

April 1938

## Agency--Broker's Right to Commissions

W. G. W.

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Contracts Commons](#), and the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

W. G. W., *Agency--Broker's Right to Commissions*, 44 W. Va. L. Rev. (1938).

Available at: <https://researchrepository.wvu.edu/wvlr/vol44/iss3/7>

This Recent Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## RECENT CASE COMMENTS

AGENCY — BROKER'S RIGHT TO COMMISSIONS. — *P* offered to "turn over" a prospective purchaser for *D*'s property if he would pay her \$150 in case he sold the property to "the people" she "introduced". *D* accepted the offer and *P* introduced the purchaser. Unknown to *D*, the purchaser had previously been shown the property by a dealer with whom *D* had the property listed under a contract, but the offer of the dealer had been "dismissed" by the purchaser. *D*'s contract with the dealer had not been terminated, and when he learned of this prior offer, he went to the dealer and obtained consent to deal with the purchaser directly. *D* then sold the property to the purchaser himself, and *P* brought this action for her commission. From a judgment for *P*, *D* appealed. *Held*, Judges Maxwell and Fox dissenting, that *P* was entitled to her commission on the sale of the property. *Clark v. Matheny*.<sup>1</sup>

The basis of the dissent was that "... there was implicit in the contract between plaintiff and defendant the intent and purpose that an introduction by her to the defendant of a prospective purchaser should be of a person whose attention had not theretofore been directed to the property by the defendant or his agent."

Considering *P*'s contract on its face, there is nothing that suggests that the purchaser introduced should have been one whose attention had not previously been directed to the property, and according to the court, the terms of the contract between *D* and the dealer cannot be used as the basis of such an inference, as that contract was not introduced in evidence and its terms established.<sup>2</sup> It follows then, that where the efforts of the first broker have failed to produce a purchaser, the seller is then entitled to sell the land to the same prospective purchaser himself or through another agent.<sup>3</sup>

To the defense at the trial that *P* was not the procuring cause of the sale, *P* replied that she had not proposed to become the procuring cause. The court terms *P*'s contention "legally sound". Generally, under the ordinary brokerage contract for the sale of

<sup>1</sup> 193 S. E. 800 (W. Va. 1937).

<sup>2</sup> *St. Louis & S. F. Ry. Co. v. Model Laundry*, 42 Okla. 501, 141 Pac. 970, 980 (1913); *Crotty v. Virginian Ry. Co.*, 115 W. Va. 558, 563, 177 S. E. 609 (1934); 1 ELLIOTT, EVIDENCE (1904) § 89; 2 CHAMBERLAYNE, EVIDENCE (1911) § 1029; JONES, EVIDENCE (3d ed. 1924) § 104.

<sup>3</sup> *Ebling v. Brewer*, 154 Md. 290, 141 Atl. 363 (1927); *Crain v. Miles*, 154 Mo. App. 338, 134 S. W. 52 (1911); *Alexander v. Sherwood Co.*, 72 W. Va. 195, 77 S. E. 1027 (1913); 2 MECHEM, AGENCY (2d ed. 1914) § 2442.

land, the broker must show that he was a procuring or efficient cause of the sale in order to obtain his commission,<sup>4</sup> but may engage to do much less (introduce prospects, assist, urge, *etc.*) and on proof that he has done what he undertook to do, be entitled to compensation without showing he was the procuring cause of the sale.<sup>5</sup> However, there is some authority for the proposition that mere "introduction" in and of itself will not entitle the broker to his commission in case of sale, and that the broker who contracts only to "introduce" prospective purchasers, must show that such introduction was a procuring cause of the sale (eliminating only the necessity of his carrying on the negotiations himself) in order to entitle him to compensation.<sup>6</sup>

---

<sup>4</sup> *Cooper v. Upton*, 60 W. Va. 648, 64 S. E. 523 (1906); *Averill v. Hart & O'Farrell*, 101 W. Va. 411, 132 S. E. 870 (1926); 2 MICHEN, AGENCY § 2435.

<sup>5</sup> *Godfrey v. Wisner*, 169 Cal. 667, 137 Pac. 952 (1915) (*P* promised commission for assistance in event a sale followed and it was held that the broker was entitled to his commission if he gave such assistance, and that he did not need to show he was the procuring cause); *Mims v. Reid*, 286 Fed. 900 (C. C. A. 4th, 1923) (where commission was promised *P* for assistance in sale, in the event that sale was consummated, and sale and assistance were shown, *P* was held to be entitled to his commission as he did what he contracted to do, and he did not have to show he was the procuring cause); *Tuffree v. Saint*, 147 Iowa 361, 126 N. W. 373 (1910) (*D* promised *P* a commission in the event of a sale if he urged the purchaser to buy and *P* was allowed to recover on proof that he urged the purchaser to buy, it being unnecessary for him to show he was the inducing or procuring cause of the sale); *Parsons v. Heenan*, 104 Okla. 86, 230 Pac. 502 (1924) (where *P* was employed to put *D* in touch with prospects, with commission contingent upon sale, it was held that *P* did not need to be the efficient cause of the sale but had earned his commission when he proved that he did what he agreed to do); *Wykoff v. Kerr*, 24 S. D. 241, 123 N. W. 733 (1909) (the broker's contract provided for a commission for assistance in case of a sale and it was held that the broker could recover his commission where the sale was consummated and such assistance rendered without showing that he was the procuring cause of the sale); *Hugill v. Weekley*, 64 W. Va. 210, 213, 61 S. E. 360, 15 L. R. A. (N. S.) 1262 (1908) (in the event of a sale, commissions were to be paid the broker for his efforts, and the holding was that the broker was entitled to commission when he had done all the contract required of him).

<sup>6</sup> *Platt v. Johr*, 9 Ind. App. 58, 36 N. E. 294 (1893); *Blake v. Stump*, 73 Md. 160, 168, 20 Atl. 788 (1890) ("It is the undoubted law, that the introduction must be the foundation of the negotiations and procuring cause of the sale. If it is such foundation and procuring cause, then the broker is entitled to commissions, notwithstanding the sale may have been finally effected by direct treaty of the parties without the broker's intervention"); *Low v. Paddock*, 220 S. W. 969 (Mo. App. 1920) (the words "find", "procure", and "introduce", are synonymous); *Cooper v. Upton*, 60 W. Va. 648, 64 S. E. 523 (1906) (the broker must show that his introduction was the procuring cause of the sale where the negotiations were carried on by the seller, in order to entitle him to a commission).

Was *P* not shown to be the procuring cause of the sale?<sup>7</sup> The dissent makes no mention of any right of the dealer to a commission and it is evident that he was not entitled to such, as he was not an effective cause of the sale, though his efforts may have been of some value to *P*.<sup>8</sup> According to the dissent, then, *D* is not liable for any commission, though the sale was effected by the efforts of others. The purchaser became the object of a new series of negotiations, begun by the introduction to *D* by *P* (all *P* contracted to do) which series culminated directly in the sale.

W. G. W.

---

CONSTITUTIONAL LAW — TAXATION — POWER OF STATE TO TAX GROSS RECEIPTS FROM CONTRACTS OF THE FEDERAL GOVERNMENT.— The Dravo Contracting Company, a Pennsylvania corporation, contracted with the federal government to construct locks and dams on navigable rivers in West Virginia. The West Virginia Tax Commissioner assessed the Dravo Company upon gross receipts from the contracts, under the West Virginia statute providing for a tax of "two per cent of the gross income of the business" of "every person engaging or continuing within this State in the business of contracting."<sup>1</sup> A three-judge district court enjoined the collection of the tax,<sup>2</sup> and the Commissioner appealed. *Held* (four justices dissenting), that the tax was valid. Decree reversed. *James v. Dravo Contracting Co.*<sup>3</sup>

---

<sup>7</sup> *Hill v. McCoy*, 1 Cal. App. 159, 81 Pac. 1015 (1905) (the introduction to the seller of the purchaser was found to be the procuring cause of the sale); *McCampbell v. Cavis*, 10 Colo. App. 242, 50 Pac. 728 (1897) (the broker was held to be entitled to his commission where he had introduced the purchaser who bought sometime later after acquiring the purchase money); *Myers v. Dean*, 10 Misc. 402, 31 N. Y. S. 119 (1894) (the act of bringing the parties together was held sufficient to entitle the broker to a commission).

<sup>8</sup> *Mears v. Stone*, 44 Ill. App. 444 (1892); *Crain v. Miles*, 154 Mo. App. 338, 134 S. W. 52 (1911); *Walker v. Van Valkenberg*, 291 S. W. 936 (Tex. Civ. App. 1926); *Alexander v. Sherwood Co.*, 72 W. Va. 195, 77 S. E. 1027 (1913) (dictum that *P* may avail himself of the broker's efforts if the broker was unsuccessful in his attempts to sell).

<sup>1</sup> W. Va. Acts 1935, c. 86; W. VA. REV. CODE (Michie, 1937) § 960 (5), amending W. VA. REV. CODE (1931) c. 11, art. 13, § 2.

<sup>2</sup> *Dravo Contracting Co. v. Fox*, 16 F. Supp. 527 (S. D. W. Va. 1936).

<sup>3</sup> 58 S. Ct. 208, 82 L. Ed. 125 (1927). The Dravo case was held to be decisive of *Silas Mason Co. v. Tax Commission*, 58 S. Ct. 233, 82 L. Ed. 154 (1937), involving a similar provision of the Washington occupation tax law. In the Dravo case there was also a question as to the territorial jurisdiction of West Virginia. And see *Helvering v. Mountain Producers Corp.*, 5 U. S. L. WEEK 797 (decided March 7, 1938).