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**Notice of Appeal to Court of Errors
and Appeals.**

New Jersey Supreme Court

CARMINE RICHARD, Respondent,	} 10
v.	
FRANCIS D. SPAGNA, Appellant.	}

To Carmine Richard or Hart and Vanderwart, his
attorneys: 20

Sir:

TAKE NOTICE, That the defendant-appellant,
Francis D. Spagna, appeals to the Court of Errors
and Appeals of the State of New Jersey from the
whole of the judgment entered in the above stated
cause on the following ground:

1. That the Supreme Court erroneously affirmed
the judgment of the Third District Court of the
County of Bergen, whereas said court should have
reversed said judgment and ordered a new trial. 30

ADOLPH J. H. PETERS,
Attorney for Appellant.

Service of the within notice is acknowledged this
6th day of January, 1927.

HART AND VANDERWART,
Attorneys for Respondent. 40

Rule of Affirmance and Remittitur.

(Filed .)

NEW JERSEY SUPREME COURT,

10	CARMINE RICHARD, Plaintiff-Appellee, v. FRANCIS D. SPAGNA, Defendant-Appellant.	}	On Appeal.
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20 The above entitled cause having been submitted to the court at the May Term, 1926, and the court having duly considered the record on appeal, the specifications filed and the arguments of respective counsel, rendered its decision, affirming the judgment of the Third District Court of the County of Bergen.

30 It is, therefore, Ordered, that the judgment of said Third District Court of the County of Bergen be and the same is hereby affirmed, with costs, and the record remitted to said District Court to be proceeded with in accordance with this judgment and the practice of said court.

Entered, January 5, 1927.

On Motion of

HART & VANDERWART,
Attorneys for Appellee.

40

Notice of Appeal.

(Served, November 12th, 1925.)

**DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT OF THE
COUNTY OF BERGEN.**

Before—FRED W. MATTOCKS, Esq., Judge.

10	CARMINE RICHARD, Plaintiff, v. FRANCIS D. SPAGNA, Defendant.	}	On Contract. Notice of Appeal.
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To Carmine Richard, or Archibald C. Hart, attorney for Carmine Richard: 20

Sirs:

Take notice that the defendant, Francis D. Spagna, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the Third Judicial District of the County of Bergen, rendered in the above stated action on the Fifth day of November, Nineteen Hundred and Twenty-five.

30

Dated, November 12th, A. D., 1925.

ADOLPH J. H. PETERS,
Attorney for Defendant.

I hereby acknowledge service of a copy of the within Notice of Appeal on me this 12th day of November, A. D., 1925.

HART & VANDERWART, 40
Attorneys for Plaintiff.

Specification of Reasons for Reversal

(Filed, April 23, 1926.)

NEW JERSEY SUPREME COURT.

10	CARMINE RICHARD, Plaintiff-Respondent, v. FRANCIS D. SPAGNA, Defendant-Appellant.	}	On Appeal From District Court.
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Specifications.

20 The following is a brief Specification of the determinations or directions of the District Court, with respect to which the appellant is dissatisfied in point of law:

- 1. The trial court erroneously denied the defendant's motion for a non-suit.
- 2. The trial court erroneously gave judgment for the plaintiff against the defendant instead of awarding a judgment in favor of the defendant.
- 30 3. The trial court erroneously admitted in evidence a certain contract marked, "Plaintiff's Exhibit P-2", over the objection of the defendant.
- 4. The trial court erroneously admitted in evidence a certain check marked, "Plaintiff's Exhibit P-5", over the objection of the defendant.
- 40 5. The trial court erroneously allowed the following answer of the plaintiff, Carmine Richard, to stand.

Specification of Reasons for Reversal.

"Q. Was there any question at all about the man Praskac being ready, willing and able to buy the property? A. He was always able.

Mr. Peters: I object to that as a conclusion.

The Court: Is that the only ground? I will allow the answer." 10

The following are additional specifications, being errors residing in the final judgment of said court, which have been served as grounds of appeal.

6. There was no legal evidence to support the finding of the trial court set out in its memorandum as follows:

"By virtue of this authorization I find the plaintiff procured one Charles Praskac, who agreed to purchase the premises at the price and upon the terms mentioned in the said authorization and that said Praskac deposited \$100 on account thereof." 20

7. The authorization marked in evidence as "P-1" did not contain all of the owner's terms; and there was no evidence of a meeting of minds between the owner and the alleged purchaser; the production of a purchaser able and willing to purchase said property being insufficient in law, under such circumstances, to support said judgment. 30

8. There was no evidence to support a finding by the trial court that the plaintiff procured a purchaser able and willing to purchase the property on the terms fixed by the owner, in the authorization.

9. The production of the alleged purchaser, Praskac, accrued after a reasonable time, as a matter of law, had elapsed for the performance of the written authority given the plaintiff, and after 40

the said authority was by such lapse of time terminated.

ADOLPH J. H. PETERS,
Attorney for Defendant-Appellant.

10 We hereby acknowledge service of a copy of the within Specifications on us this 21st day of April, A. D., 1926.

HART & VANDERWART,
Attorneys for Plaintiff-Respondent.

Docket

(Filed, April 23rd, 1926.)

20 THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE COUNTY OF BERGEN.

State of New Jersey, } ss.:
Bergen County, }

No. 20226.

Before—FREDERICK W. MATTOCKS, Esq., Judge.

30 CARMINE RICHARD,
Plaintiff,
v.
FRANCIS D. SPAGNA,
Defendant. } Upon Contract.

HART & VANDERWART,
Plaintiff's Attorneys.

ADOLPH J. H. PETERS,
Defendant's Attorney.

40

COSTS	COUNTY	AL	
Summons,	\$1.50		A Summons was issued tested March 23rd, 1925, returnable April 3rd, 1925, at 9:30 o'clock
Service and			in the forenoon at the Court Room of said Court in Bergen County. The (Constable, or) Sergeant-at-Arms, Returned the summons as follows, viz.: I served the within summons March 27th, A. D., 1925, on the defendant by reading the same to him and delivered to him a copy thereof.
Return,	.60		10
Mileage,	.56		20
Order, &c.,			
Venire,			
Summoning Jury,			
Attending Jury,			
Jury Fees,			
Service of Subpoenas,			WILLIAM A. OLIVER, Sergeant-at-Arms.
Witness Fees,			June 5th, 1925, the plaintiff appeared and the trial of the cause was proceeded with as follows: On the proof of claim judgment was rendered:
Listing Fees, 1.50			30
Attorneys' Fee 5%	25.00		
	\$3.00	\$26.16	
Execution,			June 17th, 1925, Affidavit and Rule to show cause filed.
Service and Return			
Mileage,			June 25th, 1925, Notice to produce filed.
			40

COSTS	COUNTY	AL
		August 12, 1925, Affidavit and rule to show cause filed.
10	Mileage,	September 11th, 1925, New trial granted on order.
	Orders, \$1.00	
	1.00	
	Exemplified copy of Judgment, 1.00	October 9, 1925, Parties appeared and proceeded to trial.
	Credits,	
20		On the part of the plaintiff Carmine Richard, Ralph W. Bennett, Stenographer, Nicholas F. Mahoney, John D. Coysh, Charles Praskac (Carmine Richard, rebuttal).
		On the part of the defendant, Francis D. Spagna.
30		November 7th, 1925, Opinion filed "Judgment for plaintiff for \$500.00."
		November 17th, 1925. Notice of appeal filed.
		November 27th, 1925. Bond filed on appeal.
40		December 24th, 1925. Order signed extending

	time to settle or fix state of the case, to January 13th, 1926. Filed.	
	January 6th, 1926. Certificate signed "Settlement of Case on appeal."	10
	Whereupon it is on this fifth day of June, A. D., 1925, by this court considered and adjudged that said Carmine Richard, plaintiff, recover against said Francis D. Spagna, defendant, the sum of Five Hundred Dollars and no cents, debt and twenty-nine dollars and sixteen cents costs of suit.	
	I certify this to be a true copy of the docket in above action.	20
	April 20, 1926.	
	(Seal) FRED V. KELLOGG, Clerk.	
	State of Demand.	
	DISTRICT COURT, FOR THE THIRD JUDICIAL DISTRICT OF THE COUNTY OF BERGEN.	30
	CARMINE RICHARD, Plaintiff,	} On Contract. State of Demand.
	v.	
	FRANCIS D. SPAGNA, Defendant.	
	Plaintiff, residing in the Borough of Cliffside Park, Bergen County, New Jersey, says:	40

State of Demand.

That he is a licensed real estate broker of the State of New Jersey; that his office is at 356 Palisade Avenue, Cliffside Park, New Jersey.

That on February 2, 1925, pursuant to the written authorization of the defendant, a copy of which is attached hereto, he sold the premises described therein, according to the terms therein specified. As a result of said sale, plaintiff became and was entitled to five per cent. of said price, namely, \$675.00. Plaintiff demanded payment of said sum, but defendant failed to pay it or any part thereof.

Plaintiff waives all moneys in excess of \$500.00.

Plaintiff demands of the defendant the sum of \$500.00 together with costs of court.

HART & VANDERWART,
Attorneys of Plaintiff.

May 19, 1924.

STANDARD AUTHORIZATION

REAL ESTATE BOARD OF GRANTWOOD-PALISADE

The undersigned hereby authorizes Carmine Richard member of the Real Estate Board of Grantwood-Palisade, to sell the property described below, which is made part of this agreement, and for which services I agree to pay said Agent a commission of Five (5%) per cent. if the property or properties are improved, Ten (10%) per cent. on the total selling price if unimproved, business, factory, or garage, property, acreage and farm property. These rates of commission to apply on the amount finally accepted, be it more or less than

State of Demand.

the price hereinafter named, provided the property is sold through said Agent's influence and efforts or the purchaser introduced by him.

Property: 521 Brandon Place.

Price: \$13,500.00.

Terms of Sale: First mortgage \$7000.00, \$2000.00 or \$3000.00 cash.

F. D. SPAGNA (L. S.)

Address: 515 Brandon Place.

Phone: Cliffside 50-M.

75 x 100 plot.

Frame, shingle—two family—4 rooms, summer kitchen, bath pantry—1st floor, rented \$70.00 monthly, April 1st to Oct. 1st, \$60.00 monthly, Oct. 1st to Apr. 1st.

5 room, bath, pantry—2nd floor.

Two finished rooms in attic, 1 for each apartment, gas, electric, steam heat, 2 separate heaters, one entrance, 2 open porches for second floor. Stone garage for one car.

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State of Case.

DISTRICT COURT,
THIRD DISTRICT.

10	CARMINE RICHARD, Plaintiff, against FRANCIS D. SPAGNA, Defendant.
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Hackensack, New Jersey, October 9, 1925.

Before—Hon. FREDERICK W. MATTOCKS, Justice.

20

APPEARANCES:

HERMAN VANDERWART, Esq., for the Plaintiff.
ADOLPH H. PETERS, Esq., for the Defendant.

CARMINE RICHARD, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

30

Direct Examination by Mr. Vanderwart:

Q. I show you what purports to be a standard authorization for the sale of real estate, dated May 19, 1924, apparently authorizing you to sell certain real estate, and ask you whether that form is by you and whether that was filed in your office. A. Yes.

40

Q. You are a regularly licensed broker of real estate, licensed in New Jersey? A. Yes.

Carmine Richard—Direct Examination.

Mr. Vanderwart: It is signed by him. I offer it in evidence.

(The paper referred to was received in evidence and marked "Plaintiff's Exhibit 1.")

Q. Was that authorization ever determined or cancelled by Mr. Spagno? 10

Mr. Peters: I object to that. That is leading.

The Court: Yes.

By Mr. Vanderwart:

Q. Was this ever cancelled?

Mr. Peters: I object to that.

The Court: Sustained. 20

By Mr. Vanderwart:

Q. What did Mr. Spagno do, if anything, in connection with the continuance of this authorization? Did he ever do anything? A. No, sir.

Q. Did he ever cancel it? A. No, sir.

Mr. Peters: I object to the question on the ground that it is leading and ask that the answer be stricken out. 30

The Court: Yes. I think that that is a matter of defense. They signed it and I suppose it is presumed to be still in existence.

By Mr. Vanderwart:

Q. Did you under this authorization procure a purchaser of this property for Mr. Spagno?

Mr. Peters: I object to that on the ground that it is leading. This witness may say what he did. 40

The Court: Yes. Suppose you ask him what he did.

By Mr. Vanderwart:

10 Q. What did you first do with it? Describe your filing system.

Mr. Peters: I don't want that.

Mr. Vanderwart: What do you want?

Mr. Peters: I don't want counsel to testify.

The Court: Produce somebody who wanted to buy the property.

By Mr. Vanderwart:

20 Q. Did you procure a purchaser for that property? A. Yes.

Q. I show you what purports to be a contract in duplicate—Charles Praskac and Maria Praskac—and ask you if that is a contract executed by them pursuant to your authorization to sell? A. Yes.

Mr. Vanderwart: I offer it in evidence.

Mr. Peters: I object to it.

30 By the Court:

Q. Did you see him sign it? A. Yes.

Q. Were you a witness to it? A. Yes.

Mr. Peters: It was not signed by my man; it was signed by some purchaser. A contract was never signed.

40 The Court: I suppose that that would be a matter for argument—as to whether it was a contract. He is offering it as a contract.

Mr. Peters: He is offering it as a contract, signed and executed, which he prepared and which he had no authority to prepare or to convey at all, which was never signed by Spagno, but signed by some man that he procured. That certainly cannot bind us.

The Court: I will allow it in evidence.

(The paper referred to was received in evidence and marked "Plaintiff's Exhibit 2.")

Mr. Peters: Your Honor will grant me an exception?

The Court: Yes.

Mr. Peters: I object to it on the further ground that the mere authorization of the real estate broker to sell property does not imply his right to prepare or execute a contract for the vendor.

Mr. Vanderwart: There is no one on the face of the earth with any knowledge of the fundamentals of law who would offer this as a contract, and the wonderment to me is that anyone would assume that it is being offered as a contract. It is a presentation of a bidder and a proposed contract. That is what it was offered as.

The Court: It is already in evidence. You have your objection.

By Mr. Vanderwart:

40 Q. Mr. Richard, after the signing and execution of Plaintiff's Exhibit 2 what did you do with it? A. We telephoned to Mr. Spagno that we had received a deposit, and he came in next day and he said he would not sign the contract; he would not go through with it.

Mr. Peters: A little louder.

The Witness: He said he would not go through with the contract.

By Mr. Vanderwart:

10 Q. What did you do then, Mr. Richard, with this Exhibit P-2? A. Well, then I called him up again. He came in again, but still he refused to sign the contract.

Mr. Peters: I object to this.

The Court: Let us get the question first. Then you may object to it. Read the question.

(The stenographer read the last question.)

20 Mr. Peters: I object to it on the ground that that testimony, first of all, is irrelevant, incompetent, and immaterial, and upon the further ground that there is nothing in the written authorization which specifies the terms of sale or the amount of deposit and this man had no power to take it upon himself to take a deposit for Mr. Spagno without consulting him and by his authority; and therefore that evidence is incompetent—

30 The Court: I will allow the evidence.

Mr. Peters: —irrelevant, and immaterial. Your Honor will grant me an exception?

The Court: Yes.

By the Court:

Q. What did you do with reference to the—

Mr. Vanderwart: The \$100 deposit.

40 A. Then Mr. Spagno—

Q. What did you do?

By Mr. Vanderwart:

Q. You know what you did. A. I sent Mr. Mahoney, who made this sale, with the contract and a check and \$100 in cash to tender it to him.

Q. Did you write any letter to Mr. Spagno concerning this? A. I wrote a letter and he replied— 10

Q. Was this letter registered or not registered? A. It was registered.

Q. I show you a carbon copy of a letter, dated March 12 or 13—somewhat obliterated—and ask the defendant to produce the original.

(Mr. Peters handed a paper to Mr. Vanderwart.)

By Mr. Vanderwart: 20

Q. Is this the letter which you wrote (handing a paper to the witness)? A. Yes.

Mr. Vanderwart: I ask counsel whether there is any question about the receipt by the defendant of that letter.

Mr. Peters: We admit the receipt of that letter. We replied to it.

By Mr. Vanderwart: 30

Q. I show you what purports to be a letter dated February 27,—a copy thereof—and ask the defendant's counsel to produce the original.

The Court: Do you want the first one marked?

Mr. Vanderwart: Yes. I want both of them marked.

I offer this letter in evidence, produced by the defendant on notice from the plaintiff. 40

The Court: These are offered in evidence, the March 12 letter first?

Mr. Vanderwart: No; February 27.

The Court: The February 27 letter is first?

10 Mr. Vanderwart: The February 27 letter is offered second.

(The papers referred to were received in evidence. The letter dated March 12 was marked "Plaintiff's Exhibit 3" and the letter dated February 27 was marked "Plaintiff's Exhibit 4.")

By Mr. Vanderwart:

20 Q. Did you receive anything from Mr. Charles Praskac in connection with this deposit? A. We received a check in the sum of \$100.

Q. I show you a check signed by Charles Praskac and ask you whether this is the check to which you refer. A. Yes, sir.

Mr. Vanderwart: I offer that in evidence.

30 Mr. Peters: I object to that's being offered in evidence on the ground that as a matter of law from the testimony as it has been given on the stand it does not appear that Mr. Richard had any authority to accept a deposit on this property.

The Court: I will allow it.

(The paper referred to was received in evidence and marked "Plaintiff's Exhibit 5.")

Mr. Peters: Your Honor will grant me an exception?

The Court: Yes.

By Mr. Vanderwart:

40 Q. I show you a letter dated March 10, signed

"Charles Praskac" and one dated March 16, 1925, and ask you whether those two letters were received by you from Spagno. A. Yes.

Mr. Peters: Are those my letters? Are those in reply to the two letters you just offered in evidence?

Mr. Vanderwart: Yes. 10

Mr. Peters: I have no objection.

(The papers referred to were received in evidence and marked "Plaintiff's Exhibits 6 and 7" respectively.)

By Mr. Vanderwart:

Q. Had you representatives in your office acting for you? A. Yes.

Q. What were their names? A. Nicholas F. Mahoney was one of the agents. 20

Q. Was there another? A. John D. Coysh was another.

Q. After the presentation of P 2 to Mr. Spagno did you converse with him at all on the subject of this contract? A. Only twice; in my office.

Q. What is that? A. He was in my office twice.

Q. How soon after this contract was shown? A. The first time was the day after. The second time, I believe, was the third day.

30 Q. What did he say to you and you to him in those conversations? A. He says, "I will never get out of him—he would not go through with the contract."

Q. Referring to P 2? A. Referring to the contract which Mr. Praskac signed.

Cross-examination by Mr. Peters:

40 Q. Who prepared this so-called contract that apparently was signed by Praskac? A. Who prepared it? I did.

Q. From whom did you get your instructions to prepare it? A. We always prepare contracts.

Q. Did you get any instructions from Spagno to prepare that contract? A. Under the directions—

Q. Never mind that. "Yes" or "No" is the answer to that question. Did you get any instructions from him to prepare this contract?

Mr. Vanderwart: I object to that, if your Honor please, because there is no contract in evidence and no so-called contract.

The Court: I suppose he has a right to attack its being in evidence.

Mr. Vanderwart: If counsel seeks to describe P 2, which is a proposition to purchase, as a contract, of course I don't understand the question.

Mr. Peters: I understood your Honor to allow it in evidence as a contract and I want to refer to it as such.

The Court: We allowed it in evidence for what it is worth, so I suppose he has a right to introduce something into evidence to show that it is worth nothing.

By Mr. Peters:

Q. Referring to Exhibit P 2, marked in evidence, which is purported to be a standard contract of sale signed by Charles Praskac and Maria Praskac and which you identified: Who prepared that paper?

The Court: He said he did. There is no question—

A. I dictated it to my girl.

Q. Your stenographer did the typing and you dictated it? A. Yes.

Q. Before you dictated that so-called, purported contract to your stenographer had you conferred with Mr. Spagno as to the terms? A. Well, the terms—

By the Court:

Q. Answer the question. A. I had not.

By Mr. Peters:

Q. Had you talked to Spagno at all about what was to go into that contract, before you prepared it? A. Prior, when he signed—

Q. Had you talked—

Mr. Vanderwart: I submit that counsel must allow the witness to answer the question, whether it is favorable or unfavorable.

The Court: He says he did not get any instructions from the defendant before preparing it.

Mr. Peters: All right, if your Honor is satisfied.

By Mr. Peters:

Q. This authorization that you received from Spagno was signed away back in February of 1924, wasn't it?

Mr. Vanderwart: I object to that, because it speaks for itself.

The Court: It speaks for itself.

By Mr. Peters:

Q. I show you Exhibit P-1. I presume that that was signed by Mr. Spagno on the day it bears date—May 19, 1924? A. Yes.

Q. And your first negotiations with reference to the sale of this property to Praskac did not take place until about February of the following year—about ten months later? A. Yes.

10 Q. So between May 19, 1924, and February, 1925, you did not discuss the further terms of this sale at all with Mr. Spagno? A. Yes. He was in several times and talked about the sale of the house.

Q. I understand, but did you discuss with him the terms before you prepared your so-called contract? A. I discussed the terms when he signed that authorization.

Q. I understand, but did you discuss terms with him since that, to find out whether he had changed the terms? A. I did not after that.

20 Q. Didn't he tell you that he could not afford to sell the house for \$13,500; that he had made improvements and he would have to sell it for \$14,500? A. He didn't say that.

Q. Are you sure about that? A. Positive.

Q. Did you consult Spagno about the deposit of \$100 before you took that from Praskac? A. No. I received it first and called him up shortly afterward and I told him I had a deposit.

30 Q. What right did you have to accept for him a deposit without calling him up as to the amount? A. Only under the authorization.

Q. Where does your authorization say that you had a right to accept a deposit? Look at it (handing a paper to the witness). A. How could I submit—

Q. Just look at it and tell me where this says anything about your right to accept a deposit for the owner? A. It does not say that, but that is the only way I could submit my buy.

40 Q. It does not say that, so you took this deposit

not knowing whether it was agreeable or not to Spagno and before you ever consulted him about it; is that right? A. I didn't consult him; no, sir.

Q. You did not consult him? A. No.

Q. You didn't consult him about the conditions of this contract before Praskac signed it? A. I didn't get it. What was that question? 10

Q. I say, You didn't consult him about the terms that were to go into this contract before Praskac signed it? A. These were terms that—

Q. Answer that question "Yes" or "No." A. Do you mean I didn't consult—

Q. Yes, didn't consult Spagno.

Mr. Vanderwart: I object to that. It is very obvious that the terms are expressed upon Exhibit P-2, given to Mr. Richard at the time P-2 was signed, and now in evidence. 20

The Court: You mean P-1.

Mr. Vanderwart: Yes, P-1.

The Court: He said he got no instructions from the defendant before.

Mr. Peters: All right, if your Honor is satisfied.

The Court: I don't know what more you want. 30

Mr. Peters: I don't want to clutter up the record.

The Court: He said he received no instructions before he prepared the contract.

By Mr. Peters:

Q. Do you know when the Praskac people went out to look at this house? Were you with them? A. No. Mr. Mahoney was the man that negotiated the sale. 40

Q. Do you know the time when Praskac looked at the house? A. No. Mr. Mahoney made the sale.

Q. Did you know that they did look at the house? A. As far as what Mr. Mahoney told me.

Q. You don't know what Mr. Mahoney did? A. I don't know.

10 Q. You do know that they saw the house before the contract was signed, don't you? A. I was told so.

Q. Didn't Praskac tell you that he had talked to Mr. Spagno before he signed the contract and that Spagno wanted \$14,500 for the house? A. No, sir.

Q. Didn't he tell you that he had given instructions to you to sell it for \$13,500 and he couldn't understand why he wanted \$14,500? A. No, sir.

20 Q. You never talked to Praskac about it? A. No.

Q. Praskac never talked to you about it? A. No.

Q. He never told you that he had seen the house? A. No. I don't know anything about when he saw the house.

Q. After you had this contract signed and this deposit, Spagno came into your office, didn't he? A. Yes.

Q. Did you know who the owner of this property was? A. He represented that he was the owner.

30 Q. He told you it was the Western New York Construction Company, didn't he? A. No, sir. He said he owned it himself.

Q. You never knew that it is a corporation that owns it? A. I don't know it.

Q. You didn't know it at that time? Didn't he tell you so? A. No, sir; he never did.

Q. He came to your office a day or two after, didn't he? A. Yes, sir; the next day.

40 Q. When was that? In February of this year or in March? A. It was the day after the contract was dated.

Q. You called him up and asked him to call, didn't you? A. Yes, sir.

Q. You called him up, did you? A. Yes.

Q. Are you sure about that? A. The stenographer called him up. My stenographer called him up to come over and sign a contract, as far as I remember.

10 Q. Isn't it a fact that Mr. Spagno casually passed your office and you beckoned to him to come in? A. What did you say?

Q. Is it not a fact that Mr. Spagno happened to come by your office and you called him in? A. This last time I called him in.

Q. Did you say to him, "Did you get my letter?"—referring to this paper—and didn't he say, "No. I haven't got it. I haven't been in the postoffice yet?" A. I don't remember anything about a letter.

20 Q. You have a pretty good memory, haven't you? A. Of course I have.

Q. Do you remember speaking to him about one of these letters that were offered in evidence here—the first letter? A. Yes.

Q. Don't you recall speaking to him about that letter—that you had a purchaser, a man by the name of Praskac, who was going to come out and look at the house? A. We didn't talk about this letter when he came in.

30 Q. What letter did you talk about? A. The only thing I said is that I received a deposit on the terms of the authorization. I wanted him to accept that and he said he would not.

Q. You received a deposit on the terms of the authorization? There is nothing in the authorization that says that you can take a deposit? A. The price was—

40 Q. You mean that you received a deposit pursuant to the sale price in the authorization. That is

what you mean, isn't it? A. We received the price he wanted and he ought to take the deposit. I mean my office when I say that.

Q. You don't mean Spagno? A. Of course not.

Q. You didn't consult Spagno about this deposit until after you had taken it and until after he had signed that paper. That is right, isn't it? A. I didn't consult him; no, sir.

Q. After you had the contract signed and had this deposit was the time when you made a tender of that—so to speak—to Mr. Spagno; isn't that it? A. That is the way it was.

Q. Did Mr. Spagno look over the contract? A. He says he would not look it over.

Q. Did he look over the contract? A. Yes or no. A. I don't remember.

20 Mr. Vanderwart: He said he would not look over it.

The Court: He said he would not look it over.

The Witness: He said he would not look it over. He seemed to know all about the matter.

By Mr. Peters:

30 Q. You said a moment ago that he looked over the contract. A. I didn't say that.

Q. You say he did not look over it? A. No, sir; he did not look over it. I proffered it to him and he wouldn't take it.

Q. Did he say anything to you at that time about wanting more money for the property? A. No, sir.

Q. Did he say anything to you about having made improvements and that he ought to have more money? A. Do you mean when I submitted the contract?

40

Q. Yes. A. Yes, he did.

Q. What did he say? A. He said, "I am not going to sell for that amount any more now."

Q. Did he tell you what amount he would have to have? A. He said something like \$14,500. I don't remember. He said nothing about any improvements to me.

Q. He said something about \$14,500? You do remember that? A. I don't remember. It was \$14,000 or \$14,500.

Q. Did he say anything to you about it when you called his attention to the fact that you had taken the deposit? Didn't he say, "Why didn't you consult me first before you did that"? A. He didn't say anything like that.

Q. What? A. No, sir.

Q. Didn't he say to you, "What right had you to make out a contract without consulting me first"? A. No, sir. He didn't say anything at all, except that he said he wanted more money.

Q. What is that? A. He said, "I am going to ask more money hereafter."

Q. He never said that he wanted the contract submitted for his approval? A. No, sir.

Q. And that you should have consulted him about it? A. He didn't say that.

Q. He never asked you either verbally or in writing to submit the contract for approval, did he? A. No, sir.

Q. Now I call your attention to Exhibit P-6 and ask you whether he did not ask you to produce a proper form of contract in that letter.

Mr. Vanderwart: I object to that. The letter speaks for itself.

The Court: I will allow it.

A. He did, after he refused to sign the contract.

40

By Mr. Peters:

Q. Did you ever send any other contract but this one? A. I sent the same contract.

Q. Mr. Richard, you have been a real estate man for some time? A. Certainly have.

10. Q. Didn't you think a deposit of \$100 rather small on a \$13,500 proposition—as a real estate man? A. He didn't object to the amount of the deposit.

Q. What is that? A. He didn't object to the amount of the deposit.

20. Q. I didn't ask you that, sir. I say that without consulting Mr. Spagno, and your agreement or authorization being silent as to what you had a right to take in the way of a deposit, didn't you think \$100 was rather small on a \$13,500 proposition? A. That is a matter of opinion.

Q. You would not take it, would you? A. I certainly do. Lots of times.

Q. What? A. A good many times.

Q. On a \$17,000 deal—my house—a week ago you asked for a \$700 deposit. A. That is an entirely different proposition.

Q. You get as much as you can, don't you? A. You bet your life.

30. Q. Did you feel that you were protecting the owner,—who is Mr. Spagno in this case—by accepting a deposit of \$100, when your commission, according to your agreement, upon the signing of the contract—\$625—would have been due? You don't want the court to believe that, do you? A. What is the question?

Mr. Vanderwart: The question is objectionable under all the decisions—"You don't want the Court to believe."

40. Mr. Peters: I will withdraw it.

By Mr. Peters:

Q. You say that you never got any authority to accept a deposit; you merely took \$100 deposit; is that right? A. Except that I understood when he signed the authorization that of course I could take a deposit.

Q. You are a licensed real estate broker? A. Of course I am. 10

Q. You know, as a real estate broker, that as soon as an owner and a purchaser execute a contract, upon the terms of that contract they both agree upon, your commission is immediately due and does not depend upon the title passing? You know that?

Mr. Vanderwart: I object to that. It is a matter of law. 20

The Court: I don't see that that has any bearing on this case or on any case—what Mr. Richard might think.

Mr. Peters: I will withdraw it.

The Court: His opinion on that question would not influence the Court.

By Mr. Peters:

Q. Did Mr. Spagno, after he looked at this contract, say anything to you about that when a proper form of contract is drawn up, he would sign it? A. He didn't look over the contract, and he made no suggestions at all. 30

Q. Did he speak about easements that affected that property? A. Never did.

Q. Did he speak about restrictions that would have to be mentioned in the contract? A. No, sir.

Q. Didn't he tell you that the deposit that you had accepted was entirely too small? A. He never said anything about the deposit. 40

Q. Did he tell you something had to be put into the contract about a previous mortgage that was on the property? A. As he represented it, I thought there were no mortgages on it—as he said in my office.

10 Q. What is that? A. As far as I know, I thought there were no mortgages on it.

Q. You don't mean that, do you? A. As far as I know.

Q. It says right here in this authorization, "first mortgage." A. First he represented that there were no mortgages. I have proofs of that if you want them.

Q. Now you know that there was a first mortgage? A. Yes, after looking over the card.

20 Q. Why did you say a minute ago that he represented that there were no mortgages? A. He came into our place and said that that was his property. We didn't know anything about the Western New York.

Q. Didn't he tell you that this \$7,000 first mortgage covered five or six lots? A. Never did.

Q. What? A. He never did.

30 Q. And that it was held by a building and loan company? It is in the authorization, which was taken from this—pursuant to the terms of Exhibit P-2, marked in evidence, the purchase price was to be \$13,500? A. Yes, sir.

Q. Entered as the deposit is \$1,900 in cash and \$7,000 by assuming a first mortgage now on said premises. That would show that you knew about it? A. Yes.

40 Q. The balance of \$4,500 by a second mortgage payable \$300 and interest at the rate of six per cent. semi-annually. Where did you get the instructions with respect to the second mortgage? A. That was a verbal conversation before the authorization was signed.

Q. There is nothing in the authorization about that second mortgage, is there? A. That is up to you to know that.

The Court: He explained that it was a verbal agreement prior to the authorization being signed.

By Mr. Peters:

Q. You say there was an arrangement prior to the authorization? A. Yes, verbal; when he signed that authorization. He was in the office several times.

Q. Why didn't you incorporate it in the authorization? You seem to have all the rest of it. A. He says, "It is all right if you get a buyer."

Q. You didn't put it in, did you? A. No. 20

Q. Didn't you think that, as long as you didn't have that in your card, you ought to have seen the owner about the terms of this second mortgage before you made any arrangement about it? A. That contract was drawn in accordance with the authorization and the verbal conversation which took place in my office.

30 Q. In other words, what you did—let us get it straight; you may not understand it—you simply went ahead and took Praskac's deposit and prepared this contract to suit what you thought was a proper contract pursuant to the authorization and handed it to Mr. Spagno and asked him to sign it? Isn't that true? A. Except that—

Q. What? A. I followed the authorization.

Q. Why don't you answer "Yes" or "No"? Isn't that the way you did it?

Mr. Vanderwart: I don't really know whether counsel is sincere in that question 40

or not. Are you sincere? He is probably fooling. Are you?

By Mr. Peters:

10 Q. What is the answer? A. I didn't answer. I followed the authorization; that is what I did.

Q. Between May 19, 1924, and March 2, 1925, the date of Exhibit P-2, you never consulted Mr. Spagno about the sale of this property until you had Praskac's deposit? A. No, sir. He was in several times and talked the matter over—why didn't we sell the house?

20 Q. You had no prospective purchaser at that time and why didn't you sell the house—that is one thing you discussed? A. Not the terms; we didn't talk about them after the authorization was signed.

Q. After you had your card signed up in May of 1924 there was no further discussion excepting when he would come into the office and ask you whether you had a buyer? You were doing other business with him. A. No; I didn't do any other business with him; not that I know of.

30 Q. Between May of 1924 and February or March of this year you didn't speak to Spagno about the sale of this property until you had this contract signed? A. No. Neither did he change the terms.

Q. I didn't ask you that.

Mr. Peters: I ask that that be stricken out as not responsive.

The Court: Strike it out. He said nothing.

By Mr. Peters:

40 Q. You said nothing? A. No.

Q. Until you handed this contract and the deposit to him? A. Yes.

Q. Is that correct? A. Yes.

Q. Did you know this was a building and loan mortgage on the house? A. According to the authorization, that is what it was—according to my authorization. I followed the authorization at the time, but I didn't know prior to that time that it was a building loan. 10

Q. You didn't know that it was a building loan when? A. Not until I prepared the contract.

Q. Well, you knew that the mortgage had been reduced from \$7,000 to some other amount between May of 1924 and February or March of 1925, didn't you? A. Well, I presume it was.

Q. Did you see Mr. Spagno about that or communicate with him about that? A. About what? 20

Q. About the building and loan—what the amount was that was due on it. A. I didn't talk to him about it.

Q. You didn't talk to him about it. You just took your authorization and took it that the amount of the \$7,000 first mortgage was still against it and prepared your contract accordingly and handed it to him and asked him to sign it; is that right? A. The contract says—

Q. Is that right? A. You want me to answer the question right, don't you? 30

Q. Is that the way you did it? A. There was an adjustment to be made at the closing of the title. That would take care of the terms.

Q. I understand that. You didn't inquire about that at all? A. No, sir; I did not.

Q. You didn't ask him about the payment of the second mortgage either? A. Never.

Q. What? A. The second mortgage? That was the way he told me when he signed the authorization. 40

Q. But just before you got the purchaser you had been discussing the terms of the second mortgage, hadn't you? A. No, I had not.

Q. Is that right? A. Yes.

Q. Now, Mr. Richard, don't you think, as a real estate man, that it was proper for you to send for
10 Spagno when you had your purchaser there and have the contract and the terms all signed up at one and the same time?

Mr. Vanderwart: I object to that.

The Court: I sustain the objection.

Mr. Peters: I will withdraw it. That is all.

20 NICHOLAS F. MAHONEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Vanderwart:

Q. Where were you employed in 1925 and also in 1924? A. With Carmine Richard.

Q. Until when in 1925 were you employed by Carmine Richard? A. About April, I think.

30 Q. Until about April? A. Yes.

Q. In 1924 how long? A. In 1924? In November I started with Mr. Richard.

Q. You started in November, 1924? A. Yes.

Q. You worked for him only about six months? A. No. I meant to say "1923."

Q. You worked for him the entire year of 1924? A. Yes.

Q. I show you Exhibit P1 and also P2 and ask you whether you have seen those papers before.

40 A. Yes, sir.

Q. Mr. Mahoney, what was your office with Mr. Richard. What did you do there? A. Salesman for Mr. Richard.

Q. Selling real estate? A. Yes.

Q. Do you know Mr. Spagno, the defendant? A. I have known him three or four years.

Q. Do you remember the house which is spoken
10 of in Exhibit P1? A. Very well.

Q. Have you talked to Mr. Spagno about that house? A. Yes, I have. I spoke to him about four years ago about it.

Q. What was said about it? A. He wanted to sell the house at that time.

Q. Was the house occupied? A. Well, the upstairs were occupied. That is four years ago.

Q. From then on did it continue to be occupied?
20 A. No. It was vacant.

Q. It was vacant in 1924? A. Yes, sir.

Q. How about 1925 at the time of the execution of P2? A. It was vacant then.

Q. What did he say, as far as you know, about the sale of that property—as to price? A. I don't understand.

Q. What did Spagno say about what the price was to be? A. When Mr. Spagno came to list the house with us, it was thirteen five.

Q. Were you present when Mr. Spagno signed
30 P1, the authorization? A. Yes.

Q. Did you hear him discuss the terms? A. Why, I heard him discuss it with—he came in and listed it with us. Miss James took this down. I saw her.

Q. Did that include everything, as far as you recall? A. I recall that it was a \$7,000 first mortgage.

Q. And then he signed it? A. He signed it.

Q. Subsequent to the execution of that and be-
40

fore the signing of the proposition, which is on a contract form, did you talk with Mr. Spagno at all about this real estate? A. I had a party there and I was showing it. I remember they went through it. I didn't sell it.

10 Q. Where did Mr. Spagno live? A. Right next door; to the side.

Q. Right next door to the property that is the subject of this action? A. Yes.

Q. Did you procure a purchaser who subsequently signed P2? A. Yes.

Q. What did you do with them in connection with this house? A. There was nothing to do.

Q. Did you show them the house? A. Oh, sure.

20 Q. Tell us what you did. A. I was down to Mr. Richards—that was on Sunday. It must have been around the middle of Sunday afternoon. It was rainy; I recall that.

Q. Just tell us what you did. We don't care whether it was rainy or not. A. I see. One of the houses I showed him was this house, which he liked.

Q. Then P2 was prepared and Praskac signed it? A. That is all it was.

Q. After the signing of the contract did you talk to Spagno about it? A. After the signing?

30 Q. Yes, after this proposition, P2, was signed. A. The only time after that was when I brought the deposit over.

Q. You took the contract and deposit over? A. Yes, sure.

Q. How long after the signing of that paper, P2, did you go to Mr. Spagno? A. It was either Monday or Tuesday; within two days.

Q. How many days after? A. One or two.

40 Q. What was the shape of the deposit which you took when you handed this proposition to him?

A. I brought a hundred dollar check and a hundred dollars in bills.

Q. In cash? A. In cash.

Q. What did you say to Mr. Spagno? What was the conversation when you handed him this proposition with the hundred dollars in bills? A. He said he would not sell for thirteen five. He wanted 10 more.

Q. Did he say how much he wanted? A. I don't know. I think the amount was fourteen thousand or fourteen five.

Q. Did you hand him a hundred dollars in bills? A. I tried to hand it to him.

Q. And he wouldn't take it? A. No.

Q. What further conversation did you have with him? A. I guess that is all. That is all I recall. 20

By the Court:

Q. What day was that? A. Either Monday or Tuesday.

Q. What date? A. Well it was—it must have been about the very first part of March. It must have been the second or third or fourth of March—the first of March.

Q. Who went with you to Mr. Spagno? A. Mr. Coysh, another salesman in the office. 30

Cross Examination by Mr. Peters:

Q. You say you took a hundred dollars in bills? A. And a check.

Q. And a check, making the deposit two hundred dollars? A. One hundred dollars we were offering Mr. Spagno.

Q. You had both check and bills; is that what you mean? A. Yes. 40

Q. What did you have both for? A. Well, I recall— think it was—

Q. Did he tell you to take the cash and make tender in that way? A. No. There was some question that he would not accept it and we were prepared. I thought that is what it was for.

10 Q. Did Mr. Spagno say anything about the price having been changed at that time when he said he would not sign it? A. Do you mean Tuesday?

Q. Yes. A. He said that the property was worth more and he didn't want to sell for thirteen five.

Q. Did he say he was going to ask \$14,500 for it? A. He said he was going to ask fourteen—something like that.

20 Q. Did he say anything to you at that time about having made some structural repairs to the property and that that was why he had to get more? A. No, I don't recall it.

Q. Were you present in Mr. Richard's office when Mr. Praskac told Mr. Richard that Mr. Spagno wanted fourteen five for the property? A. I think Mr. Praskac told Mr. Richard that after I had shown the house. Mr. Praskac had seen him and he had said something about not selling for that price.

30 Q. Did you say that Praskac was up there on Sunday and looked at the house? A. One day was a Sunday; yes.

Q. It was a Sunday? A. Yes.

Q. The contract was prepared before you had the deposit, wasn't it? A. Yes.

Q. At that time Mr. Spagno told Praskac that he wanted fourteen five, didn't he? A. I don't know, what he told him.

Q. But he told Richard that? A. Who told him?

40 Q. Praskac. A. Told Mr. Richard.

Q. Yes. A. I recall him saying that he had seen Mr. Spagno.

Q. He had seen Mr. Spagno and Mr. Spagno had told him that he wanted fourteen five? A. I don't recall him telling what he wanted.

Q. Then Richard said, "We will take a deposit of one hundred dollars and force him to sell for thirteen five." A. Oh, no. 10

Q. Didn't you tell Mr. Spagno that you wanted your commission and that you could force him to go through with it after what had happened in Mr. Richard's office? I certainly did not.

Q. What? A. I certainly did not.

Q. Didn't you tell him that at the time that you were pressing this deal? A. I don't recall that. I told him, as I recall it—if you will let me talk—that the house was for sale for thirteen five and naturally if I sold it, I would go to get my commission. I was interested in getting it. 20

Q. You got part of the commission, didn't you? A. I think I am already paid for that commission.

Mr. Vanderwart: I object. The words of this witness would have no binding force on Mr. Richard, his principal.

Mr. Peters: They certainly would, if he was present. 30

The Court: I would like to get along a little faster.

By Mr. Peters:

Q. Mr. Mahoney, answer the question "Yes" or "no". You got a part of this commission, didn't you? A. I have already got a part of the commission.

Q. And you will get some more if Mr. Richard is successful? In other words, you are interested 40

in the outcome of this suit? A. I am already cleared up. I am already paid.

10 Q. Did Mr. Richard say anything to Praskac at the time that Praskac told him in your presence in the office that Spagno wanted fourteen five? Did he say, "Well, we will sign up the contract and take the deposit anyhow and see what we can do with him?" A. No; I don't recall that.

Q. This contract was prepared by Mr. Richard's office? A. Yes.

Q. Did you see it prepared? A. Why, I was there at the time it was dictated.

Q. Was it dictated by Mr. Richard? A. Yes.

Q. Mr. Spagno was not there? A. No.

Q. Mr. Spagno didn't know anything about its being dictated? A. No, I guess not.

20 Q. What is that? A. I don't know anything about that.

Q. It was taken from the card? A. It was taken from the card; yes.

Q. The contract was prepared by Mr. Richard? A. Yes.

Q. Mr. Spagno was not there? A. Oh, no.

Q. And was not consulted on the terms except the terms that were on the card? A. No.

30

JOHN COYSH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Vanderwart:

Q. Early in 1925 you were employed by Mr. Richard? A. Part of the time.

40 Q. Are you the Mr. Coysh who accompanied Mr.

Mahoney at the time he presented a contract and a hundred dollars in cash to Mr. Spagno? A. Yes.

Q. Were you there? A. Yes.

Q. I show you Exhibit P-1 and ask you whether this is the paper which was presented to Mr. Spagno at the time of the tendering of the hundred dollars cash. A. I could not identify the contract. I never read it over. I didn't look over the contract. 10

Q. How about the money? A. The money, of course. I saw that money.

Q. What did Mr. Spagno say? A. Mr. Spagno would not take the money.

Q. Just tell us what he said. A. He would not accept it.

Q. What did he say? A. "I will not accept it."

Q. Did he say why he would not accept it? Do you remember? A. I don't know. 20

Q. Did he say anything about the price? A. Yes, he did; at the time.

Q. What did he say? A. If I remember right, he said, "That is entirely too little."

Cross Examination by Mr. Peters:

Q. What did he say was entirely too little? The deposit? A. No, the amount that the place was to be sold for. 30

Q. Was the amount discussed? A. Yes.

Q. What amount did he want? A. One amount was thirteen five, if I remember right. Then there was another different—a larger amount. Whether it was fourteen or fourteen five, I don't know. It may have been larger.

Q. You don't remember about that? A. I don't remember the exact figure; no; because I sat at one side. 40

Q. You don't know whether the contract, P-2, is the contract that Mr. Mahoney had with him? You would not swear to that? A. No. I could not swear to it.

Q. Except that you know the money? A. Yes.

10 Q. But you know that you saw a hundred dollars and that he said, "That is too little"? A. No.

Mr. Vanderwart: That is not the testimony.

The Court: Does the record show?

Mr. Vanderwart: It was the price of the property that was too small.

Re-direct Examination by Mr. Vanderwart:

20 Q. I ask in rebuttal whether he said that a hundred dollars was too little or the price was too little. A. No. He didn't say anything about the hundred dollars being too little. He wasn't going to accept any deposit on the sale of those premises for that amount—\$13,500.

Mr. Peters: I object to that and ask that it be stricken out. That is a conclusion.

The Court: Strike it out.

30 By Mr. Vanderwart:

Q. What words did he use? A. Mr. Spagno simply stepped back from Mr. Mahoney with the money and said, "I will not accept any deposit on such an amount as that," referring to the price of the house, as I thoroughly understand it.

Re-cross Examination by Mr. Peters:

40 Q. He said he would not accept a deposit on such an amount? A. He would not accept his deposit.

Q. On such an amount as that; is that right?

Mr. Vanderwart: I object to that as not properly predicated. What he said is upon this record.

The Court: He has the right on cross examination—

10 Mr. Vanderwart: What he said is upon the record. Now, counsel asks this witness the question, "You said that, did you?" What he said is upon the record.

The Court: He has a right on cross examination—

Mr. Vanderwart: To say, "What did you say" but not to state that so and so was the record, because what is on the record is there.

20 The Court: But the witness may say, "I didn't say that."

Mr. Vanderwart: I suppose the witness may say that. I would say it if I were the witness.

The Court: I suppose the attorney has a right to find out whether he said that.

Mr. Vanderwart: No attorney may say, "Did you say this?" or "Did you say that?"

30 Mr. Peters: I will withdraw the question. I won't press it.

CHARLES PRASKAC, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Vanderwart:

40 Q. I show you Exhibit P-2, which bears the names of Charles Praskac and Maria Praskac and

ask you whether that signature "Charles Praskac" is your signature—whether you signed that. A. Yes.

Q. Who is Maria Praskac? A. My aunt.

Q. She signed it with you in your presence? Is that her signature? A. Yes, sir.

10 Q. You know what the paper contained, having signed it? A. Yes.

Q. Do you know Mr. Spagno? A. Well, slightly. Only through that sale.

Q. You have seen him on the stand. Is that Mr. Spagno sitting here (indicating)? A. That is Mr. Spagno.

Q. Did you talk with him at any time? A. Yes, sir.

20 Q. Did you talk with him before you signed this paper or after? A. I have talked to him before I signed that paper.

Q. Where were you when you talked to him? A. I came out to look at the house, and I wouldn't know about the house only through Mr. Richard's office. The house was next door to where Mr. Spagno lives. He lives on the side of it.

Q. How many times did you look at that house? A. About two or three times.

30 Q. Did you look at the house before the time when you saw Mr. Spagno? A. Yes, I remember—

Q. Did you look at the house after you talked to Mr. Spagno? A. Yes.

Q. When did you sign the contract? After you had looked at the house all the times? A. After I looked at the house.

40 Q. What did Mr. Spagno say to you and you to him at the time of this conversation? A. Well, at the time I was looking at the house he asked me who sent me there and I told him that Mr. Richard

sent me there. I would not know about the house only through the office, because we were in the market looking for a house. I talked to Mr. Spagno. We talked over different things. He told me that the house would be satisfactory to sell at that price—\$13,500—provided I would not buy it through Mr. Richard's office. 10

Q. What did he say about the terms? A. The terms were all right. The terms could even be lower than two thousand.

Q. Is that all he said about it or did he say any more? A. He said to me different things. He told me that he fixed the house up two or three years ago. From different people I knew that the house was standing three or four years empty.

Q. Let us have just what he said about Mr. Richard. A. He told me that I could buy the house for that price provided I would not bother with Mr. Richard's office at all. He told me that the price of the house was \$14,000, but, provided I would not buy it through his office, I could have it for \$13,500. 20

Q. Did you discuss the terms? A. I discussed the terms. I told him it would be all right—about the two thousand dollars.

Q. Were those the terms that were put into this contract, P-2? A. Yes, in the contract. 30

Cross Examination by Mr. Peters:

Q. How many times did you speak to Mr. Spagno? A. Well, I can remember two times.

Q. This house is right next to where Mr. Spagno lives, isn't it? A. Right.

Q. You were there on Sunday one one occasion? A. I was there on Sunday; yes. It was rainy.

Q. When was that? In March of this year? A. I didn't get the question. 40

Q. When was the first time that you spoke to Mr. Spagno? Was that in March of this year?
A. I could not remember whether it was February or March.

Q. You don't recall it? A. No, I don't recall it.

Q. That was on a Sunday, wasn't it? A. It was
10 on a Sunday.

Q. How did you come to go into Spagno's house? Did he send someone for you? A. No, sir. He took me in there himself.

Q. You looked at this house before you spoke to Spagno, didn't you? A. Yes. I looked at it, I think it was, on a Friday.

Q. That was the first time that you looked at it?
A. The first time; yes.

Q. Did you see Mr. Spagno at that time? A.
20 No.

Q. Did he speak to you? A. No.

Q. Did you know where Mr. Spagno lived? A. I didn't know where he lived until he came over.

Q. Did he come over or someone else? A. He came over to see—to investigate—who was looking at the house.

Q. You were with your brother-in-law at that time? A. No.

Q. Were you alone? A. I was alone.

Q. That talk took place in the house that you were going to buy or contemplated buying? A.
30 That took place in both houses; in his house and in the other house. They are both his houses.

Q. You told him that Richard had sent you? A. I told him I was from Mr. Richard's office; yes.

Q. And that you were interested in buying the house? A. Yes.

Q. Did you discuss all the terms with him? A. Well, all I discussed with him was about—

Q. Did you discuss all the terms with him? A.
40 I don't remember all the terms; no.

Q. Did you discuss how much the first mortgage was to be? A. No, I don't remember that.

Q. Did you discuss how much the second mortgage was to be or the terms of the second mortgage? A. All I remember.

Q. Did you discuss that with him? A. No.

Q. Or how much he was going to take back as
the second mortgage? A. No, I didn't discuss anything of that. 10

Q. Did you discuss with him the deposit that you were going to pay? A. No.

Q. You didn't discuss that? A. No. He didn't seem—

Q. I am asking you whether that was discussed with him. A. Right.

Q. Did he tell you that he had made certain improvements to the property and that he wanted
fourteen five? A. No, sir. 20

Q. Did you say to him then in reply, "Why, you listed this with Richard for thirteen five?" A. Well, when he told me—

Q. Did you say that to him? A. No, sir.

Q. What did you say to him when he told you that? A. When he told me about the raising of the price, I told him that Mr. Richard had it listed for thirteen five and I would not pay any more than that price. 30

Q. Didn't he tell you at that time that the price that he was selling the house for was \$14,500? A. No.

Q. And that he was the owner of the house? A. He told me he was the owner.

Q. Did he tell you that? A. He said he was the owner. That is all he told me.

Q. Was that all that was said that first time? A. That is all.

Q. When was the next time that you saw
Spagno? A. It was a day or so later. 40

Q. That second visit was on a Sunday, wasn't it, and the first visit on Friday? A. Yes.

Q. On this Friday visit was Mr. Mahoney with you or were you alone? A. Yes, I think Mahoney was with me. He took me.

10 Q. Was that the first time you met Spagno? A. I didn't meet Spagno that time.

Q. You didn't meet Spagno? A. Not when Mr. Mahoney took me up.

Q. The next time that you went out there was a day or two later, which was a Sunday, wasn't it? A. Yes.

Q. What you have just testified to took place on Sunday; is that right? A. Yes, that took place on Sunday.

20 Q. Did you see Mr. Spagno on the next day, Monday morning, about nine o'clock? A. I don't remember if it was Monday, but I know I saw him a day or so later again.

Q. Were you and he alone in the house at that time? A. Yes, we were.

Q. You were alone? No one was with you; is that right? A. Yes.

Q. Were you alone that time or were you with some friends of yours? A. Yes, there were some friends of mine.

30 Q. Two or three other relatives of yours—your brother-in-law or sister-in-law? A. Not relatives. They work for me—these fellows.

Q. Did you discuss terms that day with Mr. Spagno? A. No. He only took me through the house and showed me the house, but as far as he making improvements, he didn't make any improvements in the house at all.

40 Q. Did Mr. Spagno tell you at that time that he could not afford to sell the house for \$13,500, irrespective of what Mr. Richard may have told you?

Didn't he tell you that? A. Well, I don't remember him telling me that.

Q. Why don't you remember his telling you that? A. Why don't I remember? Can't you forget sometimes?

Q. Are you purposely forgetting? A. No, I ain't.

Mr. Vanderwart: I object to that.

By Mr. Peters:

Q. Was it \$13,500 that you discussed with him? A. That is the price we discussed—\$13,500.

Q. Was \$14,000 discussed? A. Not that I remember.

Q. Was \$14,500 discussed? A. Well, he said something about fourteen or fourteen five, but I told him I would not listen to him; that if it was fourteen I wouldn't buy the house.

Q. Then he did say something about \$14,000 or \$14,500? A. He did.

Q. Yes or no. A. He did.

Q. Why did you say to this court a few minutes ago that you didn't hear him discuss anything else but \$13,500? A. I told you before. He said that he would sell it for \$13,500 if I bought it through him and did not bother with Mr. Richard's office.

Q. I understand that. I didn't ask you that. I asked you whether, irrespective of what Richard told you about the price being \$13,500, he didn't say to you that he wanted \$14,500. A. He did tell me he wanted fourteen or fourteen five provided—

Q. You do remember that now? A. Yes.

Mr. Vanderwart? May the witness testify? I suppose it is clear in your Honor's mind.

The Court: That is perfectly clear. He

said \$13,500 if he did not buy the house through Richard.

The Witness: Yes. If he could save the commission I could buy it for that and he would save the commission. That is what he told me. At that rate it would be \$14,000.

10

By Mr. Peters:

Q. Did he tell you that if he didn't have to pay a commission, he would let you have it for \$13,500? A. He did.

Q. You said a moment ago that he said if you didn't bother with Richard. A. That is the same thing.

Q. That is the way you view it? A. Yes.

20

Q. Are you giving us the conversation between you and Spagno or are you simply telling us your view of it? A. I am trying to tell you what he told me.

Q. Did he say that if he could save the commission from Richard, he would let you have it for \$13,500? A. Yes, he did.

Q. You withdrew what you said a little while ago—that if you would not bother with Mr. Richard, he would consent to sell it for \$13,500? Is that a fact? A. Well, they are both the same.

30

Q. That is your opinion? A. That is my opinion.

Q. Did Mr. Spagno say anything at that time about there being no need of going to Richard about that price that you had mentioned—\$13,500? A. No, I don't remember that.

Q. When this conversation that happened on Friday, when Mr. Mahoney was with you—do you recall the time, the first time that you were in Spagno's house? A. Yes.

40

Q. And the second one occurred on Sunday; is that right? A. Yes.

Q. And the third one occurred on Monday? A. Monday or Tuesday.

Q. But about that time when you had these various discussions with Mr. Spagno you had not signed this Exhibit P-2? A. No.

Q. You had not signed it? A. No; not before this.

10

Q. At that time this contract was not signed? A. No.

Q. And you had not paid a deposit; is that right? A. Yes.

Q. After you had this talk—these various conversations on Friday and Sunday and Monday or Tuesday—that you just referred to, did you tell Richard what Spagno said to you? A. I have told Mr. Richard that he raised the price.

Q. What did Richard say to you? A. Well, I don't remember what he said to me, but that is all Mr. Richard told me—he would see him—see Mr. Spagno.

20

Q. You say that you don't remember what Mr. Richard said? A. I don't remember it, but I remember that he told me he would see Mr. Spagno about the property.

Q. Did Richard tell you, "Well, we will take a check for a hundred dollars and you sign a contract and we will get our commission and will make him sell"? A. No, sir,

30

Q. Or words to that effect? A. No, sir; I don't remember.

Q. Why are you smiling about that? Do you think that this is a joke. A. No, I don't think it is a joke. I do not.

Q. Is that all that Richard said—that he would see Mr. Spagno? A. That is all he told me.

Q. Did you sign the contract that day?

Mr. Vanderwart: What day?

40

Mr. Peters: This Monday when he had the talk.

A. I remember signing a contract, but which day I don't remember. I know it was on the following week.

10 By Mr. Peters:

Q. Did you sign the contract on the same day when you told Richard that Spagno wanted more money? A. I don't remember that.

Q. Did you leave a deposit with Richard at that time? A. I did.

Q. Did he ask you to leave a deposit? A. He didn't ask me. I gave it to him voluntarily.

20 Q. You were very anxious to get the house, weren't you? A. Not so anxious. I wouldn't want it now.

Mr. Vanderwart: That is all. That is the plaintiff's case.

The plaintiff rested.

30 Mr. Peters: Now I ask for a nonsuit on the ground that the plaintiff has failed to establish his case pursuant to the pleadings; and on the further ground that the undisputed evidence in the case clearly shows that he undertook to make on behalf of his principal a contract which in law he was never authorized to make.

40 Furthermore, it clearly appears that there never was a meeting of the minds between the Praskacs and Spagno, thereby violating one of the very cardinal elements of a contract. In other words, they never got together upon the terms. There was some dispute and disagreement about the terms.

I also ask for nonsuit on the further ground that it is very apparent from the written authorization that there is absolutely nothing in the written authorization which specifies the amount of the second mortgage and Richard took it upon himself to insert a clause in that contract without consulting Spagno as to its terms, as he saw fit to put in there. If it be true, as he says, that there was a verbal arrangement or a verbal instruction outside of that card as to the terms of the second mortgage, I say that they must fall by the wayside because under the case of Noonberg against Young you cannot deviate from a written contract by introducing verbal testimony to explain it or to insert something that is not in the contract.

20 Upon all these grounds I ask your Honor for a judgment of nonsuit, because there never was a meeting of the minds. Richard never procured a purchaser who was ready, willing, and able to buy upon the terms mentioned and agreed upon between Spagno and the Praskacs.

(Discussion.)

The Court: I will deny your motion.

Mr. Peters: Your Honor will give me an exception? 30

The Court: Yes.

FRANCIS D. SPAGNO, the defendant, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. Peters:

Q. Where do you live? A. 515 Brandon Place, Cliffside Park. 40

Q. Do you know Carmine Richard, the plaintiff in this case? A. Yes.

Q. How long have you known him? A. About six years, I believe. Six or seven years.

Q. Long prior to this transaction? A. Yes.

Q. Had you done business with him before? A. No.

Q. You had never had any business with him before? A. No.

Q. Is this your first business transaction with him? A. The first transaction.

Q. When in the month of May of last year did you meet Richard? A. Yes. I met him on Palisade Avenue—

Q. In reference to this same property that you had on Brandon Avenue, Cliffside Park? A. Brandon Place.

Q. Just tell the court in your own way when it was that you first met him and what was said and done by you. A. I saw Mr. Richard on the sidewalk on Palisade Avenue, Cliffside Park. I stopped my car at the curb and I went up to Mr. Richard and says, "Mr. Richard, how are things around here? Are you selling anything?"

"Well," he says, "I am selling occasionally here and there; yes."

Q. "Well," I says, "I have that house next to me. In case you come across anybody that wants to buy or that would be interested," I says, "see what you can do. I want to sell it."

He says, "All right. Gladly." He says, "Come in the office and give us the particulars about it in a way that we can tell the people something about the property."

Q. So I went in the office. A girl gave me a card, a blank card, for me to sign, to give the particulars. I took the card and put down the location of the

property, the size of the plot, the number of rooms, the rental, and the price.

Mr. Richard turned around and says, "How much cash do you want?"

I says, "It is immaterial. Two or three thousand dollars will do."

"Well," he says, "all right. We will see what we can do. We will try to sell it. We will sell it."

"All right," I says, "you try all you can, so when you get your party we will get together and get in the details according to the mortgage and to the cash and so on."

That was the last of it. I never saw Mr. Richard or spoke to Mr. Richard about those matters any more, except when once in the fall, I believe, when I had told him—I says—

Q. When was that? A. I said it was in the fall. I says, "You haven't been able to get a buyer for—

Q. What year? A. 1924. "You haven't been able to get a buyer for that house yet?"

He says, "No, but eventually we will sell it."

"Well," I says, "I will have to make some alterations in that house." I says, "I will have to change the—repair the house and so on because it needs it."

I went on and never heard about it from Mr. Richard in any way, shape, or form until one day in February or the beginning of March—it was Sunday—I saw three or four men going into this house. I says, "I wonder what these people want?" The Mrs. turned around and told me, "I believe they are some people—

By the Court:

Q. Not what your wife said. A. Well, however, I called my nephew. I says, "You go across—

Mr. Vanderwart: If your Honor please, may this witness be instructed that he is not to give the family history?

The Witness: I am not giving the family history; I am saying—

10 Mr. Vanderwart: I am not talking to you; I am talking to the judge.

The Witness: Pardon me.

By the Court:

Q. Tell us with reference to this what you said, not what someone else said.

By Mr. Peters:

20 Q. Just a minute. You cannot do that. You said that there were some people— A. And I sent my nephew.

Q. Never mind that. —looking at the house? A. Yes.

Q. Did these people or any of them come into your house later to see you? A. No.

By the Court:

30 Q. You say that all you know about it is that someone came into the house? A. Yes. Then one of these two came in to see me after my sending for them.

By Mr. Peters:

Q. All right. That is what we want. A. I sent my nephew.

By the Court:

40 Q. We don't care about that. All we want to

know is what you did. You saw someone go into the house? A. Yes.

Q. After that someone came out? A. I sent for them.

Q. We don't care about that. Someone came to your house? A. Yes. This was one Mr. Praskac. He introduced himself to me as Mr. Praskac and he asked me the particulars about the house. I told him that the price of that house was \$14,500. He turned around and said, "Why, Mr. Richard showed us the house the other day and he said that you had listed it for \$13,500." 10

I says, "Yes. I had listed the house with Richard for \$13,500, but since I was obliged to make some alterations to the house and everything I am in no position to sell that house for that price any more."

Well, after talking the matter over, he says, 20 "Well, I will have to see Mr. Richard again. I will stop at Mr. Richard's and see what he says."

I says, "There is no use of you going to Mr. Richard and trying to get the house for \$13,500, because I cannot sell it for \$13,500, as I have been put to expenses to repair the house."

That was the last I heard of it.

On the Monday morning this Mr. Praskac, with three or four other men, friends of his, came in there and went in the house to look over the house again. I went over and started to talk about the house—what was there, what I had done, and what I hadn't done—and I repeated to him that I was in no position to sell the house for \$13,500. 30

By the Court:

Q. To whom did you tell this? A. To Mr. Praskac.

On that same day— I am not exactly positive 40

whether it was Monday or Tuesday morning—about eleven o'clock I passed in front of Richard's office, and while I was about to bring the car to a stop to see him, he stepped out in front of the office and called me at the same time. I went over. We greeted one another and he says, "Have you received my letter?"

I says, "What letter?"

"Why, I wrote you a letter in reference to our showing the house to a prospective buyer."

I said, "No, I didn't get it, because I didn't stop at the post office."

"Well, however," he says, "we have sold the house."

I said, "You have sold the house?"

He says, "Yes. Come in the office."

I followed him in the office—his private office—and he pulled out a contract with a check and showed it to me and he said, "There is a contract and a deposit."

I took the contract and the deposit and looked at the check. It was for one hundred dollars. I started to read the contract. It called for a first mortgage of \$7,000, a \$2,000 payment in cash, and a second mortgage, payable at the rate of \$300 every six months at six per cent.

By the Court:

Q. Is that the contract offered in evidence? A. Whether that is the one or not I do not know, but I believe it is.

The Court: We shall save time if this is identified.

By Mr. Peters:

Q. Suppose you look at it and see if that is the one. A. I have looked it over. I believe that it is.

By the Court:

Q. Is the property that was set forth in that contract the one that you discussed? A. Yes.

Q. The terms that are discussed in P-2 are the terms that were in the contract? A. Yes.

I saw, also, that there was no date set for the termination, or, rather, the time for the duration of the second mortgage—when the second mortgage would become due. According to the contract it was to run until it was paid all in full at the rate of \$300 every six months.

There being some restrictions on the property and an easement on the property, I turned around and said to Mr. Richard, "Why, that contract is absolutely impossible for me to accept that contract."

He says, "Why?"

I says, "For various reasons. First of all, the price that I have to get for it is \$14,500 and not \$13,500, because I have made changes to the house. Secondly, I won't accept a deposit, anyway, of one hundred dollars." I says, "In case any dispute should come up between the purchaser and myself, why, you would be entitled to your commission and I would not be able to cover myself with this amount of deposit. You will be entitled to collect your commission." I says, "Outside of that, you know there is a restriction there and you have failed to mention that."

By Mr. Peters:

Q. Mention it where? Did you tell him? A. Mention the restriction and also the easement, because there is a sewer pipe and water pipe that crosses that property. The two matters were impressed very much in my mind because I had sold that house previously and in the contract the re-

strictions were not mentioned and the easements were not mentioned. The party refused to take possession of the property—to take title.

10 Mr. Vanderwart: I don't know whether this is evidential— what is in the man's mind.

By Mr. Peters:

Q. Just tell what you said. A. So this party went to court and demanded his deposit back—

Q. Never mind about that. Just tell us why you didn't sign this contract. A. That was one question and there were also other reasons.

20 So Mr. Richard turned around and says, "Well, I have to get my commission."

I says, "Yes, when you sell the property you will get your commission."

After that we started to talk about other real estate propositions.

By the Court:

30 Q. Never mind about that. We are not concerned about the other real estate. A. So he says, "Well, all right. Then it means that I have to bring suit against you."

I says, "It will be up to you."

He says, "It will be a friendly suit."

I says, "All right. If I am wrong, I will have to take my medicine." That went on.

A few days after Mr. Richard wrote to me a letter, saying that—no, I am wrong.

40 Mr. Vanderwart: I don't know whether you are right or wrong, but I am going to object to what is in the letter.

A. (Continuing) I am wrong. A few days after that I passed by Mr. Richard's office and I stopped in again for other purposes, for other real estate business. Mr. Richard at that time tendered the same contract to me again.

I says, "Mr. Richard, there is no use of your trying, because I can't do it. Why don't you work differently on this matter?" 10

"Well," he says, "I will see Mr. Mahoney and we will see what can be done."

So, after I went away, a good deal of time, two or three days after, Mr. Richard wrote me a letter saying that unless I would go through with the contract, he would have to commence suit—

20 Mr. Vanderwart: There is no use interrupting this witness any more to tell him that he cannot give the contents of letters.

A. (Continuing) He wrote me a letter, which is Exhibit—

By Mr. Peters:

30 Q. The letter that is here. We have the letter. He wrote you a letter. Go on and tell what happened. A. He wrote me a letter and I got together with parties interested in the matter and talked the matter over and finally we came to the conclusion—

By the Court:

40 Q. We don't care about what conclusion you came to. Your conclusion is not what we are concerned with. We are concerned with what you did with Mr. Richard. A. I answered Mr. Richard's letter.

By Mr. Peters:

Q. Is that the letter, marked P 6? Is that the letter you wrote him (handing a paper to the witness)? A. Yes.

Q. Go right on.

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Mr. Vanderwart: From what point do you want him to go on?

Mr. Peters: He spoke about this letter.

The Court: He said that he sent this letter to Mr. Richard—this letter of March 10.

A. Mr. Mahoney on the following day came over with that other gentleman and tendered that contract—this same contract—I presume it was—and the check for \$100 and also said, "I have a hundred dollars cash in case you don't want to accept the check."

20

I took the contract. I read it over and I saw it was the same contract that he had tendered to me before. I turned around and said, "Mr. Mahoney, we have decided to sell the house for \$13,500, because we don't want any legal suit. We would sooner sell it than get into a lawsuit, but at the same time we cannot accept deposit of one hundred dollars. The least I would take is five hundred dollars, because I have to cover myself if the commission that eventually would have to be paid to Richard—in case anything should go wrong." I said, "Besides, this contract—I cannot sign it for the simple reason that it does not state how long the second mortgage is going to last—when the second mortgage is going to be terminated. Secondly, it does not contemplate anything about the restrictions on the property." In fact, all of

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this property is restricted that way. And I says, "There is an easement on the property which has to be contemplated in the contract. I can't sign that contract, because if I did sign it and then fill in that there is restrictions and there is an easement not contained in this contract, they can back out and Mr. Richard can come back at me and collect his commission." I says, "I won't do that. I can't do that. I am willing to sell it for \$13,500, but we have got to come to a different agreement."

10

Mr. Mahoney went back.

Two days after, or three days after—something like that—I am not in a position to recall correctly—I received another letter from Mr. Richard, which is in evidence; and I answered Mr. Richard with another letter, which is also in evidence. Since that I haven't heard anything about it until the suit was started.

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The Court: That is P 7.

By Mr. Peters:

Q. Is that everything—the whole transaction between you and Mr. Richard? A. That was everything—the whole transaction.

Q. Did you at any time say to Praskac that if Mr. Richard's office was left out of the transaction, you could afford to sell the house for \$13,500? A. No, sir.

30

Q. Was there ever any such talk with him? A. Something in that line, but not like that.

Q. Just what was said? A. I said to Praskac that for thirteen thousand I could not under any condition sell it.

Q. Thirteen? A. Thirteen thousand five hundred I could not sell it.

He says, "Well, Mr. Richard told us that that

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is the price—\$13,500,” and I said, “There is no use of you going around to Mr. Richard and trying to get it for \$13,500, because you are not going to get it. You have got to deal with me in reference to price, Mr. Richard is only the real estate agent. He is acting according to my instructions.

10 Mr. Richard cannot do any more than to bring the two of us together and it is up to us to agree about the terms.” I says, “If you think that you can get it through Mr. Richard, you are making a mistake.”

Q. Did you say anything to him about leaving Mr. Richard out of it? A. Absolutely not. I never did; no. I had sold it to Mr. Praskac and Mr. Richard was entitled to his commission.

20 Q. You would have paid him his commission? A. Undoubtedly, because Mr. Praskac was brought there by Mr. Richard and that was to my knowledge. I have been in my business long enough to know that much. I know Mr. Richard would have been entitled to it.

Cross-examination by Mr. Vanderwart:

Q. You have been in that business a long while—the real estate game? A. Yes.

30 Q. How many years? A. Well, I have been in the construction and real estate business something like thirty-two or thirty-three years.

Q. You have bought and sold houses and acted as real estate agent? A. No, not as real estate agent.

Q. You have been in business selling houses, have you, as a real estate agent? A. I had sold what I constructed.

Q. You were licensed to sell real estate? A. No.

40 Q. You were not a real estate salesman at all? A. No, sir; I sell my own.

Q. You sell your own houses? A. Yes.

Q. But not other people's houses? A. No.

Q. What alterations did you make to the house that is the subject of this action between May 19, 1924, and March 2, 1925? A. I repaired the roof and the plumbing.

Q. Who repaired the roof? What man? A. 10
Carpenters. My own carpenters.

Q. How much did that repair of the roof cost you? A. It cost about \$300.

Q. What alterations did you make in the plumbing in that time? A. I had the boiler repaired. I had to repair the boiler.

Q. Who did the repairing of the boiler? A. My own man.

Q. Do you have a boiler maker in your employ? A. A boiler maker didn't do that. 20

Q. A steam fitter? A. No.

Q. A plumber? A. Some man handy at that.

Q. Just a handy man repaired that boiler? A. Yes.

Q. How much did you pay the handy man to repair the boiler? A. Thirty-five dollars a week.

Q. These alterations that you had to make to this house in this period cost you \$335; is that true? A. No, sir.

Q. How much more? A. It came to something 30
like \$450.

Q. We won't quarrel over \$115? A. All right.

Q. That was the reason why you required a thousand dollars more for this house than the price you gave Mr. Richard for it? A. No, that was not the only reason.

Q. There were other reasons why you wanted a thousand dollars more? A. Yes.

Q. Was the house vacant then? A. Yes.

Q. How long had it been vacant? A. It had been 40
vacant since the September before that.

Carmine Richard—Recalled, direct.

Q. How old is the house? A. I could not say.

Q. Four years? A. No, it is longer than that. I bought it—

Q. Five years? A. I bought it five years ago.

Q. In the five years that you owned it, had it been unoccupied the whole time? A. It has been occupied about three years.

Q. Of the five years? A. Yes.

Q. Both apartments? A. It is a two-apartment house? A. It was originally a one-family house.

Q. But it was changed into a two-family house? A. Yes.

Q. Both apartments were rented for three years, were they? A. No. During the time—

Q. That answers the question. That is all.

Mr. Peters: That is the defendant's case.

The defendant rested.

CARMINE RICHARD, the plaintiff, recalled on his own behalf, in rebuttal, testified as follows:

Direct Examination by Mr. Vanderwart:

Q. Mr. Richard, did Mr. Spagno—you have heard him testify that on the Monday just about the time of the selling of this property you showed him a contract and he objected to it, saying that he required more than a hundred dollars, that easements and restrictions must be included in the contract, the price must be \$14,500, and several other things. Did he say anything of that sort? A. He never said anything about the amount of the deposit. He never read the contract. He never said anything about restrictions or easements at all, and I didn't know anything about them.

Nicholas F. Mahoney—Recalled, direct.

John Coysh—Recalled, direct.

Carmine Richard—Recalled, direct.

NICHOLAS F. MAHONEY, recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination by Mr. Vanderwart: 10

Q. You have heard Mr. Spagno testify that on the day when you and Mr. Coysh called upon him and tendered him the hundred dollars in cash he told you that he would sell the property for \$13,500. Did he say that to you? A. No. He did not say that to me.

JOHN COYSH, recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows: 20

Direct Examination by Mr. Vanderwart:

Q. You heard Mr. Spagno testify that when you and Mr. Mahoney called on him with the hundred dollar deposit he told you two that he would sell the house for \$13,500. Is that true? A. No; positively.

CARMINE RICHARD, the plaintiff, recalled on his own behalf, in rebuttal, testified as follows: 30

Direct Examination by Mr. Vanderwart:

Q. Was there any question at all about this man Praskac being ready, willing, and able to buy this property? A. He was always able.

Mr. Peters: I object to that as a conclusion. 40

The Court: Is that the only ground? I will allow the answer.

Mr. Peters: And on the further ground that he is not in a position to testify as to the financial condition of Praskac and his responsibility.

10 Mr. Vanderwart: The testimony is all in without any objection. It is a part of the res gestae.

Mr. Peters: And on the further ground that he is not competent to testify as to whether Praskac was ready, willing, and able.

The Court: I sustain the objection. He is not competent to testify.

20

CHARLES PRASKAC, recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination by Mr. Vanderwart:

Q. Were you ready, willing, and able to take this property on the terms of that proposition, P-2, at the time you signed it? A. Yes, sir.

30

Cross Examination by Mr. Peters:

Q. How much money did you have in the bank at that time? A. We had enough money to buy the property.

Q. I didn't ask you that. How much money did you have in the bank? A. We always had a standing balance of a thousand or more.

40 Q. Don't you know it was less than eighteen hundred at the time you signed this contract?

Mr. Vanderwart: I object for this reason—

The Court: I will allow it.

Mr. Vanderwart: There are two signers of this contract and this question is addressed only to one signer.

The Court: Who is the other signer? 10

Mr. Vanderwart: There is Maria, the aunt of this gentleman, and himself.

The Court: I suppose he must answer the question. I will allow the question as to his being able to take it.

By Mr. Peters:

Q. How much money did you have in the bank at the time? A thousand dollars? A. Twelve hundred or more—twelve or fifteen hundred. 20

Q. Any more than fifteen hundred? A. I always had that much.

Q. What bank do you bank with? A. The New Jersey Guarantee and Trust Company.

Q. Don't you know that at that time you didn't have nine hundred dollars in the bank; that is, your average balance was not more than nine hundred dollars?

Mr. Vanderwart: I object to that—the average balance. 30

The Court: I will let him answer the question.

By Mr. Peters:

Q. Isn't it a fact that the balance was about nine hundred dollars at that time? A. No, sir. I had more than that.

Q. How much more? A. I told you. Twelve 40

or fifteen hundred or sixteen hundred dollars. I had my share. We put it together.

Q. In other words, the other Praskac mentioned is your wife? A. That is my aunt.

10 Q. I beg your pardon. You had her money in this account too? A. No, sir. No. I don't carry her money in my account.

Q. I thought you said you had it together; you had fifteen hundred together? A. We didn't have it together. That is my money.

Q. How much did you have in the bank at that time? Can you tell? A. Well, I have told you—between twelve and fifteen hundred of my own money.

Mr. Vanderwart: That is our case.

The plaintiff rested in rebuttal.

20 Mr. Peters: I make the other point that there never was a proper tender.

The Court: I will reserve decision and give you an opportunity to submit briefs.

Mr. Vanderwart: May we leave it this way: Counsel may submit any briefs they want to?

The Court: Two weeks.

30 Time to settle the within case is extended to Dec. 24, 1925.

Dated, Nov. 20, 1925.

F. W. MATTOCKS,
Judge.

40

Order Settling Case.

THIRD JUDICIAL DISTRICT COURT,
BERGEN COUNTY, N. J.

CARMINE RICHARD,
Plaintiff,

v.

FRANCIS D. SPAGNA,
Defendant.

10

The attorneys for the respective parties having applied to me to settle the case herein, and there being no objection, I do hereby settle the case as hereinbefore set forth.

20

In Witness whereof, I have hereunto set my hand this sixth day of January, 1926.

FRED. W. MATTOCKS,
Judge of the Third Judicial District Court of the County of Bergen.

Attest:

FRED A. KELLOGG,
Clerk.

30

40

Exhibit P-2.

10 AGREEMENT, made and dated March second, Nineteen hundred and twenty-five, between Francis D. Spagna, of the Borough of Cliffside Park, in the County of Bergen, and State of New Jersey, hereinafter described as the seller, and Charles Praskac and Maria Praskac of the Township of North Bergen in the County of Hudson and State of New Jersey, hereinafter described as the purchaser.

20 WITNESSETH, that the seller agrees to sell and convey, and the purchaser agrees to purchase all that lot or parcel of land, with the buildings and improvements thereon, in the Borough of Cliffside Park, Bergen County, New Jersey, described as follows: Premises known as No. 521 Brandon Place, Edgewater Heights Park, being on a plot Seventy-five by One Hundred (75 x 100) feet.

This sale covers all right, title and interest of the seller of, in and to any land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining said premises, of the centre line thereof.

30 The price is Thirteen thousand five hundred (\$13,500) Dollars, payable as follows: One hundred (\$100) Dollars on the signing of this contract, the receipt of which is hereby acknowledged, Nineteen hundred (\$1,900) Dollars in cash on the delivery of the deed as hereinafter provided, Seven thousand (\$7,000) Dollars by assuming the first mortgage now on said premises, balance of Forty-five hundred (\$4,500) Dollars by second mortgage to the Party of the First Part, payable Three hundred (\$300) Dollars and interest at the rate of six (6%) per cent. semi-annually.

40 The deed is to be made to Charles Praskac and Paul Praskac.

Exhibit P-2.

The deed shall be delivered upon the receipt of said payments at the office of Carmine Richard, 356 Palisade Avenue, Cliffside Park, N. J., between 10 A. M. and 5 P. M. o'clock, on or before April fifteenth, 1925. Taxes, rents, insurance, water rents, assessments and interest on mortgages, if any, are to be apportioned, as of April fifteenth, 1925. 10

The deed shall be in proper form for record, shall contain the usual covenants and warranty, and shall be duly executed and acknowledged by the seller, at the seller's expense, so as to convey to the purchaser the fee simple of the said premises, free of all encumbrances except as herein stated.

It is understood and agreed that any assessment confirmed and entered prior to the date of closing, shall be paid by the seller in full. 20

The risk of loss or damage to said premises by fire until the delivery of the deeds is assumed by the seller.

The stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

The seller agrees that Carmine Richard brought about this sale and agrees to pay the broker's commission therefor. 30

WITNESS the signatures and seals of the above parties.

Signed, sealed and delivered in the presence of

CHARLES PRASKAC. (L. S.)

MARIA PRASKAC (L. S.)

40

Exhibit P-3.

CARMINE RICHARD

REALTOR

356 Palisade Avenue
Cliffside Park, N. J.

March 13th, 1925.

10

Mr. Francis D. Spagna,
515 Brandon Place,
Cliffside Park, N. J.

Dear Sir:

On March 2nd I accepted a deposit from Charles Praskac and Maria Praskac on your premises known as No. 521 Brandon Place, in accordance with your listing with us. On March 4th when you came into my office I requested you to execute the contract and accept the deposit, but you refused to accept same. Two or three days later you came into the office on other matters and I again tendered the deposit to you and asked you to execute the contract, and you again refused. This morning I received your letter dated March 10th and I complied with your request by sending Mr. Mahoney to your residence with deposit and asked you to execute the contract and accept the deposit, but you again refused.

20

Mr. Mahoney and I made quite a number of efforts to dispose of your property and finally through our solicitation succeeded in getting a deposit for you, and we worked in good faith and in accordance with the terms of your listing. I was disappointed when you refused to execute the contract, and more disappointed today when you again refused when Mr. Mahoney tendered the deposit to you.

30

40

Exhibit P-4.

Therefore, be advised that unless you call at my office within three days from the time you receive this notice, and execute the contract and accept the deposit thereon, I will be compelled to institute a suit against you for the commission in accordance with your listing with me.

Yours truly,

CARMINE RICHARD.

CR/AJ.

10

Exhibit P-4.

CARMINE RICHARD

REALTOR

356 Palisade Avenue
Cliffside Park, N. J.

February 27th, 1925.

Mr. F. D. Spagna,
515 Brandon Place,
Cliffside Park, N. J.

Dear Mr. Spagna:

Today we showed your house to Charles Praskac, who is contemplating to buy the house either alone or with his brother-in-law. They are coming up again Sunday to decide.

20

I thought I would write to you and call to your attention our prospect buyer.

With best wishes, I am,

Yours very truly,

CARMINE RICHARD.

CR/AJ.

30

40

Exhibit P-5.

CHARLES PRASKAC
721 Hackensack Plank Road
West Hoboken, N. J.
No. 898.

10 Payable in New York City Through
Northern New Jersey Clearing House
West New York, N. J., Feb. 2, 1925.

Pay to the order of F. D. Spagna \$100 00/100
One Hundred and 00/100.....Dollars

CHARLES PRASKAC.

West New York Branch
The New Jersey

20 Title Guarantee & Trust Co.
West New York, N. J.

Exhibit P-6.

WEST NEW YORK
REALTY & CONSTRUCTION CO.
581 Hudson Avenue,
West New York, N. J.

Mar. 10th, 25.

30 Carmine Richard, Esq.,
Palisade and Jersey Ave.
Cliffside PK, N. J.

Dear Sir:

I hereby beg to request you to produce your costumer for the purchase of the house at #521 Brandon place Cliffside Pk., and have a proper contract executed.

Yours truly,

40 FRANCIS D. SPAGNA.

Exhibit P-7.

WEST NEW YORK
REALTY & CONSTRUCTION CO.
581 Hudson Avenue
West New York, N. J.

West New York, N. J., March 16th, 1925. 10

Carmine Richard, Esq.,
356 Palisade Ave.,
Cliffside Park, N. J.

Dear sir:

Your letter of Mar.13th.received,and in refer-
ence to same I beg to say that the matter is com-
mencing to be annoyng.

The contract and deposit submitted to me by 20
you and Mr. Mohony, are not acceptable to me.

At the time the property at 521 Brandon Place
Cliffside Pk,was listed with your office, no power of
Attorney was givento youwith full power instruc-
tions and particulars, so you could and should
execute contracts and set conditions therein for
me and in my name.

It is foolish on your part to think that you can
make me accept a contract,contrary to my wishes,
under the treat of a law suit. It is really amusing. 30

Now, than, unless you and your costumer, with-
in thre days call at my office, at a previously ap-
pointed time, and accept from me a proper con-
tract, and pay to me a suitable deposit, I will re-
fuse to further deal in the matter and declare it
terminated, and the listing of the property will
also than and there terminate.

Yours very truly

FRANCIS D. SPAGNA. 40

Opinion.

DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE COUNTY OF BERGEN.

10	CARMINE RICHARD, Plaintiff,	}	On Contract.
	v.		
	FRANCIS D. SPAGNA, Defendant.		

The above cause was instituted by the plaintiff against the defendant for the recovery of a broker's commission for procuring a person, ready, willing and able to purchase the defendant's real estate, in Cliffside Park, Bergen County, New Jersey.

The authority to sell the premises in question was as follows:

May 19, 1924.

STANDARD AUTHORIZATION

REAL ESTATE BOARD OF GRANTWOOD-PALISADE.

THE UNDERSIGNED hereby authorizes Carmine Richard, member of the Real Estate Board of Grantwood-Palisade, to sell the property described below, which is made part of this agreement, and for which services I agree to pay said Agent a commission of Five (5%) per cent. if the property or properties are improved, Ten (10%) per cent. on the total selling price if unimproved, business, factory or garage property, acreage and farm property. These rates of commission to apply on the

Opinion.

amount finally accepted, be it more or less than the price hereinafter named, provided the property is sold through said Agent's influence and efforts or the purchaser introduced by him.

Property 521 Brandon Place.
 Price \$13500.00. Terms of Sale, first mortgage \$7000.00, \$2000 or \$3000 cash.

F. D. SPAGNA (L.S.)
 Address 515 Brandon Place,
 Phone Cliffside 50M.

By virtue of this authorization I find the plaintiff procured one Charles Praskac, who agreed to purchase the premises at the price and upon the terms mentioned in the said authorization and that said Praskac deposited \$100 on account thereof.

I further find that the defendant upon being notified that the plaintiff had procured said Charles Praskac, to purchase said premises, declined to sell the premises at \$13,500 the price specified but demanded \$14,500.

Upon this finding of facts I conclude that the plaintiff has done all the law requires to entitle him to the broker's commission of 5% of \$13,500 or \$675.

The plaintiff having waived the excess over \$500 he is entitled to judgment against the defendant for \$500.

Judgment for plaintiff for \$500.

November 5, 1925.

F. W. MATTOCKS,
 Judge.

Opinion.

NEW JERSEY SUPREME COURT,
No. 435—MAY TERM 1926.

10	CARMINE RICHARD, Respondent,	}
	v.	
	FRANCIS D. SPAGNA, Appellant.	}

Submitted May 14, 1926; decided December ,
1926.

20 On appeal from Third District Court of the
County of Bergen.

For the Respondent: HART AND VANDERWART.
For the Appellant: ADOLPH J. H. PETERS; Nicholas
S. Schloeder, of Counsel.

Before Justices KALISCH, KATZENBACH and LLOYD.
PER CURIAM.

30 In this case the plaintiff recovered in the Third
District Court of Bergen County a judgment for
\$500 as commissions alleged to have been earned on
procuring a purchaser for the defendant's property
521 Brandon Place in the Borough of Cliffwood
Park, Bergen County.

The authority of the plaintiff was contained in
a writing reading as follows:

"May 19, 1924.

40 The undersigned hereby authorizes Carmine
Richard, * * * to sell the property des-

Opinion.

cribed below, which is made part of this agree-
ment, and for which services I agree to pay
said agent a commission of 5% * * * these
rates of commission to apply on the amount
finally accepted, be it more or less than the
price hereinafter named, provided the property
is sold through said agent's influence and
efforts or the purchaser introduced by him. 10

Property 521 Brandon Place.

Price \$13,500.00. Terms of sale first mort-
gage \$7,000.00. \$2,000 or \$3,000 cash.

F. D. SPAGNA (L. S.)"

In February following the plaintiff procured one
Praskac as a purchaser for the property. The pur-
chaser attempted to negotiate with the owner, but
was told the price was higher than that given in
the authority to the plaintiff with the result that
the negotiations fell through. It clearly appeared
that Praskac was able and willing to pay the price
specified in the authorization, and formal tender
was caused to be made by the plaintiff to the de-
fendant of a contract which it was claimed was in
accordance with the terms of the plaintiff's author-
ity. The trial judge sitting without a jury gave
judgment for the plaintiff in the sum of \$500.
From that judgment this appeal is taken by the
defendant and a number of reasons assigned for
reversal. 20

The first point raised is as to the refusal by the
court of the defendant's motion for a nonsuit; the
second that the court erroneously gave judgment
for the defendant. These are covered in substance
by our consideration of the 7th point.

The third and fourth points are that the court
erroneously admitted in evidence a proposed agree-
ment which was tendered to the defendant, and a
check for \$100 tendered at the same time. These
40

were competent. They formed part of the proofs to establish that the efforts of the plaintiff to supply a purchaser able and willing to comply with the terms of purchase had been successful. It is criticized that the court received it as a contract. We do not find this to be the case. All the court said was, "I suppose that would be a matter for argument just whether it was a contract. He is offering it as a contract." After some further discussion the court said, "I will allow it in evidence." There is nothing in this to show that the court received it as evidence of a contract between the purchaser and the defendant, but if it were otherwise such action would not constitute reversible error. It was certainly evidence bearing on the performance by the plaintiff of his contract with the defendant, and if it be desired that the proof be limited, proper instruction should have been requested of the court to this end. *Hill v. Maxwell*, 77 N. J. L., 766.

The fifth point is that the court erroneously allowed the plaintiff to testify that Praskac was able to buy the property. This was not objectionable in itself, but whether so or not it was harmless, inasmuch as the uncontradicted testimony of Praskac was that he was able to make the purchase. We may add that according to the quotation in the appellant's brief the question was propounded and the answer given before objection was made, and when the objection was finally ruled upon no exception was taken. The objection was not only too late but because of the absence of exception is not available to the appellant.

The sixth point is that there was no legal evidence to support the finding of the trial court as found in its opinion to the following effect:

"By virtue of this authorization I find the plaintiff procured one Charles Praskac, who

agreed to purchase the premises at the price and upon the terms mentioned in the said authorization and that said Praskac deposited \$100 on account thereof."

Counsel conceded that error cannot be assigned on the opinion of the court but only on its judgment, and that if the judgment can be sustained on any theory the reviewing court will do so. The inaccuracy, however, is more apparent than real. What is clearly meant is that Praskac had signed the purchasing agreement and tendered the \$100 deposit.

This brings us to the seventh and important point in the case; namely, that the contract between the plaintiff and the defendant did not contain all of the terms essential to authorize the plaintiff to make the contract and *deLeonard v. Papanas*, 128 Atl., 922, is cited to support this contention. It will be noted that the terms are stated in this language, "Price \$13,500; terms of sale, 1st mortgage \$7,000; \$2,000 or \$3,000 cash." The contention of the appellant is that the contract does not express any method of securing or paying the difference between the \$9,000 or \$10,000 and the \$13,500 of the purchase money.

The real question here presented is whether the agent under this writing could have made a binding contract with the purchaser. \$7,000 and \$2,000 or \$7,000 and \$3,000 do not together make \$13,500. No provision is made as to how the difference of \$4,500 or \$3,500 as the case may be, is to be paid or secured. It is not to be supposed of course that the owner was willing to part with his property after having stated the price \$13,500 for a lesser sum amounting to either \$9,000 or \$10,000. The most that can be gathered is that the difference was to be on credit. How and whether that credit was

to be secured is not stated, but it may be, the respondent contends, that the purchaser would be permitted to place a second mortgage for the difference. In this regard the case differs materially from the one cited. In the latter there was opportunity for the purchaser to place any amount of mortgage on the property prior to the claim of the seller. Here there is no such condition. The purchaser is required to make a down payment, to give a first mortgage of \$7,000 and to remain indebted to the seller for the difference between that combined sum and the purchase price. If the contract be accepted as it reads the responsible buyer could owe the balance for a reasonable time; that he was ready to give a second mortgage may possibly be treated as more favorable to the defendant that he had a right to ask. There is, however, proof in the case that in other respects the broker had procured a buyer strictly within the terms of his authority, and with respect to the mode of payment, that it was acceptable to the defendant, and his objection did not go to the method of securing the balance; his demand was for a larger price. This being true the plaintiff had procured a purchaser acceptable to the defendant in so far as this feature was concerned.

The last point raised in the case is that the contract was made in May 1924 and that it expired of its own weight when no purchaser was found within a reasonable time. The difficulty with this position on the part of the defendant is that as late as March 10th and 16th, 1925, the defendant treats the authority as good in letters of those dates. At all events the question of whether or not the plaintiff had exercised his authority in a reasonable time was one of fact and the judgment could not be disturbed on this account.

The judgment is affirmed.

New Jersey Court of Errors and Appeals

CARMINE RICHARD,
Plaintiff-Respondent,

v.

FRANCIS D. SPAGNA,
Defendant-Appellant.

ON APPEAL
FROM SUPREME
COURT.

BRIEF FOR DEFENDANT- APPELLANT.

Statement of Facts.

This is a Real Estate Broker's Commission case, and the owner appeals from a judgment rendered in favor of the broker.

The authorization was as follows:

"May 19, 1924.

STANDARD AUTHORIZATION

REAL ESTATE BOARD OF GRANTWOOD-PALISADE

The undersigned hereby authorizes Carmine Richard, member of the Real Estate Board of Grantwood-Palisade, to sell the property described below, which is made part of this agreement, and for which services I agree to pay said Agent a Commission of Five (5%) per

cent. if the property or properties are improved, Ten (10%) per cent. on the total selling price if unimproved, business, factory or garage property, acreage, and farm property. These rates of commission to apply on the amount finally accepted, be it more or less than the price hereinafter named, provided the property is sold through said Agent's influence and efforts or the purchaser introduced by him.

Property 521 Brandon Place.

Price \$13,500.00. Terms of Sale first mortgage \$7,000.00, \$2,000 or \$3,000 cash.

F. D. SPAGNA, [L. S.]
Address 515 Brandon Place,
'Phone Cliffside 50-M.

75 x 100 plot. Frame, shingle, 2 family, 4 rooms, summer kitchen, bath, pantry, 1st. fl. Rented \$70.00 monthly Apr. 1st to Oct. 1st. \$60.00 monthly Oct. 1st to Apr. 1st.

5 rooms, bath, pantry, 2nd floor, 2 finished rooms in attic, 1 for each apartment, gas, electric, steam heat, 2 separate heaters, one entrance, 2 open porches for second floor.

Stone garage for one car."

This appears to have been delivered to the plaintiff Richard, the broker, on the date it bears, i. e., May 19, 1924.

The first negotiations with reference to the sale of this property did not take place until February, 1925, some nine months later. During the intervening nine months from the original listing no activity on the part of the broker is shown. No further transactions with reference to this authorization took place between the defendant-owner and the broker.

It appears that the alleged purchaser, Praskac, first visited the property with the plaintiff's witness, Mahoney, an employee of the plaintiff, on Friday, February 27, 1925. At that time they failed to see the defendant. On Sunday February 29, the purchaser, Praskac, visited Spagna at the house. He was told that the price was changed. All the terms were not discussed (p. 45, fol. 10). He again saw Spagna on Monday. The terms again were not discussed (p. 46, fol. 30) excepting that he was told that the price was \$14,500 (p. 47). The next day, Praskac, the prospective purchaser stated to the plaintiff that the defendant wanted more money (p. 45, et seq.). The plaintiff upon learning this immediately prepared a contract and had Praskac and his Aunt sign it (p. 38). He sent Mahoney to make a tender, giving him a check and \$100 in cash along with the contract (p. 34, fol. 37, et seq.). It appears that the defendant refused to execute the contract, demanding more money, rejecting the terms of the mortgage, and the deposit, as insufficient.

Correspondence followed (Exs. P 3-4, 6 and 7) but no other negotiations occurred between the alleged purchaser and the defendant.

The plaintiff then instituted suit upon the theory that he had earned his commission. This resulted in a judgment for the plaintiff for \$500 and from *the* ~~this~~ judgment ^{of affirmance} the defendant now appeals.

Introduction.

The nine specifications of reasons filed in the Supreme Court may conveniently be made to serve as the points upon which the appellant relies. These points will appear in the headings, and will be argued in their numerical order.

POINT 1.

The trial court erroneously denied the defendant's motion for a non-suit.

POINT 2.

The trial court erroneously gave judgment for the plaintiff against the defendant instead of awarding a judgment in favor of the defendant.

These points are covered by consideration of the other points and will be argued separately under these headings.

POINT 3.

The Trial Court erroneously admitted in evidence a certain contract marked, "Plaintiff's Exhibit P-2," over the objection of the defendant.

The record on this point is as follows (p. 12, fol. 20):

"Q. I show you what purports to be a contract in duplicate—Charles Praskac and Maria Praskac—and ask you if that is a contract executed by them pursuant to your authorization to sell? A. Yes.

Mr. Vanderwart: I offer it in evidence.

Mr. Peters: I object to it.

By the Court:

Q. Did you see him sign it? A. Yes.

Q. Were you a witness to it? A. Yes.

Mr. Peters: It was not signed by my man;

it was signed by some purchaser. A contract was never signed.

The Court: I suppose that that would be a matter for argument—as to whether it was a contract. He is offering it as a contract.

Mr. Peters: He is offering it as a contract, signed and executed, which he prepared and which he had no authority to prepare or to convey at all, which was never signed by Spagno, but signed by some man that he procured. That certainly cannot bind us.

The Court: I will allow it in evidence.

(The paper referred to was received in evidence and marked 'Plaintiff's Exhibit P-2'.)

Mr. Peters: Your Honor will grant me an exception?

The Court: Yes."

There can be no question that the admission of Exhibit P-2 (p. 72), at the time and upon the theory that it was a contract was clearly erroneous, because it was unsigned by either the defendant or his agent, and certainly was not binding upon him.

The Supreme Court did not find that the court received it as a contract. However, the trial judge indicates that it was offered as a contract and after specific objection to it upon that very ground allowed it in evidence.

The Supreme Court further says:

"It was certainly evidence bearing on the performance of the plaintiff of this contract with the defendant, and if he desired that the proof be limited, proper instruction should have been requested of the court to this end." Hill v. Maxwell, 77 N. J. L., 766.

This contract was merely a species of written hearsay. I do not see how this admission could be justified upon this theory, any more than conversations not in the presence of the defendant, between the broker and prospective purchaser, and part of his efforts to perform his contract, would have been.

The only way, it is submitted, that such written statement could be introduced as part of the proofs bearing on the performance of the plaintiff's contract with defendant, would be to accept it as an independently relative statement indicative of the frame of mind of the purchaser for the purpose of showing his willingness.

However, the insuperable difficulty with its admission upon this theory seems to be that this contract was signed, by Maria Praskac as well as by himself, and his willingness was limited to that of a co-obligor with her. Maria Praskac is no where presented as an able and willing purchaser whose production would justify a recovery in this suit. Furthermore, as such independently relative statement, it does not indicate an apparent willingness to complete the sale on the terms fixed by the authority (Ex. P-1, p. 71), but solely on the terms expressed therein, which concededly are not the same.

The Supreme Court cites *Hill v. Maxwell*, 77 N. J. L., 766. That case involved a jury trial. In *Smith v. Cruse*, 128 Atl., 379, it was said:

"It is not necessary for a party to request the court, in cases where a jury is waived, to make specific findings of law or fact, or law and fact. It is sufficient if he claims judgment in his favor upon testimony adduced upon the trial. And the court, sitting without a jury,

cannot enter judgment for either party without finding in favor of that party. A judgment presupposes a finding of facts in favor of the successful party, even if such finding be not expressed in terms, and also presupposes that, in the opinion of the judge, that party is entitled to the judgment by the law arising upon the facts."

Accordingly it would seem that if the trial judge actually received it as a contract, this would amount to a finding of fact upon that point residing in the final judgment of the court and it would therefore be reviewable without such specific request.

POINT 4.

The Trial Court erroneously admitted in evidence a certain check marked, "Plaintiff's Exhibit P-5," over the objection of the defendant.

The same reasoning applies to the Check Exhibit P-5, this evidence being merely cumulative and given in accordance with the terms of Exhibit P-2 and a part of the same transaction.

POINT 5.

The Trial Court erroneously allowed the following answer of the plaintiff, Carmine Richard, to stand.

"Q. Was there any question at all about the man Praskac being ready, willing and able to buy the property? A. He was always able.

Mr. Peters: I object to that as a conclusion.

The Court: Is that the only ground? I will allow the answer."

On this point the Supreme Court says:

"This was not objectionable in itself, but whether so or not it was harmless, inasmuch as the uncontradicted testimony of Praskac was that he was able to make the purchase. We may add that according to the quotation in the appellant's brief the question was propounded and the answer given before objection was made, and when the objection was finally ruled upon no exception was taken. The objection was not only too late, but because of the absence of exception is not available to the appellant."

In the first place, the Supreme Court fails to observe that the objection was made not to the question but to the answer, so that the time of the objection is not too late. Secondly, the answer is a mere conclusion. That the court requires that the basis of such conclusion be affirmatively shown to be valid, is indicated by such cases as *Homan v. Griffin*, 94 N. J. L., 345, where a similar statement by the broker based on mere hearsay was stricken out.

On the readiness and ability of Praskac, witness the only direct evidence on this point (p. 66, fol. 30):

"Direct Examination by Mr. Vanderwart:

Q. Were you ready, willing, and able to take this property on the terms of that proposition, P-2, at the time you signed it? A. Yes, sir."

It will be observed, Praskac never asserted more than his willingness or ability to purchase on the

terms fixed by Exhibit P-2, and not Exhibit P-1. These were obviously different, inasmuch as the former provide for securing the difference between \$10,000 and \$13,500 by a twelve year mortgage, whereas under the latter, this sum would have to be raised within a reasonable time, as the Supreme Court itself observes under Point Seven.

Under these circumstances the error, I respectfully submit, was harmful.

POINT 6.

There was no legal evidence to support the finding of the Trial Court set out in its memorandum as follows:

"By virtue of this authorization I find the plaintiff procured one Charles Praskac, who agreed to purchase the premises at the price and upon the terms mentioned in the said authorization and that said Praskac deposited \$100 on account thereof."

The Trial Court finds that Praskac *agreed* to purchase the property.

There isn't a scintilla of evidence to support this finding.

On this point the Supreme Court says:

"Counsel conceded that error cannot be assigned on the opinion of the court, but only on its judgment, and that if the judgment can be sustained on any theory the reviewing court will do so. The inaccuracy, however, is more apparent than real. What is clearly meant is that Praskac had signed the purchasing agreement and tendered the \$100 deposit."

However, counsel pointed out that this memorandum of the judge was not an opinion, but a series of findings of fact, which clearly resides in the final judgment.

It is difficult to find just what the Trial Court did mean. Several things considered together would indicate that he meant exactly what he said. The reasons are threefold, (1) The attitude of the trial judge at the time of the admission of the contract. (2) The denial of the defendant's motion for a non-suit, although at that time there was absolutely no evidence whatever of the purchaser's ability to complete the contract. This denial, therefore, was undoubtedly based on the theory that such ability, where there was a meeting of minds, need not be shown. *Freeman v. Van Wagenen*, 90 N. J. L., 358. (3) In the court's memorandum, there is no express finding that the purchaser was able and willing to take the property, the only alternative theory upon which the judgment can be predicated.

POINT 7.

The authorization marked in evidence as "P-1" did not contain all of the owner's terms; and there was no evidence of a meeting of minds between the owner and the alleged purchaser; the production of a purchaser able and willing to purchase said property being sufficient in law, under such circumstances, to support said judgment.

This point calls for decision on a rule which as far as I have been able to ascertain has never been the subject of judicial inquiry in this State, al-

though it has been recognized in at least one case, it would seem, as a necessary basis for the decision. *De Leonard v. Kapanas*, 128 Atl., 922.

Now, it has been repeatedly held in varying expressions that a "sale" is made and a broker earns his commission under an authority to sell when he has done one of two things, i.e., (1) procured a purchaser able and willing to purchase the property on the terms fixed by the owner, or (2) a meeting of minds between such owner and prospective purchaser, produced by the broker has resulted, whether the original terms are met or not.

In New York, as an extension of the foregoing, the rule prevails that where an authority for a broker does not contain all the terms upon which the owner is willing to sell and the omitted terms are left for future negotiation, the mere production of a purchaser able and willing to buy is not sufficient and the second alternative of the ordinary rule must exist, i.e., a meeting of minds between the owner and the prospective purchaser must result.

A typical expression of the New York Courts on enunciating this rule is as follows:

"It is entirely obvious, from the foregoing questions and answers, that the owner did not give the plaintiff full and complete terms upon which he was willing to sell his farm, but that the details of the transaction were to be determined thereafter by negotiation between the buyer and seller. In such a case it is well settled that a broker's commissions are not earned until the minds of the buyer and seller meet, not only in respect to the price, but also in respect to the terms of the sale and all the incidents of the transaction, which must be

worked out and understood between them. *Haase v. Schneider*, 112 App. Div., 336, 98 N. Y. Supp., 587; *Arnold v. Schmeidler*, 144 App. Div., 420, 427, 129 N. Y. Supp., 408; *Peace v. Ross*, 123 App. Div., 611, 108 N. Y. Supp., 48; *Backer v. Ratkowsky*, 137 App. Div., 559, 122 N. Y. Supp., 225. The rule is different where the owner has given the broker the full and complete terms of the proposed sale. In such case the broker's commissions are earned when he produces a customer willing and able to comply with such terms. *Arnold v. Schmeidler*, 144 App. Div., 420, 427, 129 N. Y. Supp., 408; *Martin v. Wermann*, 107 App. Div., 482, 95 N. Y. Supp., 284; *Duclos v. Cunningham*, 102 N. Y., 678, 6 N. E., 790." *Stout v. DeForest*, 183 N. Y. S., 119, at page 120.

It will be seen that there is nothing inconsistent between such a rule and the principles long established by the decisions in this state.

In the case sub judice, the authorization given did not contain all of the terms fixed by the owner; the terms of the mortgage, ^{if any} the deposit, and even the purchase price (a point about to be stressed) were left to future negotiations. Hence the production of a purchaser able and willing to purchase upon these terms was insufficient—a meeting of minds was absolutely necessary. The reason for this is simple. *Obviously, it cannot be said that the purchaser has met the owner's terms, when the owner's terms are not all fixed.*

This point must not be confused with the requirements of the 10th section of the statute of frauds. I will concede that the statute of frauds

is amply satisfied by the authorization in the instant case.

Clark v. Griffin, 95 N. J. L., 508;
Steinberg v. Midlin, 96 N. J. L., 206.

The Supreme Court I respectfully submit, misconceives the effect of the *DeLeonard* case. The question of the authority of the agent to contract is immaterial, for in no event could he have made a binding contract in the case.

Yadwin v. Arnold, 94 N. J. L., 500, 501.

In that case Justice Bergen speaking for the Court of Errors, says:

"It has been quite uniformly held by the courts of this state that an authority to sell given to a real estate broker, at an agreed commission, standing alone without other evidence of authority or ratification, does not permit an inference that the authority extends to the making of a written contract of sale by the broker in the name of the owner so as to bind him."

In *DeLeonard v. Kapanas*, supra, the court denied the plaintiff broker's right to a commission where the receipt, urged as a contract of sale, did not contain all the terms and which, therefore, precluded a meeting of minds between the owner and the alleged purchaser. The opinion of the court does not set forth the terms of the receipt but it appears that the authority of the broker was recognized in writing and that the rate of the commission was stated in such authority, sufficient to sat-

isfy the statute of frauds. If such was the case, it is difficult to understand why the broker did not recover on the theory of the production of a customer able and willing to purchase the property, unless the court deemed a meeting of the minds necessary because the terms of the owner were incomplete.

A judicial expression on this point would fulfill a long felt want. It seems to be an admirable rule, and would save confusion and uncertainty. Owners have been subjected to much litigation because of the failure of the broker to get the complete terms where the owner has furnished the residue, which have proved unacceptable to the purchaser. The only objection would seem to be the opportunity for the owner to escape liability by adding some term to the apparently complete list, which would be bound to result in the prospective purchaser's retraction. However, it is provided as a part of the same rule in the language of the one case, that

"such additional conditions must be germane to the original ones, if they are to furnish a sufficient reason for the refusal to pay the broker in case of the customer's refusal to agree to any modification of the original terms."

Arnold v. Schmiedler, 129 N. Y. Supp., 408, at page 413.

The change of price found by the trial court was in fact germane to the original terms. It was the very thing contemplated by the authorization. Witness, the words of the sentence obviously offered as an inducement to the signator:

"These rates of commission to apply on the amount *finally accepted*, be it more or less than the price hereinafter named, provided the property is sold through said agent's influence and efforts or the purchaser introduced by him."

Again the right to fix the terms of the mortgage and to refuse the \$100 deposit were most certainly germane to the original terms.

Nor is it within the inhibition pointed out in *Rauchwanger v. Katzin*, 82 N. J. L., 339, and the line of cases following it, which are aimed at the capricious refusal of the owner to convey.

It is in accord with the modern tendency to require greater strictness and particularly in reducing to definiteness the terms in transactions covering real estate.

POINT 8.

There was no evidence to support a finding by the Trial Court that the plaintiff procured a purchaser able and willing to purchase the property on the terms fixed by the owner, in the authorization.

The entire testimony on this point is confined to the willingness and ability to purchase the property on the terms fixed, not by the authorization Ex. P-1, or the owner's terms, but that of Ex. P-2, the purported contract. The difference is important, for he may have been wholly unable or unwilling to secure the difference between \$10,000 and \$13,500 within a reasonable time.

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CONCLUSION.

It is respectfully submitted that the judgment of the Supreme Court and District Court should be reversed and a venire de novo awarded.

ADOLPH J. H. PETERS,
Attorney for Defendant-Appellant.

NICHOLAS S. SCHLOEDER,
of Counsel.

**New Jersey
Court of Errors and Appeals**

10

<p>CARMINE RICHARD, Plaintiff-Respondent,</p> <p style="text-align: center;">vs.</p> <p>FRANCIS D. SPAGNA, Defendant-Appellant.</p>	<p>On Appeal From Supreme Court</p>	<p>20</p>
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BRIEF OF PLAINTIFF-RESPONDENT

The defendant authorized the plaintiff, a real estate broker, to sell real estate situate in Bergen County and belonging to him. 30

This authorization was signed on May 19th, 1924, and appears as Exhibit P-1, page 71, of the case.

At a later date the plaintiff procured ready, willing and able purchasers for this real estate in the persons of Charles Praskac and Maria Praskac. He procured their signatures to a proposed contract with the defendant. This is Exhibit P-2 and appears on pages 72 and 73 of the case. 40

The authorization provides that the price shall be \$13,500; the terms of sale, a first mortgage of \$7,000 and two or three thousand dollars in cash. There is nothing in the authorization as to the form which that part of the consideration is to take which is between the \$7,000 first mortgage together with the two or three thousand dollars cash and the \$13,500 sale consideration. The inference naturally is that this is to take the form of a second mortgage. And there is more than an inference (see page 28, f. 40 and page 29, f. 10 and 20)—

10 Q. "Where did you get the instructions with respect to the second mortgage?" A. "That was a verbal conversation before the authorization was signed."

20

In this way was the omission supplied.

"A real estate broker, acting by virtue of a written agreement, earns his commission when he secures a buyer on the seller's terms, either as originally propounded or as settled by agreement between the seller and buyer." Steinberg vs. Mindlin, 96 N. J. L. 206.

30 The Statute of Frauds (1918 C 273 p. 1020) provides:

"No broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging said land is in writing, and signed by the owner or his authorized agent . . . and the rate of commission on the dollar shall have been stated therein."

40

This authorization conforms to this Statute.

The Statute does not require the "terms" to be in writing.

The issues would seem to have been settled— 10 not only as to the purchasers' readiness, willingness and ability to perform, but of all of the terms of the proposed purchase by the defendant's assurance to the purchaser that he would sign the contract, and sell to him upon the terms therein contained, only providing that the purchaser would not purchase through the plaintiff's office (page 43).

This should dispose of the question of the purchaser's "ability," for he seems to have been acceptable to the defendant, and at least the trial court determined this. 20

The plaintiff became entitled to his compensation.

Just after the execution of Exhibit P-2, it was taken to the defendant by the plaintiff's representative, Mr. Mahoney, together with \$100 in cash and tendered to him. These letters are Exhibits P-3 and P-4. 30

The defendant then said (page 17, f. 30) "I will never go through with that contract."

The only objection which seems to have been then made by the defendant to this sale was that he was no longer inclined to sell the premises for \$13,500, but asked \$14,500 (page 25, f. 10). 40

The omission of the terms of the second mortgage was corrected by an oral conversation testified to by the plaintiff (page 28, f. 30 and page 29, f. 10 and f. 20).

10 The witness, Mahoney, talked with the defendant, he having taken the contract P-2 to the defendant and tendered it to him with \$100 in cash (page 35, f. 10) and he quoted the defendant as objecting to only one feature of the contract and that was the consideration of \$13,500—that he wanted \$14,000 or \$14,500.

20 At no time did the defendant object to any other feature of the contract as far as the testimony shows.

Mr. Coysh testified (page 39, f. 20) that the defendant merely said concerning the contract, "That is entirely too little"—"the amount that the place was to be sold for," and he, Mr. Coysh, quoted the conversation concerning the single objection of the defendant—the consideration (page 39, f. 40).

30 It appears that this objection of the amount being "too little" had no application to the deposit of \$100, but to the whole consideration (page 40, f. 30).

40 Then the proposed purchaser, Praskac, testified that he had talked with the defendant, Spagna, and had looked at the real estate in question and this significant quotation of the defendant was testified to by this witness (page 43, f. 10). "He (meaning the defendant) told me that the house would be satisfactory to sell at that price, \$13,500,

provided I would not buy it through Mr. Richard's office" and this witness also testified (page 43, f. 10) that the terms were all right and that the terms could even be lower than \$2,000 (page 43, f. 20) "He told me that I could buy the house for that price, provided I would not bother with Mr. Richard's office at all. He told me that the price of the house was \$14,000, but provided I would not buy it through his office, I could have it for \$13,500." 10

And in addition:

"Q. Did you discuss the terms? A. I discussed the terms. I told him it would be all right—about the \$2,000." 20

Q. Were those the terms that were put into this contract, P-2? A. Yes, in the contract."

The only evidence in the case concerning objections by the defendant other than to the whole consideration are those expressed in the defendant's testimony (page 57, f. 20) and they have to do with matters that do not appear in the authorization and should have been placed there by the defendant himself before he signed them. The plaintiff could not have known them. 30

The defendant (page 60, f. 20-40 and page 61, f. 10-20) gave a different story of the conversation between himself, Mahoney and Coysh. The trial court, however, has determined this issue of fact in favor of the plaintiff. 40

In rebuttal, the plaintiff and his witnesses, Mahoney and Coysh, denied the testimony of the plaintiff in so far as the conversation concerning the objections to the contract were concerned. This, also, is a question of fact, which was determined by the trial court.

The readiness, willingness and ability of Praskac to purchase was described in the plaintiff's testimony (page 65, f. 40) and by the purchaser himself (pages 66, 67 and 68).

20

The appellant's specifications of appeal are:

1. "The trial court erroneously denied the defendant's motion for a non suit."

The only feature of this motion which we believe need be discussed is:

"That the contract does not conform to the authorization unless the verbal arrangement was accepted and that no verbal arrangement might have been legally accepted which would alter the terms of this contract."

No "terms" of this "contract" were altered. Nothing about the second mortgage appears in the authorization. The parties agreed orally upon a subject which is not covered by the paper.

40

2. "The trial court erroneously gave a judgment for the plaintiff against the defendant, etc."

We believe that this is not seriously presented.

3. "The trial court erroneously admitted P-2." 10

This was not a completely executed contract, but a proposed contract signed by the purchaser, as an evidence of his sincerity.

4. "The trial court admitted P-5."

We believe that this is not seriously presented.

5. "The trial court erroneously allowed a certain answer of the plaintiff to stand." 20

The objection of the counsel to this question was presented after the answer had been made, and moreover, whatever effect this question and answer had upon the case, was accomplished by the testimony of Praskac himself (page 66, etc.).

6. "No legal evidence to support a finding of the trial court expressed in its memorandum."

The memorandum was merely a statement of reasons and the only really influential thing was the judgment. 30

7. "Authorization P-1 did not contain all of the owner's terms."

This has been discussed hereinbefore.

8. "No evidence to support a finding of the trial court, etc." 40

This has been discussed hereinbefore.

This is a matter of fact determined by the Court.

9. "The production of the purchaser, Praskac, was after a reasonable time had elapsed and after the authority was by lapse of time terminated."

10

It is submitted that until the authorization had been cancelled or a "reasonable time" had elapsed while the plaintiff was not alert, it remained as a contract between the individuals involved.

20

The defendant himself was willing to conform to the very contract presented P-2—provided the sale was made "not through Richard's office" (quotation infra). The short time which had elapsed had not altered the terms—had only inspired the defendant to accept the service of the plaintiff, sell to the plaintiff's customer, and deprive the plaintiff of his reward.

Moreover, letters of the defendant dated March 10, 1925 (Ex. P-6), and March 16, 1925, (Ex. P-7), recognize the authority.

30

This is a question of fact, and was determined by the trial Court.

Respectfully submitted,

Hart & Vanderwart

Attorneys of Plaintiff-Respondent.

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