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Judgment Record.

New Jersey Supreme Court

MONMOUTH COUNTY.

JOSEPH G. McCUE and CHARLES E. SWEENEY, partners trading as Joseph G. McCue Agency, Plaintiffs, <i>vs.</i> JAMES E. D. SILCOX, Defendant.	Judgment Record. Action at Law. On Postea. Judgment for Defendant on Complaint and for Plaintiffs on Counterclaim.	10
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LESTER C. LEONARD, Attorney for Plaintiffs. 20

EDWARD FARRY, JR., Attorney for Defendant.

James E. D. Silcox the defendant in this cause was summoned to answer unto Joseph G. McCue and Charles E. Sweeney, partners trading as Joseph G. McCue Agency the plaintiffs therein in an action at law upon the following complaint:

(Summons issued: May 27, 1935.)

30

Complaint.

The plaintiffs, JOSEPH G. McCUE and CHARLES E. SWEENEY, partners trading as Joseph G. McCue Agency, residing in the Borough of Rumson, County of Monmouth and State of New Jersey, say that:

(1) Plaintiffs are and were at the times hereinafter mentioned duly licensed real estate brok- 40

Judgment Record—Complaint.

ers of the State of New Jersey, authorized to transact business under the name of Joseph G. McCue Agency.

10 (2) The defendant, James E. D. Silcox, being the owner of a certain farm situate in the Township of Atlantic, in the County of Monmouth and State aforesaid, authorized in writing the plaintiffs to sell said farm for the sum of \$17,000.00, and defendant in said writing further agreed to pay as commission for said sale the sum of five per cent. A copy of said writing is annexed hereto and made a part hereof.

20 (3) On or about March 20, 1935, plaintiffs duly sold said premises for defendant to one Frederick J. Burghard, for said price, and the defendant then and there accepted a payment of \$1,700.00 on account of said purchase price.

(4) Thereafter, and on or about April 12, 1935, a Deed to said premises was delivered by defendant to the said Frederick J. Burghard.

30 (5) Plaintiffs demanded of defendant the agreed commission, but defendant has refused and still continues to refuse to pay the same or any part thereof.

Plaintiffs demand as damages from defendant the sum of Eight Hundred Fifty Dollars (\$850.00), together with interest and costs.

LESTER C. LEONARD,
Attorney for Plaintiffs.

Judgment Record—Complaint.

SCHEDULE.

March 14, 1935.

Joseph G. McCue Agency,
Rumson, New Jersey.

10

Gentlemen:

In consideration of services to be performed by you, I hereby employ and authorize you, as my agent, to sell for me my farm consisting of 212 acres in the Township of Atlantic, County of Monmouth, State of New Jersey, for the price of Seventeen Thousand Dollars (\$17,000.00).

In consideration of your offering my said property for sale, I agree to pay you, upon the completion and execution of an agreement of sale at the said sum of Seventeen Thousand Dollars (\$17,000.00), a commission of 5% of the sale price. This employment and authorization shall continue as irrevocable for the full period of ten days from and after the date hereof, and shall continue thereafter until this employment and authority shall be cancelled by me, giving you ten days notice in writing thereof.

20

J. E. D. SILCOX, M. D.

30

Witnessed by:

JOSEPH G. McCUE.

(Filed: June 6, 1935.)

40

*Judgment Record—Answer.***Answer.**

Defendant, residing in the Borough of Keyport, in the County of Monmouth and State of New Jersey, says that:

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FIRST SEPARATE DEFENSE.

1. He has no information or belief as to paragraph one of the first count of plaintiff's complaint.

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2. As to paragraph two of the first count of plaintiff's complaint, he admits he was the owner of the farm premises, and that he did authorize the plaintiff, in writing, to sell the said farm premises for the sum of \$17,000.00, and agreed to pay commission in the sum of five per cent (5%), in accordance with the agreement annexed to and made a part of plaintiff's complaint, but denies that there was or is any obligation to pay any commission under the said contract.

30

3. Defendant admits that he sold the farm premises to the said Frederick J. Burghard, and accepted the sum of \$1,700.00, on account of the purchase price, but that the said sale was not in accordance with the said written agreement sued upon by the plaintiff.

4. Defendant admits that a deed was delivered by him to the said Frederick J. Burghard, but said delivery was not in accordance with the said contract entered into between plaintiff and the defendant.

40

5. Defendant admits that plaintiff has demanded a commission, but defendant denies there

Judgment Record—Answer.

is any commission due and owing from the defendant to the plaintiff for the sale of said premises.

6. Defendant denies there is any amount due from the defendant to the plaintiff as a result of the said sale of the farm premises. 10

SECOND SEPARATE DEFENSE.

1. The said written agreement between the plaintiff and the defendant, covering the authorization of the said plaintiff to sell for the defendant his farm premises in the Township of Atlantic, for the price of \$17,000.00, was, by consent and action of both plaintiff and defendant, broken and declared null and void, due to the fact that the purchase price for the said premises was not in accordance with the terms of the said authorization entered into between plaintiff and defendant. 20

2. The said premises were sold for a price far less than the original amount as set forth in the agreement due to the fact that the defendant, James E. D. Silcox, then the owner of the premises, became obligated to pay to the said tenant then occupying the premises, the sum Eleven Hundred (\$1100) Dollars, representing defendant's portion of a Three Thousand (\$3,000) Dollar payment made by James E. D. Silcox and his purchaser, Frederick J. Burghard, and by the payment of the said sum of Eleven Hundred (\$1100) Dollars to the said tenant, Cusimo Bando, by the said James E. D. Silcox, the said defendant paid an excess of Two Hundred and Fifty (\$250) Dollars, more than the commission, which 30
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Judgment Record—Answer.

would have been due to the said Joseph G. McCue in the event the premises were sold for the sum of Seventeen Thousand (\$17,000) Dollars, as stipulated in the said authorization between plaintiff and defendant.

10 3. The said defendant, James E. D. Silcox, did pay the sum of Eleven Hundred (\$1100) Dollars to the said tenant, as his share of the consideration to obtain the tenant's removal before the expiration of his lease, which was a departure, and not in accordance with the original sale price formerly agreed to and entered into between plaintiff and defendant. The said Joseph G. McCue agreed that he would waive his commission and would not charge the said James E. D. Silcox
20 any money for selling the said premises.

4. At the time this commission was agreed to be waived by the said Joseph G. McCue, provided James E. D. Silcox made the Eleven Hundred (\$1100) Dollar payment as aforementioned, the said Joseph G. McCue, stated that he would be perfectly satisfied as he was making negotiations for the sale of two other parcels of land owned by other persons and which parcels were adjacent to the property then owned by James E. D. Silcox, and that he was perfectly willing to waive
30 the commission on this particular sale in order that he might consummate the sale of the other two adjoining parcels from which sales he would receive a commission.

5. Due to this agreement on the part of the plaintiff, the said Joseph G. McCue, James E. D. Silcox and Louise V. Silcox, his wife, together
40 with their attorney, Edward Farry, Jr., met at

Judgment Record—Answer.

the office of William E. Foster, Esq., Broad Street, Red Bank, New Jersey, for the purpose of drawing the said agreement of sale for the said premises, in accordance with the understanding between plaintiff and defendant.

6. At the request of both plaintiff and defendant, the agreement for the sale of the said premises was drawn by William E. Foster, Esq., the said Agreement including the stipulation that the said James E. D. Silcox was to contribute the sum of Eleven Hundred (\$1100) Dollars, in order to obtain release and surrender by the tenant of the lease, covering the said premises, as will more fully appear by the said agreement, a copy of which is attached hereto and made a part hereof. The said agreement at the request of the said Joseph G. McCue, and with his consent also included the stipulation that "The party of the first part recognizes that Joseph G. McCue is the broker in this transaction and is not obligated to pay him any commission for effecting this sale".

7. It was understood and agreed between the plaintiff and defendant that the agreement of sale was to have been signed by the said Joseph G. McCue, together with the signatures of the purchaser and the seller, but through the fraud, deceit and connivance of the said Joseph G. McCue, the signatures of the defendant-seller and the purchaser were affixed to the said agreement of sale, but the said Joseph G. McCue by unfair and fraudulent means did not affix his signature in the place provided, which was contrary to the agreement made between plaintiff and the defendant.

Judgment Record—Answer.

10 8. The signatures which were affixed to the said agreement of sale were obtained by the said Joseph G. McCue in his capacity as a Notary Public of New Jersey, and the stipulation concerning the fact that the said Joseph G. McCue was to receive no commission for the sale of the said premises was included in the agreement of sale at the time the same was delivered to the said Joseph G. McCue and prior to the time that he obtained the acknowledgment to the said signatures of the purchaser and seller.

THIRD SEPARATE DEFENSE.

20 1. Defendant says that he was formerly the owner of farm premises, situate in the Township of Atlantic, in the County of Monmouth and State of New Jersey, and that while he was in Florida, Joseph McCue, the plaintiff in this action, telegraphed him relative to the sale of the aforementioned farm premises and after some correspondence and several conversations with the said Joseph G. McCue, defendant agreed that he would sell the said farm premises for a sum of \$17,000.00 and would pay the said Joseph G. McCue five per cent commission on the purchase price of \$17,000.00 and in accordance with this understanding, defendant entered into a written authorization with the said Joseph G. McCue, a copy of the said authorization being hereto annexed and made a part hereof. Said authorization was dated March 14th, 1935.

40 2. Subsequent to the signing of the aforesaid written authorization, defendant and the said Joseph G. McCue had a conversation concerning the fact that the premises were occupied by a

Judgment Record—Answer.

tenant under a written lease and the said Joseph G. McCue informed deponent that it would be necessary to pay to the said tenant then occupying the premises, a cash consideration in order to obtain from the said tenant a surrender of the said lease and possession of the said farm premises in the event that a sale for the same was consummated. 10

3. Defendant and the said Joseph G. McCue had numerous conversations regarding the aforementioned removal of the tenant and the payment to him of the cash consideration. Finally, the said Joseph G. McCue informed defendant that it would be necessary to pay to the said tenant for the surrender of the said lease and possession of the said premises, the sum of Three Thousand (\$3,000) Dollars, and the said Joseph G. McCue requested that this defendant contribute the sum of Eleven Hundred (\$1100) Dollars, as his share toward the payment of the \$3,000.00 for the surrender of the lease and possession of the premises, and that one Frederick J. Burghard, the contemplated purchaser would pay as his share the sum of Nineteen Hundred (\$1900) Dollars, thereby constituting the sum of Three Thousand (\$3,000) Dollars, to be paid to the said tenant. This arrangement was consented to by defendant with the full understanding, acceptance and approval by the said Joseph McCue, that since the said Joseph G. McCue was selling two adjacent premises to the said Frederick J. Burghard, that the said Joseph G. McCue would waive his commission for the sale of defendant's farm premises, the said Joseph G. McCue, stating that his purchaser wanted all three places, and would not purchase unless he could obtain 30
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Judgment Record—Answer.

10 same. Therefore, in consideration of defendant's contributing the sum of Eleven Hundred (\$1100) Dollars, which defendant was not obligated to do under the written authorization the said Joseph G. McCue agreed that the commission for the sum of Eight Hundred and Fifty (\$850) Dollars would be waived by him.

20 4. As a consequence of the agreement, defendant, his wife, Louise V. Silcox, Joseph G. McCue and Edward Farry, Jr., defendant's attorney, met at the office of William E. Foster, Attorney and Counsellor at Law of New Jersey, with offices at Red Bank, N. J. and instructed the said William E. Foster, Esq., to draw the necessary agreement of sale covering the said premises
30 to Frederick J. Burghard, for the sum of \$17,000.00, as will more fully appear by the copy of the said agreement of sale, which is annexed hereto and made a part hereof. The said written agreement of sale for the said premises contained the Stipulation as to the amount that this defendant was to contribute to the tenant for his removal, and also contained the Stipulation as to the amount that the said Frederick J. Burghard, the contemplated purchaser, was to contribute for the tenant's removal. By defendant
40 contributing the sum of \$1100.00, he therefore received the sum of \$250.00 less than was called for under the authorization between the defendant and the said Joseph G. McCue.

5. Defendant further says that these signatures, together with the stipulation "The party of the first part recognizances that Joseph G. McCue is the broker in this transaction and is not obligated to pay him any commission for ef-

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fecting this sale'' were contained in the said written agreement for the sale, at the direction and with the full consent of the said Joseph G. McCue and it was understood that the said Joseph G. McCue was to affix his signature to the said written agreement, which he failed to do, and fraudulently obtained the signature of this defendant and his wife, to the said agreement, without affixing his signature thereto. 10

6. The said Joseph G. McCue at the said date of execution and acknowledgment of the said agreement of sale, was a Notary Public of New Jersey, and the said Joseph G. McCue obtained the signatures of this defendant, his wife, Louise V. Silcox, and Frederick J. Burghard, as will more fully appear by the acknowledgment as shown on the said agreement. 20

7. The stipulations aforementioned were included in the said written agreement of sale at the time the said Joseph G. McCue witnessed the execution of the signing of the same and the acknowledgment thereon.

8. A deed covering the said premises was executed and delivered by defendant and wife to Frederick J. Burghard in accordance with the agreement of sale as aforementioned and defendant executed the same with the full understanding that the said Joseph G. McCue was to receive no commission for the sale of the said premises to the said Frederick J. Burghard. 30

9. Defendant and his wife, together with his attorney, Edward Farry, Jr., and Horace S. Burrowes, Vice-President of the Peoples National 40

Judgment Record—Answer.

10 Bank of Keyport, New Jersey, met at the office of Applegate, Stevens, Foster & Reusille, Esqs., Red Bank, N. J. on the 12th day of April, 1935, and before executing and delivering the deed covering the premises in question, defendant, personally served Joseph G. McCue with a written notice repudiating any and all written agreements, signed by the said defendant wherein the said Joseph G. McCue was authorized to sell deponent's farm premises. This notice was served on the said Joseph G. McCue by defendant in the presence of Leon Reusille, Attorney and Counsellor at Law, Horace S. Burrowes, Vice-President, of the People's National Bank, and Edward Farry, Jr., Attorney-at-Law.

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FOURTH SEPARATE DEFENSE.

1. Defendant repeats the allegations as set forth in the First, Second and Third Defenses, the same as if set forth in full and with the same force and effect.

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2. By reason of the said fraudulent act of the plaintiff the defendant did not receive as a purchase price the amount as set forth in the original agreement for the sale of the said premises made between the plaintiff and defendant.

FIFTH SEPARATE DEFENSE.

1. Defendant repeats the allegations as set forth in the First, Second, Third and Fourth Defenses, the same as if herein set forth in full and with the same force and effect.

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2. As a result of the agreement and acts of the plaintiff in this cause, the said defendant con-

Judgment Record—Counterclaim.

veyed the premises to the said purchaser for a sum far less than was called for in the original agreement herein sued upon.

3. Defendant says that he is not indebted to the plaintiff for effecting a sale of the said premises.

10

SIXTH SEPARATE DEFENSE.

1. Defendant repeats the allegations as set forth in the First, Second, Third, Fourth and Fifth Defenses, the same as if herein set forth in full and with the same force and effect.

2. Defendant says that through the fraudulent acts and misrepresentations of the plaintiff, defendant was compelled to and did sell his farm premises for a sum less than was stipulated in the original agreement for the sale of the said premises between the plaintiff and the defendant, and as a result of the said fraud and misrepresentations of the plaintiff, defendant received a sum of \$250.00 less than was set forth in original agreement for the sale of the said premises between plaintiff and the defendant.

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Counterclaim.

By way of counterclaim against the plaintiff, the defendant says that:

FIRST COUNT.

1. Defendant was on the 20th day of March, 1935, the owner of certain farm premises located

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Judgment Record—Counterclaim.

in the Township of Atlantic, in the County of Monmouth and State of New Jersey.

10 2. That on or about the 20th day of March, 1935, the said Joseph G. McCue represented to the said James E. D. Silcox, that if the said James E. D. Silcox entered into a certain written agreement between himself and Frederick J. Burghard, for the sale of certain farm premises owned by the said James E. D. Silcox, a copy of the agreement being annexed hereto and made a part hereof, the said James E. D. Silcox would not have to pay the said Joseph G. McCue any commission for effecting a sale of the said premises.

20 3. The said Joseph G. McCue represented to the said James E. D. Silcox that he was to receive no commission for the sale of the said premises, well-knowing that the said James E. D. Silcox relied on this statement, and the said Joseph G. McCue well-knowing that he did fully intend upon the delivery of the said deed conveying the said premises to Frederick J. Burghard to demand a commission, contrary to the said agreement made between Joseph G. McCue and James E. D. Silcox.

30 4. The said James E. D. Silcox relied on the truth of the statements made by the said Joseph G. McCue, believing the said statements and representations to be true, and the said James E. D. Silcox did convey the said premises to Frederick J. Burghard and thereby became damaged to the sum of \$250.00.

40 5. The said Joseph G. McCue made the said statements and agreements well-knowing and intending that the said James E. D. Silcox relied

Judgment Record—Counterclaim.

on the statements and with the intent that he obtain the written agreement on behalf of the said James E. D. Silcox to sell the premises to Frederick J. Burghard.

Defendant counterclaims on this count for Two Hundred and Fifty (\$250) Dollars. 10

SECOND COUNT.

1. Defendant repeats the allegations as set forth in the First Count, the same as if herein recited in full and with the same force and effect.

2. Defendant, relying on the said allegations of the said Joseph G. McCue conveyed the said premises and became damaged in the sum of Eleven Hundred (\$1100) Dollars. 20

Defendant counterclaims on this count for Eleven Hundred (\$1100) Dollars.

EDWARD FARRY, JR.,
Attorney of Defendant.

30

COPY OF AGREEMENT.

ARTICLES OF AGREEMENT, made the 20th day of March, in the year of our Lord One Thousand Nine Hundred and Thirty-five, Between

JAMES E. D. SILCOX and LOUISE V. SILCOX, his wife, of the Borough of Keyport, in the County of Monmouth and State of New Jersey, party of the first part; and 40

Judgment Record—Counterclaim.

FREDERICK J. BURGHARD, of the Borough of Fair Haven, in the County of Monmouth and State of New Jersey, party of the second part; WITNESS-ETH:

10 That the said party of the first part, for and in consideration of the sum of Seventeen Thousand (\$17,000.00) Dollars, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns by Deed of Warranty free from
 20 all encumbrance except as hereinafter set forth on or before the 15th day of April, next ensuing the date hereof, all those lots, tracts, or parcels of land and premises, hereinafter particularly described situate, lying and being in the Township of Atlantic, in the County of Monmouth and State of New Jersey, called the homestead farm, lying near the public road leading from Freehold to Holmdel, containing two hundred and twelve acres, more or less, bounded on the north by lands of John R. Sickles, Richard Bray, DeLafayette Schanck and Daniel S. Conover, on the east by
 30 lands of Daniel S. Conover, DeLafayette Schanck and James J. Taylor, on the south by lands of James J. Taylor and Daniel S. Conover, and on the west by lands of Daniel P. Smock and John R. Sickles, which tract of land is composed of several tracts which are particularly described as follows:

FIRST TRACT:

40 *Beginning* at a stone standing in the line of Garret R. Conover which said stone is distant on

Judgment Record—Counterclaim.

a course of south 65 degrees east 5 chains and 55 links from a large black oak standing in said Garrett R. Conover's line; thence running (1) south 18 degrees west 18 chains to a stone; thence (2) south fifty degrees and 30 minutes west 5 chains and sixty links to a stone; thence north 63 degrees west 10 chains and 46 links to a chestnut sapling; thence south 14 degrees west 7 chains and 20 links; thence south 82 degrees west 17 chains and 30 links to a stake standing in Aaron Smock's line; thence north 4 degrees east 9 chains and 50 links to a stake standing in the west bank of a ditch and in John W. Holmes line; thence following said ditch to a stake fixed for a corner; thence running along the foot of said bank on the west side thereof as the gully now goes to a stake fixed for a corner; thence south 20 degrees east 82 links to a beech tree marked on four sides with a blaze and three notches below each blaze; thence north 43 degrees and 30 minutes east 6 chains to a beech stump standing on the south branch of south hop brook near to where George Taylor has opened a marl pit; thence following the lines of John W. Holmes and Garrett R. Conover until it comes to the beginning, containing sixty-two acres and eighty-eight hundredths of an acre, be the same more or less, being the tract of land described in a deed from James Taylor and wife to George Taylor dated March 25th, 1822 and recorded in F-2 of Deeds, pages 254 etc. in the Clerk's Office at Freehold, from which deed this description is taken.

SECOND TRACT: That certain farm being the easterly half of the farm whereof John W. Holmes died seized:

Beginning at a cluster of beech trees standing in the line between the tract of woodland, in the

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Judgment Record—Counterclaim.

northeast corner thereof, and land of Mrs. Nancy Taylor; thence running (1) north 85 degrees 15 minutes east 3 chains and 54 links to a stone; thence (2) south 45 degrees and 30 minutes east 2 chains and 75 links to a stone; thence (3) north twenty-seven degrees 10 minutes east 17 chains and 46 links to an oak tree; thence (4) south 51 degrees east 7 chains and 97 links; thence (5) north 7 degrees west 6 chains with off sets for the brook and thence along the said brook the various courses thereof to land of Samuel Bray, now deceased; thence (6) north 31 degrees 30 minutes west 6 chains; thence (7) north 40 degrees west 26 chains and 70 links; thence (8) along a brook north 20 degrees 10 minutes west 2 chains and 81 links; thence (9) along said brook north 5 degrees 30 minutes west 7 chains and 75 links; thence (10) along the same north 36 degrees 15 minutes west 3 chains and 67 links; thence (11) along the same north *north* 20 degrees and 20 minutes west one chain and 61 links; thence north 4 degrees 30 minutes west 4 chains and 61 links with an off set of 35 links easterly at the distance of one chain and 40 links from the beginning of course; thence (12) south 41 degrees and 37 minutes west 11 chains; thence (13) south 2 degrees and 27 minutes east 57 chains and 77 links to center of brook; thence (14) along Hop Brook to where a course of north 72 degrees 30 minutes west 5 chains and 88 links strikes the edge of the wood tract; thence (15) north 86 degrees west 7 chains to a stone; thence (16) along a brook the various courses thereof to an oak tree in a southerly course; thence (17) south two degrees west 11 chains and 59 links; thence (18) south 30 minutes east 2 chains and 50 links; thence (19) north 64 degrees 50 minutes east 1 chain and 67 links

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along the brook; thence (2) along the same north 45 degrees east six chains and 11 links; thence (21) north 27 degrees east 1 chain and 12 links along the same; thence (22) north 48 degrees east 4 chains and 36 links; thence (23) north 68 degrees 55 minutes east 6 chains; thence (24) north 54 degrees 15 minutes east 4 chains and 74 links; thence (25) north 33 degrees east 1 chain and 72 links; thence (26) south 72 degrees east 82 links to remains of an old stump; thence (27) north 31 degrees east 6 chains and 2 links to the beginning. 10

Containing of arable land one hundred and sixteen acres three-quarters and twenty-three perches, and of woodland thirty acres and eight perches, being the same premises described in a deed from Jonathan S. Holmes and wife to James C. Taylor dated March 31, 1864 and recorded in the Clerk's Office at Freehold in Book 174 of deeds, pages 92 etc. from which deed this description is taken. 20

THIRD TRACT:

Beginning at a stake standing in the middle of a brook or run of water the line between DeLafayette Schanck and James C. Taylor which stake is distant 5 chains and 23 links on a course of north 87½ degrees east from a large white oak tree standing on the top of the bank, a corner between said Taylor and Daniel S. Conover; thence as the needle pointed November 29th, 1864 south 45 degrees and 55 minutes east 2 chains and 65 links; thence south 8 degrees and 45 minutes east two chains and 3 links to Daniel S. Conover's meadow; thence along the same across the meadow south 86 degrees and 35 minutes west 2 chains and 67 links to a red oak tree on the west side of a stream or ditch; thence along the line of Daniel S. Con- 30 40

Judgment Record—Counterclaim.

over, or said stream, north 57 degrees and a quarter west binding on said Daniel S. Conover's line 2 chains and 33 links to old ditch and line between said DeLafayette Schanck and James C. Taylor; thence along said old *tich* or brook and run of water to the place of beginning. Contain-
 10 ing one acre and 62 hundredths of an acre, be the same more or less, which tract was conveyed to James C. Taylor by DeLafayette Schanck and wife by deed dated November 25th, 1864 and recorded in the Clerk's Office at Freehold in Book 191 of Deeds, pages 498 etc.

Subject, however, to a certain right of way agreement made by Hans Nielsen and wife, dated July 22nd, 1930, to Eastern New Jersey Power Company.

20 Being or intended to be the same premises conveyed by Hans Nielsen and wife to James E. D. Silcox by deed dated July 22nd, 1930, and recorded in Monmouth County Clerk's Office in Book 1529 of Deeds, page 302 &c.

And the said Frederick J. Burghard for himself, his heirs, executors and administrators, doth covenant, promise, and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he, the said party
 30 of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the sum of Seventeen Thousand (\$17,000.) Dollars, as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Upon the execution of this agreement, receipt of which is hereby acknowledged, \$1,700.00.

40 Upon the closing of title and delivery of deed, as herein specified, \$15,300.00.

It is understood and agreed that said premises are now occupied by one Cusimo Banardo as a

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tenant under a certain lease dated November 14th, 1934, for a term of one year with a privilege of renewal for three years.

The conveyance under the within agreement is to be made upon the following expressed conditions and reservations, namely, that the purchaser and the seller herein are to jointly obtain from the said tenant, Cusimo Banardo, a release and surrender of the said lease covering the within described premises upon the payment of the sum of \$3,000.00 to the said tenant. The said party of the first part is to contribute toward the consideration for said release the sum of \$1,100.00 and the party of the second part is to contribute the sum of \$1,900.00. 10

It is understood and agreed that the said tenant shall surrender said lease and vacate said farm on or before April 15th, 1935; and in the event that the parties hereto are unable to obtain a release and cancellation of said lease from said tenant and have him vacate said farm by April 15th, 1935, all moneys paid by the party of the second part to the party of the first part herein shall be returned and from that date forward this contract shall be void and for nothing holden. 20

It is further agreed that the party of the first part shall have the right and privilege of entering upon said premises and removing therefrom approximately 30 tons of baled hay upon the said premises, and approximately 125 sacks of potatoes now upon said premises. 30

The party of the first part recognizes that Joseph G. McCue is the broker in this transaction and is not obligated to pay him any commission for effecting this sale.

And it is further agreed, by the parties to these presents, that the said party of the second part, 40

Judgment Record—Counterclaim.

his heirs and assigns, may enter into and upon the said land and premises after closing of title, and from thence take the rents, issues and profits to his and their use.

10 And it is further Agreed, by the parties hereto, that the said Deed of Warranty shall be delivered and received at the offices of Applegate, Stevens, Foster & Reusille, between the hours of ten in the forenoon and three o'clock in the afternoon on the said 15th day of April, next ensuing the date hereof.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators.

20 In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

JAMES E. D. SILCOX (L. S.)

LOUISE V. SILCOX (L. S.)

FREDERICK J. BURGHARD (L. S.)

Signed, sealed and delivered }
in the presence of }

30 JOSEPH G. McCUE.

STATE OF NEW JERSEY, }
COUNTY OF MONMOUTH. } ss.

40 Be it Remembered, That on this Twentieth day of March, in the year of Our Lord One Thousand Nine Hundred and Thirty-Five, before me, the subscriber, a Notary Public of New Jersey, personally appeared James E. D. Silcox and Louise

Judgment Record—Counterclaim.

V. Silcox, who I am satisfied are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

10

JOSEPH G. McCUE,
Notary Public of N. J.
My Commission Expires Oct. 27, 1937.

(Notary Public Seal)

COPY OF LETTER.

20

To: Joseph McCue:

I do hereby repudiate any and all written agreements authorizing you to sell my farm premises, located in Atlantic Township, Monmouth County, New Jersey.

J. E. D. SILCOX.

SCHEDULE.

* 30

March 14, 1935

Joseph G. McCue Agency
Rumson, New Jersey

Gentlemen:

In Consideration of services to be performed by you, I hereby employ and authorize you, as my agent, to sell for me my farm consisting of 212

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Judgment Record—Answer to Counterclaim.

acres in the Township of Atlantic, County of Monmouth, State of New Jersey, for the price of Seventeen Thousand Dollars (\$17,000.00).

In consideration of your offering my said property for sale, I agree to pay you, upon the completion and execution of an agreement of sale at the said sum of Seventeen Thousand Dollars (\$17,000.00), a commission of 5% of the sale price. This employment and authorization shall continue as irrevocable for the full period of ten days from and after the date hereof, and shall continue thereafter until this employment and authority shall be cancelled by me, giving you ten days notice in writing thereof.

J. E. D. SILCOX, M. D.

20 Witnessed by:

JOSEPH G. McCUE.

(Filed: June 25, 1935.)

Answer to Counterclaim.

The plaintiffs, JOSEPH G. McCUE and CHARLES E. SWEENEY, partners trading as Joseph G. McCue Agency, answering the defendant's Counterclaim, say that:

ANSWER TO FIRST COUNT.

(1) They admit the allegations contained in paragraph 1, but say that defendant was the owner of said premises for a long time prior thereto.

40 (2) Each and every allegation contained in paragraphs 2, 3, 4 and 5 are denied.

Judgment Record—Judgment.

ANSWER TO SECOND COUNT.

(1) As to the allegations contained in paragraph 1, they repeat their answer to the First Count.

(2) They deny each and every allegation contained in paragraph 2. 10

LESTER C. LEONARD,
Attorney for Plaintiffs.

(Filed: Oct. 10, 1935.)

Replication.

20

The plaintiffs replying to the Answer of the defendant, James E. D. Silcox, say that:

The plaintiffs deny the allegations contained in the First, Second, Third, Fourth, Fifth and Sixth Separate Defenses set forth in defendant's Answer, and join issue on said Answer.

LESTER C. LEONARD,
Attorney for Plaintiffs.

30

(Filed: July 13, 1936.)

Judgment.

This case was tried before Honorable Rufus V. Lawrence, Circuit Court Judge, with a jury, at the Monmouth Circuit on December 18th, 1936.

The said judge directed the jury to return a verdict against the plaintiffs and in favor of the 40

Judgment Record—Clerk's Certificate.

defendant of no cause of action, and further directed the jury to return a verdict against the defendant and in favor of the plaintiffs of no cause of action on the defendant's counterclaim; and the jury did accordingly return a verdict against the plaintiffs and in favor of the defendant of no cause of action and a verdict against the defendant and in favor of the plaintiffs of no cause of action on defendant's counterclaim.

10

Whereupon it is adjudged that the complaint of the plaintiffs be dismissed without costs. It is further adjudged that the counterclaim of the defendant be dismissed.

No Costs.

Judgment entered and signed January 28, 1937.

20

THOMAS J. BROGAN,
Supreme Court Justice.

Clerk's Certificate.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

30

In testimony whereof I have set my hand and the seal of said Court at
(Seal) Trenton, this twenty-second day of August A. D. nineteen hundred and thirty-eight.

FRED L. BLOODGOOD,
Clerk.

40

Notice and Grounds of Appeal.

(Filed August 4, 1937.)

NEW JERSEY SUPREME COURT.

JOSEPH G. McCUE and CHARLES E. SWEENEY, partners trading as Joseph G. McCue Agency, Plaintiffs, <i>vs.</i> JAMES E. D. SILCOX, Defendant.	}	Action at Law. Notice and Grounds of Appeal.	10
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To Edward Farry, Jr., Attorney of Defendant, 20
James E. D. Silcox.

Sir:

TAKE NOTICE that the plaintiffs, JOSEPH G. McCUE and CHARLES E. SWEENEY, partners trading as Joseph G. McCue Agency, appeal to the Court of Errors and Appeals of the State of New Jersey in the last resort in all causes, from the judgment entered against them and in favor of defendant, upon the following ground:

That the trial court erred in directing a verdict of no cause of action in favor of the defendant and against the plaintiffs, whereas the court should have denied defendant's motion for the same and should have submitted the issues to the jury. 30

LESTER C. LEONARD,
 Attorney of Plaintiffs.

Service of a copy of the within Notice and Grounds of Appeal is hereby acknowledged this 40
 2nd day of August, 1937.

EDWARD FARRY, JR.,
 Attorney of Defendant.

Stipulation.NEW JERSEY COURT OF ERRORS
AND APPEALS.

10 JOSEPH G. McCUE and CHARLES
 E. SWEENEY, partners trading
 as Joseph G. McCue Agency,
 Plaintiffs-Appellants,
 vs.
 JAMES E. D. SILCOX,
 Defendant-Respondent.

On Appeal
from Supreme
Court.
Stipulation.

20 It is hereby stipulated and agreed by and be-
 tween counsel of the respective parties in the
 above entitled cause, listed for argument in the
 May Term, 1938, that the same be marked off and
 the cause relisted upon filing a Notice of Argu-
 ment for the October Term of said court.

LESTER C. LEONARD,
Attorney of Plaintiffs-Appellants.

30 EDWARD FARRY, JR.,
 Attorney of Defendant-Respondent.

Testimony.

SUPREME COURT,
MONMOUTH CIRCUIT.

JOSEPH G. McCUE and CHARLES E. SWEENEY, partners trading as JOSEPH G. McCUE AGENCY, Plaintiff, vs. JAMES E. D. SILCOX, Defendant.	}	10
	At Law. Testimony	

Freehold, N. J., December 18, 1936. 20

Testimony before Hon. RULIF V. LAWRENCE,
Judge and a jury.

Appearances:

SHERMAN A. MANNING, Esq.
For the Plaintiff.

EDWARD FARRY, Esq.
For the Defendant.

(Mr. Manning opens to the jury.) 30

(Mr. Farry opens to the jury.)

JOSEPH G. McCUE, the plaintiff, appearing on his own behalf, being duly sworn according to law, upon his oath testified as follows:

Direct examination by Mr. Manning: 40

Q. Mr. McCue, you are one of the plaintiffs in this action? A. I am.

Joseph G. McCue, Plaintiff—Direct.

Q. You are a duly licensed realtor of the State of New Jersey? A. I am.

Q. How long have you been in the real estate business? A. Since 1924.

Q. Your place of business is located where? A. In Rumson, New Jersey.

10

The Court: You have dealt with him as a real estate agent?

Mr. Farry: Yes, sir.

Q. At the time of this action, or rather, at the time this action was started you were trading as the Joseph G. McCue Agency. A. That is right.

Q. And at present you are by yourself? A. Yes.

20

Q. In the early part of 1935 did you have occasion to meet with the defendant in this action? A. I did.

30

Q. What happened? A. I showed his property, which was offered for sale at twenty thousand, verbally, but no written agreement, and a little later on I went to Dr. Silcox, the owner, and made him an offer of fifteen thousand dollars, which he would not accept, but finally he agreed to accept seventeen thousand dollars. I did not assure him I could get that price or not; I wanted ten days time in which to deal with my prospect, and at the same time during which to be sure that I could sell it at seventeen thousand, if he would care to buy it at that price. I asked Dr. Silcox if he would give me a written authorization at such a figure, and he consented. I thereupon drew a written authorization, whereby he authorized me to sell the farm within ten days for seventeen thousand dollars, and on which price he would agree to pay me a commission of five per cent.

40

Joseph G. McCue, Plaintiff—Direct.

Q. The Doctor signed that authorization? A. He did, in his home, in his office.

Q. I show you what purports to be an authorization, dated March 14, 1935, directed to Joseph McCue Agency, and bearing what purports to be the signature of J. E. D. Silcox, M. D. A. Yes.

Q. That is the original? A. Yes. 10

By the Court:

Q. Was that signed in your presence? A. Yes.

The Court: It may be marked.

(Paper shown to defense counsel.)

Mr. Farry: No objection.

(Paper marked in evidence Exhibit P-1.) 20

The Court: Read it to the jury.

Mr. Manning: (Reads to the jury.)

“Authorization dated March 14, 1935. Joseph G. McCue Agency, Rumson, New Jersey. Gentlemen. In consideration of services to be performed by you, I hereby employ and authorize you, as my agent, to sell for me my farm consisting of 212 acres in the Township of Atlantic, County of Monmouth, State of New Jersey, for the price of Seventeen Thousand Dollars (\$17,000.00). 30

In consideration of your offering my said property for sale, I agree to pay you, upon the completion and execution of an agreement of sale at the said sum of Seventeen Thousand Dollars (\$17,000.00), a commission of 5% of the sale price. This employment and authorization shall continue as irrevocable for the full period of 40

Joseph G. McCue, Plaintiff—Direct.

ten days from and after the date hereof, and shall continue thereafter until this employment and authority shall be cancelled by me, giving you ten days notice in writing thereof. J. E. D. Silcox, M. D. Witnessed by Joseph McCue.”

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(Paper passed around among jurors.)

By Mr. Manning:

Q. After you received that authorization what did you do with reference to effecting the sale of the property? A. I communicated with my prospect and after several visits I finally was able to get him to pay seventeen thousand dollars cash for the Dr. Silcox property, the farm. So I went to Dr. Silcox's home and told him so, and then he said “Well, McCue, you know there is a tenant there” and he brought out a lease which I think had a year to run, with the privilege of renewal for two years, at the nominal sum of six or eight hundred dollars a year, not over nine hundred, and he said “We have got to do something about that”. He said “I will run over and see this Italian farmer and see what I can do about it”.

30

Q. Do you recall the tenant's name? A. Cosimo Bernardo. And at that time he mentioned he thought he could get him released for three hundred dollars, because it was early in March and he assumed he had no crops planted outdoors and had not gone to any great expense. Afterwards, after visiting the farm he found out—

Mr. Manning: You cannot testify as to that.

40

Joseph G. McCue, Plaintiff—Direct.

By the Court:

Q. Later on did he communicate to you? A. Yes, he did.

Q. What did he say? A. He said he was unable to do anything with that farmer, he would not listen to reason. Then I suggested perhaps if a friend of the farmer's, Mr. Sardello, who was interpreter for him and a friend, got in touch with us, or met Dr. Silcox over there some day, maybe he could assist. So we met on a certain afternoon, I think it was Saturday, but I did not arrive there until some time after the Doctor had been there, and he was away down at the end of the farm talking to the Italian farmer. 10

By the Court: 20

Q. Who was away down at the end of the farm? A. Dr. Silcox. He had been away down at the end of the farm, talking to the Italian farmer, and he came back alone and met me there. He said "McCue, I cannot do anything with that fellow, I have offered him eleven hundred dollars and that is as much as I will pay, I will not pay any more." Up to that stage no mention had been made of not paying me the commission agreed upon in that contract. 30

By Mr. Manning:

Q. Then what happened? A. Mr. Sardello was on the scene, over at the house, talking to the farmer's wife, and he came out and I believe went down to the field.

Mr. Farry: Is this in the presence of the Doctor? 40

Joseph G. McCue, Plaintiff—Direct.

By the Court:

10 Q. Sardello came out and went down in the field. What happened after that? A. Mr. Sardello talked to the farmer and after Mr. Sardello could not get him to lower his figure and give a release I said to Dr. Silcox, "Gee, you know I would almost be willing to see my commission go rather than have this happen", because I had sold an adjoining farm to Mr. Burkhardt, but I did not tell Dr. Silcox that. I would be a very stupid real estate broker to tell that, but I think Dr. Silcox got some word—

20 The Court: I do not subscribe to your theory, but looking at it from a practical standpoint— Go on.

A. (continued) I think Dr. Silcox heard afterward that I had sold it and that this was a man of considerable means—

Mr. Farry: I object, your Honor please. This is going too far afield.

30 Q. Yes. What happened? A. I said "I tell you what I will do, Doctor, I will go see my man and see if he will do anything about it." Mr. Burkhardt finally consented to pay the additional nineteen hundred dollars necessary with Dr. Silcox's eleven hundred to get the farmer off.

Q. That made three thousand? A. Yes, your Honor. That made the actual purchase price of the farm eighteen thousand nine hundred, instead of seventeen thousand, as he thought he was buying it for, through my authorization from the owner. So—shall I continue?

40 Q. Yes. We want to know how that sentence got in the agreement by which you forewent your

Joseph G. McCue, Plaintiff—Direct.

commission. A. I was quite elated to think he would pay a premium of nineteen hundred dollars above the asking price, and I went to my office and called Dr. Silcox to tell him the good news, and I thought the matter was going to be brought to a close. Much to my surprise he said “McCue, I have been thinking that thing over since I saw you this afternoon. I cannot afford to pay the farmer eleven hundred dollars and your commission; that will only give me about fifteen thousand dollars.” I said “Doctor, I am amazed at such a statement. In the presence of my wife, or where she could hear the conversation, you openly stated you agreed to pay the farmer eleven hundred dollars, and no mention was made that you refused to pay me my commission” in reply to which he stated “I didn’t sign anything to that agreement” and I in turn stated that I was surprised to hear a man in the medical profession resort to such tactics.

10

20

By Mr. Manning:

Q. Did the parties ultimately get together and enter into a contract of sale? A. Yes, they did.

Q. When was that? A. Around March twentieth; I think it was on that date. On the fourteenth I was given a written authorization for ten days and six days afterward I had gotten a purchaser to pay a premium of nineteen hundred dollars in excess of the actual purchase price.

30

Q. Was an agreement actually entered into that day? A. Yes, it was.

Q. A contract of sale? A. Yes, a contract of sale.

Q. For how much? A. Seventeen thousand dollars.

40

Joseph G. McCue, Plaintiff—Direct.

Q. And the parties signed it? A. Yes, they did.

Q. Did that agreement provide for the payment of seventeen thousand dollars down?

The Court: The agreement speaks for itself.

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Mr. Farry: I have a copy of it, if the Court please.

Mr. Manning: That is the defendant's case. I can not put it in now.

The Court: The best evidence is the agreement itself. You can call upon the other side to produce a copy, if you so desire.

20

Q. Thereafter did title pass from Dr. Silcox and his wife to your client? A. Yes, it did.

Mr. Farry: If your Honor please, I think that is not the proper manner of proving the passing of title.

The Court: Technically they should produce the record but there is no question that Burkhardt got the property under the agreement of sale.

By the Court:

30

Q. Is that correct? A. Yes, sir.

Q. Where did title pass? A. In Mr. Foster's office.

Q. Were you there when title passed? A. We met in the morning and Mrs. Silcox had to go some place and I took the deed and acknowledgment to the home of her friend in Keyport, and the Doctor also signed it.

40

Q. Who drew the agreement? A. Applegate, Foster and Reusille, in Red Bank.

Joseph G. McCue, Plaintiff—Cross.

Q. Who gave them the instructions? A. I think the purchaser. I may be mistaken about that. It may be that Mr. Farry as attorney for the seller drew the contract of sale, but I believe it was drawn by Applegate, Foster and Reusille from the new description.

10

Cross examination by Mr. Farry:

Q. You say you think maybe I drew that contract? A. Possibly.

Q. Don't you know as a matter of fact you stayed there and waited around Red Bank and went back to see Bill Foster and got the contract yourself? A. I remember going back to his office for it.

Q. Do you remember you had to wait until the afternoon, it was not completed in the morning? A. Yes, that is right.

20

Q. There was nothing about me drawing that contract. A. It is almost two years, and it is customary—

Q. I am not asking you what is customary. You know as a fact the agreement was drawn by Mr. Foster in his office. A. It was either Mr. Foster or Mr. Reusille.

Q. You know where Mr. Foster's office is in the firm? A. Yes.

30

Q. You remember being in Mr. Foster's office on the day the contract was drawn? A. Yes.

Q. You remember that Dr. and Mrs. Silcox were there? A. Yes.

Q. Who else was there beside Dr. and Mrs. Silcox? A. Mr. Foster and his secretary.

Q. And yourself and myself? A. Yes.

Q. You remember that? A. I do.

Q. And you remember we told Mr. Foster the terms, so it would be incorporated in the agree-

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Joseph G. McCue, Plaintiff—Cross.

ment you were going to get that afternoon? A. You are referring to the deed, aren't you?

Q. I am speaking of the contract dated the twentieth of March. A. Yes.

10 Q. And you remember you sat there and told Mr. Foster about some of the things to go into this agreement? A. I have no recollection of telling him anything about what was going in the agreement.

Q. Do you recollect telling him about how the little clause that you were to get no commission was to be worded? A. No, I don't remember that.

Q. You remember getting the contract from him? A. Yes. I got it to have Dr. and Mrs. Silcox and Mr. Burkhardt sign it.

20 Q. You were a notary public at the time? A. Yes.

Q. And you know what a person must do before they sign before a notary? A. Yes.

Q. And you did it in each case when Dr. and Mrs. Silcox signed? A. Yes.

Q. And also when Mr. Burkhardt signed? A. Yes.

30 Q. And you know that this clause appears in the agreement, which you read to them, that the party of the first part recognizes that Joseph McCue is the broker in this transaction but is not obliged to pay him any commission for effecting this sale? A. I did not read the contract to them, I gave them each the contract to read themselves, which they did.

Q. You did not read it to them or explain it to them? A. Anything they asked I explained.

By the Court:

40 Q. Did you know that was in the contract? A. Yes.

Joseph G. McCue, Plaintiff—Cross.

By Mr. Farry:

Q. Knowing that clause was in the contract you knew also that you were supposed to affix your signature to that paper after you received the signatures of the seller and of the buyer. A. No, I did not.

Q. But even though you knew that this little clause was in there you as a notary public took it around and had all the others sign it. A. I knew the clause was in the contract.

10.

By the Court:

Q. Why didn't you protest against a thing of that kind being put in? A. Your Honor, when that clause was put in, in Mr. Foster's office, Mr. Foster said to me, "What do you think about that?"—

20

By Mr. Farry:

Q. Was Dr. Silcox there at the time? A. I am quite sure he was.

Mr. Farry: I think it should be specifically stated that Dr. Silcox was there at the time to have anything binding upon the Doctor.

30

The Court: Yes, that is true.

By the Court:

Q. When you said to Foster "What do you think about that clause?" was the Doctor present? A. He was.

Q. What did Foster say? A. Mr. Foster said, "What do you think about that, how does that suit you, Joe?" I said, "I guess it will have to be," but after the contract was signed Dr. Silcox

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Joseph G. McCue, Plaintiff—Cross.

—I had to receive or make a telephone call in the adjoining office, Mr. Stevens. Dr. Silcox came in and put his arm around my shoulder and said, “McCue, I don’t like the way this thing is going through, I don’t want to work an injustice to you” and intimated that he was obligated to me to some extent and that he would pay part of it perhaps. I was quite upset at the time and told him very frankly what I thought of his method of doing business and thereupon we parted.

By Mr. Farry:

Q. After that you came back into Mr. Foster’s office where the rest of us were gathered. A. I did.

20 Q. And you said, “All right, draw the agreement up, we will put it through that way.” A. I did not say anything at all.

The Court: Have you a signed copy of that agreement?

Mr. Farry: Yes, I have, your Honor.

Q. I ask you if this is your signature as a witness and also as the notary taking the acknowledgment? A. It is.

30 Q. Turn to the rear and see if that is your signature taking the acknowledgment on this side? A. It is.

Q. And that is the contract that had the little clause in that you were to receive no commission for effecting this sale. A. It is the contract between Dr. Silcox and Mr. Burkhardt effecting the sale of the property.

Mr. Farry: I ask to have this paper marked for identification, your Honor.

40 The Court: It may be so marked.

(Paper marked for identification Id. D-1.)

Joseph G. McCue, Plaintiff—Cross.

Q. You did have an original agreement with the Doctor as far as the sale of seventeen thousand dollars, on which he was to pay you a commission of five per cent? A. Yes.

Q. So according to your own testimony there is no doubt that the sale did not go through in strict accordance with the contract between you and the Doctor? A. So far as I was concerned. 10

Q. I am asking you, from your own testimony as already given there is no doubt that the sale did not go through in strict accordance with the terms set forth in the written agreement between you and the Doctor on March 14, 1935,—that is true, isn't it? A. Yes, it did go through in accordance with the terms of the contract. What was done aside from that was not a part of the contract. The contract was performed as drawn for seventeen thousand, and that is the price I was authorized to sell it at. 20

Q. And what was done afterward was done according to the new agreement between you and the Doctor. A. Voluntarily by the purchaser.

Q. Did the farm sell for seventeen thousand dollars? A. Yes.

Mr. Farry: Have you the original agreement? 30

(Handed to counsel.)

Q. In the original agreement I call your attention to the fact that there was nothing said about deductions or contributions on anyone's part. A. That is correct.

Q. And I am referring to the one dated March fourteenth, is that right? A. That is correct.

Q. According to your testimony you seem to think the Doctor received eighteen thousand nine hundred dollars for his farm. A. Actually. 40

Joseph G. McCue, Plaintiff—Cross.

Q. Why didn't you bring a suit for commission on eighteen thousand nine hundred? A. Because I was not authorized to sell it at that price. It was a voluntary verbal agreement on the part of the purchaser to pay more than was agreed upon.

10 Q. Then the sale price was eighteen thousand nine hundred? A. Not according to the agreement.

Q. But according to your testimony the sale price was eighteen thousand nine hundred, that is, the contract price? A. No, the contract price is in the contract.

20 Q. Do you remember what time of day or evening it was you had this agreement signed at Doctor's home? A. I don't recall. It was either in the afternoon or evening. It is almost two years ago. I know it was in the afternoon Mrs. Silcox signed it.

Q. The authorization was prepared by you and brought to the Doctor's home, was it not? A. The authorization I distinctly recall was signed by Dr. Silcox in the early evening in his office.

Q. It was drawn by you? A. It was.

30 Q. Who requested this Mr. Sardello to go up to Burkhardt's farm? A. Mr. Sardello was a frequent visitor on the farm—

Q. I didn't ask you that, I asked you who requested that Sardello go to the farm? A. I don't know or don't recall.

Q. You said Doctor said something to you about "Joe, I don't want to work this injustice on you" and that he would like to pay part of the commission. A. No, he didn't say that. He said, "I am going to make this thing right."

William E. Foster, for Defendant—Direct.

By the Court:

Q. Is that all he said? A. He said, "I don't like the way this thing is going through, I don't want to work an injustice on you." He had his arm around my shoulder and he said, "I am going to make this thing right" and he intimated he was going to pay me something. 10

The Court: Mr. Foster is here. If you want to put him on I will allow you to interrupt. Mr. Manning have you any other witness you want to put on?

Mr. Manning: Just formal proof of the deed.

The Court: It is stipulated that the property was conveyed pursuant to the written agreement of sale prepared by Mr. Foster to a Mr. Burkhardt. 20

Mr. Farry: I would like to make a motion, if the Court please.

The Court: Put Mr. Foster on. I think I will hear the defense anyway. You reserve your right to move for direction.

WILLIAM E. FOSTER, a witness produced on behalf of the defendant, being duly sworn according to law upon his oath testified as follows: 30

Direct examination by Mr. Farry:

Q. You are a practising attorney in the Borough of Red Bank? A. I am.

Q. I call your attention to the twentieth day of March, 1935. A. Yes.

Q. At your office on that day were present Mr. McCue, Doctor Silcox, Mrs. Silcox, and myself. 40
A. That is correct.

William E. Foster, for Defendant—Direct.

Q. At that time was a certain agreement drawn under your supervision? A. That's right.

Q. I show you an agreement and ask if this is the agreement drawn by you? A. Yes, sir.

10 Q. And that agreement contains the stipulation that McCue is to receive no commissions under the sale? A. I have not seen it since that time.

By the Court:

Q. Look at it. A. (Paper handed witness who examines it.)

Q. In the last paragraph, is that right? A. (Witness examines latter part of paper.)

20 By Mr. Farry:

Q. That is correct? A. That is correct.

Q. There was some discussion prior to the time that was put in? A. Yes, there was.

Q. A discussion between Doctor and Mr. McCue? A. Yes.

Q. And Mrs. Silcox and yourself and myself? A. Yes.

30 Q. Can you tell me what Mr. McCue had to say, if anything, regarding the insertion of that particular statement in that contract? A. (No answer.)

By the Court:

40 Q. How did it come to be put there? A. We sat there, Judge Lawrence, and I had either dictated or indicated to my stenographer what was to go in the whole contract, and after that had been done some discussion took place between Mrs. Silcox and her husband, as I recall, about the fact that Mr. McCue was to receive no com-

William E. Foster, for Defendant—Direct.

mission on this sale. She said she did not want to sell. I said to her "There is no sense of preparing this thing if you are not going to sign it" and she said, "All right, prepare it" but she did not think he was getting enough for it.

The Court: Woman-like.

10

By the Court:

Q. After Mrs. Silcox said that to her husband about the commission— A. Then, as I recall Mr. Farry said "I think if it is going to be a fact that Mr. McCue gets no commission it should be in the contract". I don't recall Dr. Silcox saying anything at the time. He turned to Mr. McCue and said "Isn't that right?" and my recollection is that Mr. McCue shrugged his shoulders.

20

Q. His attention was called to it? A. Yes. Then as I recall Mr. Farry dictated to my stenographer the paragraph just referred to. The stenographer left the room to get to work. The whole thing took place around eleven o'clock in the morning. The question arose when the contract would be signed. It is quite lengthy and I estimated it would take an hour to type. Mrs. Silcox had an engagement for luncheon or bridge and she said she would not stay. It was then arranged that Mr. McCue was to take the contract to the Doctor's office and have him sign, and he took the address of this luncheon or bridge party and he was going to have her sign it there. The other telephone rang for Mr. Farry, or for some reason he left the room. Mr. McCue had previously left the room, I think he went to telephone,—one or the other, there was some question about the telephone and I told them they could go into an extra room which was unoccupied. Dr. and Mrs. Silcox remained in the

30

40

William E. Foster, for Defendant—Cross.

room. Mrs. Silcox turned to me and said "Isn't it usual that a broker gives up his commission in a case like this?" I said that it was most unusual, but if that was their arrangement all right. With that Dr. Silcox stood up and said "Where is Mr. McCue?" and I said "He went out through that door, he is probably telephoning" and he said "I am going out and see McCue and fix this up." As I recall she did not say another word, she acted angry about the whole thing. I left for my lunch and I don't think I ever saw the people in the group again.

10 Q. Did you draw the deed? A. It was drawn in our office.

By Mr. Farry:

20 Q. What was the arrangement so far as Mr. McCue signing? A. I remember he shrugged his shoulders after you suggested it, and I remember some conversation was had by you or Mrs. Silcox as to whether that was not all right, and as I recall he shrugged again and either said "all right" or "O. K."

Q. That is as to the fact that he was to sign it too? A. That is right.

30 *Cross examination by Mr. Manning:*

Q. Whom did you represent at the time? A. Mr. Burkhardt.

Q. And Dr. and Mrs. Silcox were represented by Mr. Farry? A. That is right.

Q. Was there anybody there representing Mr. McCue? A. No, he was there by himself.

40 Q. After Mr. Farry suggested that that clause be put in the contract did he also suggest that McCue sign anything? A. I could not tell you

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when it was said, but there was something said about something being signed by Mr. McCue.

Q. Did Mr. McCue sign it in your presence? A. No, he did not.

DR. JAMES E. D. SILCOX, the defendant, appearing in his own behalf, being duly sworn according to law, upon his oath testified as follows: 10

Direct examination by Mr. Farry:

Q. Doctor, you are the defendant in this case? A. Yes.

Q. You reside in Keyport? A. Yes, sir.

Q. Now, Doctor, calling your attention to the original authorization wherein you authorized Mr. McCue to sell your farm, will you tell the Court and jury just how it was that you came to sign that authorization on March fourteenth? A. How I came to sign it? 20

Q. Yes. A. I gave him authorization to sell the farm.

Q. Did Mr. McCue come to you or did you go to him in reference to selling the farm? A. He came to me.

Q. What did he say when he came? A. If I remember right he said "I have a buyer for your farm." 30

Q. Did he tell you how much this purchaser would pay? A. Seventeen thousand dollars.

Q. Is that the first figure he told you, seventeen thousand? A. (No answer.)

Q. Mr. McCue came to you and said he had a purchaser for your farm. A. Yes.

Q. Did he tell you how much the buyer would pay you for your farm? A. Seventeen thousand is on the agreement. 40

Dr. James E. D. Silcox, Defendant—Direct.

10 Q. Did he say anything to you about a price before you arrived at seventeen thousand dollars? A. He sent me a telegram in Florida offering me ten thousand dollars for the farm, first start off, and I told him I thought it was a joke to offer ten thousand dollars for a twelve acre farm, and I think he sent me another telegram a few days after, offering me twelve thousand dollars, and I sent a telegram back I would not think of taking twelve thousand for the farm, and when I came home he offered me fifteen thousand dollars. He came to see me and I told him I wanted twenty thousand dollars for the farm, and then he came back and offered me seventeen thousand dollars cash for the farm and I signed the agreement.

20 Q. You were then to pay him five per cent on the seventeen thousand dollar sale. A. That's right.

Q. Where was this agreement or the authorization signed? A. In the front waiting room in my office.

Q. Prior to the signing of this agreement or the authorization, was there any conversation concerning the farm itself? A. (No answer.)

By the Court:

30 Q. What about the tenant? A. I told him I had a tenant on the farm who leased the farm and his lease did not run out until next July.

By Mr. Farry:

40 Q. What did he say concerning the tenant? A. I said, "I suppose he will have to be paid to get him off" and he said "Don't bother about that, I will take care of that."

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Q. Was there anyone present when this conversation took place? A. My wife and daughter were in the same room, in the library.

Q. After you told him about the tenant did he still want you to sign the agreement authorizing him to sell the farm? A. Yes.

Q. And you did sign it? A. Yes.

10

Q. But before you signed it you explained to him, I understand, about this tenant and the necessary release? A. Yes.

Q. Then you signed the authorization. A. Then I signed the authorization.

Q. What occurred next? A. He called me up on the 'phone and said—

Q. About how long was that after you signed the authorization? A. A few days afterward; I don't remember the date.

20

Q. What was the conversation? A. He called me up on the 'phone and told me something about me paying nineteen hundred dollars, the man wanted three thousand dollars to get off the farm, and I was to pay nineteen hundred dollars. I said "I would not think of such a thing, send me my papers back and the deal is off." Then he called me again and told me he would meet me at the farm the next afternoon between three and four. I met him up there and he says "I will tell you. I have a sale for two other farms and if I cannot make a deal on your farm I will lose the sale of the other two." He said "I will make a proposition to you. I will sacrifice my commission if you will pay the eleven hundred dollars to the tenant to get off the farm and Burkhardt will make up the difference between eleven hundred dollars and three thousand." I think the agreement was drawn up to the effect.

30

40

Dr. James E. D. Silcox, Defendant—Direct.

By the Court:

Q. You agreed to do that? A. Yes, I was satisfied to do that.

By Mr. Farry:

10 Q. Was there anything about your paying him a commission? A. He told me he would sacrifice his commission.

Q. In accordance with, or with that agreement in mind, what did you do next? A. (No answer.)

Q. Did you have the agreement drawn? A. We had the agreement drawn at Mr. Foster's office.

Q. Who requested that you meet at Mr. Foster's office? A. Mr. McCue.

20 Q. And you met down there? A. Yes.

Q. And the agreement between you and Mr. Burkhardt was drawn, is that correct? A. Yes.

Q. I show you this agreement and ask if that is the one you refer to? A. It is.

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

Q. And this is Mrs. Silcox's signature? A. Yes.

30 The Court: There is no doubt about that; you need not waste time.

Q. At the time you were at Mr. Foster's office did this idea of Mr. McCue receiving no commission again come up? A. Yes.

Q. What was said in Mr. Foster's office? A. The same as the agreement reads.

Q. Not the agreement, but what was said? A. The only thing he said was he would sacrifice his commission to make the sale.

40

Dr. James E. D. Silcox, Defendant—Direct.

By the Court:

Q. And it was put in the agreement? A. Yes, it was put in the agreement.

Q. Did you say at that time you were sorry and would fix it up with him? A. No, I did not say I would fix anything up. I told him that was his own proposition as to sacrificing his commission. 10

By Mr. Farry:

Q. As a result of your paying eleven hundred dollars to the tenant, how much less did you receive than you would have gotten under the first agreement? A. I got fifteen thousand nine hundred, but the agreement was I was to get seventeen thousand cash.

Q. Now, Doctor, it was discussed at the office of Mr. Foster that this notation or statement concerning no commissions was to go in the agreement, is that right? A. Yes. 20

Q. What was Mr. McCue to do concerning that agreement? A. He was to sacrifice his commission.

By the Court:

Q. He brought it to you later and asked you to sign it? A. Yes. 30

Q. And then he got your wife's signature? A. Yes.

Q. And then it went back to Mr. Foster's office? A. I assume so.

Q. And later on you signed the deed? A. I did.

Q. And you got fifteen thousand nine hundred? A. Yes, deducting the eleven hundred.

Q. You deducted the eleven hundred from the seventeen thousand. A. Yes, because— 40

Dr. James E. D. Silcox, Defendant—Cross.

By Mr. Farry:

Q. What was said by Mr. McCue about signing the contract? A. He was to get the contract and bring it to Mrs. Silcox and myself, and he was to put his signature on it, too.

10 Q. Then you did convey the property.

The Court: Yes, don't waste any more time on it.

Cross examination by Mr. Manning:

Q. What was the conversation you and Mr. McCue had when this matter of commissions came up? What did he actually say to you? A. When was this?

20 Q. When the matter of commissions first came up either by you or by Mr. McCue. A. (No answer.)

By the Court:

Q. Before you signed the agreement for fifteen thousand nine hundred or seventeen thousand less the eleven hundred. A. Yes.

By Mr. Manning:

30 Q. What was said between you when this matter of tenancy came up? A. Him to get the tenant off. I told him I had a tenant on the farm that had a lease and had to be taken care of, and Mr. McCue said to me "You won't have to bother about that, I will take care of that."

Q. You mean Mr. McCue would take care of your tenant? A. I told him that in my office and he said "Don't bother about that, I will take care of that."

40

Dr. James E. D. Silcox, Defendant—Cross.

Q. This man was your tenant, and you mean to say that Mr. McCue offered to take care of your tenant? A. Yes, as far as getting off the farm.

Q. Doctor, you told Mr. McCue you could get rid of that tenant for three hundred dollars, didn't you? A. No, I didn't know what he wanted. Mr. McCue said he would take care of it.

10

Q. Did you expect Mr. McCue to pay that man to move? A. That was his proposition, that he would sacrifice his commission to get the property because of those two other farms.

Q. Where did you hear about those other two farms? A. Mr. McCue told me "If I don't get your farm I will lose the commission on those other two farms." My wife was setting there with the door open and heard him.

20

Q. As a matter of fact didn't Mr. McCue say to you when the matter of tenancy came up, "I would rather lose my commission than see this deal fall through"? A. No, he didn't say anything about "rather." He said "I will sacrifice my commission to put this deal through."

Q. Didn't you yourself go down to see this tenant and have a conversation with him? A. Yes, with Mr. McCue.

Q. No, didn't you offer the tenant eleven hundred dollars? A. I never offered him a penny.

30

Q. When did the matter of three thousand dollars come up that the tenant wanted? A. The three thousand dollars?

Q. Yes. How was that arrived at? A. I don't know. I know I paid eleven hundred to the farmer to help get him off there.

Q. Did you also know that Mr. Burkhardt paid nineteen hundred? A. Yes. And I also know Mr. Burkhardt wanted me to pay that nineteen hundred and I told Mr. McCue to send my papers back, the deal was off.

40

Dr. James E. D. Silcox, Defendant—Cross.

Q. But the deal finally went through. A. Yes, the deal finally went through when he offered to sacrifice his commission and I paid eleven hundred dollars to make up the three thousand for the tenant.

10 Q. Do you deny that in Mr. Stevens' office you had a conversation with Mr. McCue to the effect that you felt sorry about this loss of commissions and would make it up to him? A. No, I never feel sorry for a man that makes an offer himself.

Q. You did not feel sorry for him when you knew he was losing over eight hundred dollars on the deal? A. That was his own proposition about his commission and I accepted it.

20 Q. That clause was put in at your suggestion and through your own lawyer. A. Through Mr. McCue suggesting it.

Q. Please answer my question. Was not that clause put in at your own suggestion, through your lawyer? A. Sure, it was.

Q. All right, say so. A. Yes, it was at Mr. McCue's suggestion.

By the Court:

30 Q. Did Mr. McCue make any protest, or say "I will not stand for it" or any similar expression? A. No. It was his own suggestion to sacrifice his commission and I was satisfied with it.

Mr. Manning: I should think you would be.

The Court: I would not comment.

By Mr. Manning:

40 Q. Didn't Mr. McCue leave the room when that clause was put in the contract? A. Yes.

Dr. James E. D. Silcox, Defendant—Cross.

Q. Don't you recall going into the adjoining room and talking to Mr. McCue? A. Yes, when he got on his high horse about sacrificing that eight hundred and fifty dollars I told him he was a mighty poor business man according to business dealings I had with people before.

Q. What did you think of your own business ability? A. I thought it was pretty good. 10

By the Court:

Q. An agreement is an agreement, with you. A. That's the idea, your Honor. That's fine.

By Mr. Manning:

Q. When Mr. McCue came to your house and procured your signature to that agreement, did you then ask him to sign it? A. I thought he should sign it. 20

Q. Did you ask him to sign it, you are such a good business man? A. I didn't think it was my place to ask him. It was his business to sign it.

Q. Why didn't you insist upon it? A. I didn't know enough about law trouble.

Q. But you knew enough to have that clause put in there to protect yourself so you could get out of paying commissions? A. That was not my proposition, having that clause in there. It was Mr. McCue's own proposition that clause should go in. It would not be any agreement; I wanted my papers back. There would not have been any sale of the farm if that clause had not been in there. 30

Q. You wanted to get rid of the tenant at the least possible cost to yourself, you did not want to pay any commissions, and yet you wanted the sale to go through. A. I think I did pay a commission when I paid eleven hundred dollars. 40

Dr. James E. D. Silcox, Defendant—Cross.

Q. How did you expect to get the tenant out of the way? A. That was Mr. McCue's proposition.

Q. Wasn't the man your tenant? A. Sure.

Q. When did you first tell Mr. McCue about the tenant being on there? A. He knew it before he undertook to buy the farm.

10 Q. You did not answer my question. When did you tell Mr. McCue you had a tenant there and the problem of taking care of him would have to be taken care of? A. When I came back from Florida, in my library, in the presence of my wife and daughter I told him about this tenant.

Q. As a matter of fact you did not tell him about the tenant until after he procured a purchaser for you. A. He must have secured a purchaser when he sent me those telegrams from Florida.

20 Q. Please answer my question. It is true, is it not, that you did not tell him about the tenant until after he had secured a purchaser for your property? A. What was the good of telling him that unless he had a purchaser?

The Court: Listen to the question and answer it yes or no.

30 Q. Doctor Silcox, you did not tell Mr. McCue about the tenant who had a lease on this property until after he had secured a purchaser? A. No.

By the Court:

Q. As a matter of fact you did not know he had a purchaser until he came to see you, is that so? A. I told him at the time he came to my office, when he said he had a purchaser for the farm, it was then I told him I had a tenant on the farm that had a lease.

40

Dr. James E. D. Silcox, Defendant—Cross.

By Mr. Manning:

Q. At the time the authorization was signed by you, you read it over carefully, didn't you? In other words, the contract of agency. A. Yes.

Q. You looked it over carefully? A. Yes.

Q. You read it? A. I read it.

Q. You read the terms and conditions of it? A. Yes. 10

Q. Did you at that time suggest that the matter of possession and the tenant problem should be inserted in there? A. I don't recall whether it was before or after that.

Q. You knew at the time you signed this authorization of this tenant? A. Yes.

Q. Did you at that time make any mention of getting rid of that tenant and getting possession? A. I think it was before I signed it. 20

Q. If it was before you signed it why didn't you suggest that the matter of getting rid of the tenant and securing possession be inserted in that authorization? A. I don't understand your question.

By the Court:

Q. Why didn't you have it put in "seventeen thousand cash, subject to the right of the tenant, or seventeen thousand cash with a deduction for the tenant's rights"? A. I don't quite understand. 30

Q. He agreed to get you seventeen thousand cash, tenant or no tenant? A. Yes.

By Mr. Manning:

Q. Didn't Mr. McCue get a purchaser for seventeen thousand? A. Yes. 40

Margaret Silcox, for Defendant—Direct.

Re-direct examination by Mr. Farry:

Q. When you say Mr. McCue got you a purchaser for seventeen thousand dollars, is that what you mean? A. That is what the contract called for.

10. By the Court:

Q. It was seventeen thousand cash less eleven hundred dollars? A. Yes, sir. I got fifteen thousand nine hundred. I did not get seventeen thousand for the farm.

20. MARGARET SILCOX, a witness produced on behalf of the defendant, being duly sworn according to law, upon her oath testified as follows:

Direct examination by Mr. Farry:

Q. Mrs. Silcox, you are the daughter-in-law of Dr. Silcox? A. I am.

Q. Where do you live? A. With Dr. Silcox at Keyport.

Q. Did you live with him in March of 1935? A. Yes.

30. Q. Some time around that time do you recall Mr. McCue coming to the Doctor's home, around March of 1935? A. Yes.

Q. Do you recall a conversation between your father-in-law and Mr. McCue? A. I do.

Q. Was anyone there beside you and the Doctor? A. Mrs. Silcox.

Q. That is the Doctor's wife? A. Yes.

Q. You say there was a conversation between Mr. McCue and the Doctor? A. Yes.

40. Q. Can you tell me what that conversation was? A. It was at night. Mr. McCue had been

Margaret Silcox, for Defendant—Cross.

in father's office, discussing terms, I presume, and they came out, and Dr. Silcox introduced Mr. McCue to us, and he said to him—Well, he reminded him that there was a tenant on the farm, and he said "I imagine we will have to get him off," and Mr. McCue said "Doctor, you do not need to worry about that, we will take care of that" or words to that effect. 10

Q. Was there any other conversation that night, if you recall? A. Not that I recall.

Cross examination by Mr. Manning:

Q. You work in Mr. Beekman's office in Red Bank? A. Yes.

Q. He is a lawyer? A. (No answer.)

Mr. Farry: What is the insinuation? 20

The Court: Where the lady is employed has nothing to do with the case. She is not employed by you or by Mr. Farry.

Mr. Manning: The only reason I made that remark was because she said she presumed they were talking over the terms of the contract.

The Court: Yes, that is lawyer's language.

Q. All you heard Mr. McCue say was "You don't need to worry about that, we will take care of it". A No, they discussed that there was a tenant on the farm and they discussed whether the prospective purchaser would want him to remain or to get off. 30

Q. But you don't know what Mr. McCue and Dr. Silcox said in the library before you heard that? A. No, they were in the next room.

The Court: That is obvious, unless the walls were sounding boards. 40

Louise Silcox, for Defendant—Direct.

Q. Did Dr. Silcox make any response to that remark by Mr. McCue? A. No, they just let it go at that.

By the Court:

10 Q. Then Mr. McCue left the house? A. Yes.

By Mr. Manning:

Q. Have you given us now all the conversation you heard? A. That is all I can remember.

20 LOUISE SILCOX, a witness produced on behalf of the defendant, being duly sworn according to law, upon her oath testified as follows:

Direct examination by Mr. Farry:

Q. You are the wife of Dr. Silcox, the defendant in this suit? A. Yes.

Q. I call your attention to a date around March 14, 1935. Can you tell me whether or not Mr. McCue was at your home some time around that date? A. He was there one evening.

30 Q. Was anyone there beside yourself on this particular occasion? A. My daughter-in-law.

Q. That is the girl who was just on the stand? A. Yes.

Q. Did you hear any conversation between Mr. McCue and the Doctor in reference to the farm? A. The only thing that was said was that the Doctor said something about a tenant on the farm and Mr. McCue said "Don't worry, I will take care of that."

40 Q. That is the only conversation you heard? A. Yes.

Louise Silcox, for Defendant—Cross.

Q. You were present down in Mr. Foster's office, Mrs. Silcox? A. I was.

Q. You were there when discussions went on pro and con concerning the agreement of sale? A. I was.

Q. Were you there when it was discussed as to the stipulation in the agreement concerning the fact that Mr. McCue was to receive no commission? A. Yes. 10

Q. Can you tell me what was said about the fact that was to go in the agreement? A. I only know that was the agreement and the lawyer, Mr. Foster, read it to Mr. McCue and said "Is that all right?" and Mr. McCue did not look very well pleased, but it was all right with him, because he did not object.

Q. It was read to Mr. McCue or called to his attention? A. It was read to him. 20

Q. Was anything said concerning who was to take the agreement around for signatures? A. Mr. McCue.

Q. Did he bring it to you for your signature? A. He did.

Q. Was anything said about Mr. McCue signing the agreement? A. I expected him to but I don't recall any conversation about it. 30

Cross examination by Mr. Manning:

Q. Do you recall saying to Mr. Foster, "Isn't it usual in a matter of this kind not to pay a broker's commission?" and Mr. Foster saying "It is most unusual"? A. Yes, I remember that.

Q. You are certain about this conversation on March fourteenth? A. Yes.

Q. And Mr. McCue said to you or to the Doctor, "Don't bother about it," meaning the tenant, 40

Berto Sardello, for Plaintiff—Direct.

“I will take care of it”? A. Yes. He said it to Doctor.

Q. Do you know whether Dr. Silcox made any offer to the tenant himself? A. No, I don't know about that.

10 Q. When Mr. McCue brought the agreement around to you did you suggest that he sign it then? A. No. I was at a bridge party, and I am sorry to say I just signed it.

Q. You mean it was done in a hurry? A. Yes, it was done in a hurry I am sorry to say.

Q. This was quite a heavy matter, involving some seventeen thousand dollars. A. Yes, but I thought the men would take care of that.

By the Court:

20 Q. You left it to the men, but you told your husband something about it, didn't you? A. Yes, Judge Lawrence, I did.

BERTO SARDELLO, a witness produced on behalf of the plaintiff, being duly sworn according to law, upon his oath testified as follows:

30 *Direct examination by Mr. Manning:*

Q. Mr. Sardello, where do you live? A. Cliff-wood, New Jersey.

Q. Do I understand that you from time to time act as unofficial interpreter for the Italian people living around there? A. Yes, sir.

Q. The ones that do not understand English very well? A. Yes, sir.

40 Q. Do you know a farmer by the name of Cosimo Bernardo? A. I know him very well.

Berto Sardello, for Plaintiff—Direct.

Q. Directing your attention to March of 1935, do you recall acting as interpreter for Dr. Silcox where a matter was discussed concerning this farmer and getting him off the land so that the Doctor could sell the property? A. I do not recall as interpreter, but I recall that some time in the month of March Cosimo Bernardo at noontime came over to my house. 10

By the Court:

Q. As a result of what he said where did you go? A. To his farm.

Q. When you got there whom did you find? A. Dr. Silcox and Joseph McCue.

Q. Go on from there. A. Cosimo Bernardo told me Dr. Silcox is going to put him out. 20

By Mr. Farry:

Q. Was this in the presence of Dr. Silcox?

The Court: Go on, don't waste time.

A. He said he sold the farm and I got to get out, and talk to him and see what I must do. I talked to Dr. Silcox and he said he had sold the farm but he would make it up to the tenant, and I explained it to Bernardo and he said, "I want three thousand dollars. If they don't pay me three thousand dollars I won't get out." I talked to Dr. Silcox and I said he wanted three thousand dollars cash and not no check, and he wants to find another farm to rent in order to get out. Dr. Silcox said, "My God, I cannot pay him three thousand dollars. I am not getting a whole lot myself for the farm but I will give him about fifteen hundred dollars. I told Mr. Bernardo, "The Doctor will give you fifteen hundred dollars" and he said, 30
40

Berto Sardello, for Plaintiff—Direct.

10 “Nothing doing; I want three thousand dollars and I want cash, I don’t want no check.” So finally Dr. Silcox said, “Talk to this gentleman and tell him I sold the farm and he has got to go,” and Mr. McCue said, “The farm is sold, see if you can talk it into him.” Meantime they broke away from me and talked amongst themselves and I kept on talking to Bernardo. I said, “Fifteen hundred for you is a lot of money,” and he said, “I would not accept less than three thousand.” I could not convince him. Finally Mr. McCue and the Doctor came back.

By Mr. Manning:

20 Q. Who? A. Dr. Silcox and Joe McCue came back and started to talk again, and Mr. Bernardo insisted that Mr. McCue would find him another farm and Mr. McCue said, “I can give you plenty farms if you want to rent it,” and Dr. Silcox agreed to give the three thousand dollars, and Mr. McCue said, “I have got a farm right nearby that I will show you right now if you want to see it.” Sure enough, Mr. Bernardo consent to it and Dr. Silcox and Joe McCue and I and Mr. Bernardo went down to Colt’s Neck near Eatontown.

30 There was a farm on the right hand side and Mr. Bernardo liked it, it was a very nice farm, and he said, “Please find out right away, if I got to get out of the Doctor’s farm, see if you can lease this farm to me.” McCue promised to do everything he could. Dr. Silcox said, “I have a thousand dollars here now; is he going to accept this agreement or not? A thousand dollars now and two thousand dollars in ten days.” Dr. Silcox pulled the agreement out of his pocket and I read it to Mr. Bernardo in Italian. He said he wanted

40 the three thousand dollars right away, and I said,

Berto Sardello, for Plaintiff—Cross.

“If you sign an agreement the Doctor is liable for the agreement,” but Mr. Bernardo said, “I will take the one thousand dollars now and the two thousand dollars later,” and the agreement was signed and the Doctor took it with him. In the meantime, while this conversation was going on I heard Dr. Silcox say to Mr. McCue, “I cannot pay three thousand dollars, you know I got to pay you commission, I cannot pay no three thousand dollars.” I heard him a number of times. 10

Cross examination by Mr. Farry:

Q. When did this take place? A. At noontime in the early part of spring, in March or something like that. I don't recall the date. It was in the afternoon. 20

Q. Around the first or the middle, or the last of March? A. I think it was the early part of the month of March but I do not recall the date. It was a splendid day, like today, with the sun shining.

Q. Can you tell me whether it was before or after March fifteenth? A. I would not want to say.

Q. What year was it in? A. 1935.

Q. As a result of all this bickering up there Mr. McCue rented another farm to Bernardo? A. I don't know; they could not do no business on that particular farm. 30

By the Court:

Q. Where did Mr. Bernardo go? A. He got a farm in Vandenberg known as the Coley farm.

By Mr. Farry:

Q. Did he tell you who rented it to him? A. No. 40

Berto Sardello, for Plaintiff—Cross.

Q. You saw this agreement the Doctor pulled out of his pocket? A. Yes.

Q. What was in it? A. It was an agreement to move within thirty days.

10 Q. Who was the agreement between? A. Between Dr. Silcox and Bernardo. One thousand dollars was to be paid right away and the two thousand dollars within ten days. I don't recall the rest of it but I remember those very well.

Q. That was on the same day? A. I think I witnessed that agreement. I think I signed my name to it.

Q. That was on the same day? A. The same day, I think.

20 Q. Did Doctor have the cash with him on that day? A. Yes, he gave him the one thousand dollars cash right there.

Q. And Bernardo took it. A. He took it, all right.

Q. And the agreement stated— A. The agreement stated "in ten days I will give you two thousand more."

Q. You did not know where that two thousand dollars was coming from? A. No.

30 Q. Did you hear anything about the Doctor paying eleven hundred dollars and Mr. Burkhardt nineteen hundred? A. No.

Q. All you know was that Bernardo was to be paid three thousand dollars to move. A. Yes.

Q. And you saw a thousand dollars paid? A. Yes.

Q. And that three thousand, or that one thousand and two thousand to be given Bernardo was in accordance with the testimony concerning the agreement between the tenant and the Doctor.

40 Mr. Manning: Object. How does he know.

A. I don't know.

Joseph G. McCue, Recalled—Direct—Cross.

JOSEPH MCCUE, recalled.

Direct examination by Mr. Manning:

Q. It has been testified by Dr. Silcox and his wife and daughter-in-law, I believe, that at the time you received the authorization, March 14, 1936, or on or about that time, on one occasion you were at Dr. Silcox home and going out of the library some mention was made of a tenant on the property and you said "Don't worry about that, I will take care of that" or words to that effect. A. I never did. I would not take such a responsibility with a tenant I knew nothing about, and somebody else's tenant, besides. 10

Cross examination by Mr. Farry:

Q. You heard Mr. Sardello testify? A. I did. 20

Q. That this agreement that was entered into was the result of bickering between you and the Doctor as to having this tenant removed. A. No, I would not say so on the strength of that question.

Q. The three thousand dollars paid to the tenant for his removal and release, that you spoke about, was to be made up eleven hundred from the Doctor and nineteen hundred from Burkhardt. A. That is correct. 30

Q. So that conversation Mr. Sardello spoke about just now naturally flowed from the agreement you had about removing the tenant? A. No.

Q. The agreement Sardello speaks of was taken up there some time after the date of March 14, 1935. A. It was.

The Court: Is that the case?

Mr. Manning: Yes, your Honor. 40

Motion for Non-suit.

The Court: You have a motion, Mr. Farry?

Mr. Manning: Should this be done in the presence of the jury, your Honor?

The Court: Oh, I think so.

10 Mr. Farry: I would like to move for a non-suit as far as the plaintiff is concerned.

The Court: Direction of verdict is what you are asking for, I assume.

20 Mr. Farry: That's right. First on the ground that the plaintiff has testified that the agreement he had was for the sale of the property at seventeen thousand dollars, upon which a commission of five per cent was to be paid. The plaintiff's own testimony shows that the sale price was seven-
20 teen thousand dollars, with another agreement afterwards made, and I think there is no doubt about the fact that an agreement was later entered into at Mr. Foster's office and at the farm, so the agreement they are suing on is not the agreement upon which the farm was sold, that it was a second agreement, doing away entirely with the first agreement. Further than that, there is no denial of the fraud on the part of Mr. McCue. We have certainly shown the elements of fraud, and the fact that suit was brought is the last article we had to prove of the five elements of legal fraud, and I think under those circumstances there should be a direction of verdict.

30 The Court: What have you to say, Mr. Manning?

40 Mr. Manning: Your Honor please, I oppose the motion, particularly the fact that Mr. Farry says they have shown fraud.

Dr. James E. D. Silcox, Recalled—Direct.

Where that is I fail to see. Mr. McCue was never represented by an attorney. The agreement was drawn up but Mr. McCue did not sign it. He has made no waiver of commissions.

The Court: You referred in your opening to a notice of revocation, where is it? 10

Mr. Farry: May I reopen to put that in?

The Court: I am going to allow it.

Mr. Manning: I object to this matter of giving notice of revocation for two reasons: first, under the Statute of Frauds relating to broker's commission the matter of revocation is only in the event of oral agreement, where the broker notifies the seller of his intention to ask for a commission.

The Court: You are right about that, but I think it is material whether or not it was revoked because the terms of the agreement were that it was to be an option for ten days and for so much longer period as there was no revocation. In the opening I know there was reference to revocation of the agreement. Go ahead and prove it. 20

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DR. JAMES E. D. SILCOX, recalled.

Direct examination by Mr. Farry:

Q. At the time the deed was to be delivered by you for the premises to Mr. Burkhardt at Mr. Reusille's office—you remember then? A. Yes.

Q. Was this commission matter again brought up by Mr. McCue? A. (No answer.)

Q. Did you cause a notice of any kind to be served upon Mr. McCue in reference to any agreement you might have had with him? A. Yes. 40

Dr. James E. D. Silcox, Recalled—Direct.

Q. Who served the notice personally on him?

By the Court:

Q. If you know. A. His lawyer, I think.

10 Mr. Farry: Have you the notice, Mr. Manning? I call for it.

By Mr. Farry:

Q. You remember while at Mr. Reusille's office that notice was dictated down there? A. Yes.

Q. And do you know who gave that to Mr. McCue for you? A. (No answer.)

By the Court:

20 Q. Did you sign it? A. Yes, I signed it. I think it was Mr. Reusille.

By Mr. Farry:

Q. This was served upon Mr. McCue? A. Yes.

By the Court:

Q. In your presence? A. In my presence.

By Mr. Farry:

30 Q. Who else was there at the time? A. Mr. Burrowes, the president of the Keyport National Bank, and his wife.

By the Court:

Q. Was that before the deed was delivered to Burkhardt? A. Yes.

Mr. Farry: Yes.

40 Q. How long before? A. The same day.

Motion for Direction of Verdict.

Mr. Farry: I offer this revocation in evidence and ask to have it marked.

The Court: It may be marked.

(Paper marked in evidence Exhibit D-2.)

Mr. Farry: May I read it to the jury?

The Court: Yes.

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(Paper read to jury: "I hereby repudiate" etc.)

The Court: Is it conceded that was the day the deed was delivered?

Mr. Farry: That is correct. It was given about ten minutes before the signing of the deed.

The Court: And after the agreement of sale.

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Mr. Farry: Yes, some time after. I also ask for direction of verdict on the ground that notice was given by the defendant prior to the actual time of the signing and delivery of the deed. The defendant realized that the fraud was there at that time and for that reason repudiated the agreement.

The Court: I will hear you, Mr. Manning.

Mr. Manning: As I said in the opening, it is fortunate that Mr. McCue had a written authorization but as the matter has developed that is the only thing he has to protect himself. In addition, he did not sign that agreement which these parties expected him to and if they expected to defend this suit and expected to obtain money on their alleged counterclaim they should have had Mr. McCue sign it, and also a similar agreement should have been drawn to waive that authorization.

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Motion for Direction of Verdict.

(Citation, Steinberg vs. Miller, 96 L. 206.)
The most that can be said of this tenant situation is something that occurred after the parties had gotten together. The seventeen thousand dollars was agreed to be paid and in addition Mr. McCue has stated on the stand he was fortunate in getting nineteen hundred dollars from Mr. Burkhardt. The terms of the original agreement, so far as the seventeen thousand dollars are concerned and so far as the commissions are concerned, remains the same. Mr. McCue cannot be called upon to take the loss Silcox had suffered.

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The Court: Silcox said to McCue, "I want seventeen thousand dollars cash" and until he got seventeen thousand dollars no commission should have been paid. What Silcox undertook to do was to pay McCue a commission if he got him seventeen thousand in cash. It is perfectly obvious on its face. Your theory is that under that contract with McCue if McCue had gotten seventeen thousand dollars from Burkhardt, when he proceeded to pay off the mortgage on the farm or paid three thousand dollars to the tenant to get him off, that would have been seventeen thousand dollars cash to Silcox.

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Mr. Manning: That is right.

The Court: I don't think so. Silcox asked for seventeen thousand dollars cash and then he would have paid him five per cent commission. The statute provides that there must be an agreement in writing. Is there anything more to be said, gentlemen?

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Court's Charge to the Jury.

Mr. Manning: Just one other thing, before there can be a change in the conditions the broker and principal must stipulate.

The Court: The broker sat by and saw that clause put in the agreement and made no protest, simply shrugged his shoulders. He then took it around and had the parties sign. In connection with the original agreement it bears out what Dr. Silcox has said here under oath, that McCue in order to get the sale through waived his commissions. I think the Doctor has proven here that McCue waived his commissions, doubtless because of the additional land sold to Mr. Burkhardt. In accordance with a recognized rule of law which leaves it to the trial judge under such circumstances, I think there should be a granting of the motion for direction.

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Court's Charge to the Jury.

LAWRENCE, J.: Members of the Jury, it appears in this case that during the month of March, 1934 or 1935,—which was it?

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Mr. Farry: 1935.

The Court: (Continuing) The plaintiff, a real estate broker, approached the defendant, the owner of a farm, with the statement that he had a purchaser for the farm. As a result of conversations between them it does appear that on an indicated date the defendant, Silcox, signed a broker's commission agreement. That agreement stipulated that if the plaintiff produced a pur-

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Court's Charge to the Jury.

chaser for the defendant's farm at seventeen thousand dollars cash, he, the defendant, would pay the plaintiff a commission of five per cent on that sum.

10 After the agreement was signed it developed there was a tenant in possession and that the prospective purchaser evidently required immediate possession. To enable the defendant to make the conveyance it was necessary, therefore, to negotiate with the tenant to remove. There is evidence in the case which is undisputed that ultimately the prospective buyer advanced nineteen hundred dollars and the defendant eleven hundred, making a total of three thousand dollars, as a consideration for the removal of the tenant. That agreement was carried out, and the defendant did
20 advance the eleven hundred dollars, and the purchaser, Mr. Burkhardt, nineteen hundred.

Before that was done there is evidence in the case that the defendant objected to paying the commission to the plaintiff if he (the defendant) was required to pay eleven hundred dollars to obtain the removal of the tenant. The controversy here involves, therefore, the question as to whether the evidence does disclose that the plaintiff waived
30 his commission in order to have the sale go through, so that he might likewise be enabled to make a sale to Burkhardt of other property for which negotiations were under way at the time.

It appears that ultimately the parties went to the office of Mr. Foster (a lawyer) and there an agreement was made between Burkhardt and the defendant whereby the latter would convey to Burkhardt the farm for seventeen thousand dollars. The terms of that agreement control the parties. It would not necessarily control the
40 plaintiff, McCue, but for the fact that it does pro-

Court's Charge to the Jury.

vide evidence which militates against McCue and indicates corroboration of the defendant that McCue did waive his commission, because in that written agreement there is a declaration that the sale is made free from any real estate commission to be paid McCue. He sat there in the lawyer's office, that paragraph was placed in the agreement at the suggestion of counsel for the defendant; if that was not the arrangement McCue should have made a protest at that time. Evidently he did not, with the result that the defendant received under the sale price of seventeen thousand dollars, the defendant received fifteen thousand nine hundred. He did not receive "seventeen thousand dollars cash", and I construe the original agent's commission agreement to mean that he (the agent) was to produce a purchaser who would pay the defendant seventeen thousand dollars in cash. It so develops that he did not do that, although the defendant voluntarily did contribute to the fund to obtain the vacation of the property by the tenant eleven hundred dollars.

Now all through this transaction I do not see any fraud at all as a matter of law. It turns entirely upon what the proofs show the agreements really were. There is no fraud shown on the part of McCue, it is just a controversy between the parties as to what agreement they had, and I hold that the obvious weight of the written evidence, in connection with McCue's own statement, clearly shows he is not entitled to recover a commission, because when you come to analyze his testimony he does not deny what the defendant claims, that in order to get the sale through, he, McCue, waived his commission. Evidence of it appears in the written contract for sale between

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Plaintiff's Exceptions.

the defendant and his wife and Burkhardt. Then it is followed by a notice admittedly given by the defendant, or in his behalf, and signed by him, to McCue, repudiating the original contract. It is perfectly obvious to me from the standpoint of law that the weight of the evidence is against Mr. McCue's right to recover.

10 On the other hand, I think the defendant has no right to recover on his counterclaim against McCue, as a matter of law, under the evidence. While he does say that he should have received seventeen thousand dollars in cash, net, under the agreement with McCue, nevertheless it does appear that he voluntarily agreed to contribute out of the proceeds of the sale eleven hundred dollars in order to procure the vacation of the property by the tenant. I hold as a matter of law 20 that is a voluntary act on the part of the defendant, and the parties should be left exactly where they placed themselves.

The result is that I incline to the view that the motion for direction, as a matter of law, should prevail, and likewise a verdict of no cause of action on the defendant's counterclaim. The jury will return a verdict of no cause of action as against the defendant and no cause of action 30 on the defendant's counterclaim.

You may have an exception, gentlemen, both of you.

 PLAINTIFF'S EXCEPTIONS.

Mr. Manning: On the part of the plaintiff, Joseph G. McCue and the Joseph G. McCue Agency, I respectfully except to the Court direction of verdict in favor of the defendant. Under 40

Plaintiff's Exceptions.

the evidence an unusual situation was presented as to whether the plaintiff waived his commission and it is therefore properly a matter for the determination of the jury, it being disputed as to whether there was an actual waiver, so far as the contract of sale is concerned, which contains a provision concerning waiver of commissions that is not binding upon McCue, he not having signed it. Furthermore, the contract in question is not in evidence and therefore not binding upon McCue. As to the construction by this Court of the written authorization, a purchaser was produced by McCue, ready and willing to pay the sum of seventeen thousand dollars, and at that time McCue was entitled to his commission. It was thereafter that the matter of the tenant was discussed and the figure of three thousand dollars ultimately paid to the tenant. So far as notice of revocation by the defendant to McCue is concerned, it has been stated by the Court that that revocation occurred at the time of the delivery of the deed. It is my understanding of the law that that revocation therefore has no effect, because the agreement for sale had already been entered into between the parties and the authorization therefore still stands and provides a further reason why Mr. McCue should be entitled to his just commission.

It has been stated in *Steinberg vs. Mindland*, 96 L. 206, that a broker is entitled to commission when he produces a buyer ready, able and willing to buy on the terms of the seller, either as originally propounded or as subsequently agreed upon. This case is authority for the proposition that the subsequent agreement of the parties so far as the tenant was concerned does not affect the waiver of McCue's commissions as a matter

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Defendant's Exceptions.

of law. In addition, the mere statement that the obligation will not be enforced is not binding.

(Gussow *vs.* Beinsen, 76 L. 209.)

10 The most that can be said of McCue's remarks is that they were casually made, and as the above case suggests, mere statements that he would not seek his commission. In short, the case properly presents facts to be decided by a jury, particularly in view of the dispute and conflict in the testimony of the parties who have testified.

DEFENDANT'S EXCEPTIONS.

20 Mr. Farry: As to the verdict of "no cause" on the counterclaim, the defendant contends that a judgment in the amount of eleven hundred dollars should have been entered, in favor of the defendant against the plaintiff, due to the fact that there was fraud shown on the part of the plaintiff in procuring the defendant to part with the sum of eleven hundred dollars which was ultimately paid to the tenant for his removal from the premises and surrender of the lease. The law distinctly says where a person is guilty of
30 fraud of this nature that upon revocation of the agreement that the plaintiff should respond in damages for the fraud, and it is contended that because of the fraud the defendant in this case was entitled to recover back his eleven hundred dollars parted with through the fraud and misrepresentation of the plaintiff in this case.

40 It is contended further that in the event the eleven hundred dollars should not be awarded to the defendant on his counterclaim that then the sum of two hundred and fifty dollars should have

Defendant's Exceptions.

been awarded on the defendant's counterclaim, based upon the fraud of the plaintiff in procuring the defendant to part with the additional sum of two hundred and fifty dollars more than was originally agreed upon, the said two hundred and fifty dollars being the difference between the eight hundred and fifty as called for in the original agreement and the amount of eleven hundred dollars which was advanced by the defendant to the tenant for the surrender of the lease and his removal from the premises.

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Exhibit P-1.

March 14, 1935

Joseph G. McCue Agency
Rumson, New Jersey

10 Gentlemen:

In consideration of services to be performed by you, I hereby employ and authorize you, as my agent, to sell for me my farm consisting of 212 acres in the Township of Atlantic, County of Monmouth, State of New Jersey, for the price of Seventeen Thousand Dollars (\$17,000.00).


20 In consideration of your offering my said property for sale, I agree to pay you, upon the completion and execution of an agreement of sale at the said sum of Seventeen Thousand Dollars (\$17,000.00), a commission of 5% of the sale price. This employment and authorization shall continue as irrevocable for the full period of ten days from and after the date hereof, and shall continue thereafter until this employment and authority shall be cancelled by me, giving you ten days notice in writing thereof.

J. E. D. SILCOX, M. D.

30 Witnessed by:

JOSEPH G. McCUE

Exhibit D-1.

(Opposite )

Articles of Agreement, made the 20th

day of March
and Thirty-five

in the year of Our Lord One Thousand Nine Hundred

Between

JAMES E. D. SILCOX and LOUISE V. SILCOX, his wife,

of the Borough of Keyport in the County of
Monmouth of New Jersey, party of the first part;
and

FREDERICK J. BURGHARD

of the Borough of Fair Haven in the County of
Monmouth of New Jersey party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of

Seventeen Thousand (\$17,000.00) ----- Dollars

to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty free from all encumbrance except as hereinafter set forth.

on or before the 15th day of April next ensuing the date hereof, all those tract s, or parcel s of land and premises, hereinafter particularly described situate, lying and being in the Township of Atlantic County of New Jersey, called the homestead

farm, lying near the public road leading from Freehold to Holmdel, containing two hundred and twelve acres, more or less, bounded on the north by lands of John R. Sickles, Richard Bray, DeLafayette Schanck and Daniel S. Conover, on the east by lands of Daniel S. Conover, DeLafayette Schanck and James J. Taylor, on the south by lands of James J. Taylor and Daniel S. Conover, and on the west by lands of Daniel P. Smock and John R. Sickles, which tract of land is composed of several tracts which are particularly described as follows:

FIRST TRACT: Beginning at a stone standing in the line of Garret R. Conover which said stone is distant on a course of south 65 degrees east 5 chains and 55 links from a large black oak standing in said Garrett R. Conover's line; thence running (1) south 18 degrees west 18 chains to a stone; thence (2) south fifty degrees and 30 minutes west 5 chains and sixty links to a stone; thence north 63 degrees west 10 chains and 46 links to a chestnut sapling; thence south 14 degrees west 7 chains and 20 links; thence south 82 degrees west 17 chains and 30 links to a stake standing in Aaron Smock's line; thence north 4 degrees east 9 chains and 50 links to a stake standing in the west bank of a ditch and in John W. Holmes line; thence following said ditch to a stake fixed for a corner; thence running along the foot of said bank on the west side thereof as the gully now goes to a stake fixed for a corner; thence south 20 degrees east 82 links to a beech tree marked on four sides with a blaze and three notches below each blaze; thence north 43 degrees and 30 minutes east 6 chains to a beech stump standing on the south branch of south hop brook near to where George Taylor has opened a marl pit; thence following the lines of John W. Holmes and Garrett R. Conover until it comes to the beginning, containing sixty-two acres and eighty-eight hundredths of an acre, be the same more or less, being the tract of land described in a deed from James Taylor and wife to George Taylor dated March 25th, 1822 and recorded in F-2 of Deeds, pages 254 etc in the Clerk's office at Freehold, from which deed this description is taken.

SECOND TRACT: That certain farm being the easterly half of the farm whereof John W. Holmes died seized;

BEGINNING at a cluster of beech trees standing in the line between the tract of woodland, in the northeast corner thereof, and land of Mrs Nancy Taylor; thence running (1) north 85 degrees 15 minutes east 3 chains and

54 links to a stone; thence (2) south 45 degrees and 30 minutes east 2 chains and 75 links to a stone; thence (3) north twenty-seven degrees 10 minutes east 17 chains and 46 links to an oak tree; thence (4) south 51 degrees east 7 chains and 97 links; thence (5) north 7 degrees west 6 chains with off sets for the brook and thence along the said brook the various courses thereof to land of Samuel Bray, now deceased; thence (6) north 31 degrees 30 minutes west 6 chains; thence (7) north 40 degrees west 26 chains and 79 links; thence (8) along a brook north 20 degrees 10 minutes west 2 chains and 81 links; thence (9) along said brook north 5 degrees 30 minutes west 7 chains and 73 links; thence (10) along the same north 36 degrees 15 minutes west 3 chains and 87 links; thence (11) along the same north 20 degrees and 20 minutes west one chain and 61 links; thence north 4 degrees 30 minutes west 4 chains and 61 links with an off set of 35 links easterly at the distance of one chain and 40 links from the beginning of course; thence (12) south 41 degrees and 37 minutes west 11 chains; thence (13) south 2 degrees and 27 minutes east 57 chains and 77 links to center of brook; thence (14) along Hop Brook to where a course of north 72 degrees 30 minutes west 5 chains and 88 links strikes the edge of the wood tract; thence (15) north 86 degrees west 7 chains to a stone; thence (16) along a brook the various courses thereof to an oak tree in a southerly course; thence (17) south two degrees west 11 chains and 59 links; thence (18) south 30 minutes east 2 chains and 50 links; thence (19) north 64 degrees 50 minutes east 1 chain and 67 links along the brook; thence (20) along the same north 45 degrees east six chains and 11 links; thence (21) north 27 degrees east 1 chain and 12 links along the same; thence (22) north 48 degrees east 4 chains and 36 links; thence (23) north 68 degrees 55 minutes east 6 chains; thence (24) north 54 degrees 15 minutes east 4 chains and 74 links; thence (25) north 33 degrees east 1 chain and 72 links; thence (26) south 72 degrees east 82 links to remains of an old stump; thence (27) north 31 degrees east 6 chains and 2 links to the beginning.

Containing of arable land one hundred and sixteen acres three quarters and twenty-three perches, and of woodland thirty acres and eight perches, being the same premises described in a deed from Jonathan S. Holmes and wife to James C. Taylor dated March 31, 1864 and recorded in the Clerk's office at Freehold in Book 174 of deeds, pages 92 etc from which deed this description is taken.

THIRD TRACT: BEGINNING at a stake standing in the middle of a brook or run of water the line between DeLafayette Schanck and James C. Taylor which stake is distant 5 chains and 23 links on a course of north 87 degrees east from a large white oak tree standing on the top of the bank, a corner between said Taylor and Daniel S. Conover; thence as the needle pointed November 29th, 1864 south 45 degrees and 55 minutes east 2 chains and 65 links; thence south 8 degrees and 45 minutes east two chains and 3 links to Daniel S. Conover's meadow; thence along the same across the meadow south 86 degrees and 35 minutes west 2 chains and 67 links to a red oak tree on the west side of a stream or ditch; thence along the line of Daniel S. Conover, or said stream, north 59 degrees and a quarter west binding on said Daniel S. Conover's line 2 chains and 33 links to old ditch and line between said DeLafayette Schanck and James C. Taylor; thence along said old ditch or brook and run of water to the place of beginning. Containing one acre and 62 hundredths of an acre, be the same more or less, which tract was conveyed to James C. Taylor by DeLafayette Schanck and wife by deed dated November 25th, 1864 and recorded in the Clerk's office at Freehold in Book 191 of deeds, pages 498 etc.

Subject, however, to a certain right of way agreement made by Hans Nielsen and wife, dated July 22nd, 1930, to Eastern New Jersey Power Company.

Being or intended to be the same premises conveyed by Hans Nielsen and wife to James E. D. Silcox, by deed dated July 22nd, 1930, and recorded in Monmouth County Clerk's Office in Book 1529 of Deeds, page 302 &c.

And the said Frederick J. Burghard

for himself, his heirs, executors and administrators, doth covenant, promise, and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he, the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the sum of Seventeen Thousand (\$17,000.) Dollars,

as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Upon the execution of this agreement, receipt of which is hereby acknowledged, \$1,700.00;

Upon the closing of title and delivery of deed, as herein specified, \$15,300.00.

It is understood and agreed that said premises are now occupied by one Cusimo Banardo as a tenant under a certain lease dated November 14th, 1934, for a term of one year with a privilege of renewal for three years.

The conveyance under the within agreement is to be made upon the following expressed conditions and reservations, namely, that the purchaser and the seller herein are to jointly obtain from the said tenant, Cusimo Banardo, a release and surrender of the said lease covering the within described premises upon the payment of the sum of \$3,000.00 to the said tenant. The said party of the first part is to contribute toward the consideration for said release the sum of \$1,100.00 and the party of the second part is to contribute the sum of \$1,900.00.

It is understood and agreed that the said tenant shall surrender said lease and vacate said farm on or before April 15th, 1935; and in the event that the parties hereto are unable to obtain a release and cancellation of said lease from said tenant and have him vacate said farm by April 15th, 1935, all moneys paid by the party of the second part to the party of the first part herein shall be returned and from that date forward this contract shall be void and for nothing holden.

It is further agreed that the party of the first part shall have the right and privilege of entering upon said premises and removing therefrom approximately 15 cords of wood now cut and stacked and approximately 30 tons of baled hay upon the said premises, and approximately 125 sacks of potatoes now upon said premises.

The party of the first part recognizes that Joseph G. McCue is the broker in this transaction and is not obligated to pay him any commission for effecting this sale.

State of New Jersey, }
County of Monmouth } ss:

Be it Remembered, That on this twentieth day of March
in the year of our Lord One Thousand Nine Hundred and thirty-four, before me,
the subscriber,
A NOTARY PUBLIC OF NEW JERSEY

personally appeared

James E. D. Silcox and Louise V. Silcox

who, I am satisfied, are the grantor^s mentioned in the within Instrument, to
whom I first made known the contents thereof, and thereupon they acknowledged that,
they signed, sealed and delivered the same as their voluntary act and
deed, for the uses and purposes therein expressed.

Joseph C. McCord
NOTARY PUBLIC OF N. J.
Commission expires Oct. 27, 1935



Contract for Property

TO

19

Dated,

In consideration of mutual promises and agreements herein stated, we hereby agree to extend
the date for the delivery of deed and execution of this contract to
at same hour and place

Witness our hands and seals this
day of

A. D. 19

APPLIGATE, STEVENS, FOSTER & REUSSILLE
RED BANK, NEW JERSEY

State of New Jersey,

55:

X

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Exhibit D-2.

To: Joseph McCue:

I do hereby repudiate any and all written agreements, authorizing you to sell my farm premises, located in Atlantic Township, Monmouth County, New Jersey.

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J. E. D. SILCOX

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OCT. T. 1938

New Jersey Court of Errors and Appeals

JOSEPH G. McCUE and CHARLES
E. SWEENEY, partners trading
as Joseph G. McCue Agency,
Plaintiffs-Appellants,

vs.

JAMES E. D. SILCOX,
Defendant-Respondent.

Action at Law.
On Appeal from
Supreme Court,
Monmouth
County.

BRIEF OF PLAINTIFFS-APPELLANTS.

This appeal presents for review a judgment in favor of defendant, Dr. James E. D. Silcox; resulting from a verdict directed by the court against the plaintiffs, Joseph G. McCue and Charles E. Sweeney, partners trading as Joseph G. McCue Agency, in an action to recover a brokerage commission from the defendant. The single ground of appeal goes to the direction of that verdict.

Plaintiffs were authorized in writing by defendant to sell his farm. The written authorization, dated March 14, 1935 (Exhibit P-1, p. 80), is as follows:

March 14, 1935

Joseph G. McCue Agency
Rumson, New Jersey

Gentlemen:

In consideration of services to be performed by you, I hereby employ and authorize you,

as my agent, to sell for me my farm consisting of 212 acres in the Township of Atlantic, County of Monmouth, State of New Jersey, for the price of Seventeen Thousand Dollars (\$17,000.00).

In consideration of your offering my said property for sale, I agree to pay you, upon the completion and execution of an agreement of sale at the said sum of Seventeen Thousand Dollars (\$17,000.00), a commission of 5% of the sale price. This employment and authorization shall continue as irrevocable for the full period of ten days from and after the date hereof, and shall continue thereafter until this employment and authority shall be cancelled by me, giving you ten days notice in writing thereof.

J. E. D. SILCOX, M. D.

Witnessed by:

JOSEPH G. McCUE.

Within six days (the authorization being expressly irrevocable for a period of ten days) an agreement of sale was made by defendant with a purchaser, one Frederick J. Burghard. (See facsimile copy of agreement, Exhibit D-1, p. 81.) This agreement, dated March 20, 1935, among other things recites the sale price to be \$17,000.00, \$1,700.00 being paid on execution and the balance of \$15,300.00 to be paid on closing of title and delivery of deed.

On April 12th, 1935, a deed was delivered by defendant to the vendee named in the agreement. On the same day (p. 70, l. 41) defendant delivered to McCue a paper reading as follows (Exhibit D-2, p. 82):

To: Joseph McCue:

I do hereby repudiate any and all written agreements, authorizing you to sell my farm premises, located in Atlantic Township, Monmouth County, New Jersey.

J. E. D. SLCOX.

Defendant refused to pay a commission because out of the \$17,000 he had been obliged to pay \$1,100 to his tenant in order to have him vacate the premises. Before he would vacate this tenant demanded \$3,000. He received it, the balance of \$1,900 being contributed by the vendee over and above the purchase price of \$17,000.

In addition to the notion that he did not actually get \$17,000 for the property, defendant, having alleged that Joseph G. McCue, one of the plaintiffs, fraudulently failed to affix his signature to the agreement for sale, in which was inserted the following clause, sought to prove the allegation:

The party of the first part recognizes that Joseph G. McCue is the broker in this transaction and is not obligated to pay him any commission for effecting this sale.

McCue did not sign and denied that he was supposed to sign (p. 39, l. 9). Defendant said he 'thought he [McCue] should sign it' (p. 55, l. 21), but added, 'I didn't think it was my place to ask him. It was his business to sign it.' Defendant, when asked why he did not insist upon it (p. 55, l. 26) answered, 'I didn't know enough about law trouble.'

The learned trial judge, after announcing that no fraud had been found (p. 75, l. 27 and l. 31), assigned two reasons for directing the verdict against the plaintiffs: First, that defendant 'did not receive "seventeen thousand dollars cash"' because of the \$17,000 he had to pay \$1,100 to his tenant; secondly, that there was a waiver of commissions as a matter of law, evidence of that waiver, among other things, appearing in the written contract for sale, and by the fact that a notice had been given by defendant 'repudiating the original contract' (pp. 75 and 76). The court said that (p. 74):

The controversy here involves, therefore, the question as to whether the evidence does disclose that the plaintiff waived his commission in order to have the sale go through, so that he might likewise be enabled to make a sale to Burkhardt of other property for which negotiations were under way at the time.

Whether the evidence did so disclose would in any event be a question of fact, to be answered by the weight of conflicting testimony. There was no evidence whatever that negotiations were 'under way' to sell 'Burkhardt' other property. McCue had testified that an adjoining farm had already been sold to Burghard (p. 34), but this he did not disclose to defendant. Defendant testified, making no mention of Burghard or anyone else, that McCue told him he had a sale for two other farms, which would be lost if defendant's farm were not sold (p. 49).

In conclusion, the court made this pronouncement (p. 76):

It is perfectly obvious to me from the standpoint of law that the *weight of the evidence* is against Mr. McCue's right to recover. (Writer's italics.)

Three arguments oppose the legality of the direction of verdict:

First: Defendant received \$17,000. It was the purchase price for the property. What defendant did with the proceeds is immaterial. Whether he used part of the money to pay off a mortgage, or to get rid of a tenant, should not defeat a claim for commissions.

Secondly: That regardless of the sum received, there was a price satisfactory to the owner received from a purchaser purchasing on terms satisfactory to the owner.

Thirdly: The record reveals no waiver as a matter of law, but disputed facts which, if bearing upon waiver, should have been submitted to the jury. Moreover, if performance of an irrevocable contract can be waived, and if at any time there did occur that which would amount to a waiver, defendant, by his notice of repudiation (Exhibit D-2, p. 82), delivered on the same day the deed was executed, elected to deem the agency contract subsisting, and thus, to his mind, a fitting subject for cancellation. He overlooked that the contract had been performed by the brokers, and that in any event it expressly required not one day's notice but ten days' notice in writing for cancellation.

POINT I.

That the plaintiffs earned their commissions, because they found either a purchaser able and willing to comply with the terms specified in the authority thus given, or a purchaser agreeing to purchase on terms satisfactory to the owner.

The learned trial judge construed the authorization agreement 'to mean that he (the agent) was to produce a purchaser who would pay the defendant seventeen thousand dollars in cash.' One of the inducing causes for directing the verdict was that 'He did not receive "seventeen thousand dollars cash."'

There is nothing in the agreement about cash, nor is there anything in the evidence to support the view that the purchase price was not \$17,000. The agreement of sale recites \$17,000, and in it appears an acknowledgement of the receipt of \$1,700 and the recital that \$15,300 was to be paid upon closing title. That the vendor contributed \$1,100 to induce his tenant to vacate the premises, and the vendee contributed, for a like purpose, the sum of \$1,900 over and above the purchase price of \$17,000 does not alter the fact that the purchase price for the premises, excluding the purchase price of a release from a tenant, was \$17,000.00, the amount mentioned in the authorization.

If a purchase price is to be considered only that which a vendor retains, then it would follow that if the premises were subject to a \$5,000 mortgage, the purchase price would be only \$12,000, notwithstanding that the mortgage was paid and cancelled simultaneously with the conveyance.

The foregoing argument assumes that the authority was one to sell at the price of \$17,000 and that alone. Such an assumption should not be forced and is contrary to the rule implied in *Ganley vs. Kalikman*, 105 N. J. L. 311, affirmed without opinion in 106 N. J. L. 237; and to the rule expressly enunciated in the recent case of *Walsh vs. Isgro*, not officially reported; but appearing in 61 N. J. L. J. 345, in which the broker's authorization recited \$14,000 and the sale was effected for \$10,000, upon which the broker was awarded a commission. To the same general effect is *Brindley vs. Brook*, 10 N. J. Misc. 612, at p. 614, where was quoted this passage from the *Ganley Case*:

* * * that a broker 'earns his commission when he finds a purchaser able and willing to comply with the terms specified in the authority given, or when he finds a purchaser who agrees to purchase on terms satisfactory to the owner.'

and *Tucker, Inc. vs. Mahaffey*, 6 N. J. Misc. 17.

While it would seem that plaintiffs did find a purchaser able and willing to comply with the terms specified in the authority given, if they did not, then it cannot be questioned that they found a purchaser agreeing to purchase on terms satisfactory to the owner.

Under the view of the court below, the agreement was deemed, not only as authority to sell at one price and that alone, but to sell for cash and to have all of that cash not only go into the vendor's pockets, but stay there without any part

of it going to remove tenants, pay off mortgages, or otherwise make good title. No legal effect was given to the unquestioned fact that the plaintiffs found a purchaser who agreed to purchase on terms satisfactory to the owner.

POINT II.

That the evidence did not constitute a waiver as a matter of law; and whether there was a waiver as a matter of fact, was for the jury and not for the court.

As said in *Freeman vs. Conover*, 95 N. J. L. 89:

By 'waiver' is meant the act of intentionally relinquishing or abandoning some known right, claim or privilege.

The closely allied doctrine of estoppel *in pais* is not applicable, for that doctrine rests upon fraud, and the court below said that no fraud was found (p. 75, l. 27).

In defendant's answer (p. 11, ll. 1-12), it is recited that:

* * * the said Joseph G. McCue was to affix his signature to the said written agreement, which he failed to do, and fraudulently obtained the signature of this defendant and his wife, to the said agreement, without affixing his signature thereto.

Defendant claimed (p. 39, l. 1) that McCue was to sign the agreement of sale containing a waiver of commissions. Neither of the plaintiffs signed it. Failure to sign a waiver cannot constitute a

waiver or become an element in producing a waiver.

What was said and what was done at the meeting whereat the agreement of sale was executed, and at the meeting when the deed was delivered, were the subjects of sharply conflicting testimony. That defendant himself did not think McCue had waived anything is strongly evidenced by defendant's seeking to repudiate the written authorization long after its conditions had been fulfilled by the plaintiffs.

Even though the evidence were not conflicting, and even though it be said that what had occurred at some of the meetings did constitute in law a waiver, the defendant himself stoutly insisted that the waiver was to be embodied in the agreement of sale and was to be signed by McCue. McCue did not sign.

If the plaintiffs earned their commission, they earned it either when they found the purchaser or when he agreed to purchase on terms satisfactory to the owner.

When commissions are earned, a debt exists. To satisfy, destroy or render non-existent that debt, other than by payment, must be accomplished by a contract. For that contract, there must be consideration. A waiver must be supported by an agreement founded upon a valuable consideration. It has been so held in *Aron vs. Rialto Realty Co.*, 100 N. J. Eq. 513 at 517; affirmed, 102 N. J. Eq. 331; *Gussow vs. Beineson*, 76 N. J. L. 209; and see 3 *Williston on Contracts (Revised Edition)* sec. 679.

Apart from the question of the application of the doctrine of waiver, there remains a serious question surrounding its legal presence, a presence which must be entirely free from conflicting facts and inferences.

‘Intentionally relinquishing or abandoning some known right, claim or privilege’ involves knowledge and intent. Both have to do with a state of mind. Hence, the almost universal rule that waiver, because it involves knowledge and intent, invariably becomes a question of fact for the jury.

7. Province of Court and Jury.—Whether there has been a waiver is generally a question of fact, and the sufficiency of the evidence relating thereto is for the jury. The jury may be properly instructed, as matter of law, that a waiver must be voluntary, and that it implies a knowledge of the right, claim, or thing waived; yet whether it was voluntary, and whether the party had knowledge of the right or thing waived, are still questions of fact to be submitted to the jury. Where, however, the facts and circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law. *27 R. C. L. 912.*

Cittadino vs. Schackter, *83 N. J. L. 593*; *43 L. R. A., (N. S.) 80*, is cited in support of this text. To the same effect is the text on supporting authorities in *67 C. J. 311 and 312.*

CONCLUSION.

That the court erred in directing a verdict against plaintiffs:

- (1) That if the written authorization be to sell for \$17,000 and that alone, the terms were met because the sale was for that sum. What defendant had to pay to his own tenant to vacate, while reducing his net proceeds emanating from the sale price, did not alter or affect the sale price.
- (2) The authorization agreement makes no mention of cash, but if, as required by the court, cash were the test, the test was met, for it would go to the cash received and not to the net cash retained after some cash was spent to fulfill the covenant for peaceful possession.
- (3) That the authorization agreement was not specifically restricted to a sale for \$17,000, but applied to any sum acceptable to the owner.
- (4) That no fraud being found, the defense of fraud or estoppel *in pais* could not support the direction.
- (5) That there could be no waiver as a matter of law because the waiver was not signed. If a written waiver be contemplated, and defendant claims it was, any preliminary oral statements are immaterial and cannot of themselves rise to

the dignity of the requisite promise of an enforceable contract.

- (6) That even assuming an oral promise to waive in contemplation of a reduction in writing, can constitute the requisite contractual promise, here there was no valuable consideration for the alleged oral promise to forego the payment of an existent debt.
- (7) That if a waiver could be inferred from the testimony, the inference was for the jury and not for the court; not alone because the facts were in sharp conflict, but because before it could be said plaintiffs relinquished or abandoned a right, it must be shown they had knowledge of that right. The record is barren of any direct or positive proof of that knowledge, and any inference pointing towards such knowledge should have been resolved in favor of plaintiffs rather than against them on their opponent's motion for a direction.

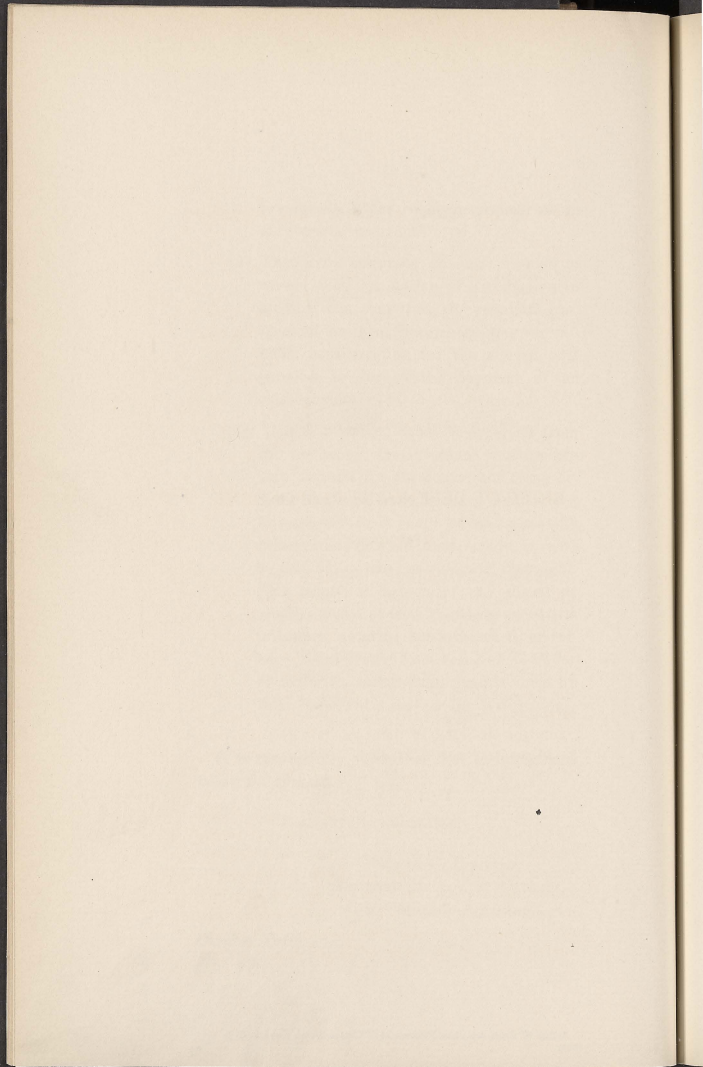
* * *

It is respectfully submitted that the judgment below be reversed.

Respectfully submitted,

LESTER C. LEONARD,
Attorney for and of Counsel
with Plaintiffs-Appellants.

October Term
1938



New Jersey Court of Errors and Appeals

JOSEPH G. McCUE and CHARLES
E. SWEENEY, partners trading
as JOSEPH G. McCUE AGENCY,
Plaintiffs-Appellants,

vs.

JAMES E. D. SILCOX,
Defendant-Respondent.

Action at Law.
On Appeal from
Supreme Court,
Monmouth
County.

BRIEF OF DEFENDANT-RESPONDENT.

Statement.

Suit was instituted by Joseph G. McCue and Charles E. Sweeney, partners trading as Joseph G. McCue Agency to recover for a brokerage commission allegedly due them from the defendant, James E. D. Silcox, under a written brokerage authorization for the sale of defendant's farm for the sale price of \$17,000, which agreement contained the provision that upon the completion and execution of an agreement of sale for the said premises at a sum of \$17,000, a commission of 5% of the sale price would be paid (Exhibit P-1, p. 80).

The defense interposed was that no purchaser was produced willing to comply with the terms specified in the agreement, and that said authorization was nullified and the farm sold under a substituted contract between the parties, wherein, no commissions were to be paid to the plaintiffs for the sale of the said premises because of the contribution of the sum of \$1,100 made by the

defendant to effectuate the removal of a tenant on the premises, which removal was necessary to satisfy the prospective purchaser.

The plaintiff subsequently produced a purchaser for the said farm and there was contained in the agreement of sale, for the said farm premises, the following stipulation:

“The party of the first part recognizes that Joseph G. McCue is the broker in this transaction and is not obligated to pay him any commission for effecting this sale” (Exhibit D-1, p. 81).

The plaintiff was present in the office of Wm. E. Foster, attorney and counsellor-at-law of New Jersey, who represented the purchaser when the above provision was dictated for insertion in the agreement of sale (p. 43, ll. 39-40, and p. 44, l. 22). He testified he knew that this provision was contained in the agreement (p. 38, l. 40) and it is to be noted that he sat by and agreed to waive his commissions in order to effectuate the sale of two adjoining properties to the same purchaser (p. 49, ll. 30-40) and that later, acting as a Notary Public, he took the agreement to Keyport and obtained the signatures of both the defendant, J. E. D. Silcox, at his office, and the signature of Mrs. Silcox, at a bridge party she was attending (p. 38, ll. 16-27.)

At the trial the only other witness produced by the plaintiff, with the exception of his own testimony, was that of Berto Sardello, who was the intermediary suggested by the plaintiff to conduct the negotiations with the tenant and whose testimony was primarily concerned with the discussions respecting the fixing of a price which would satisfy the tenant, in order to obtain his removal from the premises.

On the other hand in addition to the defendant's own testimony he produced his wife and daughter-in-law, and the testimony of Wm. E. Foster, Esq., the attorney for the purchaser who was the only disinterested witness to testify in the action.

The Trial Court, after the close of the case and after hearing all the testimony, directed the jury to return a verdict in favor of the defendant. From this direction plaintiff-appellant now seeks to review the Trial Court's action.

POINT I.

A.

The Trial Judge properly directed a verdict for defendant because the evidence adduced would not have supported any other verdict, than that directed by the Trial Judge.

The plaintiffs were not entitled to any commission because under all the evidence there was no dispute as to the material facts that the plaintiff failed to produce a purchaser for the sale price as set forth in the original brokerage agreement.

The written brokerage agreement dated March 14, 1935, (Exhibit P-1, p. 80), provides as follows:

“March 14, 1935

Joseph G. McCue Agency
Rumson, New Jersey

Gentlemen:

In consideration of services to be performed by you, I hereby employ and authorize you, as my agent, to sell for me my farm consisting of 212 acres in the Township of

Atlantic, County of Monmouth, State of New Jersey, for the price of Seventeen Thousand Dollars (\$17,000).

In consideration of your offering my said property for sale, I agree to pay you, upon the completion and execution of an agreement of sale at the said sum of Seventeen Thousand Dollars (\$17,000), a commission of 5% of the sale price. This employment and authorization shall continue as irrevocable for the full period of ten days from and after the date hereof, and shall continue thereafter until this employment and authority shall be cancelled by me, giving you ten days' notice in writing thereof.

J. E. D. Silcox, M.D.

Witnessed by:
Joseph G. McCue."

The clear import of the terms of this agreement were that the plaintiffs were to produce a purchaser for the defendant's farm for the sale price of \$17,000 net to the defendant less 5% broker's commission which would be payable to the plaintiffs upon execution on an agreement for the sale of said premises.

The plaintiffs in their brief argue that the above authorization agreement does not use the word cash, and that therefore the plaintiffs were not obligated to obtain a purchaser for \$17,000 cash. The authorization speaks for itself; words are to be construed in their natural sense and no strained construction is to be put upon them when the import is clear. The intention of the parties, as contained in their written authorization, clearly indicates that the plaintiffs, as real estate brokers, were restricted to producing a purchaser for the sum of \$17,000. This being the essence of

the authorization. This is the written agreement upon which the plaintiffs base their suit and it is to be noted that nowhere in said instrument is any provision made for the defendant to accept a lesser sum than that of \$17,000 as stipulated therein.

The plaintiffs having indicated that their prospective purchaser desired immediate possession of the farm, and there being a tenant presently in possession thereof under a written lease from the defendant, negotiations were entered into under which the tenant agreed to vacate the premises upon payment to him of the sum of \$3,000, \$1,100 being paid by the defendant and \$1,900 to be paid by the purchaser (p. 34, ll. 27-32). The payment of \$1,100 by the defendant was not contemplated under the written brokerage agreement, heretofore, referred to.

As a result, the defendant instead of receiving the sale price of \$17,000 as stipulated in the agreement, actually received \$15,900.

In the brief of plaintiffs-appellants it is argued that the defendant received \$17,000 and that what he did with the proceeds is immaterial, and further, draws an analogy to a situation where the premises were sold for \$17,000 subject to a \$5,000 mortgage, that it could not be said that the purchase price would be \$12,000. That this analogy is falacious and has no bearing to the instant case is apparent in its face, since the seller in the hypothetical case would have previously had the proceeds of any mortgage which he might have placed on the premises or purchased subject thereto.

In the instant case the \$1,100 paid by the defendant was money out of pocket and did not represent money which he previously had the benefit of, so that it does become material in view of the written agreement upon which the plaintiffs

suit is predicated, as to whether the plaintiffs produced a purchaser for the sum of \$17,000.

It is uncontroverted that the defendant did actually pay out of his pocket the sum of \$1,100 as part of an agreement to obtain the removal of the tenant and this being so it is apparent on its face that the consideration received by the defendant was the sum of \$15,900 and not \$17,000 as stipulated in the authorization agreement.

But it is further argued by the plaintiffs-appellants that under the rule implied in *Ganley vs. Kalikman*, 105 N. J. L. 311,

“that a broker may earn his commissions when he finds a purchaser who agrees to purchase on terms satisfactory to the owner;”

and that in the instant case the plaintiffs found a purchaser agreeing to purchase on terms satisfactory to the owner.

With the rule enunciated we have no argument but under the proofs nothing could be further from the fact. The written authorization to the plaintiffs is a specific one for the sale of the premises at a sale price of \$17,000 upon which a commission of 5% would be paid. The intention of the parties is unequivocally expressed in the agreement that the payment of commissions to the plaintiffs was contingent on a price of \$17,000 being obtained.

The authority was not a general one contemplating the sale of the premises on terms satisfactory to the owner but was a specific authority contemplating a sale for the price of \$17,000 and it is apparent that the attaining of this price was made a condition of the plaintiffs' right to recover; and when the defendant was obligated to pay the sum of \$1,100 out of the purchase price of \$17,000 to effect the removal of the tenant the

plaintiffs had failed to produce a purchaser for the sum of \$17,000 as contemplated in the agreement.

B.

Under the proofs there was no dispute as to the material facts that a substituted contract covering the same subject matter of the original brokerage authorization agreement was entered into between the parties under the terms of which the plaintiffs were not entitled to any commission.

During the course of the plaintiff's, McCue's, negotiations leading up to the signing of the written broker's authorization agreement the defendant advised the plaintiff that there was a tenant on the farm under a written lease (p. 48, ll. 31-33) and in view of the fact that the plaintiffs' prospective purchaser would require immediate possession of the farm, the plaintiff agreed to take care of the tenant's removal (p. 48, ll. 35-40). The plaintiff later informed the defendant that the tenant wanted \$3,000 to get off the farm and the defendant advised the plaintiff that if this were the case the deal was off (p. 49, l. 25).

Following an effort to ascertain whether the tenant would vacate the farm for a lesser sum, the plaintiff, McCue, suggested that a friend of his, one Berto Sardello be used as an intermediary and arranged for the defendant to meet with him and Berto Sardello at the farm (p. 33, ll. 10-13). Their efforts proved unavailing, the tenant refusing to accept a lesser sum to vacate the farm. Thereupon the plaintiff, McCue, said:

“* * * I will tell you. I have a sale for two other farms and if I cannot make a

deal on your farm I will lose the sale of the other two. He said 'I will make a proposition to you. I will sacrifice my commission if you will pay the \$1,100 to the tenant to get off the farm and Burkhardt will make up the difference between \$1,100 and \$3,000.' I think the agreement was drawn up to the effect" (p. 49, ll. 30-40).

Thereafter, in accordance with the plaintiff McCue's agreement, the parties met at the office of Wm. E. Foster, Esq., the attorney representing the purchaser, Burkhardt, in the transaction, and an agreement of sale for said premises was dictated by attorney Foster to be typed by his secretary. When the agreement was being dictated by attorney Foster, the question of the plaintiff's commission was discussed and Mr. Foster testified on this point as follows:

"Q. There was some discussion prior to the time that was put in? A. Yes, there was.

Q. A discussion between Dr. and Mr. McCue? A. Yes.

Q. And Mrs. Silcox and yourself and myself? A. Yes" (p. 44, ll. 22-27).

Doctor Silcox corroborates this fact.

"Q. At the time you were at Mr. Foster's office did this idea of Mr. McCue receiving no commission again come up? A. Yes.

Q. What was said in Mr. Foster's office? A. The same as the agreement reads.

Q. Not the agreement, but what was said? A. The only thing he said was he would sacrifice his commission to make the sale (p. 50, ll. 30-40).

By the Court:

Q. And it was put in the agreement? A. Yes, it was put in the agreement" (p. 51, ll. 1-4).

It was also testified by Mr. Foster that before inserting this clause in the contract, the defendant turned to the plaintiff, McCue, and said:

“Isn't that right,” and my recollection is that Mr. McCue shrugged his shoulders (p. 45, l. 19).

Thereupon, there was included in the agreement of sale, the following provision:

“The party of the first part recognizes that Joseph G. McCue is the broker in this transaction and is not obligated to pay him any commission for effecting this sale” (Exhibit D-1, p. 81).

We feel that in view of this written statement appearing in the agreement which clearly indicated the position taken by the plaintiff, McCue, that the testimony of all the parties present, bearing on the insertion of this clause is important and that a review and an analysis of all the testimony bearing on this point will conclusively show that the plaintiff, McCue, because of his desire to effectuate the sale of the two other farms to the same purchaser at that time, entered into a substituted contract with the defendant, under the terms of which he was to receive no commission for effectuating the sale of the defendant's farm.

In this connection, the defendant testified:

“Q. Was there anything about your paying him a commission? A. He told me he would sacrifice his commission” (p. 50, ll. 10-12).

The testimony of Louise Silcox, the defendant's wife, is further corroborative on this point:

“Q. It was read to Mr. McCue or called to his attention? A. It was read to him” (p. 61, ll. 20-21).

The testimony of the plaintiff, McCue, himself, clearly indicated he knew this provision was contained in the agreement, for upon interrogation:

“By the Court:

Q. Did you know that was in the contract?

A. Yes” (p. 38, ll. 40-41).

When the Court further interrogated the plaintiff, McCue, concerning the insertion of this clause, he, the plaintiff, testified this arrangement was satisfactory to him:

“By the Court:

Q. When you said to Foster, ‘What do you think about that clause?’ was the Doctor present? A. He was.

Q. What did Foster say? A. Mr. Foster said, ‘What do you think about that, how does that suit you, Joe?’ I said, ‘I guess it will have to be’” (p. 39, ll. 32-40).

And further Mr. Foster, upon being interrogated by the Court as to how the clause happened to be made a part of the agreement, testified:

“By the Court:

Q. After Mrs. Silcox said that to her husband about the commission— A. Then, as I recall, Mr. Farry said, ‘I think if it is going to be a fact that Mr. McCue gets no commission it should be in the contract.’ I don’t recall Dr. Silcox saying anything at the time. He turned to Mr. McCue and said, ‘Isn’t that right?’ and my recollection is that Mr. McCue shrugged his shoulders.

Q. His attention was called to it? A. Yes” (p. 45, ll. 10-21).

Mr. Foster further testified it was his understanding because of the fact that the plaintiff was to receive no commission he was to sign the agreement which contained this provision and

was questioned by defendant's attorney as follows:

"By Mr. Farry:

Q. What was the arrangement so far as Mr. McCue signing? A. I remember he shrugged his shoulders after you suggested it, and I remember some conversation was had by you or Mrs. Silcox as to whether that was not all right, and as I recall he shrugged again and either said 'all right' or 'O. K.'

Q. That is as to the fact that he was to sign it too? A. That is right" (p. 46, ll. 20-30).

Dr. Silcox also testified in this respect:

"Q. What was said by Mr. McCue about signing the contract? A. He was to get the contract and bring it to Mrs. Silcox and myself and he was to put his signature on it, too" (p. 52, ll. 1-10).

Following the dictating of the agreement, since it was quite lengthy and as Mrs. Silcox had a bridge or luncheon engagement it was arranged that McCue was to take the contract to defendant's office at Keyport and obtain his signature and also to have Mrs. Silcox sign it at the bridge party she was attending (p. 38, ll. 16-18). McCue acted as a notary public in obtaining the signatures of all of the parties to the contract, namely the defendant and his wife and Burkhardt, the prospective purchaser (p. 38, ll. 19-26). McCue failed to attach his own signature. The acknowledgment to the said agreement states that James E. D. Silcox and Louise V. Silcox personally appeared before the said Joseph G. McCue, a notary public of New Jersey, and he first made known the contents to them and that thereupon acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed (Exhibit D-1, p. 81).

And the plaintiff testified he took the agreement around to the parties knowing it contained a provision that he would receive no commissions and had it executed before him as a notary public (p. 39, ll. 10-14).

It is obvious from the foregoing testimony that the only inference to be drawn was that a substituted contract was agreed upon between the parties covering the sale of the defendant's farm premises, under the terms of which the plaintiff McCue was to receive no commissions and the defendant was to pay the sum of \$1,100 under an arrangement to obtain the removal of the tenant.

In view of the above testimony as well as an analysis of all the testimony adduced at the trial it indicated that there were no material facts in substantial dispute and that upon the uncontroverted facts the plaintiff would not be entitled to recover his commissions. The direction of a verdict for the defendant by the court under these circumstances was proper.

The syllabus in *McCormack vs. Standard Oil Company*, 60 N. J. L. 243, states in that case:

“The evidence shows no disputed fact. At the close of plaintiff's testimony it was possible to infer the liability of defendant. At the close of all the testimony no such inference was possible. Held, that a verdict for defendant was rightly directed.”

And also at page 246 the Supreme Court says:

“Upon the uncontroverted facts a verdict for plaintiff could not be sustained and in such case the verdict was properly directed for defendant.”

The above case was cited and followed with approval in *Weatherby vs. Newfield Rug Co.* 80 N. J. L. 364 by the Court of Errors and Appeals. The syllabus in that case states:

“Where the proofs will not support any other verdict than that directed by the trial judge the direction is proper.”

Also in *John S. Geiger Sons vs. Waldron*, 100 N. J. L. 93, at page 94, Chancellor Walker speaking for the Court of Errors and Appeals says:

“The construction and effect of a written instrument is a matter of law to be determined by the court and not by the jury, unless construction depends upon extrinsic facts which are in dispute.”

In *Schotland vs. Hirsch*, not officially reported in state reports but appearing in 155 A-21 the Court held:

“That where the salient facts were undisputed and only legal questions were presented, verdict was properly directed.”

Also in *Belcher vs. Manchester Building and Loan Ass'n*, 74 N. J. L. 833, at page 839, the Court of Errors and Appeals held:

“When the facts are not in dispute and the inferences from them are not in doubt, the question at issue is one of law for the court and the direction of a verdict is not erroneous.”

All of the above citations undeniably establish that where the material facts are not in dispute and where the proofs adduced would not support a verdict for the plaintiff, that a direction of a verdict by the Court for the defendant is proper.

A review of the testimony clearly indicates that the evidence at the trial did not support a verdict for the plaintiff as the Trial Judge rightly stated in his charge to the jury:

"I hold that the obvious weight of the written evidence, in connection with McCue's own statement, clearly shows he is not entitled to recover a commission, because when you come to analyze his testimony, he does not deny that the defendant claims, that in order to get the sale through, he, McCue, waived his commission" (p. 75, ll. 33-39).

"It is perfectly obvious to me from the standpoint of law that the weight of the evidence is against Mr. McCue's right to recover" (p. 76, ll. 7-10).

C.

Under the undisputed facts and the legal inference to be drawn therefrom it was a matter of law for the Court to determine whether the plaintiffs had waived their commissions.

As said in *Crawford vs. Winterbottom*, 88 N. J. L. 588 (overruled on other grounds) at (p. 589).

"A waiver is an intentional abandonment or relinquishment of a known right. The intention may be shown by conduct as well as by express words."

And further in *Aron vs. Rialto Co.*, 100 N. J. Eq. 513, at page 517, affirmed 102 N. J. Eq. 331. It is said:

"To make out a case of waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part. A waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition."

And in *67 C. J.* 298.

“Waiver strictly speaking is essentially unilateral in character; in strictness waiver, is used to designate the act, or the consequences of the act of one side only; it results as a legal consequence from some act or conduct of the party against whom it operates and no act of the party in whose favor it is made is necessary to complete it.”

The action of the parties at the time of the execution of the agreement of sale and more particularly the acts and conduct of the plaintiff, himself, show without material dispute that there was contained in the written agreement a provision that the plaintiff, McCue, would not be entitled to any commission. That he had knowledge of this; that he sat there in the lawyer's office when this paragraph was placed in the agreement; that he made no protest; but in fact by his actions assented to the provision; that he further obtained the signatures of the parties to this agreement acting as a notary public knowing full well that no commission was to be paid him. Under these undisputed facts it was a matter of law for the Court to determine whether the plaintiffs had waived their commission.

In *67 C. J.* 312 it is said:

“When the necessary facts are undisputed, admitted or clearly established waiver becomes a question of law, a conclusion of law, a matter of legal inference. Where but one inference can be drawn from the facts and that, a waiver, the question is one of law; and it is not error for the Court to charge the jury that they constitute waiver. Whether or not the facts in question, if proved, constitute a waiver is a question of law which the Court must decide.”

Conclusion.

The Trial Court properly directed a verdict against the plaintiffs and in favor of the defendant for the reason that:

1. From the proofs adduced there was no substantial dispute that the plaintiffs failed to produce a purchaser for the defendant's farm in accordance with the written broker's authorization for the sale price of \$17,000.

2. The authorization agreement was clear and unequivocal in its terms and that by reason of the defendant having to pay out of pocket \$1,100 to effect the removal of a tenant he did not receive the full agreed sale price of \$17,000.

3. The written brokerage authorization was specific in its terms and the payment of a commission was conditional upon the plaintiffs producing a purchaser for the sum of \$17,000 which under the undisputed facts they failed to do.

4. At the time of the execution of the agreement of sale for the premises a substituted contract was entered into between the parties covering the same subject matter of the broker's authorization agreement which in effect provided that the defendant was to pay \$1,100 towards effecting the removal of a tenant in possession, and the plaintiffs were to forego their commission on this sale.

5. The written agreement of sale contained a provision that the sale was to be made free from the payment of any real estate commissions to the plaintiff. This provision was inserted with

the knowledge and assent of the plaintiff and constituted as a matter of law a waiver by the plaintiffs of their commission.

6. The actions of the plaintiff, McCue, in permitting this paragraph to be inserted in the agreement of sale with his full knowledge and his further actions were such as to estop him from asserting a claim for commissions.

7. The plaintiff's course of conduct at the lawyer's office where the agreement of sale was drawn together with his subsequent conduct lead only to one inference and that inference being to the fact that the plaintiff voluntarily relinquished his right to any commission.

8. The facts clearly establish that the plaintiff waived his right to any commission as a matter of law.

9. A review of all of the testimony produced at the trial could not support a verdict for the plaintiff and the Trial Judge properly directed a verdict for the defendant.

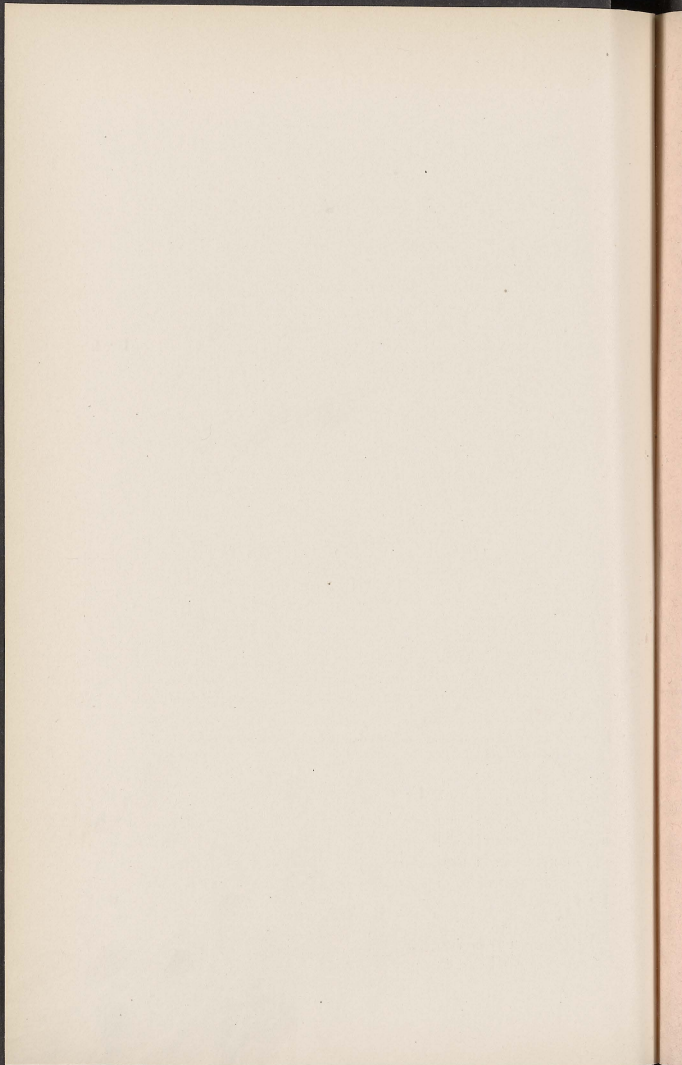
It is respectfully submitted that the judgment of the Court below be affirmed.

Respectfully submitted,

EDWARD FARRY, JR.,
Attorney for Defendant.

MELVIN A. PHILO,
Of Counsel.

October Term, 1938.



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