. 206, Texas.

2. When a broker is employed to find a purchaser for his principal's property on specific terms he is entitled to his commissions when he produces to his principal a person who is ready, willing and able to buy on such terms. *Handley vs. Shaffer*, 59 So. 286, Alabama. *Morris vs. Clark*, 80 So. 406, Alabama.

3. Under special contract providing that the agency may be termin-

ated by a written notice of a certain number of days, if, after the broker has introduced a prospective purchaser to the owner of the property, the owner sends a revocation of authority and later sells to this purchaser, the broker is entitled to commissions since he has been the procuring cause of the sale and has complied with the contract. *Weisels-Gerhart Real Estate Co. vs. Epstein*, 137 S. W. 326, Missouri. *Scott vs. Patterson*, 19 S. W. 419, Arkansas. *Montgomery vs. Amsler*, 122 S. W. 307, Texas. *Wells vs. Andreas*, 115 N. W. 792 Wisconsin.

4. A broker earns a commission where he brings the property which he is employed to sell to the attention of a third person and then turns that person over to his employer and the property is sold as the result of negotiations between the two so begun. *Johnstone vs. Cochrane*, 121 N. E. 531, Massachusetts. *Desmond vs. Stebbins*, 5 N. E. 150, Massachusetts. *Willard vs. Wright*, 89 N. E. 559, Massachusetts.

5. Bad faith presumed where there was revocation after the purchaser was found. *Cadigan vs. Crabtree*, 78 N. E. 412, Massachusetts. *Dodge vs. Childers*, 151 S. W. 749, Missouri.

6. Since, at the time of the revocation, the agent had negotiations for a sale pending with a party whom he had introduced to the owner, and the owner had himself participated in such negotiations, and, afterward the negotiations are continued, or within a few days renewed, and consummated by the owner in person or through another, the agent is entitled to his commissions. *Maddox vs. Harding*, 135 N. W. 1019, Nebraska. *McCray & Son vs. Pfof*, 94 S. W. 998, Missouri. *Martin vs. Holly*

10 S. E. 83, North Carolina. Knox vs. Parker, 25 Pac. 909, Washington.

7. The agent's authority cannot be revoked as to those acts already performed by him. (Mechem on Agency, Page 63.)

ARGUMENT

The counsel for the appellant has based his appeal on the fact that the defendant Taylor, acting under the contract, and sending a revocation of agency in writing to the broker, had thereby released himself from any further obligation under the contract.

It is a well known rule in agency that the "principal cannot revoke the agent's authority as to those acts already performed by him,"—Mechem on Agency, Page 63; and the contention of the counsel for the broker is that he (Blanchett) had performed his part of the contract before the agency was revoked. He was the procuring cause of the sale because he introduced Hardesty, the purchaser, to the owner. At the moment he introduced a purchaser ready, able and willing to buy, he had performed his part of the contract so as to entitle him to his commission. For the contract provides that "Taylor agrees to pay to said Blanchett one Dollar per acre of said real estate commission out of the first funds received in payment on account of such sale or exchange of said property (1) in case a purchaser is found, (2) said property is sold or exchanged through said Blanchett, (3) through his influence, (4) if he assists in any way in the sale or exchange of said property." Therefore, by complying with any *one* of the provisions set forth, Blanchett could earn his commission and fulfill his part of the

contract which he must do before he can recover thereon. His commission after performing any one of the above provisions could in no way be affected by any revocation subsequent to that time on account of the fundamental principle of agency above set forth. And the payment of the price is not a consideration Blanchett agreed to fulfill but a condition precedent to the payment of the commission. The price has been paid, and consequently, there is nothing to bar the commission.

But the counsel for the appellant quotes Fultz vs. Wimer, 9 Pac. 316, a Kansas case under a special contract, to sustain their point. In this case the broker by a written contract, was given two months in which to sell the land but he failed to do so within that time. Later the owner sold to the purchaser introduced by the broker. The court, in that case, said in substance, that courts can only enforce contracts as parties themselves made them; under terms it was only to be left for two months with the broker; the broker failed to perform within time allowed and after expiration of the contract time the sale was made by the owner who then had a right to sell to anyone and he would not be liable for commission.

This case is to be distinguished from the one at bar—first, because there is a time limit in the contract in the Kansas case, and secondly, because the broker was required to *sell* the land in that case which he failed to do within the time given.

But neither of these provisions was in the present contract which could be performed in any one of four ways, and within an indefinite time. That contract was to sell, in this one if a purchaser was found he

was to receive his commission and it is admitted that he found a purchaser. The case is not analogous to the one at bar nor does the ruling apply to it.

In *Weisels-Gerhart Real Estate Co., vs. Epstein*, 137 S. W. 326, a Missouri case, the facts in brief are as follows: The plaintiff, a corporation, was employed to procure a purchaser for the residence of the defendant. The contract of agency was executed by defendant in writing and it stipulated that the plaintiff should have for his commission 2 1-2 per cent of the amount of the sale made; it conferred an exclusive agency but stipulated that the authority might be revoked by the defendant on 15 days written notice to the plaintiff. Immediately the plaintiff advertised the property and the attention of one Mr. Mathes was directed to it. A member of the firm spoke to him about it and then Mr. Mathes inspected the house; then the broker notified the defendant that he had a prospective buyer, and had opened negotiations with Mr. Mathes. This was on December 22. On January 10th defendant notified the plaintiff in writing that his agency was revoked. On February 4th an agreement for the sale of the property was entered into by the defendant directly with Mathes and during this month the sale of property was consummated by the owner. Broker sued for commissions earned under this contract.

The Missouri court in holding the owner liable for commissions said: "When the plaintiff acted with reasonable diligence, and defendant revoked his agency without cause to make sale to a person called to his attention by the agent, and with whom the agent was negotiating, to escape

payment of commission, then a right of recovery appears, for law will not permit agency to be thus terminated by the principal in the midst of the negotiations to the end of defeating agent's rights. The plaintiff in this case was the procuring cause of the sale and can recover his commission under the contract." This case is identical with the present one and the ruling of the court here represents the settled law on this point.

But the courts have gone even further than this in holding brokers entitled to commissions in similar cases.

In *Scott vs. Patterson*, 53 Ark. 49, 19 S. W. 419, the real estate broker said to the owner of the land that he had done all he could to sell the land to the prospective purchaser and that he was unable to do so, and that he "turned her (the prospective purchaser) over" to the owner; that he might sell her the land if he could. The owner finally made the sale. He testified that he had nothing to do with the selling of the property until the brokers declined to have anything more to do with it.

The court, quoting from *Tyler vs. Parr*, 52 Mo. 249, said, "The law is well settled that in a suit by a real estate agent for the amount of his commissions it is immaterial that the owner sold the property and concluded the bargain. If, after the property is placed in the agent's hands, the sale is brought about or produced by his advertisements or exertions, he will be entitled to commissions. Or, if the agent introduces the purchaser or discloses his name to the owner, and through such introduction or disclosure negotiations are begun, and the sale of property is effected, the agent is entitled to his