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Notice of Appeal

Essex County Circuit Court

GEORGE F. HEWSON COMPANY, A NEW JERSEY CORPORATION, Plaintiff, vs. JOHN EBERSBERGER, Defendant.	}	Action at Law, Notice of Appeal. 10
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To Aaron Marder, Attorney for Plaintiff,
 Or to whom it may concern:

Sir:

Please take notice that the defendant in the above 20
 entitled cause appeals to the Supreme Court from
 the whole of the judgment entered in this cause.

Respectfully,

FAST & FAST,
 Attorneys for Defendant.

30

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Summons

The State of New Jersey To:
John Ebersberger:

10

SEAL

You are summoned to answer the Complaint of George F. Hewson Company, a New Jersey Corporation, in an action at law in Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Essex County

Circuit Court at Newark, within twenty days after service upon you of this writ, and annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

Witness, Honorable William A. Smith, Judge of the Essex County Circuit Court at Newark, this eighth day of January, 1926.

JOHN H. SCOTT,
Clerk.

AARON MARDER,
Attorney.

30

40

Complaint

ESSEX COUNTY CIRCUIT COURT.

GEORGE F. HEWSON COMPANY,
A NEW JERSEY CORPORATION,

Plaintiff,

vs.

JOHN EBERSBERGER,

Defendant.

Action at Law,

Complaint.

10

Plaintiff, George F. Hewson Company, a New Jersey corporation, with its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

20

1. Plaintiff is a licensed real estate broker authorized to transact the business of a real estate broker in the State of New Jersey and was so licensed and authorized at the times hereinafter mentioned.

2. On or about July 27, 1925 John Ebersberger, the above named defendant, hired and authorized the plaintiff to negotiate a lease on premises No. 1086 Broad Street, Newark, N. J., known as "The Margaret Apartment," for a period of twenty-one years at a net rent of \$8,500. per year and agreed to pay to plaintiff a commission of five per cent on a total net rental for said term upon plaintiff's procuring a tenant pursuant to said authorization and hiring.

30

3. On or about October 7, 1925, plaintiff procured as tenants for said premises, Messrs. Henry Tannenberg and Jacob Holdman, pursuant to said authorization and hiring, who were ready, able and

40

Complaint

willing to lease said premises at a net rental of \$8,500. per year for the first ten years, and a net rental of \$10,000 for the balance of eleven years, of said period of twenty-one years.

10 4. Defendant became indebted to plaintiff in the sum of \$9,750. being five per cent commission on said net rental for the twenty-one year period and thereafter plaintiff demanded of the said defendant said sum of \$9,750.; yet the defendant has refused to pay said sum, although same is due and owing by defendant to the plaintiff.

Plaintiff demands as damages the sum of \$9,750. with lawful interest and costs of suit.

AARON MARDER,
Plaintiff's Attorney.

20

30

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Affidavit of Merits

ESSEX COUNTY CIRCUIT COURT.

GEORGE F. HEWSON COMPANY,
A NEW JERSEY CORPORATION,
Plaintiff,
vs.
JOHN EBERSBERGER,
Defendant.

Action at Law,
Affidavit of
Merits.

10

State of New Jersey }
County of Essex, } ss.

John Ebersberger, being duly sworn, on his oath deposes and says: I am the defendant herein; I have a just and legal defense to the action brought by the plaintiff herein.

20

Subscribed and sworn to before
me this twelfth day of January,
1926,

John Ebersberger

LOUIS N. FREEMAN,
a Notary Public of New Jersey.

30

40

Reply

ESSEX COUNTY CIRCUIT COURT.

10	GEORGE F. HEWSON COMPANY, A NEW JERSEY CORPORATION,	}	Action at Law,
	Plaintiff,		
	vs.		
	JOHN EBERSBERGER,	}	Reply.
	Defendant.		

Plaintiff denies the separate and independent defenses of the answer.

20	AARON MARDER, Attorney of Plaintiff.
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Answer

ESSEX COUNTY CIRCUIT COURT.

GEORGE F. HEWSON COMPANY, A NEW JERSEY CORPORATION,	}	Action at Law,	
vs.			
JOHN EBERSBERGER,	}	Answer.	10
Defendant.			

The defendant, John Ebersberger of the City of Newark, County of Essex and State of New Jersey, in answer to the complaint filed herein says:

1.	The defendant admits that the plaintiff is a licensed real estate broker, authorized to transact the business of a real estate broker in the State of New Jersey, and that he was a licensed broker in the years 1925-1926 in all other respects the defendant denies paragraph 1 of the complaint.	20
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2.	The defendant denies paragraph 2 of the complaint.	
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3.	The defendant denies paragraph 3 of the complaint.	
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4.	The defendant denies paragraph 4 of the complaint.	
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As separate and independent defenses the defendant sets up:	30
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1.	That there is nothing due to the plaintiff.	
----	---	--

2.	That the plaintiff never brought a customer to him for the premises mentioned in the complaint, in accordance with the terms of the employment, between the plaintiff and the defendant.	
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FAST & FAST,, Attorneys for Defendant.	40
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Judgment

ESSEX COUNTY CIRCUIT COURT.
39472

10	GEORGE F. HEWSON COMPANY, A NEW JERSEY CORPORATION, Plaintiff,	Action at Law, Judgment entered January 14, 1927.
	vs.	
	JOHN EBERSBERGER, Defendant.	Damage ..\$6288.75 Costs 69.30 <hr style="width: 50%; margin-left: 0;"/> Total ...\$6358.05

Aaron Marder, Attorney of Plaintiff.

20 Judgment after verdict in the above entitled Action was rendered on the Fourteenth day of January, A. D., Nineteen Hundred and Twenty-Seven in favor of the plaintiff, George F. Hewson, Co., a New Jersey corporation and against the defendant, John Ebersberger for the sum of Six Thousand, Two Hundred Eight-Eight Dollars and Seventy-Five Cents, (\$6288.75) damage and Sixty-nine dollars and thirty cents, costs of suit.

Judgment entered and signed, January 14, 1927.

30 WILLIAM S. GUMMERE, Judge,
JOHN H. SCOTT, Clerk.

Circuit Court Judgment Book 102, page 179.

Certificate

ESSEX COUNTY CLERK'S OFFICE

State of New Jersey, }
County of Essex. } ss.

I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, *Do Hereby Certify* that the foregoing is a true and correct copy of all the records in the case of George F. Hewson, Company, a New Jersey Corporation, Plaintiff vs. John Ebersberger, together with a copy of the Judgment record entered in Book 102, Circuit Court Judgments, page 179, and the same is taken from and compared with Original Copies of all the records on file in my office and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this 18th day of March, A. D., 1927.

JOHN H. SCOTT,
Clerk.

Official Seal.

20

30

Plaintiff's Witness, Edwin J. Paige, Direct

ESSEX COUNTY CIRCUIT COURT,

Thursday, January 13, 1927.

10	GEORGE F. HEWSON COMPANY,	}	Action at Law.
	A NEW JERSEY CORPORATION,		
	vs.		
	JOHN EBERSBERGER,		

Before Hon. Nelson Y. Dungan, J., and a Jury.

For the plaintiff appears Aaron Marder.

20 For the defendant appears Fast & Fast
(by Louis Fast).

[A jury is called and sworn].

Mr. Marder opens in behalf of plaintiff.

Mr. Fast opens in behalf of defendant.

EDWIN J. PAIGE sworn in behalf of plaintiff.

DIRECT EXAMINATION by Mr. Marder:

30 Q You are employed by the Hewson Company,
the plaintiff in this case?

A I was at that time, yes.

Q Do you mean in the year 1925?

A. Yes, sir.

Q You are no longer with the company?

A I am right there in the office, yes.

Q You were employed in 1925 in what capacity?

A Salesman.

40 Q How long have you been with the company?

Plaintiff's Witness, Edwin J. Paige, Direct

A I have been there associated with Mr. Hewson about three years, I guess.

Q Did you have any conversation with Mr. Ebersberger in the summer of 1925?

A In the middle of July, 1925, I was working with Mr. Ebersberger on another lease, the Terrill Engineering Company, and I was at his office a number of times in connection with that lease, and on the 20th of July, I was in his office particularly and had rather general conversation. He said to me that he was not going to sell his apartment house at 1086 Broad Street now, as the values were increasing, and he thought it would be a good opportunity to hold that for his children, but that he would lease it for \$8500 a year on a twenty-one year lease. He says, "Now, you and Mr. Hewson better get to work on it and see what you can do." So I came back to Mr. Hewson's office and I asked Mr. Hewson if it was possible for us to lease the property—

MR. FAST. I object to any conversations not in the presence of Mr. Ebersberger.

Q Don't tell the conversation with Mr. Hewson.

A I brought the property in the office for listing lease.

Q Did you have anything more to do with this transaction by way of negotiation?

A On October 6th I called at Mr. Ebersberger's office and just casually asked him why the deal hadn't gone through with Mr. Hewson?

Q You mean by that, a deal that was in the air that was pending?

A Yes, there was three or four leases pending at that time, but I was not the party, I didn't know any of the negotiations any more whatever, Mr. Hewson did it all.

Plaintiff's Witness, Edwin J. Paige, Direct

Q But you were in Mr. Ebersberger's office on October 6th?

A Yes.

Q 1925?

A Yes, sir.

Q What was your conversation at that time?

10 A I asked him casually why the lease hadn't gone through and he said, I "offered Mr. Hewson \$7000 commission and he wouldn't accept it, and the deal was off."

Q Did you ask him for the written lease at that time?

A I asked him if I couldn't have the return of the leases and he said that he had not the leases or he had destroyed them; I don't remember just what he said.

20 Q Do you remember seeing in Mr. Hewson's office at any time during the summer of 1925 a gentleman by the name of Tannenberg and Holdman?

A They were in the office between July and August about three times a week, I would be in the office about one o'clock; the young lady was out at that time.

Q What did they say?

30 A They wanted to know at that time they came in if the lease had been signed by Mr. Ebersberger, whether the lease had been signed.

CROSS EXAMINATION by Mr. Fast:

Q At the time Mr. Ebersberger gave you the listing for the renting of the property was there any mention made to you of the commission?

A No mention made to me of commission.

Q You are the one that brought it into the office?

40 A Yes, sir.

Plaintiff's Witness, Edwin J. Paige, Cross

Q Was there ever any mention of a commission to be paid to the Hewson Company?

A Not to me, no, sir.

Q You say you called there October 6th?

A Yes, it was October 6th.

Q You are sure that was the date?

A I can't swear to that; as near as I can judge, 10 yes, sir.

Q What is it that caused you to say definitely it was October 6th?

A Mr. Hewson thought it was about time he had the leases returned to him, so he had called up several times and couldn't get them sent back, so he asked me if I wouldn't call there, and I did call for the leases and Mr. Ebersberger said—

Q By what do you say the date was definitely 20 October 6th?

A Well, I don't know; just happened to be that date I went there, the record made in our office that I called on Mr. Ebersberger.

Q Does that record show that it was October 6th?

A Yes, sir, twice.

Q When you asked him why the leases didn't go down Mr. Ebersberger gave you no other reason aside from the refusal of Mr. Hewson to take \$3000 30 commision?

A Not that I know of.

Q Do you remember his telling you that the tenants were to put up a security by way of a surety bond to indemnify Mr. Ebersberger for repairs that would be made to the building within two years?

A None of those details were taken up with me, not that I know of.

Q Do you remember his saying that he wanted 40

Plaintiff's Witness, George F. Hewson, Direct

a clause that the tenants would pay for liability and boiler insurance?

A Nothing to me.

Q Was there anything said about securities for the rent?

A Nothing to me.

10 Q Didn't you make a memorandum of the various terms when Mr. Ebersberger first told you that he wanted to rent?

A Just told me he wanted \$8500—not to me.
At this point the court took a recess of one hour.

AFTER RECESS

GEORGE F. HEWSON, sworn in behalf of plaintiff.

20 *DIRECT EXAMINATION by Mr. Marder:*

Q Mr. Hewson, you are the president of the plaintiff company?

A Yes, sir.

Q And the plaintiff company is in the real estate business on Market Street?

A Yes, sir.

Q Acts as broker?

A Yes, sir.

30 Q How long have you been in the real estate business in the City of Newark?

A Fifteen years.

Q Do you remember speaking to Mr. Ebersberger on the telephone some time in July, 1925?

A Yes, sir.

Q Can you tell us what that conversation was?

A Yes, sir. We had been closing a transaction of Mr. Ebersberger on Riverside Avenue—

40 THE COURT. You are only asked for the conversation.

Plaintiff's Witness, George F. Hewson, Direct

WITNESS. I called Mr. Ebersberger up on the telephone and told him that Mr. Paige had been in the listing of his property at 1086 Broad Street, and had submitted a price of \$8500 on the rental on the basis of twenty-five years with the relation to the lease. The tenant was to pay all expenses in connection with the property, make all repairs, and so forth, and he said, "That is correct", went over all the details, and at that time there was no question of security of any kind or character— 10

Q Confine yourself to that conversation. Did you speak to him about commission at that time?

A Yes, sir..

Q What did you tell him?

A He asked me what the commission was on leases and I told him the usual amount of commission on leases was five per cent. and he agreed with that. 20

Q Is that all of that conversation? I am speaking of that particular conversation.

A That was all accepted as to details, all changes and alterations in the building, in case they wanted to make it, and so forth.

Q Did you, on July 27, 1925, write this letter to Mr. Ebersberger? (showing witness paper). 30

A Yes, sir.

MR. MARDER. I offer this in evidence.

MR. FAST. No objection.

(Marked Ex. P1).

Q Let me ask you this question: You proceed with the reading of this letter, were the crossings there in pencil before you sent the letter?

A No, sir. 40

Plaintiff's Witness, George F. Hewson, Direct

MR. MARDER. There is no question about that.

MR. FAST. That is admitted.

10 Q What did you do after that in connection with getting the tenant, in connection with the organization, as testified by you?

A. I submitted the property to various people whom I thought would be interested in that type of property. Among them was one Herman Schary.

Q Was Schary the first one?

A Schary was the first one, yes, sir. I had perhaps twenty to thirty conferences with Mr. Schary relative to the leasing of this property.

Q What was Schary's offer?

20 A Schary's offer was the same, \$8500 net for the first ten, and ten thousand dollars for the eleven years succeeding, making in all twenty-one years, but he wouldn't put up any security bond.

Q Did you take that up with Mr. Ebersberger?

A Yes, sir.

Q Did you prepare a lease in accordance with what you thought Schary would do?

A Yes, sir.

30 Q And did you give that lease or contract of lease to Mr. Ebersberger?

A Yes, sir.

MR. MARDER. I call for that.

(A paper is handed to counsel).

MR. MARDER. Is this the form of lease that Mr. Hewson submitted in connection with Schary?

MR. FAST. Yes.

40 (The paper referred to is marked Ex. P2).

Plaintiff's Witness, George F. Hewson, Direct

Q What did Mr. Ebersberger say in connection with that lease?

A Submitted the lease to Mr. Ebersberger on or about the middle of August, and the lease, as to form, was all right, but he said under no circumstances would he lease the property without the security of one year's rent in advance or \$8500 as security for the lease. 10

Q Did he at that time say anything about the commissions to you, did you discuss commissions with him?

A We discussed commissions, in so far as he said, "Your commission is five per cent., it is quite a big commission, and I must have the \$8500 as security because that will go towards paying your commission."

Q Did you have any other customers for Mr. Ebersberger? 20

A Yes, sir.

Q And who were the other customers?

A I got another customer in the person of Mrs. Annie D. White.

Q What was her offer?

A Her offer was the same term lease, with \$5000 as security.

Q And was that offer communicated to Mr. Ebersberger? 30

A I submitted that offer on or about July 31st.

BY THE COURT.

Q That was before your submission to Schary?

A No, this is August 31st. I submitted the July lease first.

Q Would you say the July lease was submitted the middle of August?

A The White offer was submitted on August 11th; it was on a Friday, because Mr. Ebersberger 40

Plaintiff's Witness, George F. Hewson, Direct

was getting ready to sail for Germany on the following Saturday.

Q What day do you remember it was?

A Friday.

Q What year was it?

A 1925.

10 Q Then the Schary lease was submitted prior?

A Yes, sir, the following Saturday, and the Friday he was to sail for Germany.

Q Was it the next day?

A The next day.

BY MR. MARDER.

Q Then the July lease must have been submitted before August 7th?

20 A Yes, sir, it was submitted on or about the 1st of August.

Q What did Mr. Ebersberger say in connection with the White proposition?

A He still contended that he would have to have \$8500 security, he wouldn't consider any lease that wouldn't have security of \$8500, so, consequently, that was withdrawn.

Q You also submitted a third party, or set of parties, to Mr. Ebersberger as the prospective tenant?

30 A Yes, sir.

Q These parties were whom?

A Mr. Jacob Holdman and Mr. Henry Tannenberg.

Q When did you get in touch with these two gentlemen in connection with the proposed lease for the property in question?

A I began dealing with them some time about the middle of July; I was dealing with them the same as I was dealing with Schary.

40

Plaintiff's Witness, George F. Hewson, Direct

Q And you continued dealing with them until when?

A Until the month of October.

Q Did you have any conferences with them?

A I had upwards of fifty conferences.

Q Did you communicate their proposition?

A Yes.

10

Q What was their proposition?

A Their proposition was \$8500 for the first ten years, \$10,000 for eleven succeeding years, \$8500 to be put up as cash security.

Q Did you have a lease drawn along those lines?

A Yes, sir.

Q Did you have a conference with Mr. Ebersberger, or either or both of these gentlemen in connection with this leasing proposition?

20

A Yes, sir.

Q Where was this conference held?

A This conference was held in Mr. Ebersberger's office..

Q When?

A On or about October 7th.

Q Are you certain of that, October 7th date?

A No, not October; it was on September 29th, Tuesday, September 29th.

Q Who was present at that conference?

30

A Mr. Ebersberger, Mr. Tannenberg and myself. His stenographer was in the front office.

Q Whose stenographer?

A Mr. Ebersberger's stenographer.

Q Did you have this proposed lease prepared for you at the time?

A Yes, sir, I had two copies of this lease.

Q And you left them with whom?

A I left them with Mr. Ebersberger.

40

Plaintiff's Witness, George F. Hewson, Direct

MR. MARDER I offer this lease in evidence.

(Marked Ex. P3).

Q This is a proposed lease between Mr. and Mrs. Ebersberger, as lessee, and Jacob Holdman and Jacob Tannenberg. When these leases were offered by you were these pencil notations on at the time?

A No, sir.

Q Do you recognize these pencil notations, do you recognize the hand at all? If you don't, say so.

A No.

Q Tell us what conversations were had at that conference?

A We went over the various clauses in the lease. Mr. Ebersberger read over the lease and asked a few questions relative to the various clauses, what their effect was, and so forth, and then he started to talk about the commission.

Q Just before that was everything satisfactory?

A Everything was satisfactory, so far as the lease was concerned.

BY THE COURT.

Q How do you know that?

A Because he expressed himself as such. . He finally turned to Mr. Tannenberg and he said—

BY MR. MARDER.

Q Did he have any conversation with you about commissions?

A Yes, that was the only time that any question came up about commission. He started talking about the commission, how much it was going to be, and I told him that wasn't the time to discuss that, we had already agreed on that, that the main question was whether the lease was all right,

Plaintiff's Witness, George F. Hewson, Direct

and he said it was; he thereupon turned to Tannenberg first and says, "The only thing that will prevent me from carrying through this lease will be Hewson's commission, but, however, leave this lease with me until tomorrow morning, and I will let you know." So we left his office with that understanding.

Q Did he let you know?

A On the following morning I called him up about eleven o'clock and I asked him what decision he had reached in the matter, and he thereupon made me an offer of \$3000 commission, and I told him I could not accept that commission.

Q Did you write a letter on October 1, 1925?

A Yes.

Q (Showing witness paper). Is this the letter you wrote to him?

A Yes, sir.

Q Were those pencil notations on the letter when you sent it?

A No, sir.

(The letter referred to is offered in evidence and marked Ex. P4).

Q Did you have any more conversations with Mr. Ebersberger after signing that letter?

A No, sir, not after that; that was the last conversation I had with him except the conversation Mr. Paige testified to.

Q Did you send him a letter on October 28, 1925 (showing witness letter)?

A Yes, sir.

CROSS EXAMINATION by Mr. Fast:

Q These leases that are in evidence, the Schary lease and the Holdman lease, were drawn by you, weren't they, or at your direction?

Plaintiff's Witness, George F. Hewson, Cross

A They were drawn at my direction.

Q And you brought them down to Mr. Ebersberger's office?

A Yes, sir.

Q When was the first time that you ever spoke to Mr. Ebersberger about the Schary transaction?

10 A Some time about the first week in August.

Q There is no question in your mind about that, is there?

A Possibly..

Q What is that possible doubt, it was later or before?

A It might be earlier.

Q About how much earlier?

A It might be a day or so; it might vary two or three days.

20 Q But not more than that before August?

A I don't think so.

Q Do you keep any records in your office as to engagements of people or appointments with people?

A I certainly do.

Q Have you the card with you to show the record, as far as Ebersberger is concerned?

A Yes, sir.

Q Can I see it?

30 A Not all of them; some of them were noted in the office..

Q Show me, if you will, any reference with reference to Mr. Schary's appointment?

A Mr. Schary is July 30th. I was there with Mr. Ebersberger; Friday, July 31st, appointment with Mr. Schary at twelve P. M.; Monday, August 3rd, in touch with Mr. Schary and Mr. Ebersberger; saw Mr. Schary after seven.

Q When did you bring the lease to Mr. Ebersberger, the Schary lease?

40 A On or about Friday, August 7th.

Plaintiff's Witness, George F. Hewson, Cross

Q Wasn't it before the first of August?

A I am not clear about it; I am not clear as to the date of it.

Q During that time did you have any conversation with Mr. Ebersberger with reference to the Holdman lease?

A No. 10

Q (Showing witness paper.) I show you the Schary lease which is Exhibit P2, and its term starts August 1st. Is it possible that you brought that lease there after August 1st, notwithstanding the date?

A The date wasn't material because the date of the lease wasn't fixed; some time after the date was put in there.

Q Hasn't it been agreed as to when the term would start and when it would end? 20

A Yes; the term would start when the lease was signed.

Q Irrespective of whether it was in the middle of the month or not?

A Yes, sir.

Q You spoke of a telephone conversation with Mr. Ebersberger in which you said you went over the various terms and details. What were the terms that Mr. Ebersberger demanded?

30 A Mr. Ebersberger demanded that he be held from liability, free of any liability while they were operating the premises, and at the suggestion of Mr. Tannenberg a clause was put in relative to the alteration of the building, rehabilitation of the building.

MR. MARDER. Is that an original telephone conversation?

Q I am referring to the first telephone conversation that you had with Mr. Ebersberger. What 40

Plaintiff's Witness, George F. Hewson, Cross

were the details that Mr. Ebersberger insisted upon, the first conversation you had?

A They were all embodied in that letter to him.

Q In what?

A In the letter of July 27th.

Q Aside from that, there were no other arrangements?
10

A Oh, yes, there were other arrangements which were put into the lease.

Q What were they?

A Liability clause.

MR. MARDER. The conversation of July 25th?

WITNESS. There was nothing else except what was in that letter, it is all embodied in that letter.
20

Q What was said about the lease?

A \$8500.

Q I mean, did you pay \$8500 for the first year and \$10,000 for the next eleven years?

A Because I secured the negotiations, I thought it was only right to get a little advance on the second eleven years.

Q That was without the knowledge of Ebersberger?
30

A Yes, without his knowledge.

Q Then it was not \$8500 for the twenty-one years; the arrangement was that it would be \$8500 the first ten years?

A No, sir, the conversation was \$8500, not for the whole twenty-one years.

Q Did you tell Mr. Holdman that it was only going to be \$8500 for the whole twenty-one years?

A No, I didn't tell Mr. Holdman because I had already worked out the whole lease with Schary and
40

Plaintiff's Witness, George F. Hewson, Cross

I know that Mr. Ebersberger didn't want no other terms than with Schary.

Q What were the terms?

A The terms, there with Schary and Holdman was \$8500 for ten years and \$10,000 for eleven succeeding years.

Q Schary was willing to take a lease under those terms, wasn't he? 10

A He was willing to take the lease without putting up any security.

Q Anything said about security at that time Mr. Ebersberger gave you the listing?

A The only time there was any talk about security is when I brought the lease, Schary's lease, to Ebersberger.

Q And what was that conversation at that time?

A In that conversation Ebersberger said in view of the fact that he was paying a big commission that he would have to have a year's rent to secure it. 20

Q And Schary refused to put that up?

A He refused to put that up.

Q Was anything agreed upon as to who should pay the liability, boiler and rent insurance?

A I don't think there was a clause as to a rent insurance. The tenant was to pay everything.

Q Was supposed to pay that insurance?

A Yes, that is, liability. 30

Q That wasn't in your original lease, was it?

A No, but it was finally negotiated upon it to that point.

Q These words, "Liability, boiler and rent" were put in pencil, weren't they?

A Yes, sir, those are not mine.

Q Do you know when those written comments were made on that lease?

A No, I don't.

Q Isn't it true that this young lady was present 40

Plaintiff's Witness, George F. Hewson, Cross

at the time when you and Mr. Holdman and Mr. Tannen-
berg were there for the purpose of fixing this
lease up?

A No, sir, she was in the front office.

Q Wasn't she called in from the front office to
make these corrections?

10 A No, sir.

Q And weren't those corrections made in your
presence?

A No, sir.

Q Wasn't another bone of contention the fact
that Mr. Tannen-
berg and Mr. Holdman refused to
give to the landlord a surety bond to protect Mr.
Ebersberger in the event that any alterations were
made, that no mechanics' liens would be filed against
the building?

20 A The question was never raised.

Q Not at all?

A No, sir.

Q Do you know what the mortgage was on this
property?

A \$50,000 mortgage.

Q And wasn't there an understanding that there
was to be a subordination clause to the extent of
\$100,000?

A Yes, I believe so.

30 Q Why didn't you put that in?

A There was some talk about it, but it was final-
ly passed over.

Q Who passed it over, did Mr. Ebersberger pass
it over?

A Yes.

Q Wasn't there some question as to the clause
in your lease that the tenant agrees to keep the
premises, inside and outside, in good repair, wear
and tear and damage?

40 A No, sir, no question of that at all.

Plaintiff's Witness, George F. Hewson, Cross

Q And so Ebersberger was perfectly satisfied
with the form of this lease which you submitted?

A Yes, sir.

Q And the reason the Schary deal went off was
because of the failure on Schary's part to put up
security?

A Yes, sir.

10

Q When you brought this lease you submitted
that the payment of \$8500 was to be in notes?

A No, sir.

Q I will show it to you, it is your own typewrit-
ing.

A Perhaps at the time this lease was drawn, be-
cause some time had elapsed between the time it
was drawn and the time it got to Mr. Ebersberger's
office, this clause was left in there, but it wasn't a
final issue at all because there was some talk about
notes when we got in Mr. Ebersberger's office.

20

Q Isn't it a true that just a minute ago you said
it was to be all cash?

A Yes, sir, it was finally agreed to be all cash.

Q When was that finally agreed upon, in Mr.
Ebersberger's office?

A Yes, sir.

Q Did you ever submit a new lease of cash?

A No, I didn't, a new lease.

Q Why not?

30

A Because it wasn't necessary, all we had to do
was to change that..

Q Was that ever changed?

A It was agreed to be.

Q Did you ever change it?

A But the stenographer was called in and those
were the changes she was to make.

Q Did she make the changes?

A No, sir, she didn't.

Q She was called in and she was told to make 40

Plaintiff's Witness, George F. Hewson, Cross

them and you were all there. Did she give any reason for not changing them?

A No, because the lease didn't go through that day because we couldn't agree on the commissions..

10 Q Didn't you answer your lawyer that all the terms of this lease were satisfactory to Mr. Ebersberger?

A I meant substantially satisfactory, with very little variation.

Q In what other way were there any corrections to be made?

A I don't know of any.

Q Isn't it true that Mr. Tannenberg and Mr. Holdman said that they wouldn't give cash security?

A No.

20 Q If it was agreeable to pay the \$8500 in cash why did you send this letter under date of October 7th that Tannenberg and Holdman were willing to put up \$8500 in cash?

A There is the question.

Q If all the terms were agreed upon in Ebersberger's place, why did you send this letter under date of October 7th, why did you state that Holdman Tannenberg were then willing to put up the \$8500 in cash?

30 THE COURT What just is the wording?

MR. FAST. "They are willing to pay \$85000 cash security, as you know both men are financially responsible, each man being worth \$300,000."

THE COURT. Your question is, "Why did you say in that letter that they were then willing?"

MR. FAST. I will withdraw the question.

40 Q After Holdman and Ebersberger had agreed

Plaintiff's Witness, George F. Hewson, Cross

on the form of the lease, in so far as the \$8500 security is concerned, why did you write under date of October 3rd that they are willing to put up \$8500 cash security?

A Because I wanted to allay any fears that Mr. Ebersberger had relative to that point.

10 Q What points were they?

A The question of liability, the question of changing the apartment or any other clause that there might be, slightly change in any lease. There is sometimes a lease made for a long term without any changes. Mr. Ebersberger agreed substantially that this lease was O. K.

Q Did you ever go down to see Ebersberger at any time with a new lease so as to conform with the terms that Mr. Ebersberger insisted upon, such as this cash security of \$8500?

20

A Certainly didn't.

Q Why not?

A I didn't think it was necessary to put the lease in his possession embodying all the terms.

Q Didn't you say there was a question of \$8500 that Mr. Ebersberger insisted upon, cash?

A That was agreed upon before we left the office.

Q But there was never any such change made, was there?

30

A It wasn't necessary to make the change; it was agreed upon.

Q You mean agreed upon orally?

A Yes, sir.

Q And didn't you feel that it would be necessary to make that change in writing when the rest of the lease was in writing?

A Well, Mr. Tannenberg was perfectly willing to make the change.

40

Plaintiff's Witness, George F. Hewson, Cross

Q You were to get a substantial amount, were you not?

A Yes, sir.

Q Were you not interested enough to go down there and follow up the detail?

A When Mr. Ebersberger called me up—

10

THE COURT Answer that question.

A Yes, I was interested.

Q What did you do to show that interest?

A I called Mr. Ebersberger up the following morning; he practically cut the leg from under me when he said he would pay me \$3000 commission.

Q What did you say in response to that?

A I said absolutely nothing doing.

Q And that was about when?

20

A That was about December 30th, I think.

Q And didn't you, during that conversation the day after you had been to see Mr. Ebersberger, tell Mr. Ebersberger that the deal was off?

A No, sir.

Q Because he refused to give you five per cent. commission?

A No, sir.

Q This lease is what is generally called amongst real estate brokers a ground lease?

30

A Oh, no, there is a building on it.

Q But when you get a building for a long lease don't you call that a ground lease?

A Not in that particular case, there was a four-story building.

Q How long have you been in the real estate business?

A Fifteen years. The base itself is in the ground.

Q Isn't it generally what is termed by real estate men a ground lease?

40

A Not generally.

Plaintiff's Witness, George F. Hewson, Cross

Q Take the Lawyers Building, wasn't that a ground lease?

A That lease was made before the building was built, consequently that is called a ground lease. Where a building is built of a special type it is not called a ground lease.

Q You are sure of that?

10

A That is the generally accepted application of it from real estate men.

Q You are sure about that?

A I think so.

Q Are you a member of the Real Estate Board of Newark?

A Yes, sir.

Q Do you know what the rates are for leases of this character?

A They have a sliding scale.

20

Q What are they?

A Following from three and a half to five and some of them get ten per cent.

Q For leasing?

A Yes, sir.

Q On long term leases?

A Yes, sir.

Q For a lease of this type of ground previously, where this building is and the type of building that is on it, what is the commission?

30

A Five per cent. of the gross rental.

Q For the whole twenty-one years?

A Yes, sir. Where the property is improved with a building.

Q Are you acquainted with article 13 of the code of ethics and rulings of the Real Estate Board of Newark generally?

40

Plaintiff's Witness, George F. Hewson, Cross

BY THE COURT:

Q You recognize that book, don't you??

A Yes.

THE COURT: It does apply to this commission.

10

WITNESS. No, it does not.

Q Is there a different commission when individual apartments are listed than when a big apartment house is listed for a long term?

A No.

Q Sure of that?

A No.

Q Did you have any conversation with Miss Meisel at Mr. Ebersberger's office?

20

A Oh, yes.

Q Didn't you ever tell her that the deal was off because Ebersberger wouldn't give you the amount of commission she offered.

A No, I told her I wouldn't accept the amount of commission she offered.

Q And didn't you tell him you would take \$3000?

A No, sir.

Q And didn't you say, "I won't give you a nickel more than \$5000?"

30

A No, sir.

Q Never had such a conversation with Mr. Ebersberger?

A No, sir.

Q When you asked him for five per cent. commission and he said he wouldn't give you such, didn't you go down to see him and ask him to come up to the full five per cent?

A No, sir, never went to see him after the telephone conversation the following day after the meeting with Tannenberg.

40

Q Do you remember when you first saw Tannen-

Plaintiff's Witness, George F. Hewson, Cross

berg in connection with the Holdman suit?

A When I first saw him in connection with it?

Q Yes,

A I had been negotiating with Holdman and Tannenberg before he went to Germany, and I advised who I was dealing with and also advised his secretary, Miss Meisner, that I was dealing with Holdman and Tannenberg and that I was to take care in having him put up the security for the office.

10

Q Are you sure about the conversation that you testified about, that Mr. Ebersberger told Mr. Holdman or Mr. Tannenberg that "The only thing that will prevent me from going on with this lease is Hewson's commission"?

A Yes, sir.

Q You are positive of that?

A Positive of that, yes, sir.

20

Q Isn't it true that you called Mr. Ebersberger up that very same night when you brought the lease down to him?

A No, sir, I did not.

Q Sure of that?

A Sure of that, didn't have any conversation with him because he advised me he would let me know the following day.

Q Notwithstanding that, didn't you call him up?

A No, no, sir, no other telephone conversation.

30

Q Didn't he tell you that under no circumstances would he enter into a lease unless the \$8500 was put up in cash?

A Yes, he said that at all times, I mean with Tannenberg, that Tannenberg was willing to sign the lease.

Q Isn't it true that the only reason that this lease wasn't signed were these facts, that the clause was to be put in the lease \$8500 in cash, was to be put up by the tenants and that they were to put

40

Plaintiff's Witness, George F. Hewson, Cross

up the surety bond to protect Ebersberger against possible mechanics liens and the entire mortgage subordination clause and that you were to get \$3000 commissions?

A No, sir, it wasn't the fact.

10 Q When you left that afternoon what was your understanding as to the condition of the lease?

A My understanding of the condition of the lease was that Mr. Ebersberger was ready to sign the lease as it was written with a few slight changes which Mr. Tannenberg had already agreed to.

Q And what were those slight changes?

A One of those that you recited there—one of those changes that you have already testified to.

Q And what was that?

20 A About a repossession clause, and about altering the building, and so forth, and about putting up a personal bond.

Q A personal bond?

A Yes, sir.

Q You had put the personal bond in the lease?

A Yes, sir.

Q And then the agreement was that it be changed to a surety bond?

A Let me see the lease, please. (Paper handed witness). Yes, that was agreed upon.

30 Q That it would be surety instead of personal?

A Personal instead of surety.

Q You have personal there all the time?

A No, I think this was penciled in—no, personal was penciled in in the lease.

Q Then there was no agreement that it should be personal?

A There was an agreement that it should be personal. As a matter of fact, Mr. Ebersberger raised that question himself, he wanted a personal bond.

40 Q Why should he raise the question if the lease

Plaintiff's Witness, George F. Hewson, Cross

already said personal bond?

A This question was what was to be stricken out.

Q Why should Mr. Ebersberger have insisted upon a personal bond if that were already in the lease which you submitted?

A I don't know, but as a matter of fact they 10 didn't have—we didn't have any discussion as to this, because Mr. Ebersberger was satisfied of the personal liability of either one of the lessors.

Q How do you know?

A Because he said so.

Q What did he say?

A He said he knew either one was financially responsible.

Q Didn't you make the appointment that every- 20 thing was agreeable?

A Because the question of commission was the real meat in the kernel.

Q Had you any conversations with Mr. Ebersberger about those commissions?

A Only the telephone conversation I have already testified to.

Q That was when?

A That was about the 30th, the day after our meeting with Tannenberg in our office.

REDIRECT EXAMINATION by Mr. Marder: 30

Q Hadn't you had some conferences or conversations with Ebersberger, talk with him about the conversation in connection with some of the other leases?

A Yes.

Q You testified to that on direct?

A Yes.

Q You are not a lawyer, are you?

A Nor, sir. 40

Plaintiff's Witness, George F. Hewson, Re-cross

Q Did you expect the original lease as prepared by you was to be signed?

A Not at that particular time.

Q Wasn't it your idea that it did relate to the facts for a document to be drawn by the respective lawyers of the respective parties?

A That it was to be passed upon by Mr. Ebersberger's lawyers. 10

RE-CROSS EXAMINATION by Mr. Fast:

Q Why did you draw up the lease at all?

A I wanted to submit to Mr. Ebersberger the form of the lease that he was going to sign.

Q Didn't you agree to take the notes made by Holdman and Tannenberg as part of your commissions?

A Originally, yes.

Q And when was that? 20

A On the first phases of it.

Q When was that, as to the date?

A Well, as a matter of fact, I told Mr. Ebersberger before we went down, I think I had a conversation with either him or his secretary before I went down on the day on which Mr. Tannenberg was there to sign the lease relative to that, and I told him I would be willing to take Mr. Holdman and Mr. Tannenberg's note to apply on my commission. 30

Q And those are the notes mentioned in the lease, the form of the lease that you presented?

A Yes, sir.

Q And the notes amounted to how much?

A \$6000.

Q And your commissions were how much?

A About \$9500.

Q What was the necessity of changing it to make \$8500 in cash if you were to get more than that and you were willing to take the notes? 40

Plaintiff's Witness, George F. Hewson, Re-cross

A Just for the form of the lease.

Q Notwithstanding that you were to get more than the amount involved by way of security as your commission?

A Security wasn't the total value of the lease. The value of the lease was in the lease itself for the term of years. 10

Q You would have gotten your commission in full at the time of the execution of the lease, wouldn't you?

A No.

Q Why not?

A Because I was willing to take Mr. Ebersberger's note for a part of it.

Q Ebersberger's or the Holdman notes?

A Either one, but he finally didn't care to take any notes, he wanted the cash. 20

Q Was there much of an argument about this particular clause?

A No, not much of an argument. Mr. Tannenberg didn't argue very much. He said, "All right, I will give you the cash, I have got the money now, and it won't make much difference."

Q And in case the lease had gone through you say you would have taken Mr. Ebersberger's notes?

A Yes, sir.

Q For part of the commissions? 30

A Yes, sir.

Q He wouldn't have to put it all up at one time?

A Yes, sir.

Q Did he understand that?

A Yes. 40

Plaintiff's Witness, Henry Tannenbergh, Direct

HENRY TANNENBERG sworn in behalf of plaintiff.

DIRECT EXAMINATION by Mr. Marder:

Q You are in the real estate business in the City of Newark?

10 A Yes, sir.

Q You own real estate?

A Yes, sir.

Q Buy and sell it?

A Yes, sir.

Q Lease them?

A Yes.

Q Sometimes long time leases?

A Yes, sir.

Q Was Mr. Holdman your partner?

20 A He was.

Q Not now?

A Not now.

Q Were you ever interested in the leasing of the Margaret Apartments on Broad street?

A Yes, sir.

Q And did Mr. Hewson interest you in that leasing?

A Yes, sir.

30 Q When did he first get in touch with you or you with him?

A He got in touch with me several times, but I think it was between July and October. It was the time when I used to come up and used to call up there, "How did you make out with the lease?" And he said, "Mr. Ebersberger is in a good shape"—

Q You are getting ahead of your story. Was Holdman, your partner in this proposed lease?

A Yes.

40 Q And did Hewson tell you what you could get that lease for?

Plaintiff's Witness, Henry Tannenbergh, Direct

A Yes.

Q What did he tell you what were the terms of the lease?

A The terms of the lease was gradual, \$8500 for ten years and \$10,000 for eleven years; it was for twenty-one years, the lease.

Q That was net rental?

10

A Yes, sir.

Q And you were agreeable to take it on those conditions?

A Yes, sir.

Q And Holdman was also agreeable?

A Yes, sir.

Q Do you remember a conference between yourself and Mr. Hewson and Mr. Ebersberger on September 29th at his place of business?

A I was there.

20

Q What happened at that time?

A At that time happened we was supposed to go and sign the lease, everything was ready, we should go up to Mr. Ebersberger. We came up there and we went in the office and we found Mr. Ebersberger there, and then we have everything agreeable, but the only trouble was that we didn't agree with him about the commission, we didn't agree.

Q Were you willing to put up the cash sum of \$8500?

30

A Yes, sir.

Q Did you so tell Ebersberger at that time?

A Yes, sir.

Q What did Ebersberger say about commissions?

A Mr. Ebersberger said, "It is the only way, everything is agreeable, but Mr. Hewson's commission is in the way and I don't think I can do the business."

Q Then what happened?

40

Plaintiff's Witness, Henry Tannenberg, Cross

A Then didn't happen nothing, then went apart.

Q Were you at that time financially able to carry out the terms of that lease?

A Yes, sir.

10 MR. FAST. I object to that as a conclusion.

THE COURT. I think that is the subject of cross examination. The question may be answered.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q And when you went to that conference were you authorized by Holdman to make the agreement that you were authorized to, that you were agree-

20 able to make?

A Yes, sir.

CROSS EXAMINATION by Mr. Fast:

Q You went down there for the purpose of signing the lease, didn't you?

A Yes, sir..

Q And the lease was in both your name and Holdman's name?

A Yes, sir.

30 Q Why didn't Holdman go down?

A He didn't have time and he left it to me to sign the lease.

Q And sign your name?

02 A No, he was to sign after.

Q When you got in Mr. Ebersberger's office who was there?

A In the office, in the beginning, was only the girl; then the girl went down and called up Mr. Ebersberger and then Mr. Ebersberger came out and

40 we had a conversation.

Plaintiff's Witness, Henry Tannenberg, Cross

Q Was the young lady who was in the place present throughout the whole time?

A No..

Q Was she there at any time during the conversation?

A No.

Q At no time? 10

A No.

Q Wasn't she called in by Mr. Ebersberger some time during the conversation?

A Well, I don't remember whether she was called in, but she wasn't by the conversation.

Q Wasn't she told to make certain corrections on the lease?

A I don't know.

Q This was rather an important lease?

A The lease was already made, only to sign. 20

Q There were no corrections to be made?

A In the beginning there were corrections on the note.

Q Wasn't this young lady called in to make that correction on the note?

A I don't remember it..

Q Wasn't she there for any length of time at all at this conference?

A No, she was in the back; I don't know; we was ourselves, three of us. 30

Q You mean just you and Mr. Hewson and Mr. Ebersberger?

A Yes, sir.

Q Did she come in for any reason at all or was she called in or of her own volition?

A I couldn't tell you; I don't remember at all.

Q This lease was read in Mr. Ebersberger's place, wasn't it?

A Yes, sir.

Q Do you remember something being said about 40

Plaintiff's Witness, Henry Tannenberg, Cross

your paying liability, boiler and rent insurance in addition to the rental?

A No.

Q What insurance do you remember that you were supposed to pay?

A I don't remember at all any insurance.

10 Q No insurance at all?

A I don't remember.

Q Wasn't this supposed to be a net rental?

A Yes..

Q And you were to pay all expenses?

A I don't remember.

Q What do you think that rental is?

A Well, I don't remember.

Q You don't know what the net rental is?

A I know he is supposed to pay him \$8500..

20 Q Were you supposed to pay anything else?

A Taxes, water and insurance.

Q What insurance were you supposed to pay?

A For the building.

Q What do you mean by that, fire?

A Fire.

Q You know what liability insurance is?

A I know it.

Q Were you supposed to take liability insurance?

A I don't remember any conversation whatever;

30 I don't know.

Q Don't you remember this young lady being called in to correct this agreement that Mr. Hewson had brought down to add water, fire, insurance, liability, boiler, and rent insurance?

A I don't remember..

Q You said that you were going to make some additions, some alterations to the building, didn't you?

A Yes, I was changing the apartment, in case

40

Plaintiff's Witness, Henry Tannenberg, Cross

we wanted to do it we shall have the right to do it.

Q Was Mr. Ebersberger satisfied?

A Yes.

Q What did he say?

A Provided we shall show him the plans, what we are going to do.

Q Wasn't the young lady called in to add to the lease that the plans were to be shown to the landlord, to be approved by the landlord in writing and that he was to add to the value of the building? 10

A I think he was arguing.

Q He argued that?

A Yes.

Q Did anybody write while you were talking?

A Mr. Hewson wrote this.

Q Do you know Mr. Hewson's writing?

A I don't know; I say Mr. Hewson was at the conversation where we had a talk. 20

Q You were there, too?

A Yes, sir..

Q Do you know who made the notation as to what corrections were to be made?

A I don't remember. .

Q When a clause was ready and Mr. Ebersberger said he wanted some changes, wasn't somebody called in to make the changes in pencil? 30

A I don't remember it.

Q Didn't Mr. Ebersberger say he wanted some kind of a bond in case you should make some alterations so that he would be protected against the mechanics' lien law?

A I don't think so.

Q You are sure about that?

A Yes.

Q Didn't he ask you to put a surety bond up instead of your personal bond? 40

Plaintiff's Witness, Henry Tannenberg, Cross

A I don't remember that.

Q Would you say that it didn't take place?

A No.

Q Do you remember anything being said about a mortgage subordination clause?

A No, I don't.

10 Q You know what that is, do you?

A No.

Q In this lease there is a statement that this lease is subject to privilege, that the landlord shall substitute other mortgages for the mortgages on the property not to exceed \$50,000; do you remember that?

A Yes, sir.

Q Wasn't there a question raised by Mr. Ebersberger that it should be \$100,000?

20 A No, sir.

Q Do you remember anything being said about a policy to be obtained for the benefit of Mr. Ebersberger for loss of use in case of fire?

A I don't think so..

Q Do you remember now crossing out any lines or any word in this agreement in your presence?

A No, sir.

Q There was some talk about the \$8500 agreement, wasn't there?

30 A Yes, sir.

Q And what was the talk about that?

A It was nothing expressed, the only thing is Mr. Ebersberger looked it over, the lease, and he said, "Everything is satisfactory to me, the only thing, Mr. Hewson, what about you, about what we had a talk?" He said the same thing as before, "Well, I don't think I will be able to do anything with the people," something done. I don't know whatever they meant between them, I don't even

40

Plaintiff's Witness, Henry Tannenberg, Cross

want to bother with it, it wasn't my business to interfere with it.

Q As far as you were concerned, this lease was all right, wasn't it?

A Yes, sir.

Q You were willing to pay \$8500 in cash, were you not? 10

A Yes, sir.

Q The same day that you were down at Mr. Ebersberger's place you were willing to put up this \$8500 in cash?

A Yes, sir..

Q Before you went down to Mr. Ebersberger's place did Mr. Hewson tell you that you would have to put up \$8500 cash?

A Yes, and then we came on the premises and he wasn't satisfied. 20

Q Wasn't there some conversation there and Mr. Hewson said he was satisfied to take your notes as commissions?

A I don't know.

Q Weren't you there?

A I was there; I don't know the conversation that was there; I know Mr. Ebersberger wasn't satisfied, he wanted the cash, and I said, "That wouldn't be in, so if you want the cash we will give you the cash." 30

Q You are in the real estate business?

A Yes, sir.

Q And you have been in that business for how long?

A Over twenty years.

Q And at the time that this lease was on you rented other buildings, too, didn't you, long term leases?

A No.

Q Not at all? 40

Plaintiff's Witness, Henry Tannenberg, Cross

A Not at all.

Q Didn't you testify in response to a question of Mr. Marder that you had properties of long leases?

A No, sir, I didn't. I am in the business for that, of obtaining—

10 Q Have you any long leases now?

A No, sir.

Q Never had any leases on apartment houses?

A No, sir.

Q At the time you were down at Ebersberger's for the purpose of signing the lease or making arrangements for the lease, what would you say you were worth in dollars and cents?

A The same as I am worth now.

Q How much is that?

20 A I can't tell you that. How much do you want me to be worth?

Q How much is that?

A \$100,000, I will guarantee.

Q How was that \$100,000 made up?

A In real estate.

Q What real estate did you own in October, 1925?

A I owned a whole lot more than I own now.

Q Tell us what they were.

30 A We had an apartment corner of Broad and Murray; we had two together, me and Mr. Holdman, the Lucerne Hotel on the other corner; we had two six-family apartments, we had in West street, we had a moving picture in Springfield avenue, we had several corner of Murray street, I have two apartments. That is as much as I can figure out.

Q This Broad and Murray street property, what did you pay for it?

Objected to.

40 A What I pay? I get it for nothing?

Plaintiff's Witness, Henry Tannenberg, Cross

MR. MARDER. I think he ought to ask him what the property was worth instead of what he paid for it.

THE COURT. Objection overruled.

Q What did you pay for this Broad and Murray?

A \$155,000, one, and the other one we paid 10 \$105,000.

Q What were the mortgages on the property that you paid \$155,000 for?

A The mortgage was \$80,000, about, seventy-five, and thirty-five.

Q That is all you had, about \$110,000 worth of mortgages?

A Yes, sir.

Q On the one that you paid \$105,000 for?

A Was \$50,000 first mortgage, and it was about 20 \$25,000 second. I can't remember exactly..

Q That was \$75,000?

A Yes, sir.

Q And these properties were in both names, you and Holdman?

A Yes, sir.

Q When did you buy these properties?

A That time, the same time.

Q Around October?

A We bought them about March, something like 30 that; I can't recollect.

Q The Lucerne Hotel, what did you pay for the Lucerne Hotel?

A \$155,000.

Q That is the one at Broad and Murray streets?

A Yes, corner Broad and Murray..

Q This Orange property, two properties in Orange, are six families?

A Six apartments.

Q What were they worth? 40

Plaintiff's Witness, Henry Tannenberg, Cross

- A We sold them for \$80,000. .
- Q What were the mortgages?
- A The mortgages we only had there \$40,000.
- Q Altogether?
- A Yes..
- Q When did you buy that property?
- 10 A I can't recollect the time, the date.
- Q How about the West street property?
- A We still got it.
- Q What did you pay for it?
- A We paid for it \$50,000.
- Q Mortgage?
- A Mortgage, we only had \$17,000..
- Q And you put in that property \$33,000?
- A Yes, sir.
- Q Where is that?
- 20 A West street, near Springfield avenue.
- Q What number?
- A 47-49-51 West Street. It is a hotel.
- Q Didn't you get a second mortgage on that?
- A No.
- Q At the time you bought it?
- A No.
- Q What have you got on Springfield avenue?
- A We have a moving picture.
- Q And you have that at this time?
- 30 A Yes.
- Q What did you pay for it?
- A At that time we paid thirty-eight, thirty-seven, something like that..
- Q What was your mortgage on it?
- A We only had it that time, about a \$17,000 mortgage.
- Q Is that all the property you owned at that time?
- 40 A Except I owned the property corner of Warren and Orleans street.

Plaintiff's Witness, Henry Tannenberg, Cross

- Q What did you pay for that?
- A I paid \$65,000.
- Q What is the mortgage?
- A \$45,000.
- Q Anything else?
- A Well, I can't remember..
- Q You owned all of these properties at the time 10
of this transaction?
- A Yes, sir.
- Q And you owned them together with Mr. Holdman?
- A This corner on Warren and Orleans, they were my own.
- Q And all other were together?
- A Yes, sir..
- Q Didn't the corporation own any property?
- A We was incorporated together, partners. 20
- Q And who was in the corporation?
- A Me and Holdman and Lubetkin, and some of them, but not exactly all of them..
- Q Which one was Mr. Lubetkin in?
- A Some of them.
- Q Which ones?
- A The Lucerne Hotel at the next corner.
- Q Broad and Murray street?
- A Yes, sir.
- Q Both properties? 30
- A Yes, sir, and Springfield avenue.
- Q Did you and Mr. Lubetkin and Mr. Holdman have a third interest in these properties?
- A Yes, sir.
- Q And these others were held by you and Holdman alone?
- A Yes, sir.
- Q Except Orleans street and Warren street was yours?
- A Yes, sir. We had some on Leslie street. I 40
can't recollect any more.

Plaintiff's Witness, Henry Tannenber, Re-Direct

RE-DIRECT EXAMINATION by Mr. Marder:

Q Do you own the house you live in?

A No.

Q When did you buy this Orleans street property?

10 A I got it about six years.

Q How much is that Orleans street property worth today?

A I wouldn't sell it for a hundred thousand.

Q Was it worth that much in October, 1925?

A Yes..

RE-CROSS EXAMINATION by Mr. Fast:

Q What was the name of that corporation?

A Peerless Investment Company.

20 Q Did you have any other corporation that owned these properties?

A No.

FURTHER RE-DIRECT EXAMINATION by Mr.

Marder:

Q Did you have any other mortgages?

A We did, but I can't remember.

FURTHER RE-CROSS EXAMINATION by Mr.

Fast:

30 Q Did you owe any money to the bank?

A When?

Q At or about the time of the Ebersberger deal?

A That time about \$3000.

Q That is all you owed?

A That is all.

Q Did your corporation owe any money?

A I don't think so.

Plaintiff's Witness, Jacob Holdman, Direct

JACOB HOLDMAN, sworn in behalf of plaintiff.

DIRECT EXAMINATION by Mr. Marder:

Q You are the partner of Mr. Tannenber, who just testified?

A Yes.

Q And interested with him in various real estate transactions and purchases? 10

A Yes, sir..

Q You know about this Margaret apartment lease, a supposed lease to you and Mr. Tannenber?

A Yes, sir.

Q What was the proposition that you finally agreed to?

A We agreed to lease the building, the first ten years \$8500 and the next eleven years \$10,000.

Q Who communicated that to you? 20

A Mr. Hewson.

Q How many times did you see Mr. Hewson in connection with this deal?

A I used to see him three or four times a week.

Q You wanted to go through with the deal?

A Yes, sir.

Q Were you able to put up \$8500 cash in security?

A Yes, sir.

Q You were not present at this Ebersberger conference September 29th? 30

A No, I didn't have a chance to go there; I was busy.

Q Would you have been agreeable to any agreement made by Mr. Tannenber?

A Positively.

Q Were you financially able to carry out the terms of this lease?

A Positively..

Plaintiff's Witness, Jacob Holdman, Cross

MR. FAST. I make the same objection, that it is a conclusion.

THE COURT. Objection overruled.

Defendant's counsel prays an exception to this ruling of the court.

10 Exception noted as ground of appeal.

CROSS EXAMINATION by Mr. Fast:

Q Did you ever go through bankruptcy?

A No.

Q Wasn't there a petition in bankruptcy by you or against you?

A Never.

Q Were you ever sold out on judgments?

A No, sir.

20 Q Are you not the Holdman that had property down at Plane and Washington streets some years ago?

A No.

Q When Mr. Hewson talked to you about the terms of the proposed lease did he say anything about security?

A Yes.

Q What did he say?

A \$8500.

30 Q How was it to be paid?

A In cash.

Q When did you have that agreement with Mr. Hewson that you were to put up \$8500 in cash?

A First I tried to tell him to give notes.

Q Answer my question. When was it that you consented to give \$8500 in cash?

A Some time late in August.

Q That was before this lease was drawn up?

A About a few days before that.

40 Q Did you know that Mr. Hewson drew up a

Plaintiff's Witness, Jacob Holdman, Cross

lease between you and Mr. Ebersberger?

A Yes, sir..

Q And at that time you knew you were to put up \$8500 cash?

A Yes, sir.

Q And at that time did you agree to put it up?

A Yes, sir.

Q Why did your lease have that provision that it was to be put up in the following manner, \$8500 in cash by a certified check or your note, giving a note payable to the order of the landlord, do you know why that provision was put in the lease if you were to put up the \$8500?

A I can't tell exactly. Mr. Tannenberg took care of it.

Q When was the first time you ever saw the lease?

A Some time in September Mr. Hewson told me he has got a lease all complete and he goes over to Mr. Ebersberger to sign it, and he looked it all over—no, Mr. Hewson looked it all over—and going to go over to Mr. Ebersberger's office to sign it, and I left it to Mr. Ebersberger and Mr. Hewson, and he is going to sign it, and then we are going to take it over to our lawyer, and we are going to sign it.

Q You know when Mr. Tannenberg went down to Mr. Hewson, do you?

A I can't remember the date.

Q You remember when you went down?

A No, I was in Somerville that time.

Q How long were you at Somerville?

A I was in Somerville the whole of the summer. I used to go back and forth, I had a big piece of land.

Q Were you not at Mr. Hewson's place three or four times a week?

A No.

Plaintiff's Witness, Jacob Holdman, Cross

- Q What land was it in Somerville?
 A The Frelinghuysen estate. Saturdays and Sundays I used to go there.
 Q Then you were here every day?
 A Yes.
 Q Why didn't you go with your partner to
 10 Ebersberger at the time of the lease transaction?
 A I didn't have a chance.
 Q Why didn't you have a chance?
 A I didn't have a chance to go, I was busy every day, and I left it to Mr. Tannenberg.
 Q You didn't see the lease up until the time that Mr. Tannenberg went down?
 A He had one in his pocket and he came down a couple of days later, he showed it to me.
 Q A couple of days later than what?
 20 A A couple of days later, after he came back from Mr. Ebersberger's, he showed the lease, he had it in his pocket.
 Q Did you read it?
 A He showed it to me.
 Q When you went to Mr. Hewson's office were there any corrections on the lease in pencil marks or any ink marks?
 A I can't remember seeing them.
 Q Were there any corrections in particular that
 30 you saw?
 A Mr. Hewson read over the lease to us. I was perfectly satisfied with it. It was a very good lease for us.
 Q Do you know whether that lease had any provision in it for the payment of liability, boiler and rent insurance by you and your partner?
 A We had to pay \$8500 net.
 Q Do you remember whether the lease had a
 40 provision that you were to pay liability, boiler and rent insurance?

Plaintiff's Witness, Jacob Holdman, Cross

- A No..
 Q Don't remember any?
 A No, I never remember that.
 Q You don't know whether it did or not?
 A I don't know whether it was in there or not.
 Q Do you remember whether there was any-
 10 thing in the lease that you saw which would require you or your partner to put up a surety bond plus the cost of the alterations?
 A No.
 Q Was there anything in the lease in case you should alter the building?
 A Yes, against Mechanics' Liens.
 Q You know the difference between a surety and a personal bond?
 A No, I don't know.
 Q Do you know the difference? 20
 A I don't know.
 Q Do you know what a mortgage subordination clause is in a lease, where the lease is subject to a mortgage?
 A \$50,000 first mortgage.
 Q Do you know that the lease contained that clause, that your lease would be subordinate to the extent of \$50,000 or \$100,000?
 A No, I don't remember that.
 Q You don't remember whether it was fifty or a
 30 hundred?
 A \$50,000 and a hundred.
 Q Do you remember that your lease contained a provision that in the event change or destruction of the building by fire that you were to provide a policy for the loss of use for the benefit of Mr. Ebersberger?
 A I don't remember that.
 Q Do you remember that the lease which you
 40

Plaintiff's Witness, Jacob Holdman, Cross

saw contained a provision that it was to be put up in cash by part notes and part cash?

A First tried to give part notes—

Q I am asking about the lease that you saw, do you know whether that lease contained the provision that \$85,000 was to be put up in cash, or \$25,000
10 in cash or \$6000 in the way of renewable notes?

A \$6000 notes and \$25,000 in cash.

Q And that was in the lease that you saw?

A I think so.

Q And you saw that lease?

A Yes, sir.

Q And they said that they had been down to Ebersberger two days before?

A A few days before.

Q A few days before?

20 A Yes.

Q And that lease had a provision in it \$25,000 rent in cash and \$6000 by way of notes?

A Yes.

Q Was anything then said that it should be cash?

A Then Mr. Hewson told me it wouldn't go, got to pay all cash..

Q And you were satisfied?

A Satisfied to pay all the cash.

Q Who brought that question up about the
30 \$8500 in cash at that conference?

A Mr. Hewson.

Q What did he say?

A \$8,500 in cash.

Q Did you then say, "Maybe we can shove in the notes"?

A He told me it wouldn't go, and I said "I will give you the cash".

Q Did he tell you when the lease was to be signed?

40 A He told me only to leave the lease there, any day they are going to be signed.

Defendant's Witness, John Ebersberger, Direct

Q Did you go up to see Hewson regularly after that?

A Yes, I went up about four or five times and he told me a day or two later he is going to show it to his lawyer, that I have to sign and look it over.

Q Who look it over?

A Mr. Ebersberger show it to his lawyer and
10 then he is going to sign it.

PLAINTIFF RESTS.

JOHN EBERSBERGER, defendant, sworn in his own behalf.

DIRECT EXAMINATION by Mr. Fast:

Q Are you the owner of the property at 1086 and 1088 Broad street, Newark, known as the
20 Margaret?

A I am, yes.

Q Do you know Mr. Hewson?

A I do, yes.

Q Do you remember any conversation with Mr. Hewson in which you told him that you would pay him a commission of five per cent?

A No.

Q If he leased the premises for you?

A No, sir, we never agreed on the commission.

Q Did Mr. Hewson come down to see you or talk
30 it over with you on the telephone?

A He took it all up with my secretary; she has charge of all that.

Q Did you ever have any conversation yourself?

A I had it in my office.

Q Do you remember when it was that Mr. Hewson called at your office?

A He called with the Schary lease, he called me up, and he said, "I have somebody to lease that," he
40 called me up and he said, "Wait for me," and he

Defendant's Witness, John Ebersberger, Direct

came down there with that lease and I looked it over and I said "Where is the \$8500 cash"? And he said, "They won't give any security." I said, "It is all off." and shortly after he came down with Mrs. White, the widow, just brought the lease down and she wanted to pay \$4000 security, so I turned that down flat. I think Hewson called me up about
10 half-past four or five and he said, "Wait, I have got a party that I think will suit your place." I said, "All right, I will wait for you." And he came down with the lease and we sat around the desk there and I called Miss Meisner in and I gave Hewson the other, and she read it out, and when she came to certain things she didn't like she just corrected them.

Q (Showing witness paper). I show you this
20 lease and several pencil markings and ask you if those are the pencil marks that you refer to in your testimony?

A Yes, that is this. So then we came down to the \$2500 in cash and six notes, a thousand dollar note, the note that we paid off every year for six years, and I said, "This is not going through, I wouldn't take this for anything." And I said about the \$8500 surety or personal bond and they couldn't agree on it, and I said, "Hewson, we can agree on commission;" and I said, "The best thing you can do
30 is to go back to your office and see what you will take," and he called me up about a half an hour later; and he says, "John, it is \$9500, I will take \$7000." And I said, "I will give you \$3000." And he said, "I couldn't take it." And then he said, "I will take \$5000, and he said, "If you don't give me \$9500"—he started to curse and swear and decided to change his view. He called me the next morning and I said, "I will give you \$3000." And he said, "It
40

Defendant's Witness, John Ebersberger, Direct

is all off." And I think he called up Miss Meisner that same day.

Q Did you ever agree to pay a definite sum?

A I never agreed. I think I got a letter from him, I think July 7th, just before the July lease.

Q Did you receive this letter on July 27th?

A Yes, I was going to answer this letter, and
10 Mr. Hewson came down with the Schary lease, and I said, "I won't pay five per cent. commission for leasing that apartment." And he said, "I won't talk about it, we will get together on it."

Q When was it you first gave the terms of the letting?

A I think I gave it to Mr. Paige. I never met Mr. Hewson about it.

Q What did you tell Mr. Paige?

A I wanted \$8500, I told him I wanted \$8500
20 security as the first year's rent, and I wanted a surety bond for any alterations that were to be made, and I also wanted the insurance to cover me in case the building was afire, so I could get my rent, and to pay a liability policy and fire insurance and everything on it. The insurance was to go to them because they were to protect me.

Q Did you give them the rental?

A The rental was to be paid monthly.

Q At how much per year?

A \$8500 for the first ten years and \$10,000 for
30 the eleventh.

Q Was there anything said about the mortgage subordination clause?

A Yes, we corrected that there, and he said, "We have \$50,000." And I said I wanted originally \$100,000.

Q I mean, the original conversation with Mr. Paige?

A I gave him the listing. Mr. Hewson, every
40

Defendant's Witness, John Ebersberger, Direct

time he came down, would call up and bring down a lease of his own.

BY THE COURT.

Q Did you discuss the commissions with Mr. Paige?

A No, I didn't. I never discussed any commissions. 10

Q But you gave him the listing?

A He asked me did I have anything and I said, "I would like to lease it, I didn't want to sell it."

Q How did you come to see Mr. Paige?

A Mr. Paige used to come down and try to lease some factories that I had. I never met Mr. Hewson only through Mr. Paige.

Q Did you ever come to any agreement or have any conversation as to any commissions of any sort with reference to the lease with Hewson or Paige? 20

A The only conversation we had was when I had spoken to Mr. Hewson, when I got this letter a few days later about commission, I said, "I wouldn't pay you five per cent." He said, "We will take care of that all right, we will get along."

Q You knew that Mr. Paige was connected with Mr. Hewson?

A Yes, sir.

Q He told you that he was acting for Mr. Hewson? 30

A He said he had his office there.

Q You knew that Mr. Hewson was a real estate broker?

A Yes, sir.

BY MR. FAST.

Q You got a letter from Mr. Hewson dated October 7, 1925. Did Mr. Hewson ever come down to see you after this letter was sent to you?

A Not after that letter and I paid no attention to it, because he told me the deal was off. 40

Defendant's Witness, John Ebersberger, Direct

Q What is the date of that letter?

A October 7th.

Q When did he tell you the deal was off?

A The evening he was down there with his lease, that same evening he told me, and the next morning again he called me up.

Q Did he tell you why it was off? 10

A He told me it was off because I wouldn't agree on the commission, and I told him in the morning when he called me up, I said, "I am perfectly willing to go through with the deal provided you have the cash and make those changes in the lease."

Q Did he tell you at the time when they were in your office that they were to put up \$8500 in cash?

A Did not; completely refused to put up that amount of money in cash. 20

Q What did he say about the surety bonds?

A He wouldn't give it to us, "I am perfectly responsible". I said, "You may be worth a million dollars, I wouldn't take it, I have had experience." I says, "As a joke, you want me to pay \$9500 commission and you want me to take notes, six notes, a thousand dollars a year, with renewal privilege," and I wanted cash.

Q Did you ever agree to give your personal note to Mr. Hewson? 30

A I certainly didn't. I don't give notes.

Q Was there any conversation as to the taking of the notes mentioned in this lease by way of your commissions?

A Hewson mentioned that he would take the notes for the commission; we didn't agree on it.

ADJOURNED until Friday, January 14, 1927, at ten o'clock, A. M.

Defendant's Witness, John Ebersberger, Direct

SECOND DAY

Friday, January 14, 1927.

Continued pursuant to adjournment.

Present, counsel as before stated.

10 JOHN EBERSBERGER resumes the stand..

DIRECT EXAMINATION (continued) by Mr. Fast:

Q When the Tannenberg lease was brought down to your place of business by Mr. Hewson and you went over the several items, the several terms of the lease, was there any objection raised by you as to the terms?

20 A Yes, he brought the lease down there and I called Miss Meisner in there and we checked up there on the different items which you will see by pencil marks, which you will see, there are things there Mr. Tannenberg says he wouldn't do, and he says he wouldn't give a surety bond, and Hewson said he is personally responsible, and I said he may be, but I want a surety bond. He insisted that he wouldn't pay \$2500 in cash and notes for a thousand dollars, with renewal.

30 Q Except those two things, did he agree upon everything else?

A No, then there was the raising of the mortgage, he kind of picked on that, and we finally agreed on that.

Q Did he finally agree to everything but those two items; that rent insurance, he didn't agree on that.

Q Was there anything else that he didn't agree to?

40 A There were several items.

Defendant's Witness, John Ebersberger, Direct

Q If I show you Exhibit 3, will that refresh your memory?

A There was water insurance, rent insurance, and then there was an insurance in case of fire to protect us for our income, to protect us for our rent, monthly in case the building was a total loss or until it was fixed up, and then as we went along, on the notes, after I told him I wouldn't accept it, and I said, "You even ask five per cent. commission in here and you have three and a half here in case the building is sold." And I said, "We never agreed on those terms;" I said, "The best you can do is to go back to your office and see what you will take." And we waited awhile and then he called up and said, "John, it is \$9500, but I will take seven." And I didn't hear any more until the next morning, and I said—

THE COURT. You have already told us that. Do not repeat what you said.

CROSS EXAMINATION by Mr. Marder:

Q When Mr. Hewson came to you with the Schary lease did you then discuss with him the matter of commission?

A Not at that time.

Q You told us that he said he would put up the \$8500?

A Not in cash.

Q He didn't want to put up the \$8500?

A No.

Q But nevertheless you turned around and discussed commissions with Hewson and told him you would pay him \$3000 in commissions?

A Not then.

Q You told him at that conference, didn't you?

A Not at that conference I didn't.

Defendant's Witness, John Ebersberger, Cross

Q You testified on direct examination that you did?

10 MR. FAST. Objected to. He didn't testify that way. On direct examination he said, "Don't let's go any further, let's first agree on the commission," when Tannenberg and Hewson were present. That was his testimony yesterday.

THE COURT. He said he called him up afterwards and he said, "There is no use going any further, we have agreed on the commissions, let's not discuss commissions, we haven't agreed on them."

20 Q Didn't you discuss the commissions at that time?

A Didn't; I told him he better go back to his office and call me up and tell me what he will take.

Q Didn't you discuss the commission that night?

A Not until he called me up.

Q At that conference did you ask him what he would take at that time?

A No, I don't remember that ever came up.

Q Didn't you discuss commissions with him at all?

30 A When I seen it was five per cent. I thought it amounted to \$9500..

Q What did you tell him when you saw that?

A I told him he could go back to his office and tell me what he would take.

Q You say he wanted \$9500?

A Yes, but I didn't agree to it.

Q Did you tell him that you wouldn't pay him \$9500?

40 A Of course, I told him I wouldn't agree on the commission, to go back to his office and call me up.

Defendant's Witness, John Ebersberger, Cross

Q Didn't you also say there was no use in going on with the discussion as to the other terms of the lease because the commission hadn't been agreed upon?

A Yes, I did say that.

Q To Hewson?

A Yes, sir. 10

Q And Tannenberg was there at the time?

Q Yes, sir.

Q Wasn't that after Tannenberg had agreed to pay \$8500 cash as security?

A He never agreed to it; he insisted on taking the notes and Hewson said he would take notes for his commission and I said I wouldn't take his notes.

Q I show you Exhibit P3. These notations, you testified yesterday, were made by the young lady in your office, in your employ? 20

A Yes, sir.

Q All of them?

A All of them.

Q I show you the notation on page 2, after the word "fire", you have the words, "Liability, boiler and rent," and then down on the bottom of the page, after the word, writing, advertising, leasing, the value of the building, these two notations are not in the same handwriting.

A They are. 30

Q Isn't it patent to you that they are not in the same handwriting?

A They are in Miss Meisner's handwriting there.

Q Both of them?

A Both of them.

Q I show you on page 3 the word "surety", is that her handwriting or yours?

A That is her handwriting. She has changed it while we were there. 40

Defendant's Witness, John Ebersberger, Cross

Q I show you on page 4 the words, "Loss of use insurance." Is that the same handwriting as this word "surety"?

A That is her handwriting.

Q You notice that the "R" on page 4 is made rather peculiarly as follows the word "insurance," the "R" on page 4 was made as follows, you notice that, don't you?

A That is her handwriting.

Q That is true, isn't it?

A Yes.

Q And on page 3 in the word "surety" the word is written out completely this way, isn't that true?

A It is true there, yes. There is a question mark we put there, too.

Q Just a minute, you also notice on page 5 that one of the paragraphs has pencil marks through it, the one up on top, you notice that, don't you?

A Yes.

Q And it has alongside of it "loss of use insurance." It has the same "R" as the first one, that is true?

A Yes.

Q On down below, dealing with the five per cent. commission and the commission in the event of a sale, you find that stricken out in pencil marks which are considerably heavier than those on top of the page, that is true?

A Yes, sir.

Q Did Miss Meisner change her pencil, is that your explanation of it?

A You will have to ask her about that.

Q Were you not watching her when she was making these notations?

A She was right there.

Q As a matter of fact, the pencil marks that

40

Defendant's Witness, John Ebersberger, Cross

are heavier are much more firmer than they are at the top of the page?

A That is true, yes.

Q Isn't it true that when Mr. Hewson and Mr. Tannenbergs at that September conference came to see you they agreed to the rental provisions of the lease, \$8500 for the first ten and \$10,000 net for the last eleven years?

A I was in Europe in September. I haven't seen Tannenbergs until when he came down there about the lease.

Q When was that conference?

A I think it was in October some time.

Q When did you come back from Europe?

A The first of October, something like that, or the last of September.

Q This conference may have taken place in September?

A No, I think it was the first part of October; it wasn't in September, I know; it was the early part of October.

Q Such a conference did take place, Hewson and Tannenbergs were there at your office?

A Yes, sir.

Q At that conference it was agreed that they pay \$8500 a year for the first ten years net and \$10,000 for the last eleven years of the twenty-one year term; that is true?

A Yes, sir.

Q Tannenbergs agreed to that?

A Yes, sir.

Q You didn't have any doubts about Tannenbergs and Holdman being responsible for leasing?

A I told them I wouldn't take it.

Q Did you have any doubts about their responsibility?

A Yes, I did.

40

Defendant's Witness, John Ebersberger, Cross

Q Tannenberg at first wanted you to take notes by way of security and some cash, that is true?

A That is true.

Q And then he said he was willing to pay you this security?

A He did not.

10 Q And then you turned to Hewson and said, "What about the commission?" Didn't you?

A No..

Q You said you wouldn't pay more than \$3000.

A No.

20 Q And didn't you then turn to Tannenberg, when Hewson said he wanted his usual five per cent. commission, and say, "Mr. Tannenberg, it would go through were it not for the fact that Hewson wanted \$9000 by way of commission, if he would only take \$3000 for commission the deal would go through?" Didn't you say that?

A I didn't.

Q You testified before that all you were willing to pay was \$3000 by way of commission, the subsequent conversation that same night, as you say, over the telephone with Hewson?

A Yes, sir.

Q Do you know what the net rentals are there for the twenty-one year term?

30 A I haven't just the figures here. I guess Miss Meisner can give it to you.

Q It is easy to figure up, ten times 85, 11 times 10, making a total rental of about \$190,000, nearly \$200,000.

A You mean the net rental today?

Q I am talking about the twenty-one year term?

A \$8500 net.

Q I am talking about the entire term.

A It figures up something like that.

40 Q It figures up to \$195,000, doesn't it?

Defendant's Witness, John Ebersberger, Cross

A No, sir.

Q Don't you know that 3 per cent. is 2 per cent. less than one and one-half per cent., didn't you figure that up?

A I didn't figure because we didn't agree on it.

10 Q Do you mean to tell me that you expected a reputable real estate party in the city of Newark to make this deal and spend the time that he would naturally have to put on this sort of a deal and pay him one and one-half per cent. on the net rental, is that what you expected to do?

A We never agreed on the commission.

Q You said you offered him \$3000; is that all you expected to pay commission on, only one and a half per cent?

A That is all I agreed to pay him.

20 Q That is all you expected to pay?

A If it went through, yes.

Q The commission of one and one-half per cent.?

A But we didn't agree, if it went through.

Q But all you expected to pay was commission of one and one-half per cent., not more than that?

A If the deal had gone through I would have paid him one and one-half.

Q One and one-half, not more than that?

A I had asked him—

30 Q Answer my question. You expected to pay him one and one-half per cent. commission?

A If the deal went through, yes.

Q And not more than that?

A Yes.

BY THE COURT.

Q You are a real estate broker?

A Yes, I am.

40 Q Isn't there a regular rate of commission pro-

Defendant's Witness, John Ebersberger, Cross

vided by the Real Estate Board of the City of Newark for commissions on rentals?

A There is, yes.

Q You are a member of the Board?

A No, I am not.

Q Is Mr. Hewson a member of the Board?

10 A Mr. Hewson is, yes.

Q Do you know what that rate is?

A I think it is five per cent.

Q On real estate?

A Yes.

BY MR MARDER.

Q You testified yesterday that you never knew Hewson until some time after you had spoken to Paige, and this was July, 1926. That is true, isn't it?

20

A I met Mr. Hewson through Paige.

Q And you met him through a conversation you said that you had with Paige in the summer of 1925, isn't that true? You said so yesterday, didn't you?

A That is right.

Q Didn't you meet Hewson in the summer of mission for leasing the Terrill Engineering property?

30 A Oh, yes, I did, but I had met him through Mr. Paige.

Q And didn't you also in 1923 and '24 pay Hewson a commission for his leasing some of your property; didn't you about that time pay Hewson a commission for leasing the Terrill Engineering property?

A Yes, sir.

Q And you paid him a commission of \$400 then, didn't you?

40 A I don't just remember what it was, but I know he made allowance on it.

Q You paid him a commission of \$400?

Defendant's Witness, John Ebersberger, Cross

A Yes.

Q You agreed to pay him a commision of \$500, didn't you, at that time?

A I didn't agree; whatever terms he had made.

Q Didn't you agree to pay him a commision of \$500 at that time?

A Yes, sir.

10

Q And you paid him \$400 because you gave the tenants some rent allowance?

A He gave the tenants altogether a different deal as to the rents, and I told him he would have to stand part of it, which he agreed to.

Q You remember that?

A Yes.

Q But you don't remember the rental?

A I think it was \$2000.

Q Three years?

20

A Yes, sir.

Q And \$400 in connection with \$6000 is a much larger percent, it is about six and a half per cent?

A Brokers generally split.

Q It is about six and a half per cent., isn't it?

A Yes.

Q Your first conversation was with Mr. Paige?

A Yes, sir, I never knew Hewson before.

Q Didn't you just testify that you knew Hewson in 1924 through the other property?

30

A Through Mr. Paige, yes.

Q Was Paige in 1924 connected with the Hewson office?

A I didn't know until he told me that he was.

Q In 1924?

A I didn't know when he was connected with them.

Q You said in explanation of the fact that you knew Hewson in 1924, that you met him through Paige, how did you happen to meet Hewson if

40

Defendant's Witness, John Ebersberger, Cross

Paige didn't work in the Hewson office?

A They worked together.

Q That is your explanation. What you told Paige is this. You didn't want to sell your property, you would lease it for \$8500 and for a period of twenty-one years; isn't that true?

10 A With security, yes.

Q And you also told Paige you wanted security?

A I certainly did. I told him the terms I wanted, \$8500, and I wanted a surety bond.

Q You are positive you told him about that surety bond?

A I certainly am.

Q When Hewson came to you with that Schary lease you kept that Schary lease, didn't you?

A He left it there.

20 Q You didn't give it back to him or mail it back to him?

A The deal was off; he left it there.

Q The deal was off because all he discussed was because Schary wouldn't pay a deposit.

A He came down and he says they won't pay the security and I says I wouldn't go through with it.

Q And then you didn't look at the lease, you weren't interested in the proposition?

30 A Why should I, when he didn't have the security?

Q Did you look at your lease?

A Yes, I think I did. I said that there is no security, there is nothing to it.

Q You are avoiding the question.

Answer my question.

MR FAST. I object to that remark.

THE COURT. I think a remark like that

40

Defendant's Witness, John Ebersberger, Cross

may be used if it is apparent that the witness is evading the question.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q Did you look at the lease?

10

A Yes.

Q You say your purpose in looking at that lease was to see if there was any cash security?

A Yes, sir.

Q You didn't look at it for any other purpose?

A Yes.

Q What other purpose?

A The agreement and see that everything is right, such as a lien loss.

Q You want us to believe that when you say there was no cash security to be put up by Schary, and then when you looked at the lease and found out that there was to be no cash security in this lease, that you were still interested in the provisions of this lease to find out what the terms were; is that true?

20

A It was before.

Q Before what?

A I looked over the lease to see how the terms was; when I seen there was no \$8500 security and no bond we didn't go through with it; that ended it.

30

Q You mean you stopped looking at the lease?

A Yes, sir.

Q Didn't you ask whether there was any cash security to be put up in connection with this lease as soon as he brought it around?

A I think he went back again to Schary—

Q Oh, answer my question.

A What was that?

Q (Question read).

40

Defendant's Witness, John Ebersberger, Cross

- A No.
- Q You didn't ask him that?
- A No.
- Q You just read through the lease?
- A Yes, sir.
- Q And you said, "Why, there is no cash security called for, we can't go through with this lease." Is that how it happened?
- A That is how it happened.
- Q Then why were any additions made on this lease if it was left with you in pencil?
- A That is for future leases, if we had any more.
- Q Do you find any notation in here, a provision about the surety bond?
- A There is none in here..
- Q It wasn't in your mind at the time you made the notation for the future leases, was it?
- A Miss Meisner may answer that better than I could.
- Q I am talking about what was in your mind, not what was in the girl's mind. It wasn't in your mind when you made these notations, was it?
- A I can't account for that on there at all. We must have just went down to that far and I told him we wouldn't go through with it because he had no security. We generally look over the lease and check down on it; there must be something arose that we didn't go through with it.
- Q Didn't you go all the way through the provisions of this lease. On page 5 there are some pencil notations.
- A I can account for that.
- Q There are pencil notations?
- A There are pencil notations.
- Q You didn't have the surety business on your mind at the time?
- A Always did.

Defendant's Witness, John Ebersberger, Cross

- Q In whose handwriting is this word "security"?
- A Miss Meisner.
- Q When you first told Paige about the proposition did you also tell him that you wanted a subordination clause to a hundred thousand dollar mortgage?
- A I don't think we went in it that far at that time.
- Q You didn't tell him anything at all about postponements then, did you?
- A We just outlined the terms for him.
- Q I would like to have an answer to my question.
(Question read).
- A Postponement?
- Q Postponement of the lease to a future mortgage?
- A I don't think he spoke about it.
- Q You didn't speak to Paige about the mortgage?
- A No, sir.
- Q You didn't speak about any surety bond?
- A Yes, I did..
- Q What made that stick out in your mind so prominently? That wasn't the most important feature of your lease?
- A Always insist on a bond, a surety bond.
- Q How many leases like this have you made?
- A I have never made. My attorney has made my leases.
- Q I know, but you have signed them.
- A I have after my attorney looked over them.
- Q How many leases like this have you entered into?
- A Probably twenty or more.
- Q Where you have leased them for long terms like this?

Defendant's Witness, John Ebersberger, Cross

- A Not as long as that..
- Q I am talking about long term?
- A Long term, one for ten years.
- Q Have you got that lease with you?
- A I haven't I leased it to Wanamaker's.
- Q Did you insist on any surety bond?
- 10 A They paid me one year's rent in advance.
- Q You didn't want any surety bond?
- A Not from Wanamaker's.
- Q Because they paid you one year's rent in advance you didn't want any surety?
- A Yes.
- Q You say that with Tannenberg you insisted upon a hundred thousand dollar postponement mortgage provision?
- A He agreed upon that.
- 20 Q But you insisted upon an hundred thousand dollar one, didn't you?
- A Yes, sir.
- Q Why is this pencil notation changing in this July lease the \$50,000 provision to \$75,000?
- A Because property has increased since that time.
- Q In other words, you were changing your mind about the terms of this lease, were you not?
- A No.
- 30 Q You just said you changed your mind about the postponement provision?
- A I didn't say I would take it. I said up to a hundred thousand dollars.
- Q Why is there no notation on the Schary lease dealing with any insurance except fire insurance?
- A I can account for that.
- Q It wasn't in your mind. Why was it that you did have in your mind at the time you say that you had gone through the terms of the lease and you put down these notations finally on the last page,
- 40

Defendant's Witness, John Ebersberger, Cross

- as to the amount of insurance and commission G. E. Brokers. What does that mean?
- A I don't know. Miss Meisner will have to explain that.
- Q That is George Ebersberger so the insurance was to be written through you. Then you do know.
- A No, through my brother. That is only the rough lease.
- 10 Q You put down certain terms that you wanted inserted in it at the time, didn't you?
- A We never went through with that.
- Q Then you imply by that question and answer—if this is untrue you can say so, that you agreed to one thing and you go over the terms, but before you execute it and sign it you think it over after you looked at it; isn't that true?
- A No.
- 20 Q You just testified to that effect. Didn't you yesterday testify that you didn't discuss any terms of the salary or White leases except security, didn't discuss any of the other terms or read over the provisions; didn't you so testify yesterday?
- A You mean White's?
- Q Let us limit it first to Schary.
- A I don't think I have any more, I know it was called off. He drew the lease to suit his client without even calling me up.
- 30
- MR. MARDER. I object to that and move that it be stricken out. The objection to it is not responsive to any question.
- THE COURT. It will be.
- Q You got this letter Ex. P1, dated July 1, 1925, didn't you?
- A Yes.
- Q And did Hewson call you up soon thereafter?
- 40

Defendant's Witness, John Ebersberger, Cross

- A That is, July 27th?
 Q Yes.
 A He was down at the office a few days after.
 Q Didn't he call you up on the telephone?
 A No, sir.
 Q I mean, before this letter of July 27th?
 10 A He didn't call me up.
 Q Didn't he call you up before then?
 A I don't remember now.
 Q At any rate, he sent you this letter of July 27, 1925, without the pencil notation on it that you now find there, that is true, you got that letter.
 A I got that letter.
 Q Why didn't you answer it?
 A I didn't have to answer it. He was down to the office a few days afterwards.
 20 Q Did you discuss commissions with him at that time?
 A Yes, I told him that I wouldn't pay five per cent. And he said, "All right, John, we will get along on that."
 Q That is what you told him?
 A That is what he told me.
 Q When were these pencil notations of July 27th put on?
 A The day Hewson was there. I pulled out the
 30 letter and I said I wouldn't pay five—
 Q I am talking about these figures on the side.
 A I couldn't say anything about that; I don't know about those figures.
 Q Do you recognize the writing?
 A Yes, Miss Meisner can explain that.
 Q And this figure of five per cent. on \$85,000, showing a sum of \$4,250, will you tell us what the purpose was of putting those figures on?
 A I couldn't tell you about those figures.
 40 Q You say they are in her hand?

Defendant's Witness, John Ebersberger, Cross

- A Yes, sir, she probably can explain it.
 Q Who put these notations on here, who Xed out these various parts of the letter—you say Miss Meisner?
 A Miss Meisner did that.
 Q She did all of it?
 A Yes, sir. 10
 Q Isn't it true that you agreed that you were to take care of roof and exterior, that is marked out with a much heavier line than the one dealing with commission?
 A Yes, it is heavier.
 Q And you still insist that Miss Meisner did both of those?
 A Yes.
 Q When do you say these pencil notations were put on? 20
 A I think they were put on the day Hewson was down there.
 Q You are sure about that?
 A I think it was.
 Q Did Hewson see you put them on?
 A He was there; I didn't put them on.
 Q Was Hewson there when they were put on?
 A I think he was.
 Q I show you the letter of October 7th, Exhibit P4. There is a pencil notation there. Whose hand- 30 writing is that in?
 A That is Miss Meisner's.
 Q And it contains in the margin "Never signed", with a pencil mark pointing to the agreement of July 27, 1925.
 A Yes.
 Q Do you know the purpose of that?
 A She put that on because Mr. Hewson had told me the deal was off.
 Q What deal was that? 40

Defendant's Witness, John Ebersberger, Cross

A The Tannenberg deal.

Q When did he tell you that?

A The next morning he called me up.

Q It deals with the deal between you and Hewson, and the words, "Never signed", means your agreement with Hewson, was never a written contract. What has that got to do with the Tannenberg deal?

A I guess he didn't insert it. She said it was never signed, that is all, just for a record of it.

Q I suppose you were under the impression, were you not, that a real estate broker could not recover commissions for negotiating a lease unless he was authorized in writing, were you not?

MR.. FAST. I object to that as irrelevant, incompetent and immaterial.

THE COURT. The question may be answered.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

THE COURT. You are asked whether you knew a real estate dealer could not recover commissions unless the agreement was in writing.

WITNESS. No.

Q Is that your idea, that a real estate broker cannot recover commissions unless it is in writing?

BY THE COURT.

Q In other words, did you think at that time that an agreement to pay commissions for leasing, to be enforceable, had to be in writing?

A Yes, sir.

Q You did think so?

Defendant's Witness, John Ebersberger, Cross

A Yes, that they would have to give it in writing, a signed agreement.

Q You found out differently since, haven't you?

A Yes.

BY MR. MARDER.

Q And that was the purpose of these words, "Never signed," in connection with this agreement of July 27th between you and Hewson?

A I can't account for that writing on there.

Q It only dealt with that agreement, that is, between you and Hewson, not the lease proposition, that is true, isn't it?

A I can't account for that.

Q You are not answering. This dealt only with the agreement between you and Hewson?

A I can't account for that.

Q Where was the original conversation with Mr. Paige had?

A Down at my office.

Q How long did it take?

A He would come down there and stay fifteen or twenty minutes, something like that.

Q You knew Mr. Paige some time before that?

A Yes.

Q And you are quite sure that you wanted \$10,000 a year for the lease, eleven years, for twenty-one year term.

A I am quite sure of that.

Q And quite sure you told him about cash security at the time?

A Yes.

Defendant's Witness, Sadie Meisner, Direct

SADIE MEISNER sworn in behalf of defendant.

DIRECT EXAMINATION by Mr. Fast:

- Q What is your occupation?
 A I am bookkeeper and secretary to Mr. John
 10 Ebersberger.
 Q How long have you been such?
 A Five and a half years.
 Q Do you know Mr. Hewson?
 A I do.
 Q You remember Mr. Hewson coming down to
 Mr. Ebersberger's place with Mr. Tannenberg?
 A I do.
 Q Were you there at that time?
 A I was.
 20 Q Were you there throughout the whole talk
 when Mr. Hewson was there?
 A Throughout the whole talk.
 Q At any time was Mr. Hewson, Mr. Tannen-
 berg and Mr. Ebersberger away from you?
 A No, sir.
 Q Throughout that conference?
 A No, sir.
 Q When Mr. Hewson came in with Mr. Tannen-
 berg what transpired?
 30 A Mr. Hewson and Mr. Tannenberg came down
 for the purpose of negotiating the lease at 1086
 Broad street. The question came up as to terms.
 The rental was agreed upon, it was \$8500 a year for
 the first ten years and \$10,000 for the ensuing eleven
 years. It was agreed upon. We went through the
 leases. I think Mr. Hewson read one and I read
 one; then notations were made on the leases that
 Mr. Ebersberger wanted embodied in the final lease
 40 which was to be signed. After those were being
 made, the important feature of it was the security.

Defendant's Witness, Sadie Meisner, Direct

Mr. Ebersberger made it emphatic that he would
 accept nothing but \$8500 cash security, that is, one
 year's rental in advance, and also a surety bond to
 indemnify against any mechanics' lien in case the
 building was renovated, and, in fact, insisted the
 building be renovated within two years, and also
 \$2500 cash. Mr. Ebersberger objected to accepting
 that form of security and made that very clear at
 that time. Mr. Hewson suggested that he would
 accept those notes as his part payment of commis-
 sion, that particular question of commission, Mr.
 Ebersberger said that commission would not be due
 him because he didn't expect to pay five per cent.
 because he had previously talked the matter over
 in my presence, and Mr. Hewson argued the point
 about taking the notes, of giving security. Mr.
 Ebersberger decided, before going any further, with
 the security or the security bond, the matter of
 commission had to be settled, and he told Mr. Hew-
 son to take that lease back to his office and decide
 just what he would compromise on and call him
 back; that same evening. Mr. Hewson called up
 and told Mr. Ebersberger—

BY THE COURT.

- Q You didn't have the phone, you don't know?
 A Yes, sir.
 30 Q How can you tell us?
 A Mr. Ebersberger repeated the conversation.
 Then the following day Mr. Hewson called me up
 and he said, "What is John going to do in the mat-
 ter?" And I said, "From what John tells me, all
 he offered is \$3000 commission, according to the
 terms of the lease that he wants! Mr. Hewson said,
 "I will take \$5000". I said, "I don't think Mr.
 Ebersberger will agree to that." And he said, "Will
 40

Defendant's Witness, Sadie Meisner, Direct

you tell John the deal is off." Those are the exact words he used.

Q At the conference in the afternoon, when Tannen-
berg and Hewson were down at your place, did
Mr. Tannen-berg say he would consent to put up
\$8500 as cash security?

10 A No, sir, at no time.

Q (Showing witness paper). I show you the so-
called Tannen-berg lease, Exhibit P7, and ask you to
look through the several pencil notations thereon.

A They are mine.

Q Are they all in your handwriting?

A Yes, sir.

Q As Mr. Marder suggested before, the "Rs" are
a little bit different?

A I use both.

20 Q But notwithstanding that fact you insist
that all these notations are in your handwriting?

A I am absolutely certain.

Q Did Mr. Tannen-berg agree to change the sub-
ordination mortgage clause to \$100,000 from \$50,-
000?

A Yes, I think he agreed to that.

Q Did he agree to the change of placing liability
and boiler insurance?

30 A I am not sure that Mr. Tannen-berg agreed to
the notations that were made on that lease, but we
made those notations for the purpose of telling Mr.
Hewson what Mr. Ebersberger would agree to when
the lease would be finally drawn.

Q Did he consent to the mechanics' lien?

A No, he didn't.

Q Do you know whether Mr. Tannen-berg con-
sented to give you a loss of use insurance in case of
fire?

40 A No, I don't remember whether he consented to
that.

Defendant's Witness, Sadie Meisner, Direct

Q There are several pencil marks over the two
sentences which refer to Mr. Hewson's commission.
Were those lines made in Mr. Hewson's presence?

A They were.

Q Do you know how the lines came to be made,
how you came to cross out these particular lines at
that time? 10

A Because that was one of the clauses that
wouldn't be agreed upon by both parties.

Q What was said between the parties?

A The question of commission came up when
the security, \$8500 cash security came up, and Mr.
Hewson suggested that he take these notes in the
event that Mr. Ebersberger didn't think those notes
were good, he would accept them as his part com-
mission to prove that he had a full responsibility of
his confidence, and Mr. Ebersberger said that com-
mission would not be due him, in fact, that before
they go any further, they wouldn't go any further
with the lease; that clause is stricken out, and Mr.
Ebersberger wouldn't agree to that. 20

Q Who struck it out?

A I did.

Q (Showing witness paper). I show you the
July lease and ask you to look at the pencil nota-
tions thereon. 30

A In my writing.

Q Did you make them?

A I did.

Q How did you come to make them?

A Well, authorized to do so by Mr. Ebersberger.

Q Do you know whether Mr. Hewson was pres-
ent when that was done?

A On the Schary lease? I think he was.

BY THE COURT.

Q The question is, do you know? 40

A Well, I am not certain.

Defendant's Witness, Sadie Meisner, Cross

CROSS EXAMINATION by Mr. Marder:

Q Will you tell us the lay out of your office?

A We have two rooms in our office, a front office and a rear, with a glass partition.

10 Q And Mr. Ebersberger, his office is in the rear, is it not?

A No, sir.

Q Where is his office?

A Mr. Ebersberger has no private office. Mr. Ebersberger is not in the office very much and when he is there he is in my room.

Q I thought you said there are two rooms?

A There are two rooms.

Q Who uses the other room?

A It is vacant, both in and out.

20 Q You have got furniture in the both of them?

A That is, it is not vacant, but it is not in use by any particular person. We have drivers who come in and then sometimes they sit out there and use it.

Q Some other business?

A Yes, wholesale barrel business.

Q Mr. Ebersberger's business is the barrel business, he is not a real estate broker?

A Yes, his personal business is broker, he is a member of the corporation.

30 Q How long is this office?

A I have a very poor idea of dimensions.

Q In comparison with this courtroom?

A I am afraid I would be very inaccurate in describing it. (Indicating) I should say from that door and up to about that first door—it couldn't be quite that long, I don't think so.

Q How wide is it?

A It is just like an average two small rooms.

Q That don't tell us very much.

40 A I have a poor—

Defendant's Witness, Sadie Meisner, Cross

Q Memory?

A No, not memory, but poor idea of measurements. I should say from this door up to where Mr. Fast is. (indicating). I should imagine that would be the length of both offices.

Q You mean both offices combined by that length? 10

A Yes, they are separated by a small partition.

Q How wide are the offices?

A Well, from about this wall to that little wall there (indicating).

Q They are about as wide as long?

A No, they are longer than wider.

Q Where do you usually sit, in the front office, don't you?

A Now I sit in the front office.

Q At that time? 20

A At that particular time I was in both places.

Q Where was your telephone?

A We had telephones in both rooms, we have extensions.

Q At that time were you the young lady, the employee of Mr. Ebersberger, on the premises?

A The only office employee.

Q Where was your typewriting machine, in the front office, was it not? 30

A The typewriting machine is in the front office.

Q You mean the one with the windows?

A It is a corner building and four exposures.

Q And this conference was held in the rear office, was it not?

A The conference was held in the rear office, that is right.

BY THE COURT.

Q That is the office nearest the entrance?

A The office nearest the entrance, that is right. 40

Defendant's Witness, Sadie Meisner, Cross

BY MR. MARDER.

Q Were you present when Mr. Hewson called at Mr. Ebersberger's shortly after July 21, 1925?

A With Mr. Tannenberg, you mean?

Q No, all alone?

A I was present at all times that Mr. Hewson
10 was there.

Q Were you present when Mr. Hewson called on Mr. Ebersberger shortly after July 27th when he was there with the July lease?

A Yes, sir, I was.

Q Was the July lease read in extenso?

A Well, that was glanced over and I say I don't remember whether it was in the presence of—

Q Who glanced over it, Mr. Hewson and myself.

Q You did glance over it?

A We had two copies to look at; he looked at
20 one and we looked at another.

Q Both looked at a copy at the same time?

A I don't recall whether it was at the same time, after he read it, I read it, or vice versa.

Q All the notations were made by you?

A Yes, sir.

Q Without exception?

A Yes, sir.

Q Who told you to make the notations, Mr.
30 Ebersberger?

A Mr. Ebersberger.

Q Did you make all the notations he told you to make?

A Yes, sir.

Q Did you make any of your own volition?

A No, I didn't.

Q Positive about that?

A Yes.

Q Just a notation on page 2 of the Schary lease,
40 is that in your handwriting?

Defendant's Witness, Sadie Meisner, Cross

A Yes, sir.

Q Did Mr. Ebersberger tell you to make those?

A Yes, he did.

Q The notation on page 3, "With the consent of the landlord," did Mr. Ebersberger tell you to make that?

A Yes, sir. 10

Q Did he tell you to change on page 3 from fifty thousand to seventy-five thousand, dealing with the subordination clause?

A Yes, sir.

Q Mr. Hewson was present?

A I am not sure whether he was present or whether after he left we made them, I am not absolutely certain on that.

Q Mr. Hewson came to you with the Schary lease. What was first discussed? 20

A He brought the lease down and told him that he had a client for the Broad street apartment, discussed the rental, and he gave us the lease to look over.

Q And left?

A No, he stayed there; he had one lease and we had another; we read the lease; whether we made all of those notations in Mr. Hewson's presence or not I am not absolutely certain.

Q What else happened? 30

A We noted there was no cash security and Mr. Ebersberger said of course that would never go through, he wouldn't accept it under those conditions.

Q Then you stopped reading the lease?

A However, we were willing to make whatever changes we wanted to make, to insist, in the event that Mr. Schary did put up \$8500 cash security.

Q You mean all of these changes?

A I don't know that we made all of them. 40

Defendant's Witness, Sadia Meisner, Cross

Q Why did you make any if you were not going to make all?

A We made most of the changes.

Q Anything said about commissions to Mr. Hewson at that time?

A Yes, sir.

10 Q Positive about that?

A Yes, there was.

Q Who said it, talking about the Schary lease?

A The first time commission came up—

Q We are talking when Hewson came to Ebersberger with the Schary lease, was there anything said about commission at that time?

A I don't think so. May I see the lease?

Q How will that refresh your recollection, using that, about commissions?

20 A When Mr. Hewson brought the Schary lease down Mr. Ebersberger told him he wouldn't pay five per cent. commission.

Q Didn't you a moment ago say that not a word was said about commission when Hewson brought the Schary lease down?

A I remember that we received a letter prior to that. He asked me to bring out that letter and that was the reason they discussed commission.

30 Q Which is true, he did or did not discuss commission?

A He did.

Q Why did you tell me a moment ago that not a word was said about the commission because you had forgotten about the letter?

A No, it wasn't because I had forgotten. Mr. Hewson had been down to our office three or four times and I had to recall which particular time this was.

Q How long before this was he at the office?

40 A I think he came down with that White lease,

Defendant's Witness, Sadie Meisner, Cross

with a lease from a widow, and there was a question of cash security that wasn't at that time to be given, that was the reason that lease wasn't considered, also came down with a lease—

Q Was there anything said by Mr. Hewson at that time?

A Not at that time. 10

Q Even though it was after the receipt of the letter?

A No, not at that time.

Q Were you present when Mr. Ebersberger had a conversation with Mr. Paige?

A Yes, sir.

Q Isn't it that Mr. Ebersberger told Paige, "I want to lease this property, the terms are twenty-one years lease and \$8500 and \$10,000 for the eleven years"? 20

A I think he roughly outlined the terms.

Q Are you sure about it?

A No, I am not sure now. I think he roughly outlined the terms. It is his custom. I know he told him he would want one year's security.

Q You know he told him that?

A Yes, sir.

Q Did you make the notations on this letter of July 27th? 30

A Yes.

Q When did you make it?

A When we got the letter.

Q When you got the letter you made them right then and there?

A Well, perhaps a day later.

Q Who was present when you made these notations?

A Mr. Ebersberger and I think it was the day Mr. Hewson was down. 40

Defendant's Witness, Sadie Meisner, Cross

Q I ask you who was present when you made those notations?

A Mr. Ebersberger, Mr. Hewson.

Q You are positive about that?

A Yes, sir.

Q You are sure about that?

10 A Yes, sir.

Q And you made all notations on there?

A Yes, sir.

Q Including this one, which is a computation of five per cent?

A Yes, sir.

Q How did you happen to make that?

A To ascertain what the amount of commissions would be on Mr. Hewson's figures.

Q That is only for ten years?

20 A We didn't finish it; we just made that; we didn't use that as a permanent record of any kind.

Q You notice the difference in the pencil shading of these two notations?

A Yes, sir.

Q You made them both?

A No, I can't account for them; it may be that I pressed a little heavier on one than the other or it may be that my pencil broke and I used another one; I can't recollect now; it is two years now.

30 Q One is Xed out in a wavy line and the other is a straight line, much lighter.

A Because this is a whole paragraph, I wanted to make it easier.

Q You seem to remember so much about this conversation or what took place in connection with July meeting, don't you remember it was because you pressed harder or because you broke your pencil point?

40 A No, that was a minor point. I remember the most important details.

Defendant's Witness, Sadie Meisner, Cross

Q This is a minor point?

A Yes, pressing on the pencil lighter or heavier.

Q I show you this letter of October 7th, marked "Never signed." Did you write this, is that your handwriting?

A No, that is not my writing.

Q Then Mr. Ebersberger is not telling the truth when he said that you wrote it? 10

THE COURT. I do not think he said that.

Q Whose handwriting is that?

A I don't know.

Q Do you know Mr. Ebersberger's writing?

A I do. That is not his handwriting.

Q And it is not yours?

A No, sir.

Q However, the most important notations or changes that Mr. Ebersberger wanted made there were all on Mr. Schary's lease so that in case Mr. Schary would put up the deposit then the lease would go through; is that the idea? You testified to it. 20

A Yes, sir.

Q You don't find anything here dealing with the surety bond, do you?

A There is surety there to cover that.

Q What is that?

A I have the word "Security" there. I wanted that only to bring to our memory when the thing would be drawn up. I just put little reminders there. 30

Q That means cash security?

A No, it doesn't say cash security. It means security in form.

Q What other word have you that would indicate cash security?

A That wasn't a final lease.

Q That little word "security" would remind you 40

Defendant's Witness, Sadie Meisner, Cross

of anything that you had in mind by way of security?

A Yes, sir.

Q Isn't insurance, the amount of insurance, part of the security in that general omnibus of embracing sense?

10 A No, insurance would be termed security.

Q That is, according to your terminology?

A That is our custom of using those words in our office.

Q That is your custom in your office?

A Yes, sir.

Q That security means a surety bond or cash security?

A Pertaining to that lease.

Q How did that custom arise?

20 A Well, that particular lease was discussed and it was an interesting thing in Mr. Ebersberger's mind—

Q You can't tell us that.

A It was a discussed thing and it was a requirement of Mr. Ebersberger's and Mr. Hewson knew that that security would—

Q How do you know that he knew that?

A Because Mr. Ebersberger told him what he he would require in order to sign the lease.

30 Q The Schary lease?

A Any lease, any client of his.

Q Was there anything understood about a surety bond in connection with the Schary lease?

A Yes, there was.

Q Mr. Ebersberg said that?

A Yes.

40 Q When was that mentioned in connection with going over this lease, in connection with this lease, just what conference was that that word "surety bond" mentioned?

Defendant's Witness, Sadie Meisner, Cross

A I can't remember what particular point in the conference, but it was mentioned.

Q And suppose that would cover so-called term insurance?

A It would come under insurance.

Q But you had no notation reading "Insurance". You had notations, "Securities, amount of insurance, G. E. Broker." 10

A Yes.

Q How about term insurance, would that come under the head of insurance?

A Yes.

Q The word "Amount of insurance" would remain on all possible sources of insurance?

A Yes, sir.

Q And the word "Security" would remain; you not only had cash security, but also on the surety bond. 20

A Yes.

Q Coming back to this Tannenberg lease, all these notations are in your hand?

A Yes, sir.

Q Did all these things happen again that happened to that letter when you struck out those things on page 5? In the upper paragraph you have a pencil marking through the paragraph rather lightly—perhaps not so light—but made possibly by a different pencil, but you have a different sort of marking. 30

A This one heavier than the other.

Q Yes, but one looks much finer than the other.

A Yes, sir.

Q It looks as if it might have been done by two different people?

A No, sir.

Q You are positive you made both of them?

A Yes. 40

Defendant's Witness, Sadie Meisner, Cross

Q Aren't those much bigger, firmer lines than the lines up above?

A They are heavier.

Q And they are firmer. Do you know what I mean by firmer?

10 A I know what you mean by firmer.

Q That is true, isn't it?

A Yes.

Q And some you say, that you made them heavier?

A I made them heavy.

Q When did Mr. Ebersberger come back from Europe or from Germany?

A I think it was September 26th or 27th; the latter part of September.

Q Can you tell us when this conference was had?

20 A Well, it was somewhere around the first of October; I imagine it was shortly after he returned.

THE COURT. You mean with Mr. Tannen-
berg and Mr. Hewson?

MR. MARDER. Yes.

Q How was that meeting started, that conference?

30 A They came down with the intention of discussing the lease.

Q Describe what they did; don't give us your own conclusions.

A They came in and Mr. Hewson told Mr. Ebers-
berger he brought the leases down with him and had
Mr. Tannen-berg there and Mr. Ebersberger called
me in; I was in the front office.

Q You were in the front office?

A When they came in I was in the front office.

Q And he called you in right away?

40 A As soon as they came in they greeted each

Defendant's Witness, Sadie Meisner, Cross

other; Mr. Ebersberger called me in; we were seated, and we looked over these leases.

Q How many copies were there?

A Mr. Hewson had two copies; I know he had more than one, whether two or three, I am not certain, because Mr. Ebersberger and I was sitting on one side of the table of Mr. Hewson and Mr. Tan-
nenberg, and we went over the lease and started
talking changes right there. 10

Q Did you read it all over once before you started to make the changes?

A Yes, sir.

Q Or did you make changes as you went along in reading it?

A I think we glanced through it first.

Q Then after you glanced through it you sat
down and started to make the changes? 20

A Yes, sir.

Q And discussed the changes as they came up from time to time?

A Yes, sir.

Q In accordance with the notations set forth in the lease?

A Yes.

Q The most important thing in connection with the lease after the rental was agreed upon was this cash security? 30

A Yes.

Q That was discussed first?

A I think it is in the first part of the lease.

Q Suppose I were to tell you that it happened to come up next to the last page of the lease, would it surprise you?

A No, it wouldn't because it is two years ago and I can't remember all the details. I know it was discussed; it was the important factor of the lease. 40

Defendant's Witness, Sadie Meisner, Cross

Q You glanced through the lease?

A Yes, sir.

Q And you say that the security was not to be in cash?

A Yes, sir.

10 Q So then you discussed the minor details instead of the important ones?

A Yes, they did discuss it.

Q Which did they discuss first?

A I don't remember.

Q If they had come to some agreement as to security there might have been a lease?

A Yes, but they made that in case they did sign the lease. They began discussing commission.

Q Who?

20 A Mr. Hewson said he would take the notes if Mr. Ebersberger didn't want to take them as his commission.

Q Then Mr. Ebersberger said, "There is no use of discussing the lease, we will agree on the commissions"?

A Mr. Ebersberger said, "I insist on cash security and a surety bond, then we will discuss commission."

Q That is an afterthought?

A No, it all comes under the head of security.

30 Q Didn't you testify on direct examination Mr. Hewson called up the next day or the day following the conference and said, "Well, how did John feel about it?"

A Yes.

Q Then what did you say, "John doesn't want to do it?"

A He said he will take \$5000, and I said, "John won't consider paying \$5000, all he is offering is three." And Mr. Hewson said, he became enraged

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Defendant's Witness, Sadie Meisner, Re-direct

and shouted, and he said, "You tell him the deal is off." Those are his exact words.

Q Did you tell that to John?

A I did.

RE-DIRECT EXAMINATION by Mr. Fast:

Q What is the rental of 1084 Broad street? 10
Objected to.

MR. FAST. My reason is to show the importance for the payment of cash security.

MR. MARDER. We agree that cash security was to be put up.

DEFENDANT RESTS.

GEORGE F. HEWSON, plaintiff, recalled in his own behalf in rebuttal. 20

DIRECT EXAMINATION by Mr. Marder:

Q After this conference attended by yourself and Tannenberg and Ebersberger did you call up and speak to Miss Meisner and have this conversation about telling John this and telling John that, as testified to by her?

A No, sir; the only conversation was the following morning, about the 30th of September, and I insisted on talking to Mr. Ebersberger himself. 30
We discussed the lease and the commission, in fact, there was nothing else discussed except the amount that he was to pay for commission.

Q When you brought the July lease to Ebersberger was there anything said about commission?

A Not a word.

Q Was that after you had sent this letter?

A After I sent this letter.

Q Stating that your commission would be five per cent. in case you put the deal through? 40

Plaintiff's Witness, George F. Hewson, Rebuttal

BY THE COURT.

- Q Are you a member of the Real Estate Board?
 A Yes, sir.
 Q Is there a regular rate of commission for such as this fixed by the Real Estate Board?
 10 A Yes, sir.
 Q Are those rates in printed form?
 A They are in printed form.
 Q Have you them with you?
 A Yes, sir. (Producing book).
 Q You now produce the rules of the Real Estate Board.
 A Yes, sir.
 Q What are the commision rates adopted by that Board in these rules?
 20 A Five per cent. on property of this kind on the aggregate rental.
 Q Isn't there some rule there fixing a rate up to \$20,000 and a lower rate above that sum?
 A That is for a sale, in the event of a sale.
 Q Not for leasing?
 A No, sir.
 Q To what rule do you refer as to the five per cent. commission?
 A To rule 12.
 30 Q When you had this conversation the next morning with Mr. Ebersberger did you agree to accept his \$7000?
 A No.
 Q Did you agree to accept \$5000?
 A No.

CROSS EXAMINATION by Mr. Fast:

- Q These commisions that the Judge referred to five per cent. the idea is not take more or less; isn't that right?
 40

Plaintiff's Witness, George F. Hewson, Cross

- A I don't understand your question.
 Q The ethics of the Real Estate Board require that you take neither less nor more than five per cent; is that right?
 A I think so.
 Q Leasing ground floor, mercantile property, three and a half per cent?
 10 A Yes, sir.
 Q During the course of this trial there was some testimony about a lease that you consummated for Mr. Ebersberger known as the Terrill Machine Company, and what was the rental on that?
 A The rental was somewheres about \$6000.
 Q And what commissions did you get?
 A \$400.
 Q What sort of property was this, mercantile property?
 20 A It was factory and dock property.
 Q What commissions were you satisfied to get for that?
 A Up to ten per cent. is about the rate.
 Q I show you the Real Estate Board rules and ethics and ask you where you find that?
 A I don't think this rule applies to dock property.
 Q Show me anything that applies to dock property?
 30 A There is nothing that provides for that; there is no rule for that.
 Q Isn't it true that the lease we are referring to does not cover dock property?

THE COURT. I think we are going astray.

- Q Your testimony in rebuttal was that you called him up the next day and you discussed the lease and commission. What was there to discuss?
 40

Plaintiff's Witness, George F. Hewson, Cross

A I discussed the commissions.

Q Did you testify to that?

A No, sir.

Q Yes, you did.

A I did not. I discussed commissions, but not any other phase of the lease, because they were already settled.

Q Why did you discuss commissions?

A Because the lease couldn't be closed without the settlement of the commission.

Q Wasn't it agreed upon that you were to get five per cent?

A No, that was because of the lease not being signed the day previous.

Q Do you mean to say that there was no agreement that you were to get five per cent?

A Yes, the original agreement was July 27th.

EDWIN J. PAIGE recalled in behalf of plaintiff in rebuttal.

DIRECT EXAMINATION by Mr. Marder:

Q In your original conversation with Ebersberger did he outline any terms in the lease with the exception of a rental of \$8500 a year altogether for twenty-one years?

A No terms of any kind or any specifications, as you may call them, were mentioned at any time; all he told me was to get to work on the lease at \$8500 net.

Q \$8500 net?

A That is all.

CROSS EXAMINATION by Mr. Fast:

Q Isn't it true that at the time you called there Mr. Ebersberger said he didn't care what tenants

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Plaintiff's Witness, Edwin J. Paige, Cross

you brought down there as long as he put up the security of \$8500?

A Oh, no, he never mentioned that at all.

Q Didn't even discuss the rental of \$10,000 for eleven years?

A No, sir, it was taken up later with him, not that time.

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PLAINTIFF RESTS.

DEFENDANT RESTS.

Mr. Fast sums up in behalf of defendant.

Mr. Marder sums up in behalf of plaintiff.
The court charges the jury as follows:

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Charge

DUNGAN, J:

10 Before charging you, I want to speak of something Mr. Fast said in his argument, regarding a statement made by the court as to the testimony of Mr. Ebersberger relative to an evasion. Of course, that should not have any influence with the jury. The court is not the judge of the demeanor and manner of testifying of witnesses, and what he said should be disregarded by the jury. That was just said in reply to an objection made by the attorney and was not intended to influence the jury in any way.

20 The plaintiff, the George F. Hewson Company, a corporation of which George F. Hewson is president, is in the real estate brokerage business here in Newark, and brings this suit against Ebersberger to recover commissions for negotiating a lease for the Margaret Apartments at 1086 and 1088 Broad street, in this city. It is not disputed by Mr. Ebersberger—in fact, he admits, that he listed this property with the plaintiff for letting, therefore, if the plaintiff company found and produced to Mr. Ebersberger a customer or customers, able, ready and willing to conclude a lease of the property on the terms fixed with the plaintiff, the plaintiff is entitled to the agreed commission, if there was an agreement as to commissions, if not, then to a reasonable compensation to be determined by the jury from the evidence. Therefore, there are two, to which may be added a third, important question for the jury to consider and decide: First, did the plaintiff produce a customer ready, able and willing to execute a lease upon the terms stated by Mr. Ebersberger to the plaintiff?

40 Second, if so, was there an agreement to pay

Charge

plaintiff five per cent. commissions, or is his obligation to pay only the usual commission, if that is left, or reasonable compensation for his services.

Third, was it Mr. Ebersberger or Mr. Hewson who prevented the execution of the lease?

10 There is no dispute but that Mr. Hewson produced Mr. Holdman and Mr. Tannenberg as prospective lessees, although it was only Mr. Tannenberg who attended at Mr. Ebersberger's office; but Mr. Holdman says Mr. Tannenberg was authorized to execute or to agree to the terms of the leasing for him; nor is it disputed that they all met at Mr. Ebersberger's office, that is, Mr. Tannenberg and Mr. Hewson, in the latter part of September, or the forepart of October, 1925, for the purpose of leasing the property, and while there some changes 20 in the proposed lease which Mr. Hewson had taken there required by Mr. Ebersberger. Of course, if Mr. Ebersberger imposed terms upon the prospective lessees other than those stated to the plaintiff in the listing of the property, to which plaintiff refused to agree, that would not prevent the plaintiff from recovering its commissions, if they were ready, able and willing to execute a lease upon the terms given by Mr. Ebersberger to the plaintiff; Mr. Holdman and Mr. Tannenberg, while they 30 do not remember some of the terms proposed and changes made at Mr. Ebersberger's office nor does Mr. Hewson say that all the changes were then agreed to by Mr. Tannenberg, say that Mr. Ebersberger expressed himself as satisfied with the lease, and Mr. Holdman and Mr. Tannenberg say they were ready financially, able and willing to conclude the lease upon the terms then agreed to, and that the only thing which stood in the way was the failure of Mr. Ebersberger and Mr. Hewson to agree 40

Charge

upon the commission. If that be true, Mr. Ebersberger was not justified in refusing to execute the lease, but should have executed it, and left it to the future to settle the matter of commissions with the plaintiff, either by negotiations between them, or in just the way the matter is now being considered, that is, by a lawsuit, or in some other way. 10

Mr. Ebersberger denies that Mr. Hewson and Mr. Tannenberg agreed to all the terms, notably, to pay a cash deposit of \$8500, and to agree to enter into and execute a surety bond to provide against mechanics' liens for alterations to the buildings, for which the lease provided, and rent insurance in case of fire. While I understood from Mr. Hewson that Mr. Ebersberger agreed to accept a personal bond from Mr. Holdman and Mr. Tannenberg, as stated in the lease, I understood Mr. Holdman and Mr. Tannenberg to say that they would execute a surety bond and that they told Mr. Ebersberger so, and that they would pay the \$8500 cash deposit, and they say that all that prevented the execution of the lease was the matter of commission. 20

You will recall on this point Mr. Ebersberger's testimony that after they had discussed terms for a time, he said that there was no use in going any further, "We haven't agreed on commission," and he told them to take the lease and let him know about it. That testimony you may consider, as to whether it is not, in a sense, a corroboration of the plaintiff's claim that Mr. Ebersberger refused to execute the lease because Mr. Hewson refused to accept the commission he offered him, the effect of which I have already called to your attention. However, the commissions of the plaintiff at five per cent. were provided for in the lease and Mr. Ebers- 30
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Charge

berger was justified in refusing to sign the lease with that provision in it, if he had not agreed to pay commissions or to pay five per cent. commission, but the agreement to pay commissions was not necessarily a part of the lease, as Mr. Holdman and Tannenberg were not interested in that part of the lease, Mr. Holdman and Tannenberg were not interested in commissions at all. It need not even have been in writing. It could have been stricken out and the lease executed and the matter of commissions left to future adjustments, as I have already stated, unless Mr. Hewson refused to permit the deal to go through, if that was not agreed to by Mr. Ebersberger. Mr. Ebersberger testifies that when the controversy arose about the amount of the commission, and Mr. Ebersberger offered \$3000, Mr. Hewson not only refused to accept it, but said to Mr. Ebersberger that the deal was off, and Miss Meisner says that in a telephone conversation on the same subject, Mr. Hewson said to her, "Tell John the deal is off." Mr. Hewson had no more right than had Mr. Ebersberger to call off the deal because of the controversy about the commission, and if he did so, and by his own act prevented the execution of the lease, he cannot now recover anything. Mr. Hewson denies that he said that and that there was any such conversation at all over the telephone with Miss Meisner; he said that all his conversations over the 'phone were with Mr. Ebersberger. If the service rendered had been voluntary, and without any authorization on the part of the defendant, even though the plaintiff had produced a purchaser, the plaintiff would not have been entitled to any commissions or compensation. But that is not this case. The defendant admits that he listed his property, and that listing would render him liable for the agreed commissions, if such commis- 10
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Charge

sions were agreed to, or to reasonable compensation if no such agreement was made. If the plaintiff produced lessees able and willing to accept a lease on the terms fixed by Mr. Ebersberger with Mr. Hewson, unless it was Mr. Hewson himself who prevented the consummation of the deal, in which event he cannot recover. The plaintiff says, as I have already stated that the agreement was to pay five per cent. commission. The law does not limit the amount of commissions which might be charged under the circumstances, and even though you find that the amount of commission fixed was greater than what would be reasonable compensation, that would make no difference. The plaintiff would be entitled to that amount of commisison if it was agreed to by the defendant. The defendant, Mr. Ebersberger, said there was no agreement at all about commissions, and that he offered \$3000. He says that the plaintiff went to his office and called him up on the telephone and told him his commission would be \$9500, and that he told him he wouldn't pay Mr. Hewson any more, and he says that then Mr. Hewson said he would accept \$7000, and later \$5000. Mr. Hewson denies that there was any such conversation. But even if there was such a conversation, and even if Mr. Hewson said that, that would make no difference at this time and should not be considered by you if it was intended by Mr. Hewson merely as a compromise, and particularly since the offer of the settlement was not agreed to by Mr. Ebersberger.

It appears by the rules of the Real Estate Board of Newark that commissions in a case of this kind are five per cent. upon the total rent for the entire time. Of course, that is not binding upon the parties to this suit but is only quoted by the court

Charge

upon the subject of what is reasonable compensation, if you find there was no distinct agreement that five per cent. commission was to be paid by the defendant. Therefore, if you decide that the greater weight of evidence shows because the burden of proof is upon the plaintiff to establish his case by the preponderance of the evidence, that the plaintiff is entitled to your verdict, and that there was an agreement that five per cent. commission should be paid, the plaintiff is entitled to your verdict for five per cent. on \$195,000, the property rental for twenty-one years, which would amount to \$9750. and interest thereon at six per cent. from the time of the refusal of Mr. Ebersberger to execute the lease, which was the latter part of September or the forepart of October, 1925; so that a safe date from which to figure interest would be October 14th, which would be one year and three months of elapsed time. The interest for that period upon that sum would be \$731.25, making \$10,481.25, to which the plaintiff would be entitled if you decide that he produced lessees ready, able and willing to execute the lease upon the terms fixed by Mr. Ebersberger with the plaintiff, provided there was an agreement to pay five per cent. There can be no compromise at all about that. Sometimes juries are prone to compromise things and give away a little bit in order to get away, so I am told, but there can be no compromise in this case. If you decide that the plaintiff is entitled to your verdict, and that there was a five per cent. agreement, he is entitled to \$10,481.25, and you cannot take off even the twenty-five cents. If you find, however, that the plaintiff has failed to establish his agreement for the payment of five per cent. but is otherwise entitled to recover, then you should decide what, under the evidence, will be reasonable compensation for the services rendered,

Defendant's Exception to Charge

to which interest should be added from the same date, at the same rate.

(The jury retires.)

10 MR. FAST. I want to object to that portion of your Honor's charge which said that the plaintiff would be entitled to a reasonable compensation if there was no agreement to pay express amounts. There was no testimony as to what would be a reasonable amount, and that since the plaintiff sued upon an express agreement, he was bound only by that express agreement.

Exception noted as ground of appeal.

20 MR. FAST. Your Honor said something like this, that the question was, "Was it Mr. Hewson or Mr. Ebersberger who prevented the closing of the lease?" I maintain that your Honor should have said that if he prevented the tenant from closing the lease, there could not be any compensation.

Exception noted as ground of appeal.

30 MR. FAST. I think that your Honor erred in saying to the jury that if it was true that all the terms were agreed upon between Ebersberger, Tannenberg and Holdman, that Ebersberger should have executed the lease and settled the question of commission, especially in view of the fact that your Honor mentioned there was a provision in the lease which Mr. Hewson submitted covered the commission.

Exception noted as ground of appeal.

40 MR. FAST. I except to that part of your

Defendant's Exception to Charge

Honor's charge where you said that you understood that Tannenberg and Holdman both said they were willing to execute a surety bond. Your Honor said that the jury could consider the fact that Mr. Ebersberger said, "There is no use to go any further, we haven't agreed upon commission," as corroboration of Mr. Hewson's story, and I contend that if there was no agreement as to commissions, that, of course, we are not liable; that before the plaintiff can recover there must have been an agreement to pay commission, and also for the plaintiff to have presented a person to comply with all the terms of the listing as given to Mr. Hewson or as changed with Mr. Hewson's consent.

Exception noted as ground of appeal.

MR. FAST. Your Honor said that an agreement to pay commissions was not part of the lease. I contend that in view of the fact that Mr. Hewson himself drew the lease and presented the lease, that the lease be construed most strictly against him, since that he inserted that in the lease we were under no obligation to pay him, as alleged in the lease.

Exception noted as ground of appeal.

MR. FAST. Your Honor again said further on, "I charge you that the plaintiff would be entitled to reasonable compensation if Hewson brought a purchaser ready, able and willing to lease." We think that it should be based on the lease.

Exception noted as ground of appeal.

Defendant's Exception to Charge

10 MR. FAST. Your Honor said that the jury should not consider the conversation of Ebersberger when Hewson said he would be willing to take \$7000 or \$5000, if it was intended as a settlement. We say there was no such testimony, that it was not a settlement, but it was negotiations between the parties for rental.

Exception noted as ground of appeal.

MR. FAST. I except to that part of your Honor's charge where you said that they should decide what reasonable compensation is.

20 Exception noted as ground of appeal.

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40

Essex Circuit Court

No. 1240-39472

Friday, January 14, 1927.

GEORGE F. HEWSON COMPANY,
A NEW JERSEY CORPORATION,

vs.

JOHN EBERSBERGER,

At Law. 10

The Jury being called, Juror Number 2 being absent Counsel on both sides agreed to proceed with eleven jurors.

Plaintiff's Attorneys, Defendant's Attorney,
AARON MARDER. FAST & FAST. 20

The evidence being closed, the Court in pursuant to Section 70 of the Practise Act of 1912, submitted the following questions to the jury.

Question No. 1. Did Plaintiff produce persons able and willing to conclude a lease upon the terms stated by Mr. Ebersberger to Mr. Hewson?

Question No. 2.. Was there an agreement by Mr. Ebersberger to pay commission at the rate of 5% upon the total rental. 30

Question No. 3. Do you find a verdict in favor of the plaintiff or the defendant?

Question No. 4. If for the plaintiff for what sum? 40

Exhibit P-1

<p>Insurance Fire Liability Accident Theft Boiler Bonds</p>	<p>GEORGE F. HEWSON CO. 197 Market Street Newark, N. J. Phone: Market 3049</p>	<p>Factories Factory Sites For Sale or Rent With Rail or Water Facilities Central Business Property</p>
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10 REAL ESTATE
AND
INSURANCE
Newark, N. J., July 27th, 1925.

Mr. John Ebersberger,
267 Wilson Avenue,
Newark, N. J.

DEAR SIR:

20 Confirming our 'phone conversation of the 25th inst., and also previous conversations with our Mr. E. J. Paige, relative to the leasing of the apartment house at 1086-88 Broad Street, Newark, N. J., for a term of years, it is our understanding that you will lease same at the annual rental of \$8500. net, payable in monthly installments of \$708.33, and also it being understood and agreed that you are to take care of the exterior of the premises, such as the roof,

30 their own cost and expense—you are to be held free from all liability during any such repair or alterations. The people we have in mind are first-class and operate other properties in the center of the City under a similar type lease.

In the event of our being successful in procuring a lessee who is financially responsible and negotiating this lease, usual commission of Five Per Cent (5%) of the total amount of lease—or any renewal thereof, will be due and payable.

40 Unless we hear from you to the contrary, we will

Exhibit P-1

assume that the foregoing is correct, and will proceed to interest our parties in same.

Trusting to receive your co-operation, we are

Yours very truly,

10 GEORGE F. HEWSON COMPANY,

By: GEORGE F. HEWSON,
President.

GFH/BD.

20

30

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Exhibit P-2

THIS INDENTURE, made this
day of _____, in the year of Our Lord,
One Thousand Nine Hundred and Twenty-Five, by
and between

10 JOHN EBERSBERGER and LILLIAN EBERSBERGER, his
wife, of the City of Newark, in the County of Essex
and State of New Jersey, hereinafter called the land-
lord, Party of the First Part, and

HERMAN H. SCHARY, of the City of Newark, in
the County of Essex and State of New Jersey, here-
inafter called the tenant, Party of the Second Part:

20 WITNESSETH: That the landlord, for and in con-
sideration of the rent, covenants and agreements
hereinafter mentioned, reserved and contained and
on the part of the tenant, to be paid, fulfilled and
performed, has leased, demised and let unto the ten-
ant, all that certain tract or parcel of land and
premises, hereinafter particularly described, situate,
lying and being in the City of Newark, in the County
of Essex and State of New Jersey:

30 Consisting of property known and described as
Nos. 1086-1088 Broad Street (The Margaret), hav-
ing a frontage of Sixty (60) feet, on Broad Street
and a depth of One Hundred and Twenty (120)
feet, dimensions more or less, upon which is erected
a four story limestone and brick building, contain-
ing sixteen (16) apartments aggregating eighty-
seven (87) rooms, for residence and business
occupancy.

40 TO HAVE AND TO HOLD the above described prem-
ises with the appurtenances unto the said tenant for
the term of twenty-one (21) years, from the First

Exhibit P-2

day of August, Nineteen Hundred and Twenty-five
to the Thirty-first day of July, Nineteen Hundred

and Forty-six, for the clear, net annual rental of
Eighty-five Hundred Dollars (\$8500), payable in
monthly installments of Seven Hundred Eight and
33/100 Dollars (\$708.33) for the first ten years of 10
said term, viz. from August 1st, 1925 to July 31st,
1935, and the next eleven years, for the clear, net
annual rental of Ten Thousand Dollars (\$10,000),
payable in monthly installments of Eight Hundred
Thirty-three and 33/100 Dollars (\$833.33), viz. from
July 31st, 1935 to July 31st, 1946.

In addition to the annual rental above mentioned
and as part of the rental by this indenture reserved, 20
the tenant shall also pay all taxes, water rents, as-
sessments and any and all other impositions which
by any Municipal, County or State authority may
be imposed upon the demised premises, or any part
thereof, and all premiums for fire insurance on said
premises during the continuance of this lease. (*amt*
of insurance) (italic notation written in in pencil.)
The tenant shall exhibit to the landlord during the
continuance of this lease, paid bills for all taxes, as-
sessments, water rents or other impositions, and 30
premiums for fire insurance, within sixty days after
the same shall become due, or are a lien against
the demised premises, or any part thereof.

The landlord further agrees that during the life
of said lease the tenant shall have the right and
privilege of making alterations to the present build-
ing on the demised premises, providing such alter-
ations conform with all Municipal and State Laws
and all other requirements, same to be approved by 40

Exhibit P-2

the landlord in writing. (*& does not lessen the value of bldg impr & property*) (italic notation written in in pencil.)

10 The tenant agrees to furnish the landlord with plans and specifications showing the alterations to be made, and all expenses incurred by making such alterations to be borne by the tenant. The tenant agrees to give to the landlord his personal bond in the sum of twice the amount of the cost of said alteration, it being the purpose of the tenant to hold the landlord free from all mechanics' liens or other liability during said alteration, no reduction of rent will be claimed or allowed by tenant during the term of said alteration.

20 In case there shall have been a partial or total destruction of the building by fire, herein to be demised, at any time during the life of this lease, then in that event this lease shall be in full force and effect, and the landlord shall immediately upon receiving due notice begin to make such repairs as may be necessary to put the building in the condition it was prior to such fire; the cost of said replacement or alteration to be limited to the amount the landlord in writing (*& does not lessen the value of bldg.*) (Italic notation written in in pencil.)

30 The tenant may sub-let or under-let the whole or any part of said premises as he may see fit. (*with consent of landlord*) (italic notation written in in pencil.)

40 It is further agreed that in the event that the present first mortgage on said premises is called in or paid off, the tenant agrees to permit the land-

Exhibit P-2

lord to substitute other mortgages for said mortgage providing that such mortgage or mortgages shall not exceed the sum of Fifty Thousand Dollars (\$50,000.), (italic notation; line drawn over \$50,000 (75) written in in pencil) or in the case of foreclosure, the tenant shall have the right to supplant said mortgage with a mortgage equal to the same amount, expense in procuring such mortgage to be borne by the landlord, which expense at no time shall exceed the sum of One Thousand Dollars (\$1,000).

The landlord agrees to pay his proportionate share of the taxes against said demised premises from the First day of January, 1925 to the First day of August, 1925.

If the said premises shall become vacant or deserted during the term hereof, or the tenant shall breach any of the covenants or agreements herein contained, the tenant hereby authorizes the landlord, his heirs, executors, agents or attorneys, to re-enter and resume possession of the demised premises and re-let them and receive and apply the rent so received to the payment of the rent due by these presents, without releasing the tenant from the payment of the deficiency, in any manner.

The tenant hereby waives any notice of reentry and waives any right of redemption accorded by any law now or hereafter existing or to be enacted whereby he can regain possession of the said premises after having been removed or dispossessed therefrom.

The tenant agrees to keep the premises inside and outside in good repair, wear and tear arising from

Exhibit P-3

four story limestone and brick building, containing sixteen (16) apartments aggregating eighty-seven (87) rooms, for residence and business occupancy.

10 To HAVE AND TO HOLD the above described premises with the appurtenances unto the said tenant for the term of twenty-one (21) years, from the First day of November, Nineteen Hundred and Twenty-five to the Thirty-first day of October, Nineteen Hundred and Forty-six, for the clear, net annual rental of Eighty-five Hundred Dollars (\$8500), payable in monthly installments of Seven Hundred Eight and 33/100 Dollars (\$708.33) for the first ten years of said term, viz. from November 1st, 1925 to October 31st, 1935, and the next eleven years, for the clear, net annual rental of Ten Thousand Dollars (\$10,000), payable in monthly installments of Eight Hundred Thirty-three and 33/100 Dollars (\$833.33), viz. from October 31st, 1935 to October 31st, 1946.

30 In addition to the annual rental above mentioned and as part of the rental by this indenture reserved, the tenant shall also pay all taxes, water rents, assessments and any and all other impositions which by any Municipal, County or State authority may be imposed upon the demised premises, or any part thereof, and all premiums for fire (*liability, boiler & rent*) (italic notation written in in pencil.) insurance on said premises during the continuance of this lease. The tenant shall exhibit to the landlord during the continuance of this lease, paid bills for all taxes, assessments, water rents or other impositions, and premiums for (*all*) (italic notation written in in pencil.) insurance, within sixty days after the same shall have become due, or are a lien against the demised premises, or any part thereof. 40

Exhibit P-3

The landlord further agrees that during the life of said lease the tenant shall have the right and privilege of making alterations to the present building on the demised premises, providing such alterations conform with all Municipal and State Laws and all other requirements, same to be approved by the landlord in writing (& does not lessen the value of bldg.) (Italic notation written in in pencil.) 10

The tenant agrees to furnish the landlord with plans and specifications showing the alterations to be made, and all expenses incurred by making such alterations to be borne by the tenant. The tenant agrees to give to the landlord his (*surety*) (italic notation written in in pencil.) personal bond in the sum of twice the amount of the cost of said alteration, it being the purpose of the tenant to hold the landlord free from all mechanics' liens or other liability during said alteration, no reduction of rent will be claimed or allowed by tenant during the term of said alteration. 20

In case there shall have been a partial or total destruction of the building by fire, herein to be demised, at any time during the life of this lease, then in that event this lease shall be in full force and effect, and the landlord shall immediately upon receiving due notice begin to make such repairs as may be necessary to put the building in the condition it was prior to such fire; the cost of said replacement or alteration to be limited to the amount of insurance hereinafter to be agreed upon by both parties hereto which for the purpose of this agreement not to exceed the sum of \$60,000. 30

The tenant may sub-let or under-let the whole or any part of said premises as he may see fit. 40

Exhibit P-3

10 It is further agreed that in the event that the present first mortgage on said premises is called in or paid off, the tenant agrees to permit the landlord to substitute other mortgages for said mortgage providing that such mortgage or mortgages shall not exceed the sum of Fifty Thousand Dollars (\$50,000), (italic notation; line drawn over \$50,000, (100,000) written in in pencil.) or in the case of foreclosure, the tenant shall have the right to supplant said mortgage with a mortgage equal to the same amount, expense in procuring such mortgage to be borne by the landlord, which expense at no time shall exceed the sum of One Thousand Dollars (\$1,000).

20 The landlord agrees to pay his proportionate share of the taxes against said demised premises from the First day of January, 1925 to the First day of November, 1925.

30 If the said premises shall become vacant or deserted during the term hereof, or the tenant shall breach any of the covenants or agreements herein contained, the tenant hereby authorizes the landlord, his heirs, executors, agents or attorneys, to re-enter and resume possession of the demised premises and re-let them and receive and apply the rent so received to the payment of the rent due by these presents, (*loss of use insurance*) (italic notation written in in pencil.) without releasing the tenant from the payment of the deficiency, in any manner.

40 The tenant hereby waives any notice of re-entry and waives any right of redemption accorded by any law now or hereafter existing or to be enacted whereby he can regain possession of the said premises after having been removed or dispossessed therefrom.

Exhibit P-3

The tenant agrees to keep the premises inside and outside in good repair, wear and tear arising from a reasonable use of the same and damages by the elements excepted, and on the expiration of the term hereof, to yield up the peaceable possession thereof, to the landlord, his heirs, executors, assigns, agents or attorneys. 10

The terms, conditions and covenants herein contained in this agreement shall be binding upon the landlord, his heirs, executors, administrators and assigns, and upon the tenant, their heirs, executors, administrators and assigns, jointly and severally.

(*Loss of use Insurance*) (italic notation written in in pencil.) 20

In the event of partial or total destruction of said building by fire, then in that event, during the repair or rehabilitation of said building, the rent shall be remitted to the tenant, pending the repair or rehabilitation of said building.

(The above paragraph has been crossed out with pencil.)

30 The tenant hereby agrees to deposit with the landlord as security for the faithful performance for the covenants of this lease the sum of Eighty-five Hundred Dollars (\$8500) made up as follows \$2500 (italic notations; line drawn over \$2500 (8500) written in in pencil) in cash, or certified check, (the following lines in italics have been crossed out with pencil): *\$6,000 by giving a note payable to the order of the landlord, payable \$1,000 off per year with renewal privileges, same to be agreed upon at the time of execution of lease.* 40

Exhibit P-3

It is hereby represented that the aggregate annual rental for said property is Sixteen Thousand, Nine Hundred Twenty Dollars (\$16,920.)

10 *It is hereby agreed by the Party of the First Part that George F. Hewson Company negotiated this lease, and agrees to pay said George F. Hewson Company — Five Per Cent (5%) commission on the total amount of this lease.*

In the event of a sale of said property a commission of Three and one-half per cent. (3½%) on the first \$20,000 and Two and one-half per cent. (2½%) on the balance on total price of same will be due and payable to said George F. Hewson Company.

20 (The above paragraphs have been crossed out with pencil).

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Exhibit P-3

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

BE IT REMEMBERED, that on this day of _____, in the year of Our Lord, One Thousand Nine Hundred and Twenty-five, before me, the subscriber, personally appeared JOHN EBERSBERGER and LILLIAN EBERSBERGER, his wife, who I am satisfied are the lessors mentioned in the within Lease, 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 used and purposes therein expressed.

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Exhibit P-4

Insurance	GEORGE F. HEWSON CO.	Factories
Fire	197 Market Street	Factory
Liability	Newark, N. J.	Sites For
Accident	Phone: Market 3049	Sale or
Theft	REAL ESTATE	Rent With
Boiler	AND	Rail or
10 Bonds	INSURANCE	Water
		Facilities
		Central
		Business
		Property

Newark, N. J., October 7th, 1925.

Mr. John Ebersberger,
267 Wilson Avenue,
Newark, N. J.

20

DEAR SIR:

This is to advise you that Mr. Henry Tannenberg and Mr. Jacob Holdman were here at our office on Monday and Tuesday and are coming in today ready to sign Lease, copy of which you now have in your possession, on the premises at 1086-1088 Broad Street, Newark, N. J., in accordance with our agreement entered into under date of July 27th, 1925. *(never signed)* (italic notation written in in pencil.)

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They are willing to pay \$8500.00 cash security, and as you know, both men are financially responsible, being jointly worth \$350,000; they are also willing to make any necessary reasonable changes in the Lease that are in any way objectionable.

In view of above facts, we would suggest that you set a time, preferably not later than this week, either at your counselor's office or at your own office, to execute this Lease. Kindly advise us by letter or

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Exhibit P-4

'phone of the exact time and place so that we may advise our customers accordingly.

Thanking you in advance for your immediate attention to this matter, we are

Very truly yours,

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GEORGE F. HEWSON COMPANY,
By: GEORGE F. HEWSON,
President.

GFH/D.

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Exhibit P-5

<p>Insurance Fire Liability Accident Theft Boiler 10 Bonds</p>	<p>GEORGE F. HEWSON CO. 197 Market Street Newark, N. J. Phone: Market 3049 REAL ESTATE AND INSURANCE</p>	<p>Factories Factory Sites For Sale or Rent With Rail or Water Facilities Central Business Property</p>
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Newark, N. J., October 28th, 1925.

20 Mr. John Ebersberger,
267 Wilson Avenue,
Newark, N. J.

DEAR SIR:

30 This is to advise you that unless you carry out the terms of the Lease that you authorized us to make under date of July 31st, 1925 we will be compelled to seek our compensation for negotiating said Lease through the courts. Before putting the matter in the hands of our attorney, we desire to apprise you of such fact.

Yours very truly,

GEORGE F. HEWSON COMPANY,
By: GEORGE F. HEWSON,
President.
per B. D.

GFH/D.

(6) That the Court erroneously charged the jury over objection and exception of the defendant, as follows: "It appears by the rules of the Real Estate Board of Newark, that commissions in a case of this kind are five per cent. upon the total rent for the entire time. Of course, that is not binding upon the parties to this suit, but is only quoted by the court upon the subject of what is reasonable compensation, if you find there was no distinct agreement that five per cent. commission was to be paid by the defendant." 10

(7) That the Court erroneously charged the jury over objection and exception of the defendant, as follows: "If you find, however, that the plaintiff has failed to establish his agreement for the payment of five per cent. but is otherwise entitled to recover, then you should decide what, under the evidence, will be reasonable compensation for the services rendered, to which interest should be added from the same date and at the same rate." 20

(8) That the Court erroneously made a comment during the course of the trial, that it appeared to him that Ebersberger, the defendant, was evasive.

FAST & FAST,
Attorneys for Defendant-Appellant. 30

Opinion

GEORGE F. HEWSON COMPANY,
a New Jersey Corporation,
Plaintiff-Respondent,

vs.

JOHN EBERSBERGER,
Defendant-Appellant.

On appeal from
the Essex Circuit
Court.

Submitted May term, 1927.

Decided November 15, 1927.

Before GUMMERE, CHIEF JUSTICE, and Justice
BLACK and LLOYD.

For the appellant, *Fast & Fast.*

For the respondent, *Aaron Marder.*

PER CURIAM.

This is an appeal by the defendant from a judgment against him in the Circuit Court of Essex County, wherein the plaintiff was awarded \$6,288.75 by a jury for the reasonable value of services rendered by the plaintiff to defendant in obtaining a tenant for an apartment house in Newark known as the Margaret Apartments.

The grounds of appeal argued are:

1. That the court erred in submitting the case upon a *quantum meruit* basis, because, it is alleged, the complaint set up a special contract.

2. There was no proof of value of services upon which to rest a claim so based.

3. That the owner refused to complete the lease upon good ground; therefore, no recovery could be had.

The court did not err in submitting the case on the basis of the reasonable value of the services. The language of the complaint is substantially the same as in the case of *Colloty v. Schuman*, 76, N. J. L. 502, in which the Court of Errors and Appeals upheld a verdict resting on a *quantum meruit*. If the fact were otherwise, the case having been heard on its merits, amendment would be permissible even in this court. *Boniewsky v. Polish Home*, 5 N. J. Adv. R. 540 (not yet officially reported). Moreover, section 27 of the Practice act of 1927, page 382, provides that "no judgment shall be reversed for error as to matter of pleading or procedure unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of the parties." The defendant's rights were not injuriously affected.

We think, also, that there was evidence of the value of the plaintiff's services. It was shown that for renting there was a regular rate of five per cent. commission in the real estate board of the city of Newark, of which Hewson, president of the plaintiff company, was a member. This, coming into the case without objection, offered some basis for the jury's consideration, and on it a verdict rendered at the lower rate of three per cent. was well within the proofs adduced.

The claim that the owner refused to consummate a lease to the tenant for adequate reasons is not

well founded. It is difficult to find in the grounds of appeal any ruling of the courts presenting the question sought to be raised. If the fact here were otherwise, the criticism would be without merit. The plaintiff's proofs showed that a tenant had been procured who was ready and able to comply with the terms which the plaintiff was authorized to offer. The defendant, however, attempted to make the signing of the lease contingent on an agreement with the plaintiff, his agent, as to commissions, and contends here that he could legally do so. This the court properly told the jury the defendant could not do; that in such a situation it was his duty to execute the lease, leaving to the future to settle his differences with the plaintiff by negotiation or suit.

The judgment is affirmed.

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NEW JERSEY SUPREME COURT

No. 22 May Term 1927

GEORGE F. HEWSON COMPANY,
a New Jersey Corporation,
Plaintiff-Respondent,

vs.

JOHN EBERSBERGER,
Defendant-Appellant,

On Appeal From
the Essex County
Circuit Court.

Order of
Affirmance of
Judgment.

10

This cause having been duly submitted on briefs at the May Term, 1927 at this Court, by Messrs. Fast & Fast, of Counsel for Defendant-Appellant and Aaron Marder, Esq., of counsel for the Plaintiff-Respondent, and the Court having inspected the record and judgment below and considered the causes assigned for error and the grounds of appeal therein and finding no error in the record or proceeding and judgment in the court below; it is thereupon, on this Eighteenth day of November, 1927,

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ORDERED that the judgment of the said Essex County Circuit Court be affirmed with costs and that the records and proceedings be remitted to the Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of the said court.

30

Entered Nov. 18, 1927.

On motion of

AARON MARDER,

Attorney of Plaintiff-Respondent.

40

New Jersey Supreme Court

GEORGE F. HEWSON COMPANY,
a New Jersey Corporation,

Plaintiff-Respondent,

vs.

JOHN EBERSBERGER,

Defendant-Appellant,

Action at Law

Notice of Appeal
From Judgment
of Supreme Court

10

To AARON MARDER, Attorney for Plaintiff-Appellee.

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

20

1. Because the Supreme Court erred in the judgment it gave in affirming judgment to the Plaintiff instead of giving judgment to the Defendant, in that

a. That the Court erroneously charged the jury over objection and exception of the defendant, as follows: "If you find, however, that the plaintiff has failed to establish his agreement for the payment of five per cent, but is otherwise entitled to recover, then you should decide what, under the evidence, will be reasonable compensation for the services rendered, to which interest should be added from the same date, at the same rate."

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b. That the Court erroneously charged the jury over objection and exception of the defendant, as follows, "Nor does Mr. Hewson say that all the changes were then agreed to by Mr. Tannenberg,

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say that Mr. Ebersberger expressed himself as satisfied with the lease and Mr. Holdman and Mr. Tannenberg, say that they were ready financially able and willing to conclude the lease upon the terms then agreed to and that the only thing which stood in the way was the failure of Mr. Ebersberger and Mr. Hewson to agree upon the commission. If that be true, Mr. Ebersberger was not justified in refusing to execute the lease, but should have executed it and left it to the future to settle the matter of commissions with the plaintiff, either by negotiations between them or in just the way the matter is now being considered, that is, by a law suit or in some other way."

10

c. That the Court erroneously charged the jury over objection and exception of the defendant, as follows: "The defendant admits that he listed his property, and that listing would render him liable for the agreed commission, if such commissions were agreed to, or to reasonable compensation if no such agreement was made."

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d. That the Court erroneously charged the jury over objection and exception of the defendant, as follows: "I understand Mr. Holdman and Mr. Tannenberg to say that they would execute a surety bond and that they told Mr. Ebersberger so, and that they would pay the \$8500.00 cash deposit, and they say that all that prevent the execution of the lease was the matter of commission."

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e. That the Court erroneously charged the jury over objection and exception of the defendant, as follows: "Therefore, there are two, to which may be added a third, important question, for the jury to consider and decide: First, did the plaintiff produce a customer ready, able and willing to execute a

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lease upon the terms stated by Mr. Ebersberger to the plaintiff? Second, if so, was there an agreement to pay plaintiff five per cent. commissions, or is his obligation to pay only the usual commission, if that is left, or reasonable compensation for his services? Third, was it Mr. Ebersberger or Mr. Hewson who prevented the execution of the lease?"

- 10 f. That the Court erroneously charged the jury over objection and exception of the defendant, as follows: "It appears by the rules of the Real Estate Board of Newark, that commissions in a case of this kind are five per cent. upon the total rent for the entire time, of course, that is not binding upon the parties to this suit, but is only quoted by the court upon the subject of what is reasonable compensation, if you find there was no distinct agreement that five per cent. commission was to be paid by the defendant."

- 20 g. That the Court erroneously charged the jury over objection and exception of the defendant, as follows: "If you find, however, that the plaintiff has failed to establish his agreement for the payment of five per cent. but is otherwise entitled to recover, then you should decide what, under the evidence, will be reasonable compensation for the services rendered, to which interest should be added from the same date and at the same rate."

Respectfully yours,

FAST & FAST,

Attorneys of Plaintiff

LOUIS A. FAST,

Of Counsel.

40

77 FEB. 1. 1928

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

New Jersey Court of Errors and Appeals

GEORGE F. HEWSON COMPANY, a New Jersey corporation, <i>Plaintiff-Appellee,</i>	}	<i>Action</i>
<i>vs.</i>		<i>at Law.</i>
JOHN EBERSBERGER, <i>Defendant-Appellant.</i>	}	<i>On Appeal</i>
		<i>from</i>
		<i>Supreme</i>
		<i>Court.</i>

BRIEF OF PLAINTIFF-APPELLEE.

This is an appeal by the defendant, the owner of an apartment house in the City of Newark, known as the Margaret Apartments, from the affirmance by the Supreme Court (opinion on pp. 116-118) of the judgment recovered by the plaintiff, a licensed real estate broker, against the defendant, for procuring tenants for defendant for said apartment house building for a period of twenty-one years, said judgment being entered on the verdict of the jury in favor of the plaintiff, for the sum of six thousand two hundred eighty-eight dollars and seventy-five (\$6,288.75) cents.

Statement of Facts.

Paragraphs two and three of the complaint (pp. 3 and 4) read as follows:

"2. On or about July 27, 1925, John Ebersberger, the above named defendant, hired and authorized the plaintiff to negotiate a lease on premises No. 1086 Broad Street, Newark, N. J., known as 'The Margaret Apartment,' for a period of twenty-one years at a net rent of \$8,500 per year and agreed to pay to plaintiff a commission of five per cent. on a total net rental for

said term upon plaintiff's procuring a tenant pursuant to said authorization and hiring.

3. On or about October 7, 1925, plaintiff procured as tenants for said premises, Messrs. Henry Tannenberg and Jacob Holdman, pursuant to said authorization and hiring, who were ready, able and willing to lease said premises at a net rental of \$8,500 per year for the first ten years, and a net rental of \$10,000 for the balance of eleven years, of said period of twenty-one years."

Defendant, in his brief, admits that plaintiff produced lessees able and willing to conclude a lease upon the terms stated by the defendant, but further says that the lease did not go through because the plaintiff refused to accept \$3,000 as and for its commission and intimates that for that reason the judgment should be reversed. The question of commissions did not arise until long after the hiring took place and the terms to which the defendant would be willing to lease were submitted to plaintiff (testimony of Ebersberger, p. 60). The original hiring and terms on which defendant would lease were given to Mr. Paige, the salesman of the plaintiff, some time in July (testimony of defendant, p. 59, l. 18, to p. 60, l. 2; see also testimony of witness Paige, p. 11) and Hewson acted upon this hiring. He first brought down a proposed lease with one Schary and then a proposed lease with a Mrs. White, but these were not agreeable to the defendant because of the security question (testimony of defendant, p. 57, l. 35, to p. 58, l. 20). The defendant did testify (p. 59, ll. 10-15) that when Hewson came to see him with the Schary lease, he said by way of reply to the letter of July 27, that he would not pay five per cent. commission, although on cross examination, Ebersberger said that when

Hewson came to him with the Schary lease he did not discuss with him the matter of commission (p. 63, ll. 25-30), and that consequently the only time commissions were really disputed was at the conference in connection with the Tannenberg and Holdman lease, late in September or early in October, where Ebersberger said he would refuse to give more than \$3,000 by way of commission (defendant's testimony, p. 58, l. 30, to p. 59, l. 2), the plaintiff testifying (p. 21) that at that conference defendant turned to Tannenberg and said the only thing that would prevent him from carrying the lease through would be the commission, but, however, the lease should be left with him and he would let Tannenberg know the next morning. The plaintiff also testifying (p. 15) that after Paige received the terms of the letting from the defendant, he called Ebersberger up and went over the details and Ebersberger agreed with him on a five per cent. commission and that he thereupon wrote the letter of July 27, 1925, in confirmation.

Examination of the evidence and testimony discloses that the entire contest at the trial was whether plaintiff brought to defendant lessees ready and financially able to lease defendant's apartment house on defendant's terms (see especially the testimony of witnesses Holdman and Tannenberg) and never once was it intimated that agreement as to amount of commission was a condition precedent to the leasing and part of the hiring, in the sense that there was no authority to lease unless the commission was first agreed upon.

Ebersberger testifies (p. 80) that at the times in question he was under the impression that an agreement to pay commissions for letting to be enforceable, had to be in writing.

The only other points made and argued in defendant's brief are (1) that reasonable compensation cannot be given for services rendered where the complaint and suit are based on an express contract, and (2) that there can be no recovery of reasonable compensation where there is no proof on which the jury could base or determine same.

POINT I.

The complaint allows recovery for reasonable compensation; further this Court may amend by adding count or paragraph to the complaint asking for reasonable compensation if deemed necessary. Furthermore there was sufficient evidence to sustain the verdict of the jury.

In *Colloty v. Schuman* (E. & A.), 76 N. J. L. 502, the pleading on the point in question is, in substance, almost exactly like the complaint in the case at bar. The state of demand in the *Colloty* case (procured by plaintiff's attorney from the files of the Atlantic City District Court) reads as follows:

Suit #7324. Atlantic City District Court.
Docket 19, page 101.

DISTRICT COURT OF THE CITY OF
ATLANTIC CITY.

Filed May 19, 1906.

EUGENE M. COLLOTY,	}	<i>On Contract.</i>
<i>Plaintiff,</i>		
<i>vs.</i>		
KATE SCHUMAN,	}	<i>State of Demand.</i>
<i>Defendant.</i>		

The above named plaintiff demands of the above named defendant the sum of One

hundred and fifty dollars, upon the contract or agreement made between the said Kate Schuman and said Eugene M. Colloty, wherein and whereby the said defendant undertook and promised to pay said plaintiff the sum of One hundred and fifty dollars for procuring a tenant for the hotel Wellington, situate at 169 South Virginia Avenue, Atlantic City, New Jersey, for said defendant and in pursuance of which said contract and agreement said plaintiff procured as tenant aforesaid, a certain Mary C. Coleman, which said tenant was accepted by said defendant.

Judgment will be asked for the sum of One hundred and seven dollars and fifty cents, with interest from the first day of July, nineteen hundred and four, to date of judgment final, besides costs of suit to be taxed.

ELI H. CHANDLER,
Attorney of Plaintiff.

The Chief Justice, in writing the opinion in the *Colloty* case, says on page 504 as follows:

"But this argument rests upon the fallacy that the plaintiff cannot recover except upon proof of an express contract. His right of recovery is not so limited. Proof of services rendered by him at the request of the defendant, under circumstances which negative the idea that they were gratuitous, entitles him to compensation for those services from the defendant, notwithstanding the absence of an express promise by her to pay for them. A promise to pay what they are reasonably worth is implied from her request to him to render them. This is elementary. It is contended that the plaintiff below was not entitled to recover on a quantum meruit, however, for the reason that the state of demand counts solely upon an express contract. But this is not the case. *The pleading is silent upon the question whether the contract sued upon is an*

express or an implied one. The refusal to non-suit the plaintiff, and the overruling of the motion to direct a verdict in favor of the defendant were, therefore, each of them proper, if there was any evidence to show that the plaintiff had not been paid what his services were reasonably worth. Such evidence, we think, is to be found in the fact that the defendant paid the plaintiff five per cent. on the installment of rent actually collected by him." (Italics mine.)

In 9 *Corpus Juris* 653, the following appears:

"(125) (d) Rules, Customs and Usages. Customs and usages relating to the brokerage business may be proved, in actions by brokers for compensation, when relevant and material to the issues. Thus evidence of the established and customary charges for like services in community are competent evidence to prove what is a fair and reasonable charge, except where there is an express contract governing the amount of the commission. Where the amount agreed on is in dispute, evidence as to the usual amount paid for like services is admissible."

There is plenary proof in the case justifying the jury to bring in a verdict up to five per cent on the total rental by way of commissions.

The plaintiff was cross-examined as to the usual commissions for leases of the kind in question and also as to the rates prescribed by the Real Estate Board of Newark (pp. 30-31), and if defendant thought that the five per cent testified to by plaintiff as usual commissions was improper (plaintiff being a real estate broker of fifteen years' experience), he could have produced witnesses to testify to the contrary and this he failed to do, although plaintiff's testimony was on the first day of the trial. On the

other hand, *defendant* testifies (pages 69, *et seq.*) as follows:

"By the Court.

Q You are a real estate broker? A Yes, I am.

Q Isn't there a regular rate of commission provided by the Real Estate Board of the City of Newark for commissions on rentals? A There is, yes.

Q You are a member of the Board? A No, I am not.

Q Is Mr. Hewson a member of the Board? A Mr. Hewson is, yes.

Q Do you know what that rate is? A I think it is *five per cent.*

Q On real estate? A Yes."

The rules of the Real Estate Board were practically introduced in evidence where the plaintiff, producing the book of rules, testifies again (page 100) that the regular rate for commission for the leasing in question, according to said book of rules, is 5%. Defendant made no attempt to rebut this in any way.

It is evident, it is submitted, especially in view of defendant's testimony, that he was not harmed by the verdict. The verdict is based on a commission of three per cent. The total rental for the total of 21 years was \$195,000; 3% of said sum is \$5,850 and interest thereon from October 14, 1925 (pursuant to charge of the Court, p. 109) to January 14, 1927 (the date of the trial), at 6% per annum is \$438.75, make a total of \$6,288.75, which is the exact amount of the verdict. It will be noticed that the trial court charged that neither of the parties was bound by the rules of the Real Estate Board (p. 108, l. 35, to p. 109, l. 5).

It is further submitted that, if deemed necessary, this Court may amend the complaint herein

by adding thereto a count or paragraph claiming reasonable value for plaintiff's services.

In *Boniewsky v. Polish Home of Lodi* (E. & A.), 5 A. R. 540, the opinion by Chancellor Walker discusses (pp. 546-547) the power of amendment by the appellate court, as follows:

"However, even though no consent to this amendment is to be spelled out of the case, nevertheless, under the doctrine of *Giardini v. McAdoo*, 93 N. J. L. 138, the amendment is now and here allowable. In that case an administratrix sued under our Death Act, when she should have sued as widow under the Pennsylvania Death Act; and she was permitted to amend after trial and in aid of the verdict, which she received. This Court holding (at p. 145) that the question was: 'Are we precluded from permitting a proper amendment at this time, and must we reverse the judgment resulting from a trial upon the merits, because, on appeal, for the first time, the defendant raises the jurisdictional question?' And we said that the Supreme Court, in interpreting the section of the Practice Act in *Hoboken v. Gear*, 27 *Id.* 265, held, that it extended to the introduction of matters which the parties hoped and intended to try in the case, and was not limited to matter within the issue upon the record. See, also, *Price v. N. J. L. & T. Co.*, 31 *Id.* 229."

In the *Boniewsky* case, the amendment consisted of substituting the general administrator as plaintiff in place of administrator *ad prosequendum*. That the power of amendment is liberally exercised either before or after the trial and either by the trial court or the appellate court is shown by the following cases in addition to those cited in the *Boniewsky* case, *Waller v. Sterner Coal and Lumber Co.*, 5 Misc. page 19, where the Supreme Court sustained as proper an amendment by the trial court at the

conclusion of plaintiff's case by adding a count alleging money had and received, where plaintiff sued for fraud. See also *Miller v. West Jersey R. R. Co.*, 76 N. J. L. 282; *Thompson v. Pepler*, 91 N. J. L. 160; *Levenson Wrecking Company v. Gatti-McQuade Co.* (E. & A.), 93 N. J. L. 184; amendment by appellate court; *Klie v. Holstein* (E. & A.), 98 N. J. L. 473 (this was a broker's case for commission) amendment by appellate court.

In the case at bar, clearly defendant was not surprised or injured by the testimony of the usual rate, which constitutes proof of the reasonable value.

POINT II.

If this Court should conclude to set aside the verdict because of the pleading question, there should be a new trial as to damages only.

The first question in the special verdict (pp. 112A-112B) reads, "Did plaintiff produce persons able and willing to conclude a lease upon the terms stated by Mr. Ebersberger to Mr. Hewson?" The answer of the jury thereto is, "Yes." Unquestionably therefore, it is submitted, there is a determination by the jury of the question of fact litigated at the trial and separable from the other issues of the case, to wit, those dealing with amount and mode of recovery and plaintiff is entitled to recover some compensation and hence it is submitted that if there be a reversal because of the question of pleading dealing with express contract, the new trial should be as to damages only. Supreme Court Rules, 131 and 147 (1913); see also *Queen v. Jennings*, 93 N. J. L.; *Young v. Society*, 91 N. J. L. 310; *Robinson v. Payne*, 99 N. J. L. 135, and

Merchants, etc., Co. v Mercer Realty Company,
99 N. J. L. 442.

POINT III.

That part of the Charge of the Trial Court set out in No. 2 of Grounds of Appeal (p. 113) and discussed in Point Three of Appellant's Brief was not error.

This portion of the charge of the trial court is found on pages 105 and 106 of the state of the case. It is not fairly or properly presented, either in the grounds of appeal or in defendant-appellant's brief.

The trial court first states (p. 104, ll. 25-30) that if the plaintiff found and produced to defendant a customer or customers able, ready and willing to conclude a lease on the terms fixed with plaintiff, plaintiff is entitled to recover commissions, hence leaving it to the jury to determine whether an agreement by the plaintiff and defendant as to commissions was such a term of the hiring as to make it a condition precedent to the execution of the lease or recovery for commissions by plaintiff.

That portion of the charge excepted to which reads (p. 106):

"If that be true, Mr. Ebersberger was not justified in refusing to execute the lease, but should have executed it, and left it to the future to settle the matter of commissions with the plaintiff, either by negotiations between them, or in just the way the matter is now being considered, that is, by a lawsuit, or in some other way."

is apposite the beginning of the prior sentence of the charge which reads as follows:

"Of course, if Mr. Ebersberger imposed terms upon the prospective lessees other

than those stated to the plaintiff in the listing of the property, to which plaintiff refused to agree, that would not prevent the plaintiff from recovering its commissions, if they were ready, able and willing to execute a lease upon the terms given by Mr. Ebersberger to the plaintiff;" (p. 105).

This last again leaves it to the jury to determine what the terms of the letting were and whether (by necessary inference) an agreement as to commission was a condition precedent to the letting and communicated as such a condition precedent in the hiring.

As a matter of fact, the evidence will disclose that it was never stated that plaintiff had no authority to lease unless the commission was first agreed upon, nor does defendant's answer so state; so that any possibly improper charge in connection therewith would not be legal error.

The defendant, Ebersberger, testifies (p. 60) as follows:

"By the Court.

Q Did you discuss the commissions with Mr. Paige? A No, I didn't. I never discussed any commissions.

Q But you gave him the listing? A He asked me did I have anything and I said, 'I would like to lease it, I didn't want to sell it.'

Q How did you come to see Mr. Paige? A Mr. Paige used to come down and try to lease some factories that I had. I never met Mr. Hewson only through Mr. Paige.

Q Did you ever come to any agreement or have any conversation as to any commissions of any sort with reference to the lease with Hewson or Paige? A The only conversation we had was when I had spoken to Mr. Hewson, when I got this letter a few days later about commission, I said, 'I wouldn't pay you five per cent.' He said, 'We will take care of that all right, we will get along.'

Q You knew that Mr. Paige was connected with Mr. Hewson? A Yes, sir.

Q He told you that he was acting for Mr. Hewson? A He said he had his office there.

Q You knew that Mr. Hewson was a real estate broker? A Yes, sir."

It was not until the Tannenberg and Holdman lease was practically agreed to that the dispute as to commissions arose and the testimony dealing with this dispute does not in any way indicate that plaintiff had no authority unless commission was first agreed upon, but indicates to the contrary that defendant refused to go through with the lease unless plaintiff would come down in its commissions.

Moreover the part of the charge excepted to does not charge or indicate that if the jury found that there was no authority to lease unless the commission was first agreed upon, then despite the fact that Ebersberger refused to execute the lease, he would nevertheless be liable for commissions if the other terms of the hiring were met. Consequently defendant was not harmed.

It will also be noticed that defendant made no request for the trial court to specifically charge that if the jury found that there was no authority to lease unless the commission was first agreed upon and they further found that there was no agreement as to commissions, then the verdict must be for the defendant.

Moreover, the trial judge did charge (p. 107, ll. 23-30) that Hewson had no more right than had Ebersberger to call off the deal because of the controversy about commissions and if he did so and by his own account prevented the execution of the lease, he could not recover anything; and also (p. 105, ll. 8-9) the trial court left it to

the jury to find whether it was Ebersberger or Hewson who prevented the execution of the lease.

It is submitted that the case is on all fours with *Steinberg v. Mindlin*, 96 N. J. L. 206 (E. & A.), in which the broker's judgment for commissions was sustained; the following are excerpts from the opinion:

"In the absence of a special agreement, a real estate broker, acting by virtue of a written agreement, earns his commission when he secures a buyer on the seller's terms either as originally propounded or as settled by agreement between the seller and buyer, *Freeman v. Van Wagenen*, 90 N. J. L. 358; *Homan v. Griffin*, 95 *Id.* 508. * * *

"But it further appeared that after the parties had thus agreed upon the terms of purchase, and the attorney of the purchaser (who was present) had produced a blank form of contract to fill out, Mr. Mindlin, the representative of the seller, said he would not execute the contract unless the plaintiff broker would abate his commission to \$500 or \$750. This the plaintiff declined to do and the matter fell through for that reason alone." * * *

"Certainly, in the present case, the word 'sold' should not be held to mean that the seller could utilize it to deprive the broker of the commission which the seller had agreed to pay, by refusing to carry out the settled terms of sale unless the broker would waive his commission. *Rauchwanger v. Katzin*, 82 *Id.* 339."

It is submitted that it was too late for the defendant to change the terms of the hiring after plaintiff brought him proposed lessees ready, able and willing on the terms given to plaintiff by defendant.

On page 59, the defendant testifies as follows:

“Q Did you ever agree to pay a definite sum? A *I never agreed.* I think I got a letter from him, I think July 7, just before the July lease.”

This clearly shows that a stipulation as to the amount of commission was never made a condition precedent to the leasing, and part of the hiring.

That the *defendant* did not believe he had a reason to stipulate the amount of the commission, as a condition of the authorization, at the time of the hiring, is shown by his testimony as follows (pp. 80-81):

“*By the Court.*

Q In other words, did you think at that time that an agreement to pay commissions for leasing, to be enforceable, had to be in writing? A Yes, sir.

Q You did think so? A Yes, that they would have to give it in writing, a signed agreement.

Q You found out differently since, haven't you? A Yes.”

POINT IV.

There should be no reversal for any harmless error.

Section 27 of the 1912 Practice Act, Vol. 2, Cumulative Sup. to Compiled Statutes (page 2810) reads as follows:

“No judgment shall be reversed, or new trial granted on the ground of misdirection, or the improper admission, or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party.”

See also *DiBenedetto v. Friedman*, (E. & A.), 3 Adv. Rep. 1577.

Connelly v. Public Service, 94 N. J. L. 157.

In conclusion, it is respectfully submitted that the judgment of the court below should be affirmed.

AARON MARDER,
Attorney for and of Counsel
with Plaintiff-Appellee.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

GEORGE F. HEWSON COMPANY,
a New Jersey Corporation,
Plaintiff-Appellee,

vs.

JOHN EBERSBERGER,
Defendant-Appellant.

Action at Law

ON APPEAL
FROM
SUPREME
COURT

FAST AND FAST,
Attorneys for Defendant-
Appellant.

BENJAMIN M. WEINBERG,
Of Counsel.

POINTS TO BE RELIED UPON AND CITATION
OF AUTHORITIES
BRIEF

TO AARON MARDER, ESQUIRE,
Attorney for Plaintiff-Appellee.

This is a suit brought by the plaintiff to recover commissions from the defendant as will be more fully set out hereinafter. A judgment was rendered in favor of the plaintiff in the Essex County Circuit Court. The plaintiff appealed to the New Jersey Supreme Court, where the judgment was affirmed. Appeal is now duly made to this Honorable Court, from the affirmance made by the Supreme Court.

STATEMENT OF FACTS

This action was brought by the plaintiff, a licensed broker, to recover commissions alleged to be due for procuring lessees pursuant to an alleged hiring and authorization by the defendant, for premises 1086 Broad street, Newark, New Jersey, known as the "Margaret Apartments." It appears from the evidence that the defendant owner was willing to have the plaintiff lease the premises for him, and agreed to pay the plaintiff \$300.00~~x~~ as and for the plaintiff's commissions. (Page 30 State of case line 39.)

The plaintiff produced lessees able and willing to conclude the lease upon the terms stated by Mr. Ebersberger, but the lease did not go through for the reason that the plaintiff broker refused to close the deal, because he would not accept \$3000.00 as and for its commission (page 20, line 32; page 27, line 28; page 35, line 13; page 39, line 22; page 102, line 11.)

The plaintiff broker thereupon instituted suit, and by its complaint, alleged that the defendant hired and authorized the plaintiff to negotiate a lease and agreed to pay the plaintiff a commission of five per cent of the total net rental, for a term alleged to be at twenty-one years. At the trial, the court charged in effect that if the jury found that the plaintiff had failed to establish its agreement for the payment of five per cent, but is otherwise entitled to recovery, then the jury should decide what, under the evidence, would be reasonable compensation for the services rendered, to which interest should be added from the same date, at the same rate. Nowhere is there, in the evidence, any data or criterion whereby the jury might make rational deduction and calculation to determine the amount that might be due as reasonable compensation. It was further charged

in effect by the Court, that if the owner was satisfied to go ahead with the lease, but would not do so unless the plaintiff broker took a certain amount for its commissions, then the defendant owner was not justified in refusing to lease, but should have executed it and left it to the future to settle the matter of commissions with the plaintiff.

The evidence clearly shows as a reference to the pages of the State of Case cited hereinbefore, that the question of commissions was an important item to the acceptance or the making of the lease by the defendant owner.

It is the contention of the defendant owner that the Court erred in charging as it did in respect to the charges hereinbefore made.

GROUND OF APPEAL

1. Because the Supreme Court erred in the judgment it gave in affirming judgment to the plaintiff instead of giving judgment to the defendant, in that

(a) That the Trial Court erroneously charged the jury over objection and exception of the defendant as follows: "If you find, however, that the plaintiff has failed to establish his agreement for the payment of five per cent, but is otherwise entitled to recover, then you should decide what, under the evidence, will be reasonable compensation for the services rendered, to which interest should be added from the same date, at the same rate."

(b) That the Trial Court erroneously charged the jury over objection and exception of the defendant as follows: "Nor does Mr. Hewson say that all the charges were then agreed to by Mr. Tannenberg, say that Mr. Ebersberger expressed himself as satisfied with the lease and Mr. Holdman and Mr. Tannenberg say that they were ready financially, able and willing to conclude the lease upon the terms then

agreed to and that the only thing which stood in the way was the failure of Mr. Ebersberger and Mr. Hewson to agree upon the commission. If that be true, Mr. Ebersberger was not justified in refusing to execute the lease, but should have executed it and left it to the future to settle the matter of commissions with the plaintiff, either by negotiations between them, or in just the way the matter is now being considered, that is, by a law suit or in some other way."

(c) That the Trial Court erroneously charged the jury over objection and exception of the defendant as follows: "The defendant admits that he listed his property, and that listing would render him liable for the agreed commissions, if such commissions were agreed to, or to reasonable compensation if no such agreement was made."

(d) That the Trial Court erroneously charged the jury over objection and exception of the defendant as follows: "I understand Mr. Holdman and Mr. Tannenberg to say that they would execute a surety bond and that they told Mr. Ebersberger so, and that they would pay the \$8500.00 cash deposit, and they say that all that prevent the execution of the lease was the matter of commission."

(e) That the Trial Court erroneously charged the jury over objection and exception of the defendant as follows: "Therefore, there are two, to which may be added a third, important question, for the jury to consider and decide: First, did the plaintiff produce a customer ready, able and willing to execute a lease upon the terms stated by Mr. Ebersberger to the plaintiff. Second, if so, was there an agreement to pay plaintiff five per cent commissions, or is his obligation to pay only the usual commission, if that is left, or reasonable compensation for his services? Third, was it Mr. Ebersberger or

Mr. Hewson who prevented the execution of the lease?"

(f) That the Trial Court erroneously charged the jury over objection and exception of the defendant as follows: "It appears by the rules of the Real Estate Board of Newark, that commissions in a case of this kind are five per cent upon the total rent for the entire time. Of course, that is not binding upon the parties to this suit, but is only quoted by the Court upon the subject of what is reasonable compensation, if you find there was no distinct agreement that five per cent commission was to be paid by the defendant."

(g) That the Trial Court erroneously charged the jury over objection and exception of the defendant as follows: "If you find, however, that the plaintiff has failed to establish his agreement for the payment of five per cent, but is otherwise entitled to recover, then you should decide what, under the evidence, will be reasonable compensation for the services rendered, to which interest should be added from the same date and at the same rate."

POINT ONE.

Reasonable compensation cannot be given for services rendered where the complaint and suit are based on an express contract for a definite sum.

Osterling vs. Cape May Hotel Co., 82 N. J. Law 650, 83 Atl. Rep. 887.

Booye vs. Ries, Vol. 4 N. J. Adv. Rep. 1281.
9 Corpus Juris 579.

West End Dry Goods Store vs. Maun, 133 Ill. A. 544.

Meirick vs. Wittemann Lewis &c., Co. 98 N. J. Law 531.

POINT TWO.

There can be no recovery of reasonable compensation where there is no proof on which the jury could base or determine same.

13 Cyc. 214.

West End Dry Goods Store vs. Maun, 133 Ill. A. 544.

Stevens vs. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173.

Queen vs. Jennings, 93 N. J. Law 353.

Gilmore vs. Kane, 60 Atl. Rep. 181.

POINT THREE.

Where the defendant owner has a good ground for refusing to complete the transaction and does so, the plaintiff broker is not entitled to commissions.

9 Corpus Juris 625.

Diamond vs. Fay, 23 Cal. A. 566, 138 P. 933.

13 Corpus Juris 279.

Potts vs. Whitehead, 23 N. J. E. 512.

Runyon vs. Wilkinson, 57 N. J. L. 420, 31 Atl. Rep. 390.

Hinds vs. Henry, 36 N. J. Law 328.

Crowley Co. vs. Meyers, 69 N. J. Law 245.

POINT FOUR.

Where the verdict rendered is so tied up to a wrong theory of recovery, the verdict should be reversed in toto.

First Caldwell Oil Co. vs. Hunt, 100 N. J. Law 308, 312.

Flammer vs. Morelli, 126 Atl. Rep. 307.

Robinson vs. Payne, 99 N. J. Law 135, 142.

BRIEF OF ARGUMENT**POINT ONE.**

Reasonable compensation cannot be given for services rendered where the complaint and suit are based on an express contract for a definite sum.

The complaint alleges that the defendant owner agreed to pay a commission of five per cent of the total net rental. The jury by its answer to the second question of the special verdict, on page 112 B, State of Case, found that there was no agreement by the defendant to pay commission at the rate of five per cent upon the total rental. It is the defendant's contention, therefore, that the jury having so found, no verdict could be rendered for the plaintiff under the complaint, and no verdict under the proofs in the case.

In Osterling vs. Cape May Hotel Co., 82 N. J. Law, 650, 83 Atl. Rep. 887 (Court of Errors and Appeals), decided in 1911, it was held—" * * * It is plain from a reading of these provisions that the agreement for payment was not to pay money but to pay in a certain quantity of lots to be selected by the plaintiff, the quantity or number to be determined not by the actual value of the lots as footing up the amount in dollars figured at five per cent of total cost, but by the list price of such lots. Of that list price, we know little or nothing from the evidence. It may be more or less than the real value of the lots or some of them. THE QUESTION OF ACTUAL VALUE WAS NOT DEALT WITH BY THE COURT, NOR THE QUESTION OF PAYMENT IN LOTS, BUT THE JURY WAS PERMITTED TO ASSESS THE PLAINTIFF'S

DAMAGES AS UPON AN IMPLIED ASSUMPSIT TO PAY THE REASONABLE VALUE OF HIS SERVICES IN CASH. WE CONSIDER THAT THIS ENTIRE THEORY OF RECOVERY WAS ERRONEOUS."

It can be clearly seen that under the complaint, the defendants would not be called upon, and they did not call upon any witnesses to testify what the reasonable compensation would be in this case if recoverable, for the reason that they expressly charged an express agreement to pay five per cent of the total rental.

The above case is cited in *Booye vs. Ries*, Vol. 4 N. J. Adv. Rep. 1281, with approval.

We respectfully contend that the case of *Colloty vs. Schuman*, 76 N. J. Law 502, is not controlling. In the *Colloty* case, the plaintiff brought suit to recover commissions for procuring a tenant for the defendant. The broker collected \$850.00 on account of the rent, and turned it over to the defendant, and that she paid him five per cent of that amount, viz., \$42.50. It was further proved in that case that afterwards the defendant's son collected \$1400.00 more on account of the rent, and that no commission on that amount was paid to the plaintiff, and that he received no further payment from the defendant for his services in procuring her a tenant. In the State of Demand in the cited case, it was held that the pleading was silent upon the question whether the contract sued is an express or an implied one.

It is therefore contended that the case at bar is distinguished from the cited case in the following respects:

(a) Because the Court found that there was evidence to show that the plaintiff had not been paid what his services were reasonably worth, in that it

was proven that defendant had paid the plaintiff five per cent on the installment of rent actually collected by him. Such evidence is wholly lacking in the case at bar.

(b) In the cited case, the Court held that the State of Demand was silent upon the question whether the contract sued upon is an express or implied one. In the present case, the complaint alleged an hiring and authorization to negotiate a lease on certain property for a certain period, at a certain rental, and agreed to pay the plaintiff broker a certain stated commission on the total net rental.

It is further respectfully contended that a recovery on a quantum meruit theory was injurious to defendant, in that he was not prepared to proceed on such a theory under the pleadings, and also there was no evidence to show what the value of the plaintiff's services was reasonably worth.

Where the complaint and the proofs seek recovery on an express contract, a verdict for a wholly different action cannot be supported. The charge of the court allowing a recovery is erroneous. In *Meirick vs. Wittemann Lewis & Co.* 98 N. J. Law 531 (Court of Errors and Appeals), it was held that a judgment entered in and brought to recover compensation as secretary, under a contract, is not a bar to suit between the same parties brought afterwards by the plaintiff to recover the value of services under a quantum meruit. There is no identity of the thing sued for. The judgment of the first suit is not *res adjudicata* as to the second suit. It is expressly stated in the opinion that there is no identity of the thing sued for in each suit, that is, a suit on a contract and a suit on a quantum meruit. The opinion further states:

"The recognized rule applicable to the topic under discussion, supported by a long line of cases, is thus stated in 23 Cyc. 1158: 'A proper test in determining whether a prior judgment between the same parties, concerning the same matters, is a bar to a subsequent action, is to ascertain whether the same evidence, which is necessary to sustain the second action, would have been sufficient to authorize a recovery in the first; if so, the prior judgment is a bar. But if the evidence in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit, although it is for the same cause of action.' Cited, with approval in Hoffmeier vs. Tröst, 83 N. J. Law 358, 360; 15 R. C. L. 784 Par. 239. It is quite apparent, tested by this rule, that the action of the court below in striking out the second defense interposed (defense of *res adjudicata*) was not error. BECAUSE THE EVIDENCE WHICH WAS NECESSARY TO SUSTAIN THE PRESENT ACTION (FOR QUANTUM MERUIT) WOULD NOT HAVE BEEN SUFFICIENT TO AUTHORIZE A RECOVERY IN THE FIRST ACTION (ON CONTRACT)."

POINT TWO.

There can be no recovery of reasonable compensation where there is no proof on which the jury could base or determine same.

In 13 Cyc. 214 it is stated in effect, that where substantial damages are claimed, their amount is the subject of proof, and must be shown with reasonable certainty; and evidence to be sufficient to authorize the recovery, must furnish some criterion or data whereby the jury may make rational deductions and calculations to determine the amount

without danger of gross injustice, or reliance on their own speculations or conjecture of the probable loss sustained.

The case is absolutely barren of any competent evidence of any kind, to provide the jury with such data or criterion, that they could have made a rational deduction as to the damages found. It is therefore, the defendant's contention that the Court, in charging that if the jury found that the plaintiff had failed to establish its claim for the payment of five per cent, but is otherwise entitled to recovery "then you should decide what, under the evidence, will be reasonable compensation for the services rendered, to which interest should be added from the same date at the same rate," erred. *Gilmore vs. Kane*, 60 Atl. Rep. 181, holding it to be erroneous where the charge permits the jury to find damages which there is not evidence to prove.

The Supreme Court, by its opinion, stated that there was evidence that for renting there was a regular rate of five per cent commission, in the Real Estate Board of the City of Newark, of which the plaintiff's president was a member. It is also stated that the jury's consideration being based at the lower rate of three per cent was well within the proofs adduced. We respectfully contend that there was absolutely no basis on which a verdict of three per cent could be based, and in support thereof, we cite the case of *Queen vs. Jennings*, 93 N. J. Law 353. In that case, an almost parallel situation appears. That case involved a suit to collect a commission on the sale of a certain stock, the plaintiff alleging and testifying that the contract was for a commission of a dollar a share, while the defendant claimed that the agreement was for only twenty-five cents a share. The Court submitted to the jury the question whether the contract was for one dollar or twenty-five cents a share. The jury

found the contract was for fifty cents a share. It was held that the verdict was inconsistent with and contrary to the pleadings and with the evidence and also with the Court's charge. The verdict was set aside.

The fact that the president of the plaintiff company was a member of the Real Estate Board of the City of Newark, and that its regular rate was five per cent, surely is not binding on the defendant.

The rules and regulations of a real estate board although governing and binding on its members, ARE NOT BINDING ON AND CANNOT BE ENFORCED AGAINST NON-MEMBERS; and therefore, they do not constitute a rule of evidence binding or controlling the courts in the trial of a case by a real estate broker who is a member of such board against a third person, for his commissions. *West End Dry Goods Store vs. Maun*, 133 Ill. A. 544. Ebersberger was a non-member. (State of case page 70, line 4.)

The book of rules and rates was not put in evidence. In order that a customary charge may be decisive as to the amount of recovery, a custom must be established, so definite, uniform, and well understood that it may be assumed that the parties contracted with reference to it and in effect made it a part of their contract. *Stevens vs. Wisconsin Farm Land Co.*, 124 Minn. 421, 145 N. W. 173. Such testimony is not present.

The defendant respectfully insists that the charge of the Court that "the plaintiff is entitled to the agreed commission, if there was an agreement as to commissions, if not, then to a reasonable compensation to be determined by the jury from the evidence," was improper and erroneous for the foregoing reasons, or as summarized:

1. Because suit was brought to recover commissions on an express agreement for a definite sum;

2. If the agreement be not proven and found by the jury, the plaintiff's case must fall;

3. If there can be recovery for reasonable services, there was no evidence to find what they were worth.

As to the rates alleged to be shown by the Real Estate Board book, it was not offered in evidence. The book itself was the best evidence of same. Further, the plaintiff admits that neither of the parties was charged by the rules of the board.

POINT THREE.

Where the defendant owner has a good ground for refusing to complete the transaction and does so, the plaintiff broker is not entitled to commissions.

Ordinarily, a broker is entitled to commissions on producing a purchaser ready, willing and able to comply with the owner's conditions. However, a refusal based on substantial reasons such as may be properly deemed a part of the consideration for the lease, prevents liability on the part of the owner for commissions. 9 *Corpus Juris* 625; *Diamond vs. Fay*, 23 Cal. A. 566, 138 P. 933.

By reference to the testimony hereinafter stated, it clearly appears that the defendant owner made it a condition of his offering of the terms proposed to the plaintiff, that the plaintiff accept a definite amount as and for his commissions. It is contended by the defendant that such acceptance by the broker of such definite amount, becomes, in effect, one of the terms and conditions of the lease itself, and a refusal to accept such definite amount, amounts to a failure to produce a purchaser ready, willing and able.

For instance, if O owns property and lists the same with B, a broker, for sale, the price being \$5000, if B will take \$100 as his commissions, he makes that condition as to commissions to escape a financial loss, because if more is to be paid as commissions, the sale would have to be at a loss. Can it be said that if B produces a buyer able and willing to pay the \$5000, that then, in any event, O must sell the property for that amount, and leave the commissions with B open and to be decided upon? Has not O the right to say exactly how much he shall ultimately receive for his property and not leave it open to discussion or determination by suit or otherwise? Cannot O make his own definite terms or conditions of sale?

The charge of the Court in the present case that if "Mr. Ebersberger expressed himself as satisfied with the lease, and Mr. Holman and Mr. Tannenberg say they were ready financially, able and willing to conclude the lease upon the terms then agreed to, and that the only thing which stood in the way, was the failure of Mr. Ebersberger and Mr. Hewson to agree upon the commission. If that be true, Mr. Ebersberger was not justified in refusing to execute the lease, but should have executed it and left it to the future to settle the matter of commissions with the plaintiff, either by negotiations between them, or in just the way the matter is now being considered, that is, by a law suit, or in some other way," was erroneous.

It practically directed the jury to find for the plaintiff, notwithstanding that they might have found that the agreement as to commissions was a condition precedent made by the defendant.

On page 27, line 28, State of Case, George F. Hewson for the plaintiff testifying:

"Q Did you ever submit a new lease of cash?

A. No, I didn't, a new lease.

Q Why not?

A Because it wasn't necessary, all we had to do was to change that.

Q Was that ever changed?

A It was agreed to be.

Q Did you ever change it?

A But the stenographer was called in and those were the changes she was to make.

Q Did she make the changes?

A No, sir, she didn't.

Q She was called in and she was told to make them, and you were all there, did she give any reason for not changing them?

A No, because the lease didn't go through that day because we could not agree on the commissions."

Nowhere in the testimony is it shown that the plaintiff agreed to take the commissions offered by the defendant owner, and on page 20, line 32, the following: George F. Hewson for the plaintiff testifying:

Q Did he (Ebersberger) have any conversation with you about commissions?

A Yes, that was the only time that any question came up about commission. He started talking about the commission, how much it was going to be, and I told him that wasn't the time to discuss that, we had already agreed on that, that the main question was whether the lease was all right, and he said it was. He thereupon turned to Tannenberg first and said, "The only thing that will prevent me

from carrying through this lease will be Mr. Hewson's commission, but, however, leave this lease with me until tomorrow morning, and I will let you know.' So we left the office with that understanding.

Q Did he let you know?

A On the following morning I called him up about 11 o'clock, and I asked him what decision he had reached in the matter, and he thereupon made me an offer of \$3000 commission, and I told him I could not accept that commission."

13 Corpus Juris 279 states that the offerer has a right to prescribe in his offer any conditions as to time, place, quantity, mode of acceptance, or other matters which it might please him to insert therein, and make a part thereof, and the acceptance to conclude the agreement, must in every respect, meet and correspond with the offer, neither falling short of or going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand. Potts vs. Whitehead, 23 N. J. E. 512 cited.

And on page 281, an acceptance, to be effectual, must be identical with the offer and unconditional. Where a person offers to do a definite thing and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat or it is a counter proposal, and in neither case is there an agreement. Runyon vs. Wilkinson, 57 N. J. L. 420 and 31 Atl. Rep. 390, cited.

On page 35, line 19 of the State of Case, the following appears: Testimony of George F. Hewson:

"Q Didn't you make an appointment that everything was agreeable?

A Because the question of commissions was the real meat of the kernel."

And on page 102, line 11 of the State of Case:

"Q Why did you discuss commissions?

A Because the lease couldn't be closed without the settlement of the commissions."

And on page 39, line 22 of the State of Case, Henry Tannenberg, plaintiff's witness, being on the stand.

"Q What happened at that time?

A At that time happened we were supposed to go and sign the lease, everything was ready; we should go up to Mr. Ebersberger's office. We came up there and we went in the office and we found Mr. Ebersberger there and then we have everything agreeable, but the only trouble was that we didn't agree with him about the commissions, we didn't agree.

The proofs of the case clearly show that there were no definite terms or conditions for the lease upon which the plaintiff could have found a lessee ready, willing and able. The proofs show that for different prospective tenants, different leases were made up and each time certain features upon which the parties could not agree prevented the consummation of the particular leases. That there were no proofs shown by the plaintiff that the lease, as drawn up for Messrs. Holdman and Tannenberg, upon which lease the commissions are now being sought, conformed to any listing. Therefore, it is our contention that at the time when they came together to agree on what the terms of the lease should be, that at that time, Ebersberger had a right to insist and agree upon a certain commission to be paid the plaintiff or else that there be no lease. And therefore, in such a circumstance, he was not obliged

to sign a lease (on the terms of which he was agreed, but the commissions for which were not to his offerings), contingent on an agreement with the plaintiff as to commissions, leaving it to the future to settle his differences with the plaintiff by negotiation or suit, as was held by the Supreme Court and as was charged by the Court. (Page 118 State of Case and top of page 106.)

To so hold would be to put the ordinary business man in great jeopardy, for we maintain that it is the right of any person engaged in ordinary business to know before hand what his ultimate condition will be with respect to any deal.

In *Crowley Co. vs. Myers*, 69 N. J. Law 245, the following were the facts: The plaintiff, real estate broker, was authorized to sell certain property at \$70,000 cash, on which the defendant agreed to pay two per cent commission, or on any selling price which might be agreed upon between the owner and the purchaser. The owner accepted a proposed purchaser, whose offer was to buy the lands at the price fixed to be paid, not all in cash, but in part by the conveyance to the seller of other lands at the price of \$30,000. In an action by the broker for commissions on \$70,000 the owner set up as a defense that he was not entitled to commissions on the price of the lands taken in exchange until he had effected a sale of said lands or procured a purchaser therefor, satisfactory to the defendant owner. It was held at page 249, that the defendant owner had a right to accept the procured purchaser on the proposed terms, on the condition that no commissions should be paid under the contract upon the price at which the exchanged lands were taken and it would constitute a defense to an action for commissions in excess of the amount, at two per cent upon \$40,000 of the consideration.

There is no proof that the plaintiff produced a purchaser ready, willing and able to conclude a lease upon the terms as offered by the defendant, Ebersberger, free and clear of an agreement on the part of the plaintiff broker to accept a stated commission. The charge of the Court and the opinion of the Supreme Court, as hereinbefore stated, to the effect that Mr. Ebersberger should have executed the lease and left it to the future to settle the matter of commissions with the plaintiff, either by negotiations between them, or in just the way the matter is now being considered, that is, by a lawsuit, or in some other way, is contrary to the law as laid down in the *Crowley* case, that the defendant owner has a right to accept proposed purchasers on the proposed terms, dependent on conditions of adjustment before hand, of the commissions.

In *Hinds vs. Henry* 36 N. J. Law 328, it was held that a broker may, by special agreement with his principal, so contract as to make his compensation dependent on a contingency which his efforts cannot control, even though it relates to the acts of his principal. Similarly, we contend that the principal may also contract so as to make his obligation to make compensation dependent on a contingency. This is elementary law.

POINT FOUR.

Where the verdict rendered is so tied up to a wrong theory of recovery, the verdict should be reversed in toto.

The awarding of a new trial on damages only, seems hardly to apply to cases where a fundamentally erroneous rule is laid down by the Trial Court, but is limited to cases in which the "question or questions with respect to which the verdict or decision is found to be wrong" is, or are, "separable." *First Caldwell Oil Co. vs. Hunt*, 100 N. J.

Law 308, 312, rule 131 of the Supreme Court. The Hunt case was decided by the Court of Errors and Appeals. The opinion cites *Flammer vs. Morelli*, 126 Rep. 307, where we said following cited decisions, that a verdict erroneous on the theory adopted in the Trial Court cannot be sustained on a theory excluded in that court, and which the jury had no opportunity to consider. That rule seems applicable in the case at bar. To put it in another way, the verdict for the plaintiff was so tied up to the nominal amount and a wrong theory of recovery, that the rule of separability is inapplicable.

"But even if the rule were applicable, this is not a case in which to apply it. As we said in *Robinson vs. Payne*, 99 N. J. Law 135, 142, the power to confine the new trial to damages only is one which rests in the sound discretion of the court. We further said that it should be 'exercised with caution, with due regard to the rights of both parties, and only in those cases where it is certain that the error which resulted in excessive or inadequate damages did not affect the other issues.' Not only might the error as to damages in this case have affected the issue as to right of recovery, but that very issue, as we have pointed out, was put on a false ground."

The judgment in the Hunt case was reversed to the end that a new trial be had on all the issues in the case.

We respectfully submit that the judgment rendered in this case, and affirmed by the Supreme Court, should be reversed.

Respectfully submitted,
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Of Counsel.