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SUMMONS.

The State of New Jersey to Antonio Losito, Giuseppina Losito, Vincent (Vincenzo) Losito, Jennie Losito, Michael (Michele) Losito: You are Summoned to answer the annexed complaint of Jacob L. Kram, in an action at law in the New Jersey Supreme Court. And Take Notice, that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton, within twenty days, after the service upon you of this writ, and the annexed complaint, the plaintiff, may proceed in the suit, and judgment may be entered against you (and see notice endorsed hereon).

(seal)

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this fourth day of August, nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

Corn & Silverman,
Attorneys.

Notice to the Within Named Defendants:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you.

CORN & SILVERMAN,
Plaintiff's Attorneys.

COMPLAINT.

New Jersey Supreme Court

ESSEX COUNTY.

JACOB L. KRAM, *Plaintiff,* *vs.* ANTONIO LOSITO, GIUSEPPINA LOSITO, VINCENT (VINCENZO) LOSITO, JENNIE LOSITO, MICHAEL (MICHELE) LOSITO, *Defendants.*	*Action at Law.* *Complaint.*

Plaintiff, residing in the Town of West Orange, County of Essex and State of New Jersey, says that:

1. On the dates hereinafter mentioned, plaintiff was and still is a duly licensed real estate broker.

2. On or about November 15, 1926 defendants engaged plaintiff to procure a purchaser for fifteen acres of land belonging to defendants, located on the westerly side of Pleasant Valley Way, in the Town of West Orange, County of Essex and State of New Jersey, for the price of twenty-five thousand five hundred dollars ($25,500) and defendants did thereupon agree to pay to plaintiff the sum of twelve hundred seventy-five dollars ($1275) as and for his commission.

3. Thereafter plaintiff procured Joseph Greene and Samuel Friedlander to purchase said

premises at the price and on the terms agreed upon by defendants.

4. Thereafter defendants entered into an agreement with said Joseph Greene and Samuel Friedlander for the sale by defendants of the said premises, in which said agreement defendants confirmed payment of commission to plaintiff for effecting said sale.

5. A true copy of said agreement and confirmation is hereunto annexed and made part hereof, as completely as if herein recited at length.

6. Defendants were unable to perform said agreement of sale in that they were unable to secure from the Lawyers Title Guaranty Company a title guarantee of said premises in the sum of fifteen thousand dollars ($15,000).

7. Defendants were unable to perform said agreement of sale in that they did not procure a five-year extension, with proportionate release clauses, on the mortgage then on said premises.

8. Said Joseph Greene and Samuel Friedlander were at all times ready, willing and able to perform said agreement on like performance by defendants.

9. Defendants have not paid to plaintiff said sum of twelve hundred seventy-five dollars ($1-275) or any part thereof.

Plaintiff demands twelve hundred and seventy-five dollars ($1275) as damages, with interest thereon from December 1, 1926.

CORN & SILVERMAN,
Attorneys of Plaintiff.

Received of Joseph Greene and Samuel Friedlander, the sum of one hundred dollars ($100) deposit on account of purchase price of our property consisting of approximately fifteen (15) acres, located on the westerly side of Pleasant Valley Way, 2,039.33 feet southerly from the intersection of the centre line of Pleasant Valley Way and the central line of Eagle Rock avenue in the Town of West Orange, New Jersey, the total purchase price of which is seventeen hundred dollars per acre, payable as follows; on the following terms and conditions, namely:

Forty-nine hundred dollars ($4900) upon the execution of formal agreement of sale; acceptance and assumption of a eight thousand dollar ($8,000) first mortgage, now on the property, upon the condition that a five-year extension with proportionate release clause is secured by us from the present mortgagee, and a second mortgage which shall be a purchase money mortgage for the balance of the agreed price, payable $5,000 in two years on account of which shall be credited moneys paid on account of said mortgage for proportionate releasing any part or parts of the above described tract, and the balance of said second mortgage in seven (7) years from the date of taking title.

Possession of the entire premises and warranty deed to same to be turned over to the aforementioned Joseph Greene and Samuel Friedlander upon the payment of the said sum of forty-nine hundred dollars ($4900), with the exception of the house now occupied by the undersigned, possession of which is to be given to the aforesaid Greene and Friedlander no later than July first.

It is also understood and agreed that the undersigned are to apply for and secure from

the Lawyers Title Guaranty Company a title guarantee in the sum of fifteen thousand dollars ($15,000) before payment of the balance of the deposit and the execution of the formal agreement.

We also agree to allow to the aforementioned purchasers on account of the purchase price, the interest on the said payment of five thousand dollars ($5,000) from the date of the execution of the formal agreement until the date of the closing, at six per cent.

Title is to close on or before December first, 1926.

The undersigned hereby agree to recognize Jacob L. Kram as our broker, and agree to pay him a commission of five per cent. (5%) upon the agreed purchase price, upon the execution and payment by the above mentioned purchasers of the balance of the initial payment of the purchase price of five thousand dollars ($5,000).

The provisions and terms of the second mortgage hereinbefore provided are so stated with the understanding that they comply with the similar terms in a certain agreement made by the signers hereof with Walter J. Crine and wife for the purchase of property located in the Township of Marlboro, Monmouth County, N. J., under agreement dated March 26, 1926. In the event that the aforementioned provisions do not coincide with the terms as set forth with the said Crine, the terms shall be so modified as to coincide with the same in the formal agreement which the parties hereto are to enter into hereafter.

ANTONIO LOSITO,
GIUSEPPINA LOSITO,
JENNIE LOSITO,
VINCENT LOSITO,
MICHAEL LOSITO.

AFFIDAVIT OF MERITS.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB L. KRAM,
Plaintiff,

vs.

ANTONIO LOSITO, GIUSEPPINA LOSITO, VINCENT (VINCENZO) LOSITO, JENNIE LOSITO, MICHAEL (MICHELE) LOSITO,
Defendants.

Action at Law.

Affidavit of Merits.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

ANTONIO LOSITO, of full age, being duly sworn according to law, upon his oath deposes and says that:

I am one of the defendants in the above-entitled cause and I believe that I have a just and legal defense to the said action on the merits of the case.

ANTONIO LOSITO.

Sworn and subscribed to before me this 13th day of August, 1927.

GEO. B. BAILEY,
Master in Chancery of New Jersey.

Note: Each defendant filed an affidavit of merits similar to the above.

ANSWER.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB L. KRAM, *Plaintiff,* *vs.* ANTONIO LOSITO, GIUSEPPINA LOSITO, VINCENT (VINCENZO) LOSITO, JENNIE LOSITO, MICHAEL (MICHELE) LOSITO, *Defendants.*	*Action at Law.* *Answer.*

Defendants, Antonio Losito, Giuseppina Losito, Vincent (Vincenzo) Losito, Jennie Losito, and Michael (Michele) Losito, residing at Wickatunk, Monmouth County, State of New Jersey, and each of them, in answer to the complaint of the plaintiff say that:

ANSWER.

1. They have no knowledge or information sufficient to form a belief as to the allegations of paragraph 1 and therefore deny same.

2. Paragraph 2 is denied.

3. Paragraph 3 is denied.

4. Defendants admit the execution of the agreement referred to in paragraph 4 which is the same agreement referred to in paragraph 5 of the complaint, but defendants and each of them deny same constitutes an agreement of sale of the said premises to said Joseph Greene and

Samuel Friedlander, and defendants and each of them deny that said agreement confirmed payment of commission to plaintiff or that any commission is due to plaintiff from defendants or any of them under said agreement or any other agreement, and defendants and each of them deny that said agreement has ever been performed by the said Joseph Greene and Samuel Friedlander by payment of the balance of the initial payment of the purchase price of $5,000 and deny that said Joseph Greene and Samuel Friedlander have otherwise performed their agreement as aforesaid and by reason of such failure or neglect to perform, the plaintiff is not entitled to receive said commission or any part thereof from these defendants or any of them.

5. Defendants admit the execution of the instrument referred to in paragraph 5, but deny it has the legal effect alleged by plaintiff in his complaint.

6. Paragraph 6 is denied.

7. Paragraph 7 is denied.

8. Paragraph 8 is denied.

9. Defendants admit they have not paid plaintiff the sum of $1,275 or any other amount and deny that same or any amount is due to plaintiff.

Defendants demand judgment against plaintiff with costs of suit to be taxed.

FIRST SEPARATE DEFENSE.

1. Said agreement referred to in paragraph 5 of the complaint provides, "The undersigned (the defendants herein) hereby agree to recognize Jacob L. Kram as our broker, and agree to pay

him a commission of five per cent. (5%) upon the agreed purchase price, upon the execution and payment by the above mentioned purchasers of the balance of the initial payment of the purchase price of five thousand dollars ($5,000)" and defendants deny that any formal written contract of sale was ever executed by said Joseph Greene and Samuel Friedlander and also deny that said Joseph Greene and Samuel Friedlander ever paid defendants the balance of the initial payment of the purchase price of $5,000 as required by the terms of said agreement, and that plaintiff is therefore not entitled to recover any commission under or by virtue of said agreement from these defendants.

SORG, DUNCAN & BAILEY,
Attorneys of Defendants.

RESERVATION OF RIGHT TO MAKE MOTION TO STRIKE OUT THE COMPLAINT.

1. Defendants and each of them hereby reserve the right at or before the trial of the issues involved in this cause to strike out the complaint as insufficient in law in form and substance and setting forth no cause of action against defendants or any of them.

SORG, DUNCAN & BAILEY,
Attorneys of Defendants.

REPLY.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB L. KRAM, *Plaintiff,* vs. ANTONIO LOSITO, *et als., Defendants.*	*Action at Law.* *Reply.*

Plaintiff, replying to defendants' answer, says that:

1. He joins issue on the answer.

2. He denies the new matter contained in paragraph 4 of the answer.

3. He admits the agreement referred to in paragraph 1 of the first separate defense, but denies that he is "not entitled to recover any commission under or by virtue of said agreement from these defendants."

CORN & SILVERMAN,
Attorneys of Plaintiff.

AGREED STATE OF FACTS.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB L. KRAM, *Plaintiff,* *vs.* ANTONIO LOSITO, GIUSEPPINA LOSITO, VINCENT (VINCENZO) LOSITO, JENNIE LOSITO, MICHAEL (MICHELE) LOSITO, *Defendants.*	*Action at Law.* *Agreed State of Facts.*

The parties, by their respective attorneys, submit the following agreed state of facts for judgment without oral proof:

1. Paragraph 1 of the complaint is admitted.

2. It is admitted that the exact acreage intended to be embraced in the agreement annexed to the complaint is fourteen and three-quarter (14¾) acres. It is agreed that the engagement of plaintiff was on the basis of seventeen hundred dollars ($1700) per acre and that no total sales price was fixed by the parties.

3. The agreement annexed to the complaint is admitted as having been executed by the defendants. No commission has been paid by defendants to plaintiff.

4. Joseph Greene and Samuel Friedlander, mentioned in the said agreement annexed to the complaint, were ready, willing and able to purchase the said premises under the terms set forth in the said agreement.

Agreed State of Facts.

5. Defendants did not apply to Lawyers Title Guaranty Company for a title guarantee in the sum of fifteen thousand dollars ($15,000) on said premises.

6. Defendants did not secure from Lawyers Title Guaranty Company a title guarantee in the sum of fifteen thousand dollars ($15,000) on said premises.

7. Defendants did not secure a five-year extension with a proportionate release clause of the first mortgage on the said premises as set forth in the said agreement.

8. The one hundred dollar ($100) deposit mentioned in said agreement was in the form of a check made by Joseph Greene and Samuel Friedlander, or one of them, and handed to defendants but defendants never cashed the said check and the same was never deposited by defendants and has not been paid, nor has same been returned by defendants to the said Joseph Greene and/or Samuel Friedlander.

9. The forty-nine hundred dollars ($4900) to be paid by said Joseph Greene and Samuel Friedlander upon the execution of formal agreement of sale has never been paid to defendants or any of them, nor has same ever been tendered to them, and the second mortgage provided in the second paragraph of said agreement was never, in fact, executed or delivered or tendered by said Joseph Greene and Samuel Friedlander, or either of them, to the defendants or either of them.

10. Defendants never tendered the said Joseph Greene and Samuel Friedlander formal agreement for the sale of the said premises nor

a deed for the said premises, nor did the said Joseph Greene and Samuel Friedlander ever deliver or tender a formal agreement to the defendants for the sale of the said premises, in fact, the only agreement ever executed is the above-mentioned agreement and the only agreement as to commission is contained in the above-mentioned agreement.

Both parties hereby expressly reserve the right to appeal on the question of law.

CORN & SILVERMAN,
Attorneys of Plaintiff.

SORG, DUNCAN & BAILEY,
Attorneys of Defendants.

FINDINGS.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

JACOB L. KRAM,
Plaintiff,

vs.

ANTONIO LOSITO, GIUSEPPINA LOSITO, VINCENT (VINCENZO) LOSITO, JENNIE LOSITO, MICHAEL (MICHELE) LOSITO,
Defendants.

Action at Law.

Findings.

Submitted to the Court on agreed statement of facts.

Corn & Silverman for the plaintiff.

Sorg, Duncan & Bailey for the defendants.

SMITH, Circuit Court Judge.

This case was duly referred to the Circuit Court Judge for trial and has been submitted on an agreed statement of facts which the Court finds to be the facts in the case in addition to the facts as admitted in the pleadings, and concludes therefrom that the plaintiff produced a buyer for the defendants' land described in the agreement attached to the complaint, who was ready, able and willing to buy upon terms satisfactory to the defendants and agreed to by them.

The said contract contains a memorandum in writing authorizing the plaintiff to sell, and fixing the rate of commission on the dollar, said compensation being fixed as five per cent. on the

selling price, which was $1,700 per acre, the acreage being 14¾ acres. The total sales price was to be $25,075.

I find that the payment of said commission to the plaintiff became due on December 1, 1926, and amounted to the sum of $1,253.75. The agreement between the seller and the defendants contemplated a more formal agreement of sale, but the employment of the plaintiff and his compensation was not made conditional upon that agreement being entered into. The agreement attached to the complaint is one satisfactory to the parties and a formal agreement of sale was not necessary in order to legally ascertain the terms of sale; and the plaintiff's commission was to become due upon the cash payment of $4,900 being made, which sum was to be paid upon the execution of the formal agreement of sale. It also provides in the agreement of sale, that possession of the premises and warranty deed were to be delivered upon the payment of the said $4,900.

The legal effect of these provisions I find to be that in the event of no formal agreement of sale, title was to close, possession delivered, warranty deed delivered, and the $4,900 to be paid on or before December 2, 1926. The plaintiff's commission, therefore, became due on December 1, 1926.

Judgment should be entered in favor of the plaintiff and against the defendants for $1,253.75, together with interest from the 1st of December, 1926, and postea will be signed in accordance with these findings.

October 23, 1928.

WILLIAM A. SMITH,
Circuit Court Judge.

POSTEA.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB L. KRAM, *Plaintiff,* *vs.* ANTONIO LOSITO, GIUSEPPINA LOSITO, VINCENT (VINCENZO) LOSITO, JENNIE LOSITO, MICHAEL (MICHELE) LOSITO, *Defendants.*	*Action at Law.* *Postea.*

This case was tried before Judge William A. Smith (to whom the case was duly referred for trial) without a jury at the Essex Circuit on October 23, 1928 on an agreed state of facts (which agreed state of facts is hereto annexed and herein included) and upon admissions in the pleadings (a transcript of which pleadings is hereto annexed and herein included).

The findings of the Court are hereunto annexed and herein included.

The Court rendered a general verdict against the defendants, Antonio Losito, Giuseppina Losito, Vincent (Vincenzo) Losito, Jennie Losito, Michael (Michele) Losito, and in favor of the plaintiff for twelve hundred fifty-three dollars and seventy-five cents ($1253.75), together with interest from the first day of December, 1926 amounting to one hundred forty-one dollars and sixteen cents ($141.16), making a total of thir-

Postea.

teen hundred ninety-four dollars and ninety-one cents ($1394.91).

October 24, 1928.

WM. A. SMITH,
Circuit Court Judge.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB L. KRAM, *Plaintiff,*		
vs.	*Action at Law.*	
ANTONIO LOSITO, GIUSEPPINA LOSITO, VINCENT (VINCENZO) LOSITO, JENNIE LOSITO, MICHAEL (MICHELE) LOSITO, *Defendants.*	*Notice of Appeal.*	

To Corn and Silverman, attorneys of plaintiff, or whom it may concern:

PLEASE TAKE NOTICE, that the defendants in the above-entitled cause appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause, on the following grounds, to wit:

(1) Because the Supreme Court erred in giving judgment to the plaintiff instead of to the defendants in that

(a) The verdict rendered by the Court in favor of the plaintiff is contrary to law.

Dated November 19, 1928.

Respectfully yours,

SORG, DUNCAN & BAILEY,
Attorneys of Defendants.

GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB L. KRAM, *Plaintiff,* *vs.* ANTONIO LOSITO, GIUSEPPINA LOSITO, VINCENT (VINCENZO) LOSITO, JENNIE LOSITO, MICHAEL (MICHELE) LOSITO, *Defendants.*	*Action at Law.* *Grounds for Appeal.*

Defendants, Antonio Losito, Giuseppina Losito, Vincent (Vincenzo) Losito, Jennie Losito, Michael (Michele) Losito, each assign the following as grounds for appeal of the above-entitle cause to the Court of Errors and Appeals:

(1) Because the judgment was erroneously given to the plaintiff instead of to the defendants.

(2) Because the verdict rendered by the Court in favor of the plaintiff is contrary to law.

Dated December 24, 1928.

SORG, DUNCAN & BAILEY,
Attorneys for Defendants.

Service acknowledged December 26, 1928.

CORN & SILVERMAN,
Attorneys of Plaintiff.

New Jersey Court of Errors and Appeals.

JACOB L. KRAM, *Plaintiff-Appellee,* VS. ANTONIO LOSITO, GIUSEPPINA LOSITO, VINCENT (VINCENZO) LOSITO, JENNIE LOSITO, MICHAEL (MICHELE) LOSITO, *Defendants-Appellants.*	*Action at Law.*

BRIEF OF DEFENDANTS-APPELLANTS.

Statement.

This is an appeal by defendants from judgment of Supreme Court upon decision by Smith, *C. C. J.*, at Circuit, upon an agreed state of facts (Case, p. 11). Findings of the Court below (Case, p. 14) indicate the Court erroneously construed the contract in question, upon which plaintiff-appellee bases his right to a commission, by considering plaintiff's claim as one for commissions earned by producing purchaser "ready, willing and able to purchase at the seller's terms", whereas that rule is not applicable to the case at bar.

Points.

The defendants-appellants contend that the plaintiff-appellee is not entitled to judgment and that the Court erred in giving judgment to the

plaintiff-appellee and that the verdict in favor of the plaintiff-appellee is contrary to law, for the following reasons:

(1) The plaintiff's right to recover commissions in this case is fixed by the agreement which was the only agreement ever made and it is not within the province of the Court to make a different agreement for the parties, but same must be construed as made.

(2) Notwithstanding the recognized rule, based upon proper agreement, that a broker may be entitled to recover commissions if he produces a purchaser "ready, willing and able to purchase at the seller's terms", in this case the broker's right to a commission is not to be determined by the foregoing rule, as he has entered into a contract making his right of recovery dependent upon conditions precedent, which he has agreed to and must abide by.

(3) The liability of the defendants for the plaintiff-broker's commission was expressly made subject to a condition precedent, which never happened and which is binding upon him and his right of recovery is not to be determined by a construction of the rights of the buyer and seller as contained in the same agreement.

Argument.

(Note: Any underlining or italics is by counsel.)

In attempting to determine the rights of the parties in the case at bar, it must be remembered that the only agreement is the one contained in the agreed state of facts. It is therefore obvious,

if we are to be guided by the rule that the broker has earned his commission when he produces a purchaser "ready, willing and able to buy at the seller's terms", that he had already done that at the time the parties, buyer and seller, executed this tentative agreement.

For convenience, the portion of the agreement pertinent to the payment of commission is set forth as follows:

> "The undersigned hereby agrees to recognize Jacob L. Kram as our broker, and agree to pay him a commission of five per cent. (5%) upon the agreed purchase price, upon the execution and payment by the above mentioned purchasers of the balance of the initial payment of the purchase price of Five Thousand Dollars ($5,000.00)."

The foregoing language is significant. The defendants state that they "hereby agree *to recognize* Jacob L. Kram as broker", indicating that he was the one entitled to a commission when same became payable. The language does not say "hereby recognize", thereby acknowledging a commission already earned and payable. The language then goes on to say "and agree to pay him a commission of 5% upon the agreed purchase price, *upon the execution and payment* by the above mentioned purchaser", etc. This is not language which merely designates the time of payment as urged by the plaintiff-appellee, but when the above quoted portion of the agreement together with the entire agreement is considered, it is clearly language intended to make the payment of the commission subject to a condition or conditions precedent.

The cases cited by the plaintiff as indicating that the foregoing language merely designates

time of payment, are not similar in language when the entire agreement, which entire agreement must be considered in the construction of this case, is carefully considered.

The conditions precedent are:

(a) "Upon the *agreed* purchase price."

The purchase price never was agreed upon (bearing in mind that this agreement must be construed as of the date it was made, the fact that the quantity of acreage was subsequently stipulated for purpose of trial has no bearing in the matter); that remained for future calculation when the exact amount of acreage was determined at the time the formal agreement was to be entered into.

(b) "Upon the execution *and* payment by the purchaser," of the balance of the initial payment of the purchase price of $5,000.00.

It will be observed that the aforesaid provision is expressed, not in the disjunctive, but in the conjunctive—the word "and" being used. Consequently, the commission became payable, in any event, only upon the happening of the condition precedent, to wit: payment of the $5,000.00 and execution of a mortgage and of a formal contract. The payment was never made, nor was it ever tendered. A mortgage was never tendered, nor could it be as the terms thereof never were agreed upon. Neither was a formal contract ever entered into nor tender thereof made a condition precedent to the liability for commissions.

It may be true that the failure of the defendants to obtain a title guaranty or an extension of

the mortgage as provided in the agreement between the buyer and the seller may be significant as to, and may affect the right between, the buyer and the seller in the event of a suit between them for specific performance or damages, but has no bearing whatsoever upon the rights of the broker in this case to his commission, as said broker by his own contract has agreed that these things must occur before he is entitled to his commission. Certainly, the defendants had a right where the broker could not, by any previous understanding, collect commissions, to impose such conditions precedent as they cared to before becoming liable for the payment of same to the broker.

The above agreement was the only agreement ever entered into and upon which the plaintiff broker must rely to establish his right of recovery.

In *Hinds* v. *Henry,* 36 N. J. Law, p. 328, the Court held:

> "If the employment be by special agreement the rights and liabilities of the parties *will be determined by the terms of the agreement exclusively.*"

In *Runyon* v. *Wilkinson-Gaddis & Co.,* 57 N. J. Law, p. 420, the Court said:

> "It is obvious that the contract furnished the sole ground for recovery in the action,"

and further said:

> "Therefore, to maintain his case Runyon must establish, by proof sufficient to be submitted to a jury, that he had *earned his commissions under the written contract relating thereto.*"

It needs no citation of authority to support the proposition that the broker is not entitled to commission unless he has earned same upon the terms and conditions imposed by the seller, unless the doctrine of estoppel bars the seller from a defense. The facts herein stipulated do not set forth anything which would invoke the doctrine of estoppel—there has been none found which might invoke the doctrine.

It is fundamental that where parties enter into a contract not otherwise illegal, that the rights thereunder are to be construed and fixed by that agreement and it is not within the province of the Court to make a new or different contract for the parties. It should be borne in mind that we are not here concerned with the interpretation or construction of the agreement as between the buyer and the seller with respect to their respective rights, but are to consider the entire agreement only for the purpose of enabling us to arrive at a construction of the provision concerning the plaintiff's right to commission. Four times the phrase "formal agreement" is used in the agreement, clearly evidencing an intent in so far as the defendants are concerned, that no liabilities are assumed or intended by the agreement, *and this applies to the payment of commission,* until a further final and formal agreement is entered into.

It is urged by the plaintiff that the existing agreement is complete on its face, but it is respectfully submitted that this is not so. The terms of the mortgage to be made between the purchaser and the seller as part of the purchase price were not agreed upon, that is, no agreement was ever made as to the rate of interest, default clauses, nor was even the amount of the mortgage then determinable, but had to be deter-

mined at some future date (at the time of the making of the formal contract) after the quantity of acreage was ascertained. *The agreement must be construed as of the date it was made* and not by facts subsequently ascertained or circumstances thereafter occurring.

In *Tansey* v. *Suckoneck,* 130 At. 528, 98 N. J. Equity, page 669, the Court of Errors and Appeals said:

> "* * * the bargain must have been completely determined between the parties, and its terms definitely ascertained. So long as negotiations are pending over matters relating to the contract, and which the parties regard as material to it, and until they are settled and their minds meet upon them, it is not a contract, although as to some matters they may be agreed."

In the same case the Court further said it was obvious that a further agreement was contemplated because,

> "It is to be observed that this paper does not specify * * * what all the terms of the formal agreement are to be; nor does it state the rate of interest on the mortgage or how long it is to run, or whether it is to contain any provisions for default of interest, taxes, etc., common in such cases * * *. It is to be further observed that the clauses, '*formal agreement to be executed* and additional amount paid on November 7, 1924', *points clearly to another and definite agreement* which should normally settle all outstanding details of the transaction."

And

> "The basis for decision in the present case is that the paper is on its face pre-

> liminary and not final, and by its very language indicates that other features left unsettled are to be settled by further negotiation."

It will be noted in the findings of the Court below, upon which judgment was entered (Case, p. 14) that the Court states that the broker was ready, willing and able to buy, upon terms satisfactory to the defendants and agreed to by them. *This is not the stipulated fact.* Paragraph four of the agreed State of Facts (Case, p. 11) states that the purchasers "were ready, willing and able to purchase the said premises *under the terms set forth in said agreement*". This stipulated fact merely means that they were ready and willing to enter a further formal agreement, but does not change the fact that the terms of that further and formal agreement had to be agreed upon between them as purchasers and the defendants as sellers, nor does it change the fact that the purchasers recognized that a further and formal agreement was to be made and entered into.

Furthermore, the Court below in its findings states that the contract in question "contains a memorandum in writing authorizing the plaintiff to sell" (Case, p. 14, l. 38). This is not so. The words "to sell" are not used in the agreement and there is a total absence of any words inferring a right, to the broker, *to sell.* The fact is, that he had theretofore, by some oral arrangement, apparently been authorized to sell, and pursuant to that oral arrangement the purchasers and sellers got together and executed the contract in question. This is proof that the contract was not intended by the sellers as an authorization to the broker to sell and to pay

commission, but was intended merely as a recognition of the fact that, as if and *when a commission became payable upon the happening of the above mentioned conditions precedent,* that he was the broker that they recognized and that he would be the one to receive the commission at the rate specified.

The Court further says (Case, p. 15, l. 12) "but the employment of the plaintiff" again indicating by this language that the Court construed this agreement as one of employment when in fact as stated before, he was not employed by the agreement, as he already had gotten the purchasers and the sellers together.

The Court below finds as a fact that the commission became due on December 1, 1926, recognizing by implication the fact that the commission was payable at some future date after the execution of the contract in question upon the happening of the conditions precedent, execution of formal contract, and of mortgage, and payment. The Court cannot take this position and construe that date as time of payment because the language of the entire contract does not lend itself to such construction. The Court's construction that the broker has produced a purchaser ready, willing and able to purchase, and therefore earned his commission is not sound, because the commission by virtue of such a construction would have become due immediately upon the execution thereof and as same is without date, the Court could not insert some other date which is contained in the agreement for an entirely different purpose.

It is respectfully urged, therefore, that it is obvious from the language of the agreement that the broker agreed that he had no commissions payable at the time the agreement was entered

into and that any commissions payable to him were payable thereafter only upon the happening of conditions precedent, and the failure of such contingency to happen, to which the broker expressly made subject his right to commission, absolutely and legally bars the broker from the recovery thereof.

It is submitted that for the foregoing reasons the plaintiff-appellee's right to commission must be denied and the judgment below in favor of the plaintiff be reversed and judgment entered for the defendants.

Respectfully,

SORG, DUNCAN & BAILEY,
Attorneys for Defendants-Appellants.

GEORGE B. BAILEY,
Of Counsel.

THE COURT PRESS—47 West Street—Bowling Green 2820

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JACOB L. KRAM, *Plaintiff-Respondent,* *vs.* ANTONIO LOSITO, *et als.*, *Defendants-Appellants.*	*On Appeal from Supreme Court.*

RESPONDENT'S BRIEF.

Argument for Dismissal of Appeal.

This appeal is from a judgment of the Supreme Court, sitting in the first instance, awarding $1,394.91 to respondent against appellants.

The Notice of Appeal (State of Case, p. 18) sets up one ground: that the Court erred in giving judgment to plaintiff instead of to defendants, in that the verdict was contrary to law. The Grounds of Appeal (State of Case, p. 19) are: (1) because the judgment was erroneously given to the plaintiff instead of to the defendants, and (2) because the verdict is contrary to law.

Respondent respectfully contends that these grounds are improper, are too general, and therefore should not be considered.

> Grounds of appeal must state the judicial action complained of with sufficient precision to apprise the court and opposing counsel of the injury complained of. *Del Vecchio* v. *Shubin Bldg Co.* (Sup. Ct. 1927), 5 Misc. 1029, 139 Atl. 528 (not officially reported).
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> The printed case presented by appellant on this appeal is radically defective. * * * It presents seven reasons couched in gen-

> eral terms, in the form of a pleading pertinent to a rule to show cause in a court of first instance why a verdict should not be set aside, but wholly irregular and improper in a case on appeal, which requires grounds for reversal to be explicitly stated. * * * None of the reasons presented sets out with sufficient distinctness in what particular respects the trial judge erred in any of his rulings and hence will not be considered. * * * The appeal is dismissed.
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> *Anderson* v. *Freehafer* (E. & A. Ct. 1927), 5 A. R. 1517, 139 Atl. 29 (not officially reported).

The assignment that judgment was erroneously given to respondent instead of appellants, standing by itself is ineffective. For, if such ground is proper, what need of any other? Every appellant complains that the judgment or decree should have been in his favor and not in favor of respondent. The respondent, however, is entitled to have pointed out, in appellant's grounds of appeal, the precise particulars wherein appellant hopes to sustain his contention that the judgment should have been rendered pro and not con.

> The only error assigned is the common one that the judgment was given for the plaintiff instead of the defendant. * * * On this ground the judgment should be affirmed. *Driscoll* v. *Carlin* (Sup. Ct. 1887), 50 N. J. Law 28.
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> "Because the Supreme Court gave judgment for the defendants-respondents, when it should have given judgment for the plaintiff-appellant." This is not a proper ground of appeal from the Supreme Court when sitting in the first instance.
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> *Van Horn* v. *Huegel* (E. & A. Ct., 1927), 5 A. R. 1434, 139 Atl. 28 (not officially reported).

> That judgment should have been rendered for appellant, is too general to be considered. 3 *C. J.* 1387, Sec. 1534.

Of course, had the Supreme Court sat in this case as a court of appeals from a lower court, this assignment would have been proper; for in such event, the very grounds urged in the Supreme Court would have been in effect on appeal from the judgment of affirmance.

The ground of appeal that the verdict is contrary to law is valueless.

> "That the judgment is contrary to law" has no proper place in a case upon appeal. * * * Appeal dismissed. *Dooling* v. *Dragrin* (Sup. Ct. 1925), 3 Misc. 1073, 130 Atl. 522 (not officially reported).

> "The judgment is erroneous." This is too general. *Del Vecchio* v. *Shubin Bldg. Co., supra.*

> The general rule that an assignment of error must point out definitely and specifically the errors relied on applies to findings of fact and conclusions of law in a case tried by the court without a jury and a mere general assignment of error that the court below erred in its findings of fact or conclusion of law, without setting forth or specifying the particular findings or exceptions thereto, is improper and will not be considered. 3 *C. J.* 1381, sec. 1531.

> That the verdict is contrary to law, without specifying or indicating in what way and for what reason it is so, is too general and will not be regarded by the Court. 3 *C. J.* 1384, sec. 1533.

It would therefore appear that the appeal should be dismissed.

But, as this Court may not consider these matters as warranting dismissal, respondent now proceeds to the merits of the case.

Facts.

This was a broker's action to recover commissions.

Defendants, in writing, acknowledged receipt of $100 from Greene and Friedlander on account of purchase price of 14¾ acres at $1,700 per acre (thus making the sum of $25,075). It was provided that $4,900 was to be paid by purchasers on execution of formal agreement, $8,000 by assuming a first mortgage and the balance by purchase money mortgage. Defendants were to procure a five-year extension of the first mortgage. Possession was to be given and deed delivered on payment of the $4,900. Defendants were to apply for and secure from Lawyers' Title Guaranty Co. a title guaranty for $15,000 before payment of the $4,900 and the execution of formal agreement. Title was to close on or before December 1, 1926. Defendants agreed to recognize plaintiff as their broker and agreed to pay him a commission of 5 per cent. on the purchase price "upon the execution and payment by the above-mentioned purchasers of the balance of the initial payment of the purchase price of $5,000."

Defendants did not procure the required extension of the first mortgage, nor did they apply for or secure the required title guaranty. The balance of $4,900 was not paid, formal agreement was not executed, and neither deed nor purchase money mortgage tendered. Greene and Friedlander were ready, willing and able to purchase under the terms of the agreement.

The trial court found that plaintiff's employment and his compensation were not conditional, that a formal agreement was not necessary to legally ascertain the terms of sale, and that his

commission became due on December 1, 1926. Judgment was entered accordingly.

From appellants' brief it would seem to appear that they feel aggrieved for three reasons: (1) The agreement as to commission is not enforceable; (2) respondent's right to commission was dependent on a condition which was not fulfilled; and (3) the sale agreement was not final.

POINT 1.

The Commission Agreement is Enforceable.

Appellants contend that the words "The undersigned *hereby agrees to recognize* Jacob L. Kram as our broker" is not equivalent to "The undersigned *hereby recognize* Jacob L. Kram as our broker." But, if there is a distinction, there is no difference. The word "agree," as here used, merely signifies assent. (*Thornton* v. *Kelly,* 11 R. I. 498); that is, that the owners thereby expressed themselves content to recognize the agent. The recognition as broker is just as conclusive whether defendants "hereby agree to recognize" or "hereby recognize." There can be no doubt as to intention.

Whether appellants recognized or agreed to recognize respondent as broker is immaterial. Eliminating the phrase in question leaves "The undersigned agree to pay him (Jacob L. Kram) a commission," etc. Recognition as broker is surplusage; the material factor is the agreement to pay commission.

Appellants then point to the fact that the exact purchase price, in so many dollars, is not expressed in the sale agreement. Yet the amount is clearly ascertainable from the agreement it-

self. The sale is of "our property consisting of approximately 15 acres" and "the total purchase price of which is $1,700 per acre" (State of Case, p. 4, ll. 6-14). Surely it is not seriously contended that the purchase price cannot be computed from those figures. Were it not that the agreed facts (State of Case, p. 11, l. 8) reduced the plot to 14¾ acres, and the sale price accordingly to $25,075, respondent would have been entitled to recover on 15 acres at a sale price of $25,500.

In their brief (p. 8, bottom) appellants say "the fact is, that he had theretofore, by some oral arrangement, apparently been authorized to sell, and pursuant to that oral arrangement the purchasers and sellers got together and executed the contract in question. This is proof, etc." There is no proof whatsoever in the case as to such fact. The practice is clear that a case on appeal is heard only on such evidence as was produced in the trial court. However, since the amendment (P. L. 1911, p. 703; P. L. 1918, p. 1020) to section 10 of the Statute of Frauds, there is no longer any legal distinction as to an agent's right to commission, depending on the time when he receives his writing, for the amendment provides "whether or not such writing is signed by said owner or agent before or after such sale or exchange has been effected."

POINT 2.

The commission was not conditional, and even if conditional, respondent was entitled to recover.

Plaintiff's commission does not depend on any contingency.

"Upon the execution and payment by the above-mentioned purchasers of the balance of

the initial payment of the purchase price of $5,000" merely designates the time of, but not the condition preceding payment.

Similar language has been construed by our Courts as not constituting conditions precedent:

(1) "On day of settlement." *Rauchwanger* v. *Katzin* (Sup. Ct. 1912), 82 N. J. Law 339.

(2) "To be paid on the date set for the delivery of the deed." *Haber* v. *Goldberg* (E. & A. Ct. 1918), 82 N. J. Law 367.

(3) "If sold to a purchaser introduced to me through Mr. Steinberg." *Steinberg* v. *Mindlin* (E. & A. Ct. 1921), 96 N. J. Law 206.

(4) "For perfecting the sale." *Klipper* v. *Schlossberg* (Sup. Ct. 1921), 96 N. J. Law 397.

(5) "Negotiating the sale." *Dickinson* v. *Walters* (Sup. Ct. 1924), 100 N. J. Law 62.

(6) "On the date of closing title to said premises." *Lehrhoff* v. *Schwartsky* (Sup. Ct. 1924), 125 Atl. 496 (not officially reported).

(7) "At the time of passing title." *Taylor* v. *Buonicontri* (Sup. Ct. 1925), 101 N. J. Law 278.

(8) "On the delivery of deed." *Ludwig* v. *Aberbach* (Sup. Ct. 1926), 132 Atl. 241 (not officially reported).

(9) "On the sale of the property." *Maxwell* v. *Staulcop* (Sup. Ct. 1927), 138 Atl. 201 (not officially reported).

(10) "At the conveyance of the premises." *Mahlenbrock* v. *Stonehell Realty Co.* (E. & A. Ct. 1927), 138 Atl. 875 (not officially reported).

(11) "At time of final settlement." *Tucker* v. *Mahaffey* (Sup. Ct. 1928), 139 Atl. 806 (not officially reported).

(12) "At settlement." *Roe* v. *Eggleston* (Supt. Ct. 1928), 142 Atl. 366 (not officially reported).

The phrase used here by defendants is surely no more indicative of a condition than those used, for instance, in the eighth, ninth, tenth and twelfth cases above cited.

Our courts are inclined to construe such provisions as indications of time of payment, unless it clearly appear that a condition is expressed. Where either construction may seem to fit the case, that opposed to condition precedent is adopted.

> In order to absolve a party from the payment of commissions, it must clearly appear by the contract with his broker that the payment of commissions was made contingent upon the actual transfer of title. *Dickinson* v. *Walters, supra.*

> To absolve a defendant from the payment of commission it must appear that the payment was to be made contingent upon the actual transfer of the title, and that the stipulated remuneration for the service rendered is not to be payable unless the title shall have passed. *Taylor* v. *Buonicontri, supra.*

> If it was intended that no commission was to be paid unless an actual sale was consummated by the delivery of a deed, it should have been explicitly so stated in the contract. *Ludwig* v. *Aberbach, supra.*

There is nothing in defendants' writing to indicate that the commission was to be paid to plaintiff only if the purchasers paid the balance or that the commission would not be payable if the purchasers did not pay the balance.

It is elemental that a real estate broker earns his commission when he secures a buyer in the seller's terms (*Roe* v. *Eggleston, supra; Tucker* v. *Mahaffey, supra; Maxwell* v. *Staulcop, supra; Steinberg* v. *Mindlin, supra*). As far as this action is concerned, defendants' agreement (except that portion expressing plaintiff's commission) is of no interest other than to show that the buyers procured by plaintiff met defendants' terms of sale and that defendants accepted Greene and Friedlander as purchasers. Plaintiff procured buyers for the property on the terms set out by defendants; all that then stood between plaintiff and his commission was the period until the $4,900 was payable.

> The fact that the settlement did not take place on that date, or that the date of final settlement was postponed to a later date or never took place at all cannot operate to defeat the broker's claim. *Tucker* v. *Mahaffey, supra.*

But defendants cannot complain that the buyers did not pay the balance of the cash. The agreement expressly requires that defendants apply for and secure a title guaranty before payment by the buyers of the balance of $5,000. Defendants did not apply for or secure such guaranty, and hence were not entitled to receive the money from the buyers. Nor did defendants procure the extension of the first mortgage, which they had obligated themselves to procure. Defendants were clearly in default.

Plaintiff was legally justified in relying on defendants' ability to deliver the property in accordance with the terms of sale.

> The agent has a right to rely on his principal being able to give a perfect title to a prospective purchaser. *Ludwig* v. *Aberbach, supra.*

Nor could defendants, by failing or refusing to obtain the title guaranty and mortgage extension, so postpone the time for payment by the buyers as to defeat plaintiff's claim.

> The rule is not intended to work injustice by putting it within the powers of a vendor after the agent has fulfilled his part of the contract to postpone indefinitely the day of settlement, and thereby deprive the agent of the fruits of his labor and enable the vendor to profit by his own malfeasance. *Rauchwanger* v. *Katzin, supra.*

> Undoubtedly a vendor may protect himself against paying commissions until an actual sale of the property has been made by the passing of title by using words to that effect; but even then it might be questionable whether he could properly escape liability if he capriciously refused to carry out his bargain. *Lehrhoff* v. *Schwartsky, supra.*

Appellants say that "execution" as used in the commission sentence, refers to execution of a mortgage and formal contract. There appears no justification for such construction. If permitted to rove in the realm of possibilities, "execution" may refer to the execution of the very agreement in evidence, or of the title company's guarantee, or of a check in payment of the $4,900 balance. But it hardly matters to the case if the execution of mortgage and formal contract are referred to; the purchasers' execution of those papers was not, and could not

be, required until defendants had procured the title guaranty and extension of the first mortgage. Whether through wilfulness or other cause, defendants did not apply for or secure this guaranty or procure this extension; by reason of defendants' default in this respect the balance of the $5,000 was not payable by the purchasers, nor could the purchasers execute formal agreement nor purchase money mortgage.

The case of *Hinds* v. *Henry* (36 N. J. L. 328) cited by appellants, is in support of respondent's case. The Supreme Court there held there could be no recovery by an agent where his commission is conditional on consummation when the reason for failure to consummate was a defect in seller's title. But the Court also held that "in an action of this kind, the pleader must aver, and it must be proved at the trial, that the contingency on which the debt is payable has happened, or that it was defeated through some fault of the obligor." Hence, even if respondent's commission was conditional on the execution of formal agreement, etc., and payment of balance of cash equity, he should recover because he pleaded and proved that the condition was defeated through the fault of appellants in not securing a five-year extension of the first mortgage and in not applying for and not securing the title guaranty.

And likewise the case of *Runyon* v. *Wilkinson-Gaddis & Co.* (57 N. J. Law 420), also cited by appellants, is favorable to respondent's case. There this court passed on a commission payable when defendant actually received the purchase price, holding that to maintain his case plaintiff must establish "that he earned his commissions under the written contract relating

thereto. This he could only do by effecting sale, or at least bringing to his principal a purchaser able and willing to buy at the price and on the terms fixed by it." In the instant case respondent effected the sale (as "sale" in such actions has been repeatedly construed by our courts to mean a contract of sale), and brought to appellants purchasers admittedly able and willing to buy at the price and on the terms fixed by appellants.

> "Plaintiff sues to recover commissions for the sale of real estate to defendants to be paid upon the delivery of the deed. Plaintiff had procured a purchaser who signed an agreement to purchase the property of the defendants, by which agreement the vendors agreed with the vendee to do certain repairs. The vendors never did do the repairs as agreed, and the vendee would not take title because of the default of the vendor. Judgment was given for the plaintiff for $230, the amount of his commissions." It is apparent that the state of the case discloses no question raised in the trial court as to the legal propriety of any of its rulings.
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> *Kapner* v. *Gollender* (Sup. Ct., 1924) 2 Misc. 792 (not officially reported).

POINT 3.

The Sale Agreement was final, and even if not final, respondent's claim was not effected.

The agreement refers to execution of a formal agreement. However, if examined carefully, it will appear that no formal agreement would be made, for all that was to be done by both buyers and sellers is set out. On payment by the buyers of $4,900, possession of the premises was to be turned over to them and deed delivered to them. Of course, simultaneously therewith, the buyers would be required to deliver the purchase money

mortgage. The agreement also provides for execution of formal agreement on payment of the $4,900, but what could be contained in such formal agreement after consummation of the sale by delivery of possession and deed? It would seem that by "formal agreement" the parties meant "consummation of this agreement." No time is specified as to when formal agreement is to be made or the $4,900 paid.

Appellants point as, as matters resting in later negotiations between them and purchasers, that no agreement was ever made as to the rate of interest, default clauses or amount of purchase money mortgage. As to interest and default clauses, the agreement provides that the terms of that mortgage are to comply with those of a specified agreement (State of Case, p. 5, ll. 24-31); this fixes those matters as definitely as if the Losito-Crine agreement were set out in length. As to amount of this second or purchase money mortgage, it is definitely expressed as "for the balance of the agreed price" (State of Case, p. 4, l. 24); it requires no mathematical genius to compute a sale price of 14¾ acres at $1,700 per acre to make $25,075, and then deducting $5,000 cash paid and to be paid, and an $8,000 first mortgage, to leave $12,075 as the amount of such purchase money mortgage. As appellants have not set out any other respects in which the agreement is not complete, respondent assumes they are satisfied that in all other details the minds of the parties had met.

It must not be presumed that merely because an agreement bears some provision pointing to the making of a formal contract, it is incomplete.

> The fact that parties negotiating a contract, contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind them-

> selves until the agreement was reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding, and which, for greater certainty, or to answer some requirement of the law, they designed to have expressed in some formal written agreement. *Wharton* v. *Stoutenburgh* (E. & A. Ct. 1882) 35 N. J. Eq. 266.
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> The mere fact, however, that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared (embodying the terms already agreed upon) which shall be signed by the parties does not by itself show that they continue merely in negotiation.
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> *Levine* v. *Lafayette Bldg. Corp.* (Chanc. Ct. 1928) 142 Atl. 441 (not yet officially reported).

The case of *Tansey* v. *Suckoneck* (98 N. J. Eq. 669) cited by appellants is not in point. There this court pointed out that there were seven particulars in which the paper was incomplete, some of which could not be supplied by intendment because the parties evidently intended that they should be set forth in the formal agreement referred to in the paper. But in the instant case there do not appear any particulars in which the agreement is not complete, nor can there be noticed any intention of the parties to leave any details for later negotiations and expression in a formal agreement. In the cited case it was held that some particulars might be supplied by intendment as above shown; all the incomplete details referred to by appellants can be supplied by the very terms of the agreement or by reference to the Crine agreement therein referred to.

At any rate it is immaterial to this action whether or not the agreement was tentative or final. So far as this plaintiff and defendants are concerned, with relation to commissions, the agreement is final and does not provide for or infer any future understanding or arrangements as to commissions. The construction of the writing may become important in an action between buyers and sellers for specific performance or damages for breach or what-not, but in the instant case, as stated in *Dickinson* v. *Walters* (100 N. J. Law 62 *supra*), there was nothing further for the plaintiff to do after having brought the parties together.

In *Lesser* v. *Stolman,* 132 Atl. 328 (not officially reported), our Supreme Court had up for review a judgment by a broker on an agreement like the one made by these defendants; the Court affirmed the judgment, declaring all of defendants' contentions to be without merit. There, as here, a receipt for $100 deposit was signed by defendants, an additional deposit and formal agreement provided for, and the plaintiff's commission set out.

Plaintiff therefore respectfully contends that the judgment be affirmed.

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