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"Right To Sell" Contract Where Owner Sold Property Himself -
Brown v. Maris, 150 N.E. 2d 760 (Ind., 1958)**

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CASE NOTES

CONTRACTS—REAL ESTATE BROKER ALLOWED TO RECOVER ON EXCLUSIVE “RIGHT TO SELL” CONTRACT WHERE OWNER SOLD PROPERTY HIMSELF

Defendant, an owner of real property, engaged plaintiff, a real estate broker, to find a purchaser for his property under a listing contract which provided: “In consideration of your listing for sale, and your services in undertaking to find a purchaser for the following described real estate . . . , I hereby grant and give you the *exclusive right to sell*. . . . In the event you find a purchaser for, or that said real estate is sold *by or through you or otherwise* . . . then in consideration of your services tendered I hereby agree to pay you five percent (5%) of the selling price.”¹ The owner sold the property himself and the trial court refused commission to the broker. The Indiana Appellate Court at first affirmed. However, the affirming opinion was later withdrawn and the trial court reversed. The basis of the withdrawal and reversal was that the clause to the effect that the commission was to be paid if the property was sold by the broker or otherwise was controlling and supported by sufficient consideration. *Brown v. Maris*, 150 N.E.2d 760 (Ind., 1958).

Where there is no exclusive right to sell contract, but merely an authority in the broker to find a purchaser, it is generally held that the broker may not recover any commission if the owner sells the property himself.² Even where the broker is given an exclusive agency contract the owner may still sell the property himself and deny the broker his commission.³ In fact, the owner need not revoke the agency before negotiating the sale himself.⁴ This result is based upon the proposition that an exclusive agency contract deprives the owner only of the right to appoint other agents, but does not interfere with his right to sell the property himself.⁵ Such right of the owner to sell the property himself has been said to be an implied condition in every contract of agency, unless expressly negated.⁶

¹ Emphasis supplied.

² *Haggart v. King*, 107 Kan. 75, 190 Pac. 763 (1920); *Kimball v. Hayes*, 199 Mass. 516, 86 N.E. 875 (1908); *Burch v. Hester*, 109 S.W. 399 (Tex., 1908); *Stewart v. Murray*, 92 Ind. 543 (1884); *Dolan v. Scanlon*, 57 Cal. 261 (1881).

³ *Harris v. Stone*, 137 Ark. 23, 207 S.W. 443 (1918); *Davis v. Van Tassel*, 107 N.Y. Supp. 910 (1907).

⁴ *Dreyfus v. Richardson*, 20 Cal. App. 800, 130 Pac. 161 (1912).

⁵ *Gilbert v. McCollough*, 146 Iowa 333, 125 N.W. 173 (1910).

⁶ *Ingold v. Stevens*, 125 Iowa 82, 99 N.W. 713 (1904).

Where the broker has an exclusive right to sell contract with the owner, as in the instant case, and not merely an exclusive agency, the courts have taken several distinct views with respect to the broker's right to a commission where the owner sells the property himself. Some jurisdictions admit a difference between the two types of contracts but nevertheless deny a commission.⁷ Other courts have refused to admit a distinction between exclusive agency and exclusive right to sell contracts.⁸ Many courts allow a commission automatically upon sale by the owner where the broker had an exclusive right to sell contract.⁹ The courts appear to be in general agreement that where the parties specifically provide in the contract that the owner will be bound to pay the broker's commission regardless of who sells the property the owner is bound according to these terms.¹⁰

The instant case and the cases on point seem to pivot on whether or not there was included in the agreement a provision adequate to manifest an intention that the parties intended the broker to receive a commission despite sale by the owner himself. The phrase "by or through you or otherwise" in the *Brown* case was deemed sufficient evidence of such intention.

The Supreme Court of Pennsylvania in *Turner v. Baker* stressed the principle that parties may make any legal contract they choose which will be binding upon them, when it said:

If the owner of real estate chooses to make a contract with a broker, in which it is stipulated that the broker shall have the exclusive right to sell the property within a specified time, and that he shall be entitled to receive a certain commission if a sale be made within the time designated, no matter who makes it, he is bound by its terms, and cannot be relieved from a bad bargain because his agreement may have been foolish or improvident.¹¹

The Iowa Supreme Court seems to require stronger, more definite language to expressly negative the right of the owner to sell the property without liability for the broker's commission. It has said:

The right of an owner to sell his own property is an incident of the right of property and arises by implication in every contract of agency for sale unless the clear and unequivocal language of the contract negatives such right.¹²

⁷ *So. Florida Farms v. Stevenson*, 84 Fla. 235, 93 So. 247 (1922); *Turner v. Baker*, 229 Pa. 359, 74 Atl. 172 (1909).

⁸ *Sunnyside Land & Investment Co. v. Bernier*, 119 Wash. 386, 205 Pac. 1041 (1922); *McPike v. Silves*, 168 Iowa 149, 150 N.W. 52 (1914).

⁹ *Rosin v. Eksterowicz*, 45 Del. 314, 73 A.2d 648 (1950); *James v. Hollander*, 3 N.J. Misc. 973, 130 Atl. 451 (1925); *Harris v. McPherson*, 97 Conn. 164, 115 Atl. 723 (1922).

¹⁰ *Rosin v. Eskterowicz*, 45 Del. 314, 73 A.2d 648 (1950); *Turner v. Baker*, 225 Pa. 359, 74 Atl. 172 (1904).

¹¹ *Turner v. Baker*, 225 Pa. 359, 362, 74 Atl. 172, 173 (1904).

¹² *Hedges Co. v. Shanahan*, 195 Iowa 1302, 1304, 190 N.W. 957, 958 (1922).

The Virginia court in *Morris v. Bragg*¹³ held that the broker could collect a commission where the owner promised to pay the commission if the property was sold by the broker or any other, where the owner sold the property himself. On the other hand, the Illinois court in *Wozniak v. Siegle*,¹⁴ in an exclusive agency contract, held that substantially similar language was inadequate to give the broker a right to a commission.

In summary, it can be said that, while some courts automatically allow the broker a commission under an exclusive right to sell contract where the owner effects the sale himself, many courts require strong, positive language indicating such an intention. The language of the provision in the *Brown* case was sufficient to manifest this intention.

¹³ 155 Va. 912, 156 S.E. 381 (1931).

¹⁴ 226 Ill. App. 619 (1922).

CRIMINAL LAW—MULTIPLE TRIALS FOR A SINGLE TRANSACTION INVOLVING SEVERAL OFFENSES HELD NOT VIOLATIVE OF DUE PROCESS

In several recent United States Supreme Court decisions, the issue was raised as to whether an accused's right to due process as guaranteed under the Fourteenth Amendment is violated where he is subjected to multiple trials for a single transaction involving several different offenses. In *Hoag v. State of New Jersey*, 356 U.S. 464 (1958), three armed men entered a tavern, lined up five persons against a wall and robbed each of them. Hoag was arrested and indicted for the robbery of three of the victims. At the trial only one of the victims was able to identify Hoag as one of the robbers. Although several of the other victims had previously identified Hoag from a photograph, they could not identify him at the trial. Hoag's defense was that he was not present within the state at the time the robbery took place. He was acquitted, but shortly thereafter was indicted and tried for the robbery of another of the victims and was convicted. The Court ruled that the State's decision to try the defendant a second time was not so unreasonable or oppressive as to deprive him of due process of law.

In *Ciucci v. State of Illinois*, 356 U.S. 571 (1958), the defendant was charged in four separate indictments with murdering his wife and three children, all of whom, with bullet wounds in their heads, were found dead in a burning building. In three successive trials, Ciucci was found guilty of the first degree murder of his wife and two of his children. The horrid details of the four deaths were introduced into evidence at each trial. In the first and second trials, the punishment was fixed at 20 and 45 years imprisonment respectively. At the third trial, involving the death of another child, the penalty was fixed at death. The Court here held that the State