INDEX

Essex County Circuit Court

FEIST & FEIST, a corporation of the State of New Jersey, *Plaintiff,* *vs.* BLOOMFIELD BANK & TRUST COMPANY, a corporation of New Jersey having its principal office in Bloomfield, Essex County, New Jersey, *Defendant.*	*Notice of Appeal.*

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To Boyd & Dodd, Esqs.

Attorneys of Defendant:

Take Notice, that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this case, upon the following ground:

The Trial Court directed a judgment of non-suit against the plaintiff and in favor of the defendant when thereunto moved by counsel for the defendant, whereas said court should have denied said motion and should have submitted to the jury for decision the questions involved in the issue.

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YOUNG & SHANLEY,
Attorneys of Appellant.

Service of the within Notice of Appeal is hereby acknowledged this 17th day of May, 1937.

BOYD & DODD,
Attorneys for Defendant.

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COURT OF ERRORS AND APPEALS

10 FEIST & FEIST, a corporation of the State of New Jersey,

Plaintiff-Appellant,

vs.

BLOOMFIELD BANK & TRUST COMPANY, a corporation of New Jersey having its principal office in Bloomfield, Essex County, New Jersey,

20 *Defendant-Respondent.*

Grounds of Appeal.

The appellant states the following grounds of appeal:

Because the court granted the defendant's motion for non-suit upon the evidence given at the

30 trial.

YOUNG & SHANLEY,
Attorneys of Plaintiff-Appellant.

Service of the within Grounds of Appeal is hereby acknowledged this 17th day of May, 1937.

BOYD & DODD,
Attorneys for Defendant.

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JUDGMENT RECORD
ESSEX COUNTY CIRCUIT COURT

FEIST & FEIST, a corporation of the State of New Jersey, *Plaintiff,* *vs.* BLOOMFIELD BANK & TRUST COMPANY, a corporation of New Jersey having its principal office in Bloomfield, Essex County, New Jersey, *Defendant.*	*Action at Law.* *Complaint.*

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Bloomfield Bank and Trust Company, the defendant in this cause, was summoned to answer unto Feist & Feist, the plaintiff therein, in an action at law upon the following complaint:

Plaintiff, Feist & Feist, a corporation duly organized and existing under the laws of the State of Jersey, and having its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

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FIRST COUNT

1. Plaintiff is a duly licensed real estate broker under the laws of the State of New Jersey.

2. In April, 1935, the defendant, the Bloomfield Bank and Trust Company, was the owner of lands

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and premises known as No. 350 Hoover Avenue, Bloomfield, Essex County, New Jersey, which property was formerly owned by Sprucolite Corporation. During April, 1935, the said defendant entered into a contract with the plaintiff herein, a true copy of which contract is annexed hereto and made a part hereof, and is contained in Schedules A and B, wherein and whereby the said defendant authorized the plaintiff to sell the property located at No. 350 Hoover Avenue, Town of Bloomfield, County of Essex and State of New Jersey, and agreed in said contract to pay the plaintiff for its services a commission of 5 per cent. of the consideration received in the sale of said premises.

3. The plaintiff, in accordance with the aforesaid authorization, procured Budde Schiffenhaus as purchaser of said premises aforesaid at the purchase price of Thirty-two Thousand Five Hundred ($32,500.00) Dollars, and the defendant executed and delivered a bargain and sale deed to the said Budde Schiffenhaus, dated June 1, 1935, and recorded on June 4, 1935, in the Essex County Register's Office in Book 89 of Deeds for said County, pages 246, etc.

4. Plaintiff has fully performed all of the services which it was authorized to perform by the defendant in accordance with the aforesaid authorization.

5. The Plaintiff has earned as commission the sum of One Thousand Six Hundred Twenty-five ($1625.00) Dollars which it has demanded of the defendant, but which the defendant has refused to pay.

Judgment will be demanded in the sum of One Thousand Six Hundred Twenty-five ($1625.00) Dollars with lawful interest and costs on the first count.

SECOND COUNT

1. The Plaintiff repeats the allegations contained in Paragraph 1 of the first count.

2. In April, 1935, an oral agreement was entered into by the said defendant and the plaintiff herein for the sale by the plaintiff of No. 350 Hoover Avenue, Town of Bloomfield, County of Essex and State of New Jersey, for and on behalf of the owner, the defendant herein.

3. The Plaintiff, within five days of the making of said oral agreement, served upon said defendant, the owner of said premises, a notice in writing setting forth the terms of said oral agreement and stating the rate or amount of commission to be paid thereunder, which notice is contained in Schedule A annexed hereto and made a part hereof.

4. The said defendant, the owner of the said premises did not repudiate or terminate such agreement prior to the actual sale of said real estate.

5. The plaintiff has fully performed all of the services which it was authorized to perform by the defendant in accordance with the aforesaid authorization.

6. The plaintiff has earned as commission the sum of One Thousand Six Hundred Twenty-five ($1625.00) Dollars which it has demanded of the defendant and which the defendant has refused to pay.

Judgment will be demanded for the sum of One Thousand Six Hundred Twenty-five ($1625.00) Dollars with lawful interest and costs on the second count.

YOUNG & SHANLEY,
Attorneys for Plaintiff.

SCHEDULE "A"

FEIST & FEIST
58 Park Place
Newark, N. J.

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April 15, 1935

Bloomfield Bank and Trust Company,
Bloomfield Avenue and Broad Street,
Bloomfield, New Jersey

Attention of Mr. Francis A. Schilling
Vice President.

Gentlemen:

20 Confirming our various conversations, we have submitted and shown your building at Hoover Avenue (formerly Franklin Avenue) formerly owned by the Sprucolite Corporation to the Progressive Paper Box Company of 341-55 Jeliff Avenue, Newark, represented by Mr. Budde Schiffenhaus, Vice-President, and are now actively negotiating with them for the purchase of this property.

As stated to you on the occasion of our first visit, our commission in case of a sale will be five
30 per cent. of the purchase price.

We will keep you fully advised as to our progress in these negotiations.

Very truly yours,

FEIST & FEIST, INC.
C. W. HULL
Industrial Department

C. W. Hull
40 RA

SCHEDULE "B"

THE BLOOMFIELD BANK AND TRUST COMPANY

Bloomfield, New Jersey 10

April 17, 1935

Feist and Feist,
58 Park Place
Newark, New Jersey.

Gentlemen:

We are in receipt of your favor of 15th instant, and have noted on our records that you have shown the Hoover Avenue property, formerly owned by 20 the Sprucolite Corporation, to the Progressive Paper Box Company of Newark, and that you may succeed in consummating a sale of the property to these parties.

The commission indicated in your letter will be fully recognized in the event a sale is effected.

Truly yours,

F. A. SCHILLING, 30
Vice President.

FAS MHF

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ESSEX COUNTY CIRCUIT COURT

FEIST & FEIST, a corporation of the State of New Jersey, *Plaintiff,* *vs.* BLOOMFIELD BANK & TRUST COMPANY, a corporation of New Jersey having its principal office in Bloomfield, Essex County, New Jersey, *Defendant.*	*Action at Law.* *Answer.*

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The Defendant, Bloomfield Bank and Trust Company, a New Jersey corporation, answering the complaint of the plaintiff in the above entitled cause says that:

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ANSWER TO FIRST COUNT

1. Defendant admits the allegation contained in the first paragraph of the first count of plaintiff's complaint.

2. Defendant admits that in April, 1935, it was the owner of lands and premises known as No. 350 Hoover Avenue, Bloomfield, N. J., but denies the allegations contained in the remainder of paragraph two of the first count of plaintiff's complaint.

3. Defendant admits the execution and delivery of a deed to Budde Schiffenhaus but denies the

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other allegations contained in paragraph three of the first count of plaintiff's Complaint.

4. Defendant denies the allegations contained in paragraph four of the first count of plaintiff's complaint.

5. Defendant denies the allegations contained in paragraph five of the first count of plaintiff's complaint, except as to its refusal to pay to the plaintiff any commissions on the aforementioned sale.

ANSWER TO SECOND COUNT

1. Defendant admits the allegations contained in paragraph one of the second count of the plaintiff's complaint.

2. Defendant denies the allegations contained in paragraph two of the second count of plaintiff's complaint.

3. Defendant denies the allegations contained in paragraph three of the second count of plaintiff's complaint.

4. Defendant denies the allegations contained in paragraph four of the second count of plaintiff's complaint.

5. Defendant denies the allegations contained in paragraph five of the second count of plaintiff's complaint.

6. Defendant denies the allegations contained in paragraph six of the second count of plaintiff's complaint.

FIRST SEPARATE DEFENSE TO ALL COUNTS

1. Plaintiff had no contract with the defendant for the sale of the premises mentioned in the complaint filed in the above entitled cause to Budde Schiffenhaus.

SECOND SEPARATE DEFENSE TO ALL COUNTS

1. Defendant did not sell premises described in the complaint filed in the above entitled cause to the Progressive Paper Box Company.

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THIRD SEPARATE DEFENSE TO ALL COUNTS

1. Plaintiff did not comply with the statute and laws of the State of New Jersey for the purpose of establishing any relationship between plaintiff and defendant in connection with the sale of the premises mentioned and described in the complaint in the above entitled cause which entitles the plaintiff to commissions on the sale consummated by the defendant.

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FOURTH SEPARATE DEFENSE TO ALL COUNTS

1. Plaintiff was not the efficient and procuring cause of the sale of the premises described in the plaintiff's complaint to Budde Schiffenhaus.

FIFTH SEPARATE DEFENSE TO ALL COUNTS

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1. The purchaser of the premises described in the complaint, one Budde Schiffenhaus, purchased said premises as the result of conferences with the Bloomfield Bank and Trust Company and others but not as the result of any conferences, introduction, overtures or efforts on the part of the plaintiff.

BOYD AND DODD,
Attorneys for Defendant.

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ESSEX COUNTY CIRCUIT COURT

November 30, 1936.

FEIST & FEIST, a corporation of the State of New Jersey, *vs.* BLOOMFIELD BANK & TRUST COMPANY, a corporation of the State of New Jersey.	*Action at Law.*

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Before Hon. William A. Smith, Judge, and a jury.

For the plaintiff appears Bernard M. Shanley, 3rd, Esq.

For the defendant appears Boyd & Dodd (by Ernest F. Keer, Jr.).

(A jury is called and sworn.)

(Mr. Shanley opens for the plaintiff.)

(Mr. Keer opens for the defendant.) 30

CHESTER W. HULL sworn in behalf of the plaintiff.

Direct examination by Mr. Shanley.

Q What is your profession? A Real estate salesman.

Q How long have you been a real estate salesman? A Twenty-five years. 40

Q How long have you been licensed? A Since licenses were first issued.

Q Who did you start with in the real estate business? A I started with a title company originally, handling mortgages, originally. I was with Feist and Feist for nineteen years.

10 Q When did you sever your connection with Feist and Feist? A In August, 1935.

Q This particular deal took place prior to your severing your business connections with them? A Yes, sir.

Q Tell us the whole story in your own words as to how in the first place you came to know Mr. Schiffenhaus and how you knew he was in the market for a factory. A I originally heard that he was in the market through the insurance depart-
20 ment of Feist and Feist and I got in touch with him to tell him about some property and he told me he was dickering for some property in Belleville.

By the Court.

Q When was this? A The early part of April.

Q 1935? A Yes, sir.

Q Go ahead. A In the meantime I was looking for other suitable property for him and among others I was looking at the Diamond Paper Mill
30 in Bloomfield and he went and looked at that but it did not seem suitable and I noticed the property next door.

By Mr. Shanley.

Q Did you look at the property in Belleville too? A No, I didn't know anything about that property except that Mr. Schiffenhaus told us that if he thought that would be satisfactory he would
40 let us handle the matter for him, but I found this

particular plant now in question was owned by the bank and I went down to the bank and asked them and they said yes that they would have to have $45,000 and they showed me an appraisal which stated a great deal higher price than that and informed me that $45,000 was the rock bottom price. I got in touch with Mr. Schiffenhaus and made several appointments with him and finally he went up with me and looked at the plant all through and I called his attention to the plant next door and he said that he thought that he might be able to use that as a paper manufacturing plant and so we went next door and tried to get in.

By the Court.

Q Next door was the $45,000 property of the bank? A No, the property we were going through, or rather the paper mill was next door and he thought that he could use that next door and wanted my opinion on that which would have some bearing on whether he could take this particular plant. We got in touch with the people who kept machinery in there, whether it would be a suitable place for his line of work which is paper manufacturing and he found that it would not be suitable and he would not take the plant in question. I felt it was a plant suitable in every way and the price was at that time, a very reasonable price. Mr. Schiffenhaus and I had several talks about it and he told me he thought the price was too high, he didn't want to pay that much, that he thought he could get the plant for a much cheaper price. I told him what they told me that that was the lowest price but that would he make an offer and he said he didn't want to make an offer, he said he wasn't sure whether that plant would be all right for him. I talked to Mr. Schilling in the bank and

he told me that was the cheapest price he would take that if he could not pay he might at least consider it as I said I thought the plant was well worth the price being asked. Then Mr. Schiffenhaus told me that was entirely out, he could not talk of that at all that he needs more space of seventy-five thousand square feet like the plant he could get for $30,000 or $35,000. I still felt that he would come back to this plant and I told him that I did not know of any other place as suitable for him as this and I looked for other plants but could not find anything as suitable. This was taking up several weeks' time and in the meantime the next thing I heard was that Mr. Schiffenhaus had purchased the property.

Q How long after the original negotiation did that take place?

By the Court.

Q When did he say the plant was not all right, he needed more space? A Until, I imagine, we were going on probably two weeks.

Q When did that bring it up to? A To around the first of May.

The Court. The selling of the property is admitted?

Mr. Keer. To Mr. Schiffenhaus as of June 1st, yes.

By Mr. Shanley.

Q Some time around the middle of April you said you saw Mr. Schilling personally? A Yes, sir.

Q At the Bloomfield Bank and Trust Company? A Yes, sir.

Q Do you recall his particular position at the trust company?

Mr. Keer. I will admit that he was vice president.

The Court. And he represented the bank in this matter?

Mr. Keer. Oh, yes. 10

Q Do you recall how many times you saw him in all? A No, I would say probably about three times all told after I saw him personally at the bank.

Q Did you speak to him on the phone at all? A I did, but I couldn't say how many times I spoke to him.

Q On April 15, 1935 did you write a letter for your company to the trust company? A I did. 20

Q I show you a letter dated April 15, 1935 and I ask you if that is your signature (indicating)? A It is.

Q Were you authorized to write that letter for Feist and Feist? A I don't know as I talked of that particular item. In the ordinary course of business we did that, yes.

Mr. Shanley. I offer the letter in evidence.

(Same is received in evidence and marked Exhibit P-1.) 30

Q I show you a letter dated April 17, 1935 from the Bloomfield Bank and Trust Company to Feist and Feist and I ask you if you recall that letter (indicating). A I do.

Q Is that the letter written in answer to this? A It is.

Q Read that letter. A "We are in receipt of your favor of the 16th instant and have noted on our record that you have shown the Hoover Ave- 40

nue property, formerly owned by Sprucolite Corporation to the Progressive Paper Box Company of Newark and that you may succeed in consummating a sale of the property to these parties.

"The commissions indicated in your letter will be fully recognized in the event the sale is effected.

10 "Truly yours, Mr. Schilling."

Mr. Shanley. I offer this letter in evidence.

(Same is received in evidence and marked Exhibit P-2.)

Q That was written when, April 17th? A Dated April 17th.

Q This was during the period you had spoken to Mr. Schilling and talked to him on the phone? A Yes, sir.

20 Q How soon after that was it Mr. Schiffenhaus began to get lukewarm about this particular property? A Commenced to get what?

Q He commenced to get lukewarm about this property. A About two weeks.

Q Two weeks after the date of this letter, around the 1st of May? A Yes, sir.

Q After Mr. Schiffenhaus informed you this property was not satisfactory to him anyway what did you then continue to do? A I continued to

30 look for other properties which could be bought in comparison with this and told him if something turned up more suitable I would submit it.

Q When did you first discover the property had been sold to Mr. Schiffenhaus by the trust company? A I don't recall.

Q How did you feel about it?

Mr. Keer. I object.

The Court. Sustain the objection.

40 Q I think that you said Mr. Schiffenhaus' fore-

man had gone through the plant. A No, he was going to have his foreman go through the plant. I didn't go with him.

Q Did his foreman go through? A He said he did; I don't know.

Mr. Keer. I ask that that be stricken out.
The Court. Strike it out. 10

Q Did you arrange for the foreman to go through this plant? Did you make the arrangements or not? A I really don't recall whether I did or not. We may have made arrangements there at the time.

Mr. Keer. I object to this line. There wasn't any proof that the foreman went through.
The Court. He says he does not know. 20

Q With reference to making an offer to the bank, what was the general attitude with reference to the purchaser and seller in the matter?

Mr. Keer. I object.
The Court. Sustain the objection.

Q Up to what time had you urged or how late in that year prior to the sale by the bank to Mr. Schiffenhaus, had you urged Mr. Schiffenhaus to make the bank an offer in reference to this property? 30

The Court. He said about May 1, 1935 at the time Mr. Schiffenhaus said he did not have enough space there.

Cross examination by Mr. Keer.

Q When was the first time you took Mr. Schiffenhaus to the property? Can you establish the date? A I can't establish it definitely, it was 40

about the 10th of April. I am fixing that by the letter we wrote to the bank.

Q Before this letter of April 15th? A Prior to that.

Mr. Schiffenhaus had been dealing with your insurance department of Feist and Feist prior to that time? A We had carried his insurance for some time, if that's what you mean.

Q That is the insurance of the Progressive Paper Box Company. A I don't know anything about the insurance, I wasn't in that department, I just knew the department was in touch with him.

Q You knew that Schiffenhaus represented the Progressive Paper Box Company? A Yes, sir.

Q Did you know in dealing with Mr. Schiffenhaus that you were dealing with him as an officer of that company? A I was dealing with him as an individual. How he would purchase the property, I don't know.

Q You have no idea how he was purchasing the property? A No, I understood it was to be used for paper box manufacturing.

Q When did you first have any idea, if you had any idea about it that this was to be used by a corporation? A Well, except it was to be used for paper box manufacturing, that's all I know.

Q Didn't you have any idea that this was to be used by a paper box company? A Nothing was ever said as to what it was to be used for. I was getting for Mr. Schiffenhaus a building suitable for a paper box company.

Q Do you know where Mr. Schiffenhaus was engaged in business at the time you took him around? A On Jeliffe Avenue, yes.

Q Had you been to that plant? A Yes, sir.

Q Did you see anything of the Progressive Paper Box Company? A Yes, sir.

Q On April 15, 1935 you wrote to the Bloomfield Trust Company this letter, admitted in evidence and marked Exhibit P-1. A Yes, sir.

Q That letter you did not read to the jury. Will you read that to the jury? A "Confirming our various conversations we have submitted and shown your building on Hoover Avenue, formerly owned by the Sprucolite Corporation to the Progressive Paper Box Company of 341-355 Jeliffe Avenue, Newark, represented by Mr. Budde Schiffenhaus, vice president, and are now actively negotiating with them for the purpose of this property. As stated to you on the occasion of our first visit, our commission, in the case of a sale, will be five per cent. of the purchase price. We will keep you fully advised as to our progress in these negotiations. 10 20

"Very truly yours, Feist and Feist.
"By C. W. Hull."

Q All the time you knew that you were attempting to sell the property to the Progressive Paper Box Company, didn't you? A I couldn't say that. I was dealing with Mr. Schiffenhaus. I assumed that he was president of a paper box company and assumed that he was getting it for the Progressive Paper Box Company. 30

Q You found out that he was vice president of the paper box company, didn't you? A Yes, sir.

Q So at all times you were dealing with him on behalf of that corporation, correct? A I was dealing with him as a representative of that corporation, yes.

Q Did you go up the second time, before you had written that letter to the Bloomfield Trust Company on April 15th? A Up to the property?

Q Yes. A I was never through the property but once with Mr. Schiffenhaus. 40

Q That was the first time you took him there? A First time I took him there, yes, sir.

Q Was it right after that he told you that he was not interested in the property? A No, it was a considerable time after.

Q You never went back to that property again? A I never went with him but once.

Q You say at that time about the first of May, or before that time he told you that he was not interested in that property. A Sometime in the vicinity of the first of May, I couldn't definitely establish the date. Two or three weeks after this.

Q At no time did you bring any offer of the property from the Bloomfield Bank and Trust Company, did you? A No.

Q When he told you he was through with the property did you do anything further in connection with it? A I looked for other properties and then talked to him over the phone and told him I could not find anything as suitable as this particular property.

Q You had no talk with Mr. Schilling? A I did talk with Mr. Schilling and told him of the situation, what the situation was and I felt that he could not get anything else and that eventually he would have to come back to this building.

Q That was before you sent that (indicating)? A Subsequent to that.

Q How many days before did you see Mr. Schilling? A Three or four.

By the Court.

Q You saw him between April 10th and April 15th when you wrote the letter? A That is my recollection.

Q You say in this, "Confirming our various con-

versations". So you saw him between that time. A I saw him two times prior to that letter.

By Mr. Keer.

Q You did not take Mr. Schiffenhaus into the Bloomfield Bank and Trust Company, did you? A I did not. 10

Q You did not tell Mr. Schiffenhaus who owned this property did you? A Yes. I told him the bank in question. They had taken it over by a mortgage.

Q When did you tell him that? A At the time I showed it to him.

Q Which time? A I only showed it to him once.

Q What date was that? A In the neighborhood of April 10th. 20

Q How did you get the listing of this property, general listing? A No, I got it direct from Mr. Schilling. I had gone to the building and found it was owned by the bank and I went down to Mr. Schilling to see about getting a listing.

Redirect examination by Mr. Shanley.

Q Did you later discover this property had been formerly listed with Feist and Feist? A No. 30

Q Isn't it a fact that you were handed a circular? A I had no circular. I had no information about it. I was looking at the Diamond mills next door and saw this building and I thought it would be suitable for him to use if he may be in the market.

Q Did Mr. Schiffenhaus ever say anything to you in reference to your having shown him the property? 40

Mr. Keer. I object.

The Court. Sustain the objection.

Q Did Mr. Schiffenhaus ever say to you that you were the first broker to show him the property?

Mr. Keer. I object.

10 *The Court.* Sustain the objection. You can put him on the stand in rebuttal if he says he did.

PLAINTIFF RESTS

Mr. Keer. I respectfully move for a non-suit on several grounds.

1. The testimony shows that he was dealing with the Progressive Paper Box Company and that the agreement, if any existing, and I deny that, was to pay a commission, on the sale to the Progressive Paper Box Company, when the sale actually transpired, to Budde Schiffenhaus individually and there was no proof to show that it was bought by Mr. Schiffenhaus as agent for the Progressive Paper Box Company or bought by him for the purpose of defrauding the present plaintiff out of any commissions.

Also on the ground they have failed to establish a case within the Statute of Frauds in respect to the sale of this property. The terms of the sale are not set forth. It says five per cent. of the purchase price but no terms of sale are set forth; it does not say at any time any particular price.

The Court. It is in the tenth section. You do not have to have the terms of the sale in the written memoranda, if you are depending

on the written memoranda here, but you have to have the rate.

Mr. Keer. There is no rate which is expressed by Mr. Schiffenhaus. There wasn't any sale effected by any of the parties and assuming the rate is incorporated in this letter, still it was a sale to Budde Schiffenhaus individually and the ground upon which the bank would be held liable, in the event a sale was made to Mr. Schiffenhaus, is in the event of avoiding payment of a real estate commission.

The Court. I will hear you, Mr. Shanley.

Mr. Shanley. Mr. Hull said in his testimony that he dealt with Mr. Schiffenhaus as an individual.

The Court. You haven't put any proof in in that respect. We don't know the relationship between the Progressive Paper Box Company and Mr. Schiffenhaus.

Mr. Shanley. Mr. Schiffenhaus was the vice president of the Progressive Paper Box Company.

The Court. He may have been. I could pretty nearly assume that his contact originally was the same contact as with the company but you have to tell us that. You just tell us the two names and none of the details with reference to how the sale was affected. Your agreement here is that they will pay a commission if the sale is made to the party named there. Their agreement is here, "In the event a sale is effected," that is effected with the Progressive Paper Box Company and I am dealing now with a purely legal transac-

tion; that is as far as the legal proposition is concerned, and there is no proof that there was a sale actually effected by your client. He might have brought the parties together, but he didn't say that they actually effected a sale. Mr. Schiffenhaus walked out and then later went back to the bank, but your client did not actually effect the sale, he might have been the procuring cause but under the statute as amended where you rely on a writing or a written letter and a verbal arrangement, you must show you actually effected the sale or exchange of the property. He might have been the procuring cause, but he did not actually effect the sale. I do not think your letter, being written, formed a verbal transaction that we can use. I might let this go to the jury on that account, but I could not use that so for that reason we are thrown back on the letter in writing, his agreement to pay commissions, and there we have the difficulty about the rate not being specified therein, so I will grant the motion for the grounds stated.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

4.

(Stenographic Transcript.)

5.

This action was tried before Judge William A. Smith with a jury, at Essex County Circuit on November 30, 1936.

The Court granted the defendant's motion for

non-suit whereupon it was adjudged:

That the defendant recover of the plaintiff the taxed costs being the sum of Seventy-three Dollars and Ten Cents ($73.10).

Judgment entered the 30th day of November, 1936.

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YOUNG & SHANLEY,
Attorneys of Appellant.

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Book CC 126 - 356

ESSEX COUNTY CIRCUIT COURT

69574

FEIST & FEIST, a corporation of the State of New Jersey, *Plaintiff,* *vs.* BLOOMFIELD BANK & TRUST COMPANY, a corporation of the State of New Jersey, having its principal office in the Town of Bloomfield, County of Essex and State of New Jersey, *Defendant.*	*Action at Law.* *Trial*

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JUDGMENT

Non-Suit by Order of the Court.
Judgment entered Nov. 30, 1936.
Costs $73.10—Defendant.
Judge William A. Smith
Boyd and Dodd, Attys. for Defendant.

Judgment on Non-Suit by order of The Court in the above entitled action was rendered on the 30th day of November A. D. 1936 in favor of the defendant The Bloomfield Bank and Trust Company, a corporation of the State of New Jersey, having its principal office in the Town of Bloomfield, County of Essex and State of New Jersey and against the plaintiff Feist and Feist, a corporation of the State of New Jersey for the sum of $73.10 costs of suit.

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Judgment signed and entered November 30, 1936.

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CHARLES W. PARKER,
J.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between FEIST & FEIST, a corporation of the State of New Jersey, *Plaintiff-Appellant,* *and* BLOOMFIELD BANK & TRUST COMPANY, a corporation of New Jersey having its principal office in Bloomfield, Essex County, New Jersey, *Defendant-Respondent.*	*On Appeal.* *Notice of Argument.*

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To Boyd & Dodd, Esqs.

Attorneys of Defendant-Respondent:

Take Notice, that on the ~~30th~~ 1st day of ~~October,~~ February 1938 ~~1937,~~ at the hour of 11 A. M. in the forenoon, or as soon thereafter as counsel can be heard at the State House in the City of Trenton, New Jersey, I will move the above entitled cause for argument.

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YOUNG & SHANLEY,
Attorneys for Plaintiff-Appellant.

Service of copy of the within Notice of Argument is hereby acknowledged this ~~7th~~ 19th day of October, 1937.

BOYD & DODD,
Attorneys for Defendant-Respondent.

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The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

Between

FEIST & FEIST, a corporation of the State of New Jersey,

Plaintiff-Appellant,

and

BLOOMFIELD BANK & TRUST COMPANY, a corporation of New Jersey having its principal office in Bloomfield, Essex County, New Jersey,

Defendant-Respondent.

On Appeal.

BRIEF OF PLAINTIFF-APPELLANT

YOUNG & SHANLEY,
Attorneys of Plaintiff-Appellant.

BOYD & DODD,
Attorneys of Defendant-Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

FEIST & FEIST, a corporation of the State of New Jersey,

Plaintiff-Appellant,

and

BLOOMFIELD BANK & TRUST COMPANY, a corporation of New Jersey having its principal office in Bloomfield, Essex County, New Jersey,

Defendant-Respondent.

On Appeal.

BRIEF FOR PLAINTIFF-APPELLANT

FACTS

This is a suit to recover commissions for the sale of real estate. The entire testimony taken in the case was given by Chester W. Hull on behalf of the plaintiff corporation. Mr. Hull handled the entire negotiation for the appellant and at the time of the suit was no longer connected with the appellant and was an entirely disinterested witness. At the termination of the appellant's case the respondent moved for a non-suit which was granted. From the granting of said non-suit the Plaintiff-Appellant appeals to this Court.

Briefly Mr. Hull's testimony as set forth entirely in the State of Case was that in the early part of April 1935 through the insurance department of the Appellant, with whom Mr. Budde Schiffenhaus placed his insurance, he heard that Mr. Schiffenhaus was in the market for some factory property. After showing Mr. Budde Schiffenhaus numerous factory properties Mr. Hull suggested the factory, the sale of which is basis of this suit. Mr. Schiffenhaus advised Mr. Hull he desired his foreman to inspect the building, which was arranged. Mr. Schiffenhaus subsequently advised Mr. Hull that the price for the premises was too high and Mr. Hull urged him to make an offer to the Respondent for the factory. Mr. Hull then went to the Respondent and spoke with Mr. Schilling, and Mr. Schilling advised Mr. Hull that it was the cheapest price they would take for the factory. Thereupon, Mr. Schiffenhaus advised Mr. Hull that he was not interested. Mr. Hull paid many visits to the bank and discussed this matter with Mr. Schilling of the Respondent institution, and spoke with him with relation to it on the telephone regularly during the course of the negotiations. Mr. Hull kept in continual contact with Mr. Schiffenhaus telling him that he felt the plant the most suitable of any for his purposes.

During the early stages of the negotiations, on April 15, 1935, the Appellant wrote a letter to the Respondent which letter was submitted in evidence at the trial, which letter reads as follows:

FEIST & FEIST
58 Park Place
Newark, N. J.

April 15, 1935

Bloomfield Bank and Trust Company,
Bloomfield Avenue and Broad Street,
Bloomfield, New Jersey

Attention of Mr. Francis A. Schilling,
Vice-President.

Gentlemen:

Confirming our various conversations, we have submitted and shown your building at Hoover Avenue (formerly Franklin Avenue) formerly owned by the Sprucolite Corporation to the Progressive Paper Box Company of 341-55 Jeliff Avenue, Newark, represented by Mr. Budde Schiffenhaus, Vice-President, and are now actively negotiating with them for the purchase of this property.

As stated to you on the occasion of our first visit, our commission in case of a sale will be five per cent. of the purchase price.

We will keep you fully advised as to our progress in these negotiations.

Very truly yours,

Feist & Feist, Inc.
C. W. Hull
Industrial Department

C. W. HULL
RA

The Respondent acknowledged the above letter by the following letter:

THE BLOOMFIELD BANK AND TRUST COMPANY
Bloomfield, New Jersey

April 17, 1935

Feist and Feist,
58 Park Place
Newark, New Jersey.

Gentlemen:

We are in receipt of your favor of 15th instant, and have noted on our records that you have shown the Hoover Avenue property, formerly owned by the Sprucolite Corporation, to the Progressive Paper Box Company of Newark, and that you may succeed in consummating a sale of the property to these parties.

The commission indicated in your letter will be fully recognized in the event a sale is effected.

Truly yours,

F. A. Schilling
Vice President.

FAS MHF

Subsequently, during the month of June it came to the attention of the Appellant that the Respondent had sold, on June 1, 1935, the premises in question to Budde Schiffenhaus. The Appellant thereupon advised the Respondent that they were responsible to them for the commission as set forth in the Respondent's letter of April 17, 1935.

ARGUMENT

The non-suit was granted by reason of the fact that the Court held that the Tenth Provision of the Statute of Frauds and Perjuries had not been fully complied with, (Cumulative Supplement to Compiled Statutes page 1452).

I

The Court's first grounds for non-suiting the Appellant was that the rate of commission was not specified in the agreement. The letter set forth in the Statement of Facts herein, written April 15, 1935 by the Appellant to the Respondent contains the following language:

> "As stated to you on the occasion of our first visit, our commissions in case of a sale will be five per cent. of the purchase price."

In the case of *Nary* v. *Heath* 9 Misc. page 771, the Defendant-Appellant having appealed from a judgment entered for the Plaintiff by the direction of the Judge at the close of the case, the Supreme Court following the opinion of the Court of Errors and Appeals, in the case of *Clark* v. *Griffin,* N. J. L. 508 said: "Shortly stated, our statute of frauds relating to the employment of brokers (Pamph. L. 1918 p. 1020); insofar as we are now concerned with it, requires that the authority of the broker must be in writing signed by the owner or his authorized agent either before or after sale has been effected, *containing the rate of commissions on the dollar.*" (Italics inserted).

In *Clark* v. *Griffin* (*supra*) the owner said in the letter upon which suit was brought "I am asking One Hundred and Ten Thousand Dollars for the property, commission two and one-half per cent." The property was later sold for the sum of Ninety-three Thousand Dollars, and the Court taking for granted the rate of commission was properly set forth in accordance with the statute sent the case back for a new trial on the grounds that the question of whether or not the broker effected the sale was a question for the jury under proper instructions from the trial court, therefore,

It would seem that the letter of April 15th addressed by the Appellant to the Respondent and the acknowledgment addressed to the Appellant by the Respondent stating that the rate of commission was satisfactory, fully complied with the statute.

II

The trial Judge stated, in reference to the question as to whether the Appellant effected the sale, which language is contained in the State of Case: "I might let this go to the jury on that account, but I could not use that so for that reason we are thrown back on the letter in writing, his agreement to pay commissions, and there we have the difficulty about the rate not being specified therein, so I will grant the motion for the grounds stated."

The Court of Errors and Appeals in the case of *Clark* v. *Griffin* (*supra*) said, "Whether the plaintiff was the procuring or efficient cause of the sale? There being doubt upon that point, the doubt must be solved by the jury under proper instructions from the trial court." Citing *Vreeland* v. *Vetterlein*, 33 N. J. L. 247; *Queen v. Jennings*, 93 Id. 353; *Weeks* v. *Smith & Sons Co.*, 79 Id. 388; *Hudson Real Estate Co.* v. *Bauer*, 74 Id. 90.

"It seems unnecessary to review the facts at any length, pointing out wherein there is a jury question on the point, whether the plaintiff was the procuring or efficient cause of the sale. But the respondent argues that there was not a jury question, even though the writing satisfies the statute of frauds. The testimony, in brief, shows the plaintiff, after receiving the writing, went to see a Mr. Abrams, who is a real estate dealer. They then went to see Mr. Hersch, the purchaser of the property. He told them to go and see his lawyer, Mr. Koestler, which they did. The plaintiff then showed Mr. Koestler the above writing, and they

then made an appointment to meet Mrs. Griffin in Mr. Wilson's office. The plaintiff then told her that Mr. Abrams had a buyer, a Mr. Hersch, for $90,000. Mrs. Griffin said she would not accept that amount, she wanted $95,000 in cash. There is more testimony in detail, but, subsequently to these negotiations, on September 10th, 1919, the property was conveyed by Mrs. Griffin to Louis F. Hersch and Herman Hersch, partners, for $93,000. The question, then, who was the procuring or efficient cause of the sale was a jury question.

"The judgment of the Supreme Court is reversed, to the end that a *venire de novo* may issue."

Therefore, the question as to whether or not the Appellant was the procuring or efficient cause of the sale is one for the jury.

III

The trial judge stated that there was no proof that the Appellant dealt with Mr. Budde Schiffenhaus as an individual and that the court and jury did not have proof of the relationship of the Progressive Paper Box Company and Mr. Budde Schiffenhaus. With reference to the question as to dealing with Mr. Budde Schiffenhaus as an individual as well as Vice-President of the Progressive Paper Box Company, Mr. Hull testified on direct examination: "I originally heard that he (meaning Budde Schiffenhaus) was in the market through the insurance department of Feist & Feist and I got in touch with him to tell him about some property and he told me he was dickering for some property in Belleville." Mr. Hull testified that that was in the early part of April 1935. Later in the testimony Mr. Hull said: "In the meantime I was looking for other suitable property for him (meaning Budde Schiffenhaus) and among others I was look-

ing at the Diamond Paper Mill in Bloomfield and he went and looked at that but it did not seem suitable and I noticed the property next door." Further in the testimony Mr. Hull testified as follows: "No, I didn't know anything about that property except that Mr. Schiffenhaus told us that if he thought that would be satisfactory he would let us handle the matter for him, but I found this particular plant now in question was owned by the bank and I went down to the bank and asked them and they said 'yes' that they would have to have $45,000 and they showed me an appraisal which stated a great deal higher price than that and informed me that $45,000 was the rock bottom price. I got in touch with Mr. Schiffenhaus and made several appointments with him and finally he went up with me and looked at the plant all through and I called his attention to the plant next door and he said that he thought that he might be able to use that as a paper manufacturing plant and so we went next door and tried to get in." Further in the testimony Mr. Hull said: "Mr. Schiffenhaus and I had several talks about it and he told me he thought the price was too high, he thought he could get the plant for a much cheaper price. I told him what they told me that that was the lowest price but that would he make an offer and he said he didn't want to make an offer, he said he wasn't sure whether that plant would be all right for him." And throughout the entire testimony given by Mr. Hull in the instant case when referring to the entire transaction, he refers specifically to Mr. Budde Schiffenhaus. With reference to whom the Appellant was dealing with reference to the sale of the property, that is, the Progressive Paper Box Company or Mr. Budde Schiffenhaus, Mr. Hull said on cross examination, upon being asked whether, when in dealing with Mr. Schiffenhaus that he was

dealing with him as an officer of the company. "I was dealing with him as an individual, how he would purchase the property, I don't know." The next question put to Mr. Hull was: "You have no idea how he was purchasing the property?" "No, I understood it was to be used for paper box manufacturing."

Later in the testimony, the question was put to Mr. Hull on cross examination: "All the time you knew that you were attempting to sell the property to the Progressive Paper Box Company, didn't you?" Answer. "I couldn't say that. I was dealing with Mr. Schiffenhaus. I assumed that he was president of a paper box company and assumed that he was getting it for the Progressive Paper Box Company."

There is ample testimony on cross examination of Mr. Hull to the effect that he knew Mr. Budde Schiffenhaus was an officer of the Progressive Paper Box Company.

Therefore, it is respectfully submitted that there was considerable proof in the case showing the Appellant dealt with Budde Schiffenhaus as an individual and likewise, ample testimony showing that Mr. Schiffenhaus was vice president of Progressive Paper Box Company. And further, that under the cases cited above, where there is a doubt as to whether or not the Plaintiff was the procuring or efficient cause of the sale, the case must be submitted to the jury upon proper instructions from the trial court, and it is respectfully submitted that this case should have been submitted to the jury to determine that question.

It is respectfully submitted that the judgment non-suiting the Plaintiff-Appellant be reversed and the case ~~remanded~~ REMANDED for a new trial.

YOUNG & SHANLEY,
Attorneys for Plaintiff-Appellant.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

Between

FEIST & FEIST, a corporation of the State of New Jersey,

Plaintiff-Appellant,

and

BLOOMFIELD BANK & TRUST COMPANY, a corporation of New Jersey having its principal office in Bloomfield, Essex County, New Jersey,

Defendant-Respondent.

On Appeal.

BRIEF OF DEFENDANT-RESPONDENT

YOUNG & SHANLEY,
Attorneys of Plaintiff-Appellant.

BOYD & DODD,
Attorneys of Defendant-Respondent.

I hereby acknowledge service of the within brief as of time.
Young & Shanley

NEW JERSEY COURT OF ERRORS AND APPEALS

Between FEIST & FEIST, a corporation of the State of New Jersey, *Plaintiff-Appellant,* *and* BLOOMFIELD BANK & TRUST COMPANY, a corporation of New Jersey having its principal office in Bloomfield, Essex County, New Jersey, *Defendant-Respondent.*	*On Appeal.*

BRIEF FOR DEFENDANT-RESPONDENT

FACTS

This suit was brought for real estate commissions alleged to be due from the respondent on two counts as stated in the complaint which has been copied into the State of Case. (page 3 thereof). The first count is founded upon a contract alleged to have been entered into between the respondent and the appellant respecting the sale of the property at 350 Hoover Avenue, in the Town of Bloomfield, County of Essex and State of New Jersey. This contract was alleged to be contained in the two letters, copies of which are contained on pages 4 and 5 of the appellant's brief.

The second count is predicated upon the provisions of the tenth section of the Statute of Frauds and Perjuries as amended. Pamphlet Laws 1911, chapter 331, page 703, and Laws of 1918, chapter 273, page 1020. As stated in the appellant's brief at the conclusion of the plaintiff's case, the lower court granted a nonsuit. It would seem unnecessary to review the testimony of the appellant's one witness in view of the fact that the argument herein contained alludes to sufficient portion thereof to show that the appellant has failed to prove such facts as would warrant a recovery against the respondent.

SUMMARY OF ARGUMENT

For convenience the respondent's argument is divided into three parts. Point One is devoted to the first count contained in the complaint. Point Two is devoted to the second count contained in the complaint. Point Three is devoted to a reply to the appellant's arguments as set forth under one, two and three in its brief.

ARGUMENT

POINT ONE

As to the first count, the plaintiff's right to recovery was limited by the contract alleged to have been made between the parties. The plaintiff-appellant attempted to prove compliance on its part with the terms of that contract by proof that the Bloomfield Bank and Trust Company had sold the premises in question to Budde Schiffenhaus. The lower court refused to accept this proof as a compliance with the terms of the contract because the alleged contract as shown by the letters referred to is an agreement to pay commissions upon the sale of the property in question to the Progressive Paper Box Com-

pany. There was no proof that the Progressive Paper Box Company and Budde Schiffenhaus were one and the same individual nor was there any proof of fraud on the part of either the defendant-respondent or of Mr. Schiffenhaus, nor was there any proof that Mr. Schiffenhaus purchased this property on behalf of Progressive Paper Box Company. In the case of *Resky* v. *Meyer*, 98 N. J. L. 168, (Court of Errors and Appeals), we find the following state of facts: The defendant, Meyer, the owner of a house, circularized various brokers and also inserted advertisements in various newspapers respecting such sale and the terms thereof. The plaintiff, Resky, who received one of the circular letters, communicated with one Weiss (to whom Meyer ultimately conveyed the premises) and notified Meyer he had a prospective purchaser. Resky took Weiss to see the property by arrangement and Meyer, the owner, was not present on that occasion. Subsequently an offer was made by Resky on behalf of Weiss which offer was not acceptable to the defendant, Meyer. Thereafter Meyer entered into a contract to sell to one Solomon, who, it appears, was an acquaintance of Mr. Weiss and who later assigned the contract to Weiss. Pursuant to the terms of the assignment Meyer conveyed to Weiss. The defendant acknowledged that he had authorized Resky in writing as his broker. The Court of Errors and Appeals reversed the lower court in finding for the plaintiff and found for the defendant. Justice Parker, who delivered the opinion for the court, said:

> The proposition that a broker, in order to be entitled to commission, must be "the producing cause of the sale" necessarily implies that the purchaser must have been produced by him. In this case the broker produced Weiss;

he did not produce Solomon. If the "sale" was made to Weiss, the owner is liable; if the "sale" was made to Solomon he is not. . . . If there had been any evidence to show that Meyer knew or had reason to believe, before the contract of sale was executed, that Solomon was acting for Weiss and not for himself, the case would be different; but there is no such evidence".

In the instant case no evidence was offered nor has there been any suggestion that Budde Schiffenhaus, in the purchase of the defendant's property, was acting for or on behalf of the Progressive Paper Box Company which evidence, if it were true, would have been available to the plaintiff by subpoenaing the corporate records of the Progressive Paper Box Company or the records of Budde Schiffenhaus.

POINT TWO

As to the second count the plaintiff below attempted to show compliance with the following clause of the tenth section of the Statute of Frauds:

"Provided, however, that any broker or real estate agent who may hereafter be employed by any owner of real estate by oral agreement, to sell or exchange any real estate belonging to such owner, and who *shall actually effect the sale* or exchange of such real estate pursuant to such oral agreement before the same shall have been terminated by such owner in writing as hereinafter provided, may recover from such owner the amount of commission on such sale or exchange provided such broker or agent shall within five days after the making of such oral agreement serve upon such owner a notice in writing setting forth the terms of

> such oral agreement and stating the rate or amount of commission to be paid thereunder, and provided said owner shall not have repudiated or terminated such agreement prior to the actual sale or exchange of such real estate."

In proving a cause of action on this count the plaintiff below utterly failed in supplying any proof that it actually effected the sale and, as pointed out by the court below, this is a statutory requisite of the right to recover. Such has been the holding in the Court of Errors and Appeals. *Baron* v. *Wisnowski,* 102 N. J. L. 46, in which Justice Parker, in delivering the opinion of the Court of Errors and Appeals, in construing the phrase "shall actually effect the sale" said:

> "The first proviso speaks of a broker who shall actually effect the sale, and of repudiation or termination prior to the actual sale or exchange; that the employment may be repudiated or terminated at any time after notice by an owner served on the broker prior to the actual sale by such agent. We consider that by this repeated use of the word "actual," as applied to "sale," the legislature intended to limit the right of recovery on an oral contract to cases where the vendor either conveyed to the broker's client, or at most to cases in which a valid and binding contract of sale was entered into between vendor and the purchaser brought in by the broker."

The plaintiff did not actually effect a sale before repudiation which, in this case, was a sale to another.

The plaintiff-appellant failed in the court below to prove that it actually effected the sale of the property in question to anyone, let alone to the

Progressive Paper Box Company.

An examination of the testimony shows a complete absence of any proof of an oral agreement made by and between the Bloomfield Bank and Trust Company, the defendant-respondent, and the plaintiff-appellant herein, nor does the letter set forth the terms of any such alleged oral agreement.

The court below commented upon this omission in saying to counsel for plaintiff-appellant:

> "I do not think your letter being written formed a verbal transaction that we can use." (page 24, State of Case).

Defendant-respondent maintains that the letter of Feist & Feist to Bloomfield Bank and Trust Company, dated April 15th, does not comply with the statute in that it does not refer to any oral agreement and, therefore, of necessity, does not set forth the terms of such oral agreement.

POINT THREE

A. Under paragraph one of the appellant's brief the appellant argues that it should be entitled to recover upon an authorization contained in the letter written and signed by the defendant-respondent and set forth in full on page 7 of the State of Case. Undoubtedly the argument is presented for the reason that the court below considered in its comments (page 24, State of Case) the feasibility of such a claim although the plaintiff did not plead a count in its complaint for recovery thereon. This letter, the court said, is insufficient to be an authorization to sell and an agreement to pay commissions because the rate of commission is not specified therein and it therefore fails of compliance with the first part of section ten of the Statute of Frauds. The entire first point of the appellant's brief is de-

voted to showing that the rate of commission on the dollar is set forth not in the letter of authorization but in another letter not signed by the owner as required in the Statute. In both of the cases cited by counsel under this point, the authorization signed by the owner contained the rate of commission to be paid on the dollar. It therefore appears that appellant's first point pertains to a count not included in the complaint and the authorities therein cited fail to substantiate by legal precedent the conclusion drawn in his argument.

B. The appellant submits as a second ground for reversal that this case should have been submitted to the jury to determine whether or not the appellant was the procuring or efficient cause of the sale. Had the sale been made to the Progressive Paper Box Company, an issue would have been raised as to whether the appellant was the procuring or efficient cause. Since, however, such a sale did not transpire, no such issue arose in this case. The cases cited by the appellant under this point hold that in a proper case where there is a sale to the broker's client and there is a doubt as to the broker being the efficient and procuring cause of the sale, such doubt must be resolved by the jury. *Lough* v. *Spicer Manufacturing Company,* 105 N. J. L. 152 (hereinafter referred to) is a case in which a nonsuit was sustained on the ground that the sale was not made to the broker's client. In the case of *Murray Apfelbaum Inc.* v. *Bernstein,* 104 N. J. L. 664 (Court of Errors and Appeals) the plaintiff broker worked for two or three weeks after July 27th, 1925, on a proposed lease. Later in May, 1926, a new lease with different terms was entered into between the owner and the broker's client. Judge Dungan granted a nonsuit stating that there were no inferences from which the jury could find

that the plaintiff was the efficient procuring cause of the lease which was actually executed.

In the case at bar the testimony most clearly supports the following comment made by the court, namely:

> "He" (the broker) "might have brought the parties together, but he didn't say that they actually effected a sale. Mr. Schiffenhaus walked out and then later went back to the bank but your client did not actually effect the sale."

As a matter of fact the testimony clearly shows (page 13, line 36, State of Case) that the plaintiff broker had not even succeeded in getting his client to make an offer for the property.

C. Appellant argues in its point three that the trial judge erred in stating that there was no proof, that the appellant dealt with Mr. Budde Schiffenhaus as an individual and that there was no proof as to the relationship between Progressive Paper Box Company and Mr. Schiffenhaus. With reference to the question as to dealing with Mr. Budde Schiffenhaus as an individual, it is true that Mr. Hull in the early part of his testimony stated that he was dealing with Mr. Schiffenhaus individually. Later, however, Mr. Hull changed his testimony and stated that he was dealing with Mr. Schiffenhaus as a representative of the Progressive Paper Box Company (page 19, line 34, State of Case).

Although counsel claims in his brief that there is ample testimony that Budde Schiffenhaus was vice-president of Progressive Paper Box Company, there is not one iota of evidence that when Mr. Schiffenhaus purchased the property from Bloomfield Bank and Trust Company he did so either in trust for Progressive Paper Box Company or on

behalf of that company, nor was there any proof of such a relationship as would entitle the plaintiff to recover commissions on this sale. In the case of *Lough* v. *Spicer Manufacturing Company Supra:* This case involved a suit for commissions by a broker to whom the defendant had agreed to pay commissions on all sales to customers produced by him. The broker produced Fiber Cushion Horseshoe Company of which Peter C. Argyro was president. Shortly after that company closed up. A new company was organized named P. C. A. Steel Fiber Horseshoe Company of which Argyro was treasurer and actively engaged in the management. The new company purchased from the defendant. According to the evidence the two corporations were not connected. The court held in this case that there being no proof that the plaintiff had by any act on its part produced the new concern as a customer of the defendant, a nonsuit was proper. In that case the agreement was to pay commissions irrespective of whom the broker produced whereas in the instant case the agreement was to pay commissions in the event of the sale to Progressive Paper Box Company.

SUMMARY

Respondent therefore submits that plaintiff-appellant in order to have avoided a non-suit in the court below must have proved a *prima facias* case on one of three possible causes of action. First, by virtue of a written agreement between the parties. Second, under the verbal agreement and notice clause of the tenth section of the Statute of Frauds. Third, under a written authorization signed by the owner as provided in the first clause of section ten of the Statute of Frauds. Appellant in the court below pleaded the first two of these

possible causes of action but failed to substantiate by the evidence submitted any one of the three possible causes of action. It failed to prove first that it had effected a sale to the person named in the written agreement between the parties. It failed in the second place to prove any verbal agreement or that it effected an actual sale in pursuance with any verbal agreement which might have been had and it failed in the third place to show a proper written authority signed by the owner containing the rate of commission on the dollar as provided by the Statute.

WHEREFOR it is respectfully submitted that the judgment of nonsuit was entirely proper and should be affirmed.

BOYD & DODD,
Attorneys for Defendant-Respondent.

ERNEST F. KEER, JR.,
Of Counsel.