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**REVOCABILITY OF AGENT'S AUTHORITY WHERE  
PRINCIPAL HAS CONTRACTED NOT TO  
REVOKE WITHIN A CERTAIN PERIOD**

*Piper et al. v. Wells*<sup>1</sup>

On January 6th, 1937, P (principal) entered into a sealed "Standard Multiple Listing Contract" with A (agent) whereby the latter undertook to sell P's realty for a commission. The contract stipulated: "This authority shall continue for a minimum period of three months and not more than six months from date hereof, except that either party, by giving thirty days' written notice, may cancel this contract at the end of said minimum period or at any time thereafter." A advertised the property and endeavored to interest prospects but his efforts were fruitless, and, on February 28th, 1937, P wrote A cancelling the contract. A acknowledged the cancellation on March 2nd, 1937, stating, "if you are of the same mind at the expiration of your thirty days notice, we shall be glad to cancel this listing." Early in March, through the efforts of an outside broker, whose activity was within the purview of the present contract, a customer for P's property was obtained who was willing and able to purchase. P rejected the offer. A thereupon sued P under the Speedy Judgment Act for commissions on the theory that the contract was still subsisting, presumably because by the terms of the contract the authority could not be revoked prior to April 6th, 1937. *Held*, A could not recover in such an action. As A was without authority after February 28th (the date of P's letter cancelling the contract) to sell P's property, he was without power to enter into an agreement with a purchaser which could bind P to pay commissions under the contract.

In this, the Maryland Court of Appeals followed a rule of law in accord with the great weight of authority,<sup>2</sup> i. e., "where one is given authority to sell the lands or other property . . . and is to have a certain commission or share out of the proceeds for his services, the authority may be revoked at the will of the principal, even though in terms

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<sup>1</sup> 2 A. (2nd) 28 (Md. 1938).

<sup>2</sup> Restatement of Agency, Secs. 118, 119, 138 comment b; 386, comment b; 2 C. J. S. Sec. 74a; 1 Williston, Contracts (Rev. Ed.) Sec. 279; 1 Mechem, Agency (2nd Ed.) Secs. 560-587.

it was declared to be exclusive or irrevocable."<sup>3</sup> The Court, however, emphasized the generally recognized distinction between the *power* to revoke and the *right* to revoke, quoting from Mechem:<sup>4</sup>

"... the principal always ... (has) ... the power to revoke but not the right to do so in those cases wherein he has agreed not to exercise his power during a certain period. If, in the latter case, he does exercise his power he must respond in damages."

The justification or rationale for the power-to-revoke doctrine is set forth in the Restatement of Agency:<sup>5</sup>

"... altho a principal has contracted that he will not terminate the authority of an agent to act for him, he has the power to do so, and the agent is not thereafter privileged to act in accordance with the terms of such contract. To give the agent a privilege to continue would be to give him an informal power to enforce specific performance of the contract, requiring the continuance of a confidential relationship, the primary purposes of which are benefit to the principal and the performance of his wishes."

Section 138, comment b, of the Restatement, also embraces the factual situation involved in the principal case:

"If ... the power so given is held for the benefit of the principal and the agent is interested in its exercise only because it entitles him to compensation for exercising it, then even though the principal contracts not to terminate it, and altho the agent gives consideration therefor, as by acting or agreeing to act, the power is not a power given as security as the term is herein used. An agent's interest in earning his agreed compensation is an ordinary incident of agency and neither a contract that the principal will not revoke nor a contract that the agent may protect his right to earn commissions will deprive the principal of control over acts to be done by the agent on his behalf."<sup>6</sup>

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<sup>3</sup> 1 Mechem, *ibid*, Sec. 586.

<sup>4</sup> *Ibid*, Sec. 568, and see Restatement of Agency, Sec. 450, comment a, and 455.

<sup>5</sup> Restatement of Agency, Sec. 386, comment b.

<sup>6</sup> See Restatement of Agency, Secs. 138, 139. "... A power given as security is not terminated by (a) revocation by the creator of the power ..."

These sections, like the instant case, do not seem to abrogate the principal's obligation to respond in damages for breach of his contract not to revoke.<sup>7</sup>

There is language in some of the earlier Maryland cases that would seem to warrant holding a power of the sort herein involved irrevocable, viz., "an agent's authority to act for his principal is always revocable at the will of the principal by withdrawing his authority unless the authority be coupled with an interest, or has been conferred on the agent for a valuable consideration moving from him to the principal."<sup>8</sup> Professor Casner points out in the Maryland Annotations to the Restatement of Agency:

"The facts of these cases, however, do not present situations where the consideration is given for the bare agency power. Thus, it is suggested, that the statement referred to above (power irrevocable where agent gives valuable consideration to principal) is meant to apply to a case where the valuable consideration operates to give to the agent some interest to protect, other than just his employment, or that the principal cannot revoke without subjecting himself to liability for damages."<sup>9</sup>

The instant case, in its apparent holding that suit failed because predicated on the existence of a contract which the Court considered appropriately canceled, indicated that some recovery might have been had if suit had been brought for breach. This leaves the reader in doubt as to whether the Court visualized the possible recovery of commissions less such expenditures as would have been

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*Ibid.*, Sec. 451, comment a: "one who has a power given as security, although in name an agent, does not hold the power for the benefit of the power giver, and such a power is not subject to revocation by the power giver, nor by his death if the power is one given to secure the performance of a duty not terminated by the death of the power giver."

<sup>7</sup> Restatement of Agency, Sec. 439, comment d; 445, comment f.

<sup>8</sup> *Attrill v. Paterson*, 58 Md. 226, 250 (1882); *Smith v. Dare*, 89 Md. 47, 51, 42 A. 909 (1889); *Howard v. Street*, 125 Md. 289, 300, 93 A. 923 (1915); *Hill v. Iglehart*, 145 Md. 537, 552, 125 A. 843 (1924); *Acker v. Cecil National Bank*, 162 Md. 1, 3, 157 A. 897 (1932). Italics supplied. An authority coupled with an interest "is an interest in the thing itself on which the power is to be exercised, and not an interest in that which is to be produced by the exercise of the power." *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589 (1823); *Blackstone v. Buttermore*, 53 Pa. St. 266 (1866).

<sup>9</sup> Maryland Annotations, Restatement of Agency, Sec. 118.

made by the agent,<sup>10</sup> or whether it visualized merely recovery on the agent's right to reimbursement from his principal for moneys spent in reliance upon the principal's promise to keep his contract open.<sup>11</sup>

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<sup>10</sup> See Note, 38 L. R. A. (N. S.) 366, annotating *Chloe v. Rogers*, 31 Okla. 255, 121 P. 201 (1912); *Goldberg v. McNaghten Inv. Co.*, 112 Kan. 348, 211 P. 157 (1922). In the latter case it was said: "The agent could not . . . be prevented from earning a commission within the period of his appointment while he was conducting negotiations with a prospective tenant." See Note, L. R. A. 1918D 731; and Restatement of Agency, Sec. 455, comment e, Sec. 445, comments a and f; and Sec. 453, comment c. Apparently the right to commissions (less expenses that would be incurred in obtaining same) depends on the certainty of performance by the agent but for the wrongful revocation, and possibly his ability to prove this without violating his duty of obedience to his principal.

<sup>11</sup> 8 Am. Juris. 1007, and cases cited note 18, p. 1008; *ibid.*, 1105; Restatement of Agency, Sec. 439, comment d.

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