

JUNIOR MOOT COURT

Cases Reported.
(Chas. J. Mooney)

CAUSE NO. 5

Andrew White and Samuel Small,
Partners as White & Small
vs.
Andrew Johnson

Andrew Johnson, the defendant, in writing authorized the real estate firm of White & Small, plaintiffs, to sell a certain tract of real estate for him at a stated price and on certain terms also stated. The plaintiffs, pursuant to such written authority, entered into a written contract with Whitcomb & Kellar for the sale of defendant's said real estate. Plaintiff executed said contract of sale as agents for the defendant, referring to themselves as agents in the body of the contract and signing themselves as agents.

The sale thus contracted for, however, was so different in character of price and terms and conditions from the sale the defendant had authorized plaintiffs to make, that he refused to close the deal as thus made and refused longer to recognize the plaintiffs as agents and in fact discharged them by letter expressly revoking the agency. Later the defendant and Whitcomb & Keller got together and closed the deal and carried out the contract on the terms and conditions as stated therein.

Plaintiff demanded a commission from defendant which was refused on the ground that plaintiffs acted wholly outside their authority in entering into such a contract of sale, that he, defendant, had refused to recognize their action in making such a contract, had in fact discharged them,

and was not liable to the plaintiff for anything he did subsequently, being free to contract and transact for himself in the sale of his land.

Should plaintiffs recover or not and why?

Archibald Duncan and
Lewis L. Van Dyke

Attorneys for Plaintiffs.

Charles M. Dunn and
Edward J. Meagher,

Attorneys for Defendant.

PLAINTIFFS' POINTS AND
AUTHORITIES

The plaintiff contends in this case that he was the procuring cause of the sale and therefore entitled to compensation for his services from defendant.

The general rule is that a broker has performed his contract and is entitled to his compensation when he is the procuring cause of the sale affected with the purchaser, and the rule is the same even though the sale is affected by the owner himself.

In the case of *Hoadley v. Savings Bank of Danbury*, 44 L. R. A. 321, the broker merely called a person's attention to a certain piece of property, and gave him information as to how to obtain admission thereto. Later the owner, without the broker's knowledge, took up the negotiation and completed the sale. Here the Conn. court held the broker the procuring cause, and was entitled to compensation.

Also in the case of *Platt v. John*, 9 Ind. App. 58, the same proposition was applied. In this case the broker secured a prospective buyer and introduced him to his employer, which

resulted in a sale between them. Here the Indiana Supreme Court said he was the "procuring cause" and entitled to compensation.

The following citations support this general proposition 62 Mich. 543. 93 Am. Dec. 718. 22 Am. Dec. 441.

"Mechan" on this proposition says: "If an agent has done all that he undertook to do, he is entitled to compensation, even though the principal received no benefits, or failed or refused to avail himself of the advantages secured. Thus a broker employed to effect a sale of property is entitled to compensation when he has found a purchaser ready, willing and able to buy on the proposed terms, even though the principal does not, or cannot through defective title or otherwise complete the sale."

DEFENDANT'S POINTS AND AUTHORITIES

1. An agency not coupled with an interest may be revoked at any time. John Alexander et al vs. Sherwood Co. 77 S. E. 1027. This principle shows that the defendant may discharge the broker at anytime since the broker is not coupled with an interest.

2. If the broker attempts unsuccessfully to effect a sale and his proposed purchaser abandons the idea of buying but is afterwards induced to do so by the principal or by another person without being in any way induced by the broker, the latter is not entitled to his commission. So where the broker has had a reasonable time in which to affect a sale and does not do so the principal may complete the sale and the fact that the sale is made to the same customer

does not entitle the broker to his commission. Vol. 4 Amer. & English Law 2d. Ed. 978. Then in Crook et al. vs. Forest, Ala. 1897 22 So. 540 It was held in the opinion that a land owner by employing a broker does not bar his right to sell the land if he does it in a fair and honest way and if he notifies his agent before the sale is completed, further an agent cannot recover for a commission if he does not procure a party ready, willing and able to buy on the terms and price made by the principal. These two authorities show that the defendant in our case was entitled to revoke the agency which he did with a letter and sell the land to the customer if does so with no intention of defrauding the agent and there is no such fraud alleged in the case before the court. To support this contention further Mecham on Agency says pp. 964-9666: "The broker must show before he can recover commission, that he has completed his undertaking according to its terms, or that its completion was prevented without his fault by the principal. What constitutes a completion, however, is a question of no little difficulty in many cases, depending as it does upon vague and indefinite agreements between the parties. The duty of the broker is performed when he has procured a purchaser ready, willing and able to purchase upon the terms specified or if no particular terms are agreed upon, when he procures a purchaser to whom the principal sells." As may be seen in our case the terms were specified and the agent was unable to procure a purchaser who was able to purchase at the price agreed upon and therefor was discharged by a letter giving him actual notice of his dismissal.

CAUSE NO. 6

Mary Hardesty

vs.

Anna Jamison

Action for Damages for Alleged
Assault and Battery.

Demand \$500.

Mrs. Anna Jamison, the defendant, was the owner of a number of tenement flats which she rented, located in the City of South Bend. For more than a year her husband collected the rents and accounted to her for them, and during this year the plaintiff had been a tenant of Mrs. Jamison and had paid the rent to Mr. Jamison.

On August 15, 1919, Mrs. Jamison took from her husband the authority to collect these rents, intending to appoint a firm of real estate agents to collect her rents thereafter. On September 1st, following, Mr. Jamison, notwithstanding the revocation of his authority to do so, called as usual to collect the rent from Mrs. Hardesty. Mrs. Hardesty represented at the time that she was unable to pay the rent; because of her refusal or inability to pay Mr. Jamison became quarrelsome and in fact struck Mrs. Hardesty several times in the face.

For this assault and battery Mrs. Hardesty brings action against Mrs. Jamison. Mrs. Jamison knew nothing about her husband's attempt to collect the rent on this occasion and, after learning of it, immediately communicated to Mrs. Hardesty the fact that she had prior to the difficulty with her husband taken from him all authority to collect the rents, by expressly forbidding him to collect the rents September and thereafter.

Who should recover?

Clyde A. Walsh and
Henry W. Fritz,
Attorneys for Plaintiff.

James K. O'Toole and
Francis Franciscovich,
Attorneys for Defendants.

PLAINTIFF'S POINTS AND
AUTHORITIES

A married woman may appoint an Agent and her husband may be so appointed: Section 48 Mechem on Agency "Where a married woman is competent to act by Agent her husband may be appointed as the Agent." Case of *Shane v Lyons* (1898) 172 Mass. 199-51 N. E. 976, 70 Am. St. Rep. 261.

Court said in this case: "We see no reason for regarding her as incapable of authorizing any act to be done by him in her name, and her behalf, or for shielding her from responsibility."

Married woman as principal—it is now a settled principal of law that a married woman may be a principal and appoint her agent. Mechem on Agency Section 42. Statutes in most states have removed the common law disability for married women and she is clothed with the power to manage to her own affairs, and certainly the power to appoint an agent or attorney to do that which she is capable of doing in person.

Notice of Revocation—upon revoking the authority of a general agent, the principal must give notice of revocation to persons who have had previous dealings with the agent as such, or he will continue to be bound by agent's acts.

The notice must be actual—and must be extended to those who have extended credit in reliance upon the authority and general public notice

to others. *Mechem on Agency*. Section 117.

Court in *Diversity v Kellog* 114 Ill. Reports says: "Where a party is shown to have been the agent of another in a particular business or continues to so act within the scope of his former authority it will be presumed that his authority still continues, and will bind his principal unless the persons with whom he acts have been notified that his agency has ceased.

Burns Revised Statutes. Section 5120 (1882) Removes the common law disability of married woman in this state and allows a married woman to contract, appoint an agent.

Principals liability for Tort of Agent—*Mechem on Agency* Sec. 98—Both principal and agent are liable for tort committed in scope of his authority.

In the case of *Bergman v Hendrickson* 81 N. W. 304 The court said that if the assault was committed for the purpose of compelling payment the servant was acting within the scope of his employment and the master was liable for plaintiff's injuries, though he may never have authorized such method of collection and may have expressly prohibited it.

Mechem on Agency page 135 Sec. 253 says: "The older cases hold the principal not liable to third persons for the agent's wilful and malicious acts, but the modern rule is that he is liable for these also if the agent committed them while he was acting in the execution of his agency and within the scope of his authority.

Cases supporting this: *Singer Mfg. Co. v Rahn* 132 U. S. 518. *Southern Express Co. v Brown* Am. St. Rep. 306 (67 Miss. 260).

In 90 N. Y. 77 Judge Earle says:

"It matters not that he exceeded the powers conferred on him by his principal and that he did an act which the principal was not authorized to do so long as he acted in scope of authority and line of duty, or being engaged in the service of the defendant, attempted to perform a duty pertaining which he believed to that service.

In 116 Ill. App. 80 the Court held that principal was liable for assault of agent in attempting to collect an installment due on furniture sold by the principal to the complainant.

Supporting this *C. B. & Q. R. R. v Bryan* 90 Ill. 126.

Vol. 21 R. C. L. page 846—A duty rests upon every man in the management of his own affairs whether by himself or by his agents or servants so to conduct them as not to injure another, and that if he does not do so, and another is thereby injured, he shall answer for the damage. 1 Atk. 709-91 Am. Dec. 425.

Page 94 Cyc. of Law Vol. 5. It is sufficient to make the master liable if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment, even if he departed from the instruction of the master.

It is an old rule of law that "where one of two innocent persons must suffer for acts of another, the person who caused or set in motion the agency will be held liable.

Case of 109 Fed. 369-45 N. Y. 549-71 N. W. 427-44 Iowa 318-7 N. W. 368.

DEFENDANT'S POINTS AND AUTHORITIES

The doctrine that in order that the principal not be bound by the acts of an agent whose authority has been revoked, notice must be given to

third parties, has no application in this case.

20 N. W. 476 "The doctrine that a discharged agent can bind his principal to the extent of the authority with which he was apparently clothed has no application beyond the claims of the agent."

Even if the authority of the agent had not been revoked, this principal would not be liable for the assault. There is a clear-cut distinction between torts of the agent which are merely negligent and unskillful and those which are in themselves malicious, intentional and unlawful.

McManus vs. Cricket (1 East 160) "When a servant quits sight of the object for which he was employed, and without having in view his master's orders, pursues that which his own malice suggests, he is no longer acting in the pursuance of the authority given him and his master is not liable for such act."

It is clearly beyond the authority of an agent who has the mere authority to collect rents, to assault and batter a tenant.

82 S. W. 552 "The defendant is not liable for the assault of his collecting agent upon the plaintiff, the agent in so doing not being about his master's business and not acting within any authority delegated to him by the master. To assault and beat a creditor is not a recognized or usual means resorted to for the collection of a debt nor is it one calculated to bring about a settlement."

137 Pac. 428 "A merchant is not liable for the act of his general manager authorized to collect for goods sold and to recover goods wrongfully taken, in assaulting a customer to whom he has gone to collect

for goods which he claims were taken by the customer."

56 Hun. 506 "A drayman sent by the purchaser to get some goods from the warehouse of the defendant objected to receiving certain damaged packages and was assaulted by the employe of the defendant who was sent by the defendant to superintend the loading of the goods. It was held that the defendant was not liable for the assault as the employe was acting outside the scope of his authority.

CAUSE NO. 7

Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company

vs

John Hamilton

Action for Collection of Stock Subscription.

FACTS

Defendant signed and delivered to the plaintiff's agent, the following written instrument:

"We, the undersigned, agreed to pay fifty dollars (\$50) for each share of stock stated and annexed to our names, to be paid in installments of 5 per cent levied every sixty days by the Board of Directors of the Company. No assessment is to be made till the subscriptions amount to the sum of \$600,000. The railroad is to be constructed within a mile of the subscriber's place."

Defendant signed and opposite his name set "50 shares."

The \$600,000 was later fully subscribed and the Board of Directors levied the assessments upon the subscribers to be paid every sixty days. The defendant refused to pay his subscriptions, because, as the facts are, John Doe, the company's agent who

solicited the subscription and to whom the paper was delivered, before and at the time of the signing of the subscription, stated to defendant that defendant would not be required to pay any money on his subscription till the railroad was built—till the road was constructed and worked in that county; that the road had not been constructed in that county; that he, the defendant, relied upon the statements of the company's agent thus made and signed and delivered the instrument in action on the belief that no money would have to be paid thereon till the road was constructed; that he, defendant, was induced by such statement to make the subscription and that, but for such representation of the company's agent, he would not have signed the instrument; that this fraud of the agent procured the subscription, and that, therefore, plaintiff should not recover on the subscription in action.

Donnelly C. Langston and
George D. O'Brien,
Attorneys for Plaintiff.

Alden J. Cusick and
Joseph H. Flick,
Attorneys for Defendant.

PLAINTIFF'S POINTS AND AUTHORITY

(Indiana Rule). It is a general rule that extrinsic or parole evidence is not admissible to contradict, vary, add to, subtract from, or otherwise modify the terms of a written instrument. 17 L. R. A. 273; 6 L. R. A. 33; 6 Ind. 656.

Quotation from Wigmore, Vol. 4. Par. 2439: "It may be added that the term 'fraud' must here be understood in its legitimate, narrow sense, i. e., a misrepresentation of a past or

present fact; for, although a much looser significance has been occasionally intimated, yet it is obvious that an intent not to perform a promise (i. e., a misrepresentation as to a future fact), or a subsequent failure knowingly to perform an extrinsic agreement not embodied in the writing, cannot be included in the term 'fraud.' It seems to be a disregard for this distinction that is in part responsible for the anomalous attitude of the Pennsylvania court towards the general rule."

Referring to the foregoing quotation 18 L. R. A. (N. S.) 434, says: "The only cases which have been disclosed holding that fraud of this kind is sufficient to warrant the allowance of parole evidence are those of Pennsylvania."

Where a man, who can without difficulty read, executes a paper without reading it, trusting to the party to whom it is executed for a statement of its contents, or trusting to the reading of it by the latter, there being no substantial reason shown for not reading it himself, he will be guilty of negligence. (37 L. R. A.) 64 Ind. 120; 73 Ind. 198; 106 Ind. 406.

Thornburgh vs. Newcastle & Danville R. R. Co. (14 Ind. 6) "Reliance cannot be placed upon the statements of a soliciting agent for stock of a railroad company, that the terms of the subscription, that the subscriber is asked to sign, provided for payment in money or supplies."

The foregoing citation presents the attitude taken by the courts of this state, as regards the contracts made by the soliciting agent of a railroad. It presents the court's attitude as to contemporaneous oral agreements and the rule in this state, as to the

introduction of such agreements is clearly stated in 121 Ind. 6. "Evidence of prior or contemporaneous agreement is not admissible to contradict, or vary the terms of a written instrument or contract."

According to Hughes on Evidence, Page 238, it is conclusively presumed that all extrinsic or parole agreements have been merged into the one written contract of the parties. Since this is a conclusive presumption, parole may not be introduced to in any way change the written contract.

DEFENDANT'S POINTS AND AUTHORITIES

1. Fraud is a false representation of fact, made with a knowledge that it is false, or in reckless disregard as to whether it is true or false, made with an intention that it should be acted upon, and actually inducing one to act thereon to his damage. Anson on Contracts 199.

(a) Corporation liable for representations of its agent selling stock Fifth Ave. Bank v Ferry Co. 19 L. R. A. 331; Jewett v Valley R. Co. 34 Ohio 601.

(b) If corporation seeks to enforce subscription obtained by promoter, it will be bound by fraudulent representations made by the promoter to induce the subscription. McDermott v Harrison 30 N. Y. 324.

2. Nothing indefinite or suspicious about agent's statement and defendant was not bound to investigate.

(a) Parole evidence is admissible to prove fraud induced the giving of the subscription. Haynes v Moore 17 L. R. A. 272; 6 L. R. A. 45.

(b) The mere fact that the contract is reduced to writing will not prevent its being set aside for fraud in procuring it. Boyce v Grundy 28 U. S. (Pet.) 120

(c) Whether the representation is of opinion or of fact is a question to be decided by the jury and not by the court. Banta v Savage 12 Nev. 151.

3. Opinion cannot be relied upon unless so made as to intentionally deceive by putting the person off his guard and inducing him to act on it. Jackson C Collins 30 Mich. 557.

(b) If the false statements are of matters peculiarly within the knowledge of the person making them and are affirmations of fact, the other party has a right to rely on them. Rouer v Truant 83 Va. 397-54 Am. Rep. 60.

(c) Case in point. Statements made concerning the happening of a future event cannot be relied on to avoid a subscription obtained by an agent, unless they are made fraudulently, with an intention to deceive. Jefferson v Hewitt 95 Cal. 535; Armstrong v Karshner 47 Ohio 276.

CAUSE NO. 8.

Alfred Whitaker
vs

George Swanson

Action for Damages, \$1000, for injuries due to Defendant's alleged negligent driving of his automobile into plaintiff.

Plaintiff, while crossing the street in South Bend, was struck by the automobile of defendant driven at the time by the defendant himself. Defendant crossed the street without obtaining the traffic policeman's signal or leave to cross, and while thus crossing and without warning, ran into plaintiff, causing injuries which occasioned doctor and hospital bills, loss of time from work, to the extent of \$200.

After the injury the plaintiff met and settled their case in this manner:

defendant agreed to give to plaintiff his certain described horse and buggy which plaintiff then and there agreed to accept in full settlement and compromise of the plaintiff's right of action against defendant.

Despite the fact of this agreement in settlement, plaintiff brings this action and defendant seeks to bar the action by pleading the agreement in settlement set out.

Gerald Craugh and
William S. Allen,

Attorneys for Plaintiff.

Joseph Sanford and
Frank Coughlin,

Attorneys for Defendant.

PLAINTIFF'S POINTS AND AUTHORITIES.

The right of plaintiff to recover damages for injury.

24 L. R. A. (N. S.) 557, Kentucky.

50 So. 449, Louisiana.

188 S. W. 638, Kentucky.

The facts show accord without satisfaction which cannot constitute settlement.

Buchart v. Barger, 114 Ind. 553—
17 N. E. 125.

McKeon v. Reed—12 Am. Dec. 319
—Kentucky.

Young v. Jones—18 Am. Rep. 279
—Maine.

Russell v. Lytle—22 Am. Dec. 537
—New York.

Brooklyn Bank. DeGrauw et al.
35 Am. Dec. 569 New York.

Hoxie v. Empire Lumber Co.—41
Minn. 548.

Also the following decisions sustaining the above proposition.

97 S. E. 90.

45 L. R. A. (N. S.) 1062.

77 Atl. 874.

159 N. W. 717.

171 S. W. 939.

155 Pac. 246.

114 Pac. 1106.

Accord and Satisfaction defined as an *executed* agreement.

Bully. Bull —43 Conn. 455.

Continental Gin Co. et al. v. Arnold, 153 Pac. 160—Okla.

Must put in statu quo, then can recover—

5 R. C. L. 899.

Swan v. Gt. Northern Ry. Co.—168
N. W. 659. North Dakota.

Accord without satisfaction only a bar where so stipulated.

Binder v. Altman, 210 Ill. App. 237.

DEFENDANT'S POINTS AND AUTHORITIES.

The rule that a promise to do another thing is not a satisfaction is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty and the new agreement is based upon a good consideration and is accepted in satisfaction—then it operates as such and bars the action.

Goodrich vs. Stanley—24 Conn. 613 holds that an acceptance of a new and valid promise which can be enforced in substitution of an existing claim may be as effectual a satisfaction and extinguishment of such claim as the acceptance of any other thing. Cases.

Smith vs. Elrod 24 So. 994.

Allison vs. Abendroth 15 N. E. 606.

Nassay vs. Tomilson 42 N. E. 715.

Langhead vs. Frich Coke Co. 58

A new promise is evident in this Atl. 685.

case. Whitaker agreed to the promise made by Swanson (my client) whereby he would give up his right of action to sue for damages upon the new agreement to accept a horse and buggy in compromise.

Other cases.

Munley vs. Vermont Mut. Ins. Co. 62 Atl. 1020.

Palmer vs. Yager, 20 Wis. 91.