

The only brief filed in this
Case by Defendant appellant
was suppressed by the Court.
See opinion

INDEX.

	PAGE
Notice of Appeal	1
Grounds of Appeal	2
Judgment Record	4
Case	10
Motion for Direction of Verdict	62
Charge	63

TESTIMONY.

Landon Berkeley:

Direct	11
Cross	17
Redirect	19, 60
Recross	20, 61

William McCullough:

Direct	20
Recalled, Direct	50
Cross	51

James A. Nelligan:

Direct	22
Cross	34
Redirect	45, 49
Recross	48, 60

Jerome Dunn:

Direct	54
Cross	58

Eugene Makray:

Direct	61
Cross	61

George Sleigh:

Direct	62
--------------	----

EXHIBITS.

	Offered Page	Printed Page
P-1.—Letter, dated May 29, 1925, W. McCullough to A. Makray, Inc.	13	13
P-2.—Lease, dated May 29, 1925..... Schedule A	14	67 75
D-1.—Letter, dated May 29, 1925, A. Makray, Inc., to James A. Nel- ligan	47	76

Notice of Appeal.

New Jersey Supreme Court

A. MAKRAY, INC., Plaintiff, v. WILLIAM McCULLOUGH, Defendant.	}	Action at Law.
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To Mark Townsend, Jr., Esq.,
Attorney of Plaintiff.

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TAKE NOTICE, that the defendant appeals from
the whole of the judgment entered in this cause to
the New Jersey Court of Errors and Appeals.

JEROME J. DUNN,
Attorney of Defendant.

Dated, Jersey City, N. J., May 11th, 1926.

Endorsed:

Service of a true copy of the with-
in notice of appeal is hereby acknowl-
edged this 11th day of May, 1926.

30

MARK TOWNSEND, JR.,
Attorney of Plaintiff.

Filed May 12, 1926,

EDWARD J. KELLEHER,
Clerk.

40

Grounds of Appeal.

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

10

A. MAKRAY, INC.,
Plaintiff-Respondent,

v.

WILLIAM McCULLOUGH,
Defendant-Appellant.

} Action at Law.

To Mark Townsend, Jr., Esq.,
Attorney for Plaintiff-Respondent.

20

TAKE NOTICE, That the defendant appeals to the
New Jersey Court of Errors and Appeals from the
whole of the judgment entered in this cause on the
following grounds:

1. Because the entire charge of the Court was
contrary to law.

2. Because the verdict was contrary to law.

3. Because the verdict was contrary to the
weight of evidence.

30

4. Because the Court erroneously permitted the
attorney for the plaintiff to interrogate the jury,
over and against the objections of the attorney for
the defendant, after they had been drawn and be-
fore they had been sworn, touching their qualifica-
tions, by an omnibus examination instead of upon
their *voir dire*, in that the Court permitted the said

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Grounds of Appeal.

attorney for the plaintiff to ask the following questions:

“Are you acquainted with or have you had any business dealings with Jerome J. Dunn, the attorney for the defendant?”

10

“Do you know the defendant, William McCullough, or have you had any business dealings with him?”

“Are you acquainted with or have you had any business dealings with James A. Nelligan, who was sitting behind Mr. Dunn?”

5. Because the Court erred in refusing to grant a mistrial, upon motion by the attorney for the defendant, upon the grounds that the questions aforesaid asked by the attorney for the plaintiff, and the manner in which they were propounded, were contrary to law and the statute in such case made and provided.

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JEROME J. DUNN,
Attorney for Defendant-Appellant.

Dated, Jersey City, June 9, 1926.

Endorsed:

30

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

FLORENCE O'NEILL, being duly sworn according to law, upon her oath, deposes and says that on the 9th day of June, 1926, she served a true copy of the within grounds of appeal on Mark Townsend, Jr., the attorney for the plaintiff-respondent, at his office, No. 921 Bergen Avenue, Jersey City, N. J., at 2:45 P. M., by leaving a copy thereof with

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Judgment Record.

A Makray, Inc., the plaintiff herein, a corporation of the State of New Jersey, with its principal office at No. 921 Bergen Avenue, in the City of Jersey City, County of Hudson, says:

FIRST COUNT.

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1. That it is engaged in the business of acting as real estate broker in the State of New Jersey, being duly licensed by the proper authorities of the State of New Jersey for that purpose.

2. That on May 29th, 1925, William McCullough, the defendant herein, duly authorized it by written agreement, a copy of which is hereto annexed, to lease the premises known as Nos. 835-837-839 Communipaw Avenue, Jersey City, to one, James A. Nelligan, for a term of five years for the sum of forty-two hundred (\$4200.00) per year, and agreed to pay it five per cent. of the total rental for the said five years, to wit, one thousand fifty (\$1050.00) dollars as commission.

20

3. That thereafter the said James A. Neeligan took possession of said premises under said lease and is now in possession thereof.

4. That the plaintiff has demanded from the defendant the agreed brokerage commission.

30

5. That the defendant has not paid the same.

SECOND COUNT.

1. Plaintiff repeats the allegations contained in paragraph one of the first count.

2. That on May 29th, 1925, the defendant duly authorized it by written agreement, a copy of which is hereto annexed, to lease the premises

40

Judgment Record.

known as Nos. 835-837-839 Communipaw Avenue, Jersey City, to James A. Neeligan, as tenant, for a period of five years and agreed to pay to the plaintiff five per cent. of the total rental for the period of five years, namely, the sum of one thousand fifty (\$1050.00) dollars, at the time and on the day that the tenant paid to the defendant three months security for rent, which time was not to be subsequent to the time the tenant took possession.

10 3. That thereafter the said James A. Neeligan executed a lease for the said premises with a provision therein for the payment of three months security for rent to the defendant.

20 4. That after the execution of said lease, the said tenant, James A. Neeligan, moved into the premises without paying the said security for rent, the payment thereof being waived by the defendant.

5. That the commission aforesaid of \$1050.00 has become due and payable from the defendant to the plaintiff and the plaintiff has demanded the payment of it.

30 6. That the defendant has not paid the same.

7. That there is therefore due to the plaintiff the sum of \$1050.00 together with interest from May 29th, 1925, and the costs and disbursements of this suit.

Wherefore plaintiff demands judgment against the defendant in the sum of twenty-five hundred (\$2500.00) dollars.

Judgment Record.

MARK TOWNSEND, JR.,

ATTORNEY FOR PLAINTIFF.

May 29th, 1925.

A. Makray, Inc.,
921 Bergen Avenue,
Jersey City, N. J.

10

Gentlemen:

In consideration of the services rendered by you and your associate, Mr. Berkeley, in negotiating for and securing the execution of a lease for the term of five years, of property on Communipaw Avenue, of which I am the owner, wherein one James A. Neeligan is named as tenant, I do hereby agree to pay as and for your commission, five (5%) percent. of the total rental for the period of five (5) years, namely the sum of one thousand and fifty (\$1,050.00) dollars, which amount shall be paid to you at the time and on the same day as I receive the payment by the tenant of three months security for rental, which time shall not be subsequent to the time on which the tenant takes possession. This payment to you is to be in full for all commissions due you for services in securing the execution of this lease.

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30

Should the tenant avail himself of the option to purchase the premises, as provided in said lease, I hereby agree to pay to you five (5%) percent. of the total purchase price, and there shall be credited on account of such sales commission, any part of the commission due on rental which has been paid on the unexpired term of the lease.

Very truly yours,

WM. McCULLOUGH.

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Judgment Record.

(Filed December 26, 1925.)

The defendant William McCullough, of the town of Little Ferry in the County of Bergen, State of New Jersey, answering the complaint of the plaintiff herein, says:

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FIRST COUNT.

1. Defendant neither admits nor denies paragraph one and leaves the plaintiff to his proof thereof.

2. Defendant admits the written agreement mentioned in paragraph two but denies that any commission is due thereunder.

20

3. Defendant denies paragraph three.

4. Defendant denies paragraph four.

5. Defendant admits that he has not paid any commission to the plaintiff, but says no commission is due to plaintiff.

SECOND COUNT.

1. Defendant repeats his denial contained in paragraph one of the first count herein.

30

2. Defendant admits paragraph two.

3. Defendant admits paragraph three.

4. Defendant denies paragraph four.

5. Defendant denies paragraph five.

6. Defendant admits that he has not paid the said commission but said that the same is not due to the plaintiff.

40

7. Defendant denies paragraph seven.

JEROME J. DUNN,
Attorney of Defendant.

Judgment Record.

(Filed December 17, 1925.)

The plaintiff by way of reply, states:

1. He denies the allegations contained in paragraph five of the answer to the first count.
2. He denies the allegations contained in paragraph six of the answer to the second count. 10

MARK TOWNSEND, JR.,
Attorney for Plaintiff.

(Filed January 11, 1926.)

This case was tried before the Honorable Henry E. Ackerson, Circuit Court Judge, with a jury, at the Hudson County Circuit on April 5th, 1926. The jury found a verdict for the plaintiff A. Makray, Inc., and against the defendant William McCullough, in the sum of one thousand eighty-six dollars and seventy-five (\$1,086.75) cents. 20

Whereupon it is adjudged that the plaintiff, A. Makray, Inc., do recover of the said defendant William McCullough, the sum of one thousand eighty-six dollars and seventy-five cents damages, together with its costs, which have been taxed at the sum of forty-eight dollars and seventy-four cents, making in the whole the sum of one thousand one hundred thirty-five dollars and forty-nine cents. 30

\$1,086.75	
48.74	
\$1,135.49	

Judgment entered April 8, 1926.

WM. S. GUMMERE,
C. J.

Landon Berkeley, direct.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY CIRCUIT.

Before—HON. HENRY E. ACKERSON, JR.,
Judge, and a Jury.

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<p style="text-align: center;">A. MAKRAY, INC., Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">WILLIAM McCULLOUGH, Defendant.</p>	}
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Jersey City, N. J.,
April 5, 1926.

APPEARANCES:

MARK TOWNSEND, JR., Esq., for the Plaintiff.
JEROME J. DUNN, Esq., for the Defendant.

A jury was duly empanelled and sworn.

30

Counsel opened to the jury.

LANDON BERKELEY, sworn:

Direct examination by Mr. Townsend:

Q. You are the Vice-President of A. Makray, Inc.? A. Yes, sir.

Q. Your office is where? A. 921 Bergen Avenue.

40

Landon Berkeley, direct.

Q. What business is your corporation engaged in? A. Real estate.

Q. Licensed by authority of the State of New Jersey? A. Yes, sir.

Q. Do you know the defendant in this suit, William McCullough? A. Yes, sir.

10

The Court: Are you a member of this firm, the plaintiff firm?

The Witness: Yes, sir.

Q. How long have you known Mr. McCullough, approximately? A. Something around a year or more, a little bit more probably.

20

Q. Do you know whether he was the owner and in possession of any property on Communipaw Avenue, in May, 1925? A. He claimed to be.

Mr. Dunn: We admit ownership.

Q. Did you have any conversation with him about that time, in the month of May, 1925, relative to either selling or leasing that property? A. Quite a lot.

30

Q. Will you just tell the Court and jury what that was? A. Well, McCullough had this property that was taken. I went to see him originally about another piece, and he mentioned this to me, and I entered into negotiations with another party. We had of course a regular verbal agreement regard-

40

Landon Berkeley, direct.

ing commissions, but did not cover it very fully at that time, and I had another deal with another party, which fell through, and I knew Mr. Nelligan. I knew he was in the paint business and was looking for a location. I went to see him regarding another matter and began discussing his business. His lease expired in September, 1925, and he needed approximately 12,000 square feet of space. So I interested him in this McCullough property on Communipaw Avenue.

10 Q. Where was Mr. Nelligan? A. He was in the painting business, Duro Gloss Auto Painting—I don't know the exact name, but he knows that.

20 Q. Where was he located? A. At the corner of Baldwin and Montgomery. I brought Mr. McCullough and Mr. Nelligan together in our office, and they virtually agreed with the exception of minor details that arose later. In fact, they agreed in every respect while they were in the office, but a number of minor details arose later, in which I did quit a bit of running around between East Rutherford, where Mr. McCullough was in business and Jersey City, until we finally got together and closed the lease.

30 Q. Well, now, subsequently, or about that time, did Mr. McCullough make an agreement with you relating to commissions? A. Yes; you have it in your hand.

Q. Is this the paper? (Handing witness.) A. Yes; I don't have to look at that twice.

40

Landon Berkeley, direct.

Q. Is that Mr. McCullough's signature? A. Yes, I saw him put it on.

Q. That is written on the stationery of his lawyer, Mr. Dunn, the attorney here? A. It was originally written on our stationery. There was an additional clause in there that Mr. Dunn didn't wish, so he struck that out. 10

Mr. Townsend: I offer it in evidence.

Mr. Dunn: No objection.

(Accepted and marked as Plaintiff's Exhibit P-1.)

Mr. Townsend: Gentlemen, I will read this to you (reading):

It is on the stationery of Jerome J. Dunn, First National Bank Building, 1 Exchange Place, Jersey City, N. J. 20

"May 29th, 1925.

A. Makray Inc.
921 Bergen Avenue,
Jersey City, N. J.

Gentlemen:

In consideration of the services rendered by you and your associate, Mr. Berkeley, in negotiating for and securing the execution of a lease for the term of five years, of property on Communipaw Avenue, of which I am the owner, wherein one James A. Nelligan is named as tenant, I do hereby agree to pay as and for your commission, five (5%) percent of the total rental for the period of five (5) years, namely the sum of one thousand and fifty (\$1050.00) dollars, which amount shall be paid to you at the time and on the same day as I receive 30 40

Landon Berkeley, direct.

10 the payment by the tenant of three months security for rental, which time shall not be subsequent to the time on which the tenant takes possession. This payment to you is to be in full for all commissions due you for services in securing the execution of this lease.

20 Should the tenant avail himself of the option to purchase the premises, as provided in the said lease, I hereby agree to pay to you five (5%) percent of the total purchase price, and there shall be credited on account of such sales commission, any part of the commission due on rental which has been paid on the unexpired term of the lease.

Very truly yours,

W. McCULLOUGH."

Q. Was there a lease entered into between McCullough and Nelligan? A. Yes, sir.

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

30 Q. Will you be good enough to produce the lease? A. I probably was a witness on it. I don't know. I don't remember that.

(Copy of lease produced by counsel.)

Q. Is that a copy of the lease, do you know (handing witness)? A. That is the lease.

Mr. Townsend: I offer that in evidence. (Accepted and marked as Plaintiff's Exhibit P-2 of this date.)

(Exhibit P-2 read to the jury.)

40 The Court: When does the term begin?

Landon Berkeley, direct.

Mr. Townsend: September first, 1925.

Q. Subsequent to that time, Mr. Berkeley, do you know whether Mr. Nelligan moved into possession? A. Yes, sir.

Q. When did he move into possession? A. I could not give you the date definitely. The tenant who was in possession prior to the first of September had to make certain necessary changes. 10

Q. Is he in possession there now? A. Yes, I believe he is.

Q. You say you believe he is? A. Well, I have seen him in there. I have seen him going in and out of the place, his car going in and out.

Q. What kind of business does he do there? A. Duro Gloss Auto Painting Company. 20

Q. Signs around indicate that is the business being carried on there? A. Yes, sir.

Q. At that time, there was some discussion, was there not, about Mr. Nelligan respecting his ability to put up \$1,050 cash deposit? A. Yes, sir.

The Court: What time; you say "at that time"?

Q. When was this? A. Prior to the time that the lease was signed.

Q. That was in the month of May then? A. Yes, sir. 30

Q. Was there any suggestion or was Mr. McCullough there at the time? A. The lease was originally discussed, that I believe was the only time that Mr. McCullough and Mr. Nelligan discussed it together. In our office that point did not arise, had never arisen, and that came out later when we were closing the other details. In other words, I drew up a tentative lease, which I believe your office drew up, for us to speak to both of them, to 40

Landon Berkeley, direct.

see what objections they had, and the matter of \$1,050 or three months' security for rent arose. I advised Mr. Nelligan of that and he said "Nothing doing."

10 Mr. Dunn: I object, unless Mr. McCullough was there.

Q. Was Mr. McCullough there? A. Not when I advised Mr. Nelligan.

The Court: The jury will disregard that.

The Witness: I did a lot of running backward and forwards between the two.

20 Q. Did Mr. Nelligan subsequently make any request upon you to loan him any money? A. Yes, sir.

Q. When was that? A. It was prior to the time the lease was signed. The question arose and I expected that probably I might—

Mr. Dunn: I object.

Q. Was Mr. McCullough present? A. No.

30 Q. He wasn't present at any of these conversations between you and Mr. Nelligan? A. No, Mr. Nelligan and myself could not reach arrangements—

Q. Has Mr. McCullough paid you this commission? A. No.

Q. Have you demanded it from him? A. Yes, sir.

Q. Has he refused to pay it? A. Well, he told me when Mr. Nelligan paid him he would pay.

40 Q. Just answer categorically; has he refused to pay you or not? The fact is, he hasn't paid you? A. He has not paid it.

*Landon Berkeley, cross.**Cross examination by Mr. Dunn:*

Q. Mr. Berkeley, there was quite some running around, was there, on this lease? A. There was indeed.

Q. Do you remember that one of the conditions under the lease was that Mr. McCullough was to get a deposit of \$1,050? 10

Mr. Townsend: I object.

The Court: I assume that is covered by the written contract.

Mr. Dunn: I withdraw it.

Q. You testified that Mr. Nelligan asked you for some money, the loan of some money, did you not?

Mr. Townsend: I object to that on the ground that on counsel's own motion owing to the fact that that conversation did not take place in the presence of Mr. McCullough, the Court struck it out. 20

The Court: Though he objected to it, there was no motion to strike out.

Mr. Townsend: He objected and the Court told the jury to disregard it. If you want it to go in, I have no objection.

Mr. Dunn: You have raised the point and I think I am entitled to go into it. 30

Q. You had a conversation with Mr. Nelligan regarding borrowing some money from you? A. Yes, sir.

Q. You agreed to lend him some money? A. Yes, sir.

Q. You agreed in writing? A. Under certain conditions; I think probably you have the letter there in front of you. 40

Landon Berkeley, cross.

Q. I show you a letter signed by you as vice-president of A. Makray, Inc., dated May 29, 1925, addressed to Mr. James Nelligan. Did you sign that or cause that to be written and signed it? A. Yes, I think that is all right, if you will allow me
10 to read it to refresh my memory. (Received paper.) That is correct.

Mr. Dunn: I ask to have that marked for identification.

Mr. Townsend: No objection.

(Marked Defendant's Exhibit D-1 for identification.)

Q. Did you lend Mr. Nelligan that money? A. No, sir.

20 Q. Why didn't you lend it to him? A. Never came for it.

Q. He at no time ever came for it? A. Never in my presence.

Q. Did he ever telephone you? A. I think he called me up two or three weeks—I understand he called the office, but never talked to me.

Q. There are other people in your office, are there not? A. Oh, yes, sir.

30 Q. You know the \$1,050 was never paid Mr. McCullough? A. I know nothing about the transaction between Mr. Nelligan and Mr. McCullough beyond what each one, what they told me or rather not what Mr. McCullough told me, because I had no conversation with McCullough on it.

Q. Did you ever demand \$1,050 from Nelligan for Mr. McCullough?

Mr. Townsend: I object. I don't think that would be material.

40 Mr. Dunn: Withdrawn.

*Landon Berkeley, redirect.**Redirect examination by Mr. Townsend:*

Q. You told Mr. Dunn that you had some conversation with Mr. McCullough after this thing. When did Mr. McCullough tell you that Nelligan was going into possession? A. Sometime in September; I can't say when. 10

Q. Did he tell you whether he had gone into possession or not? A. He was in possession, yes, sir.

Q. Did he tell you that he was paying his rent? A. He said he was slow on his rent. I don't remember whether that was the September rent or the October rent. I think it was in October he said that he was behind, but it had been paid.

Q. Now, at any time did Nelligan demand any of this commission from you? A. No. 20

The Court: Did Mr. McCullough ever say anything to you about whether he had received the \$1,050?

The Witness: He said he had not. That is what I started to testify a few minutes ago. I only knew by hearsay.

Q. Did I understand you to say that Mr. McCullough had told you that he did enter into possession sometime around the first? A. I think he was in there before that. 30

Q. Did McCullough tell you? A. He told me he was in there on September first, yes, sir.

Q. He said he had received rent from you? A. He had received rent from him in October. He told me he had received rent, I am sure it was in October. You see, he had paid at the time of the signing of the lease \$350 for the first month's rent. The second month's rent was due the first of October and he told me in October that this rent had 40

William McCullough, direct.

been paid. He first told me it had not been paid; later I saw him again and he told me it had been paid.

Recross examination by Mr. Dunn:

10 Q. What part of October did Mr. McCullough say the October rent had been paid? A. I could not tell you the date.

Q. Was it the first part or the middle? A. Somewhere around the middle of the month, I imagine. I don't remember. I could not say; it might have been the latter part, or it might have been earlier.

20 Q. It was around the middle of the month when he said it had been paid? A. Yes, I think it was some time.

Q. It was in the early part of the month when he said it had not been paid? A. Correct.

Mr. Townsend: Plaintiff rests.

WILLIAM McCULLOUGH, sworn:

Direct examination by Mr. Dunn:

Q. Where do you live, Mr. McCullough? A. Bergen County.

30 Q. What street and number? A. 355 Terrace Avenue, Hasbrouck Heights.

Q. Do you know Mr. Berkeley, the gentleman who just testified? A. Yes, sir.

Q. You know about this lease that was entered into with Mr. Nelligan? A. Yes, sir.

Q. You recall when that was signed, Mr. McCullough? A. Yes, sir.

Q. Do you recall the provisions of that lease? A. Well, pretty much.

40 Q. Do you recall that provision in the lease

William McCullough, direct.

wherein you were to receive \$1,050 on or before the 31st of August, 1925? A. Somewheres in that time.

Q. Did you ever receive that \$1,050? A. No, sir.

Q. Have you ever demanded it? A. Yes, asked Mr. Nelligan for it.

10

Q. What did he tell you? A. He told me that he was supposed to get it off Mr. Berkeley.

Mr. Townsend: I object and ask to have the answer stricken out.

The Court: Strike it out.

Mr. Dunn: I withdraw it.

Q. When did you first demand this \$1,050? A. Why, I guess it was around the 15th or 20th of August.

20

Q. Before it was even due? A. I think it was; or September, I beg pardon.

Q. Was he in possession at that time? A. Yes, he was in possession.

Q. When did he go in possession, do you know?

A. Why, possibly around the first of September.

Q. Did you ask him for a deposit at that time?

A. I didn't see him at that time.

Q. Is he a tenant now? A. He is a tenant now.

Q. Under a lease? A. No.

30

Mr. Townsend: I object to that as calling for a conclusion.

The Court: Sustained.

Mr. Dunn: I withdraw it.

Q. When Mr. Nelligan didn't pay you the \$1,050 what did you do? A. I went to you.

Q. What else did you do? A. I asked him about it and I believe you called him up about it, didn't you?

40

James A. Nelligan, direct.

The Court: Strike that out.

Mr. Dunn: I consent.

Q. Did you take any proceedings against Mr. Nelligan? A. No.

10 Mr. Townsend: I object to that as leading.

Mr. Dunn: Will your Honor permit me to withdraw the witness temporarily.

(Recess to 2 P. M.)

AFTER RECESS.

JAMES A. NELLIGAN, sworn.

Direct examination by Mr. Dunn:

20 Q. Mr. Nelligan, are you the tenant mentioned in that lease? A. Yes.

Q. At the time the lease was entered into with whom did you have the dealings? A. With Mr. Berkeley.

Q. At that time was anything said about the security under the lease? A. Yes, there was.

Q. And did you agree to pay the security? A. No, I did not.

30 Mr. Townsend: I object and ask that the answer be stricken out on the ground it is an attempt to question the terms of a written contract.

Mr. Dunn: I will withdraw the question.

40 Q. I show you a letter dated May 29, 1925, addressed to Mr. James A. Nelligan, Jersey City, N. J., and signed by A. Makray, Incorporated, L. C. Berkeley, Vice President, and marked for identification in this matter, and ask you if you

James A. Nelligan, direct.

were a party to that letter? A. Yes, that is the letter Mr. Berkeley wrote to me.

Mr. Dunn: I offer this in evidence at this time.

Mr. Townsend: I do not see what relevancy this has. For that reason I object to it. 10

Mr. Dunn: Mr. Berkeley testified he had an agreement with Mr. Nelligan and identified that letter as containing the agreement.

Mr. Townsend: This is a suit on a written contract and it now appears that under the terms of that written lease offered in evidence Mr. Nelligan went into possession with the consent of Mr. Berkeley. 20

The Court: This seems to be an admitted agreement, a letter between this plaintiff in this suit and some third party. How would it be evidential?

Mr. Dunn: It would show a secret agreement between a party whose interest was adverse, in order to induce entering into this lease.

The Court: He agreed to loan him this money. Is there anything wrong about it? You do not allege fraud in your pleadings, so that is not an element. 30

Mr. Dunn: I am trying to show the reason why Nelligan did not pay this money to us.

The Court: Assuming that Nelligan was to get his money from the broker and he didn't, that did not relieve him of legal responsibility. He had intended to go ahead 40

James A. Nelligan, direct.

and get that money somewhere else and put it up, if he did not have it.

10 Mr. Dunn: The very basis of entering into this lease was the financial responsibility of the tenant, and if he had to go out and borrow this money you do not think the landlord would want him as a tenant. That was the very essence of the lease—the most important thing in the lease.

20 The Court: You will find a case under brokerage for sale of real estate holding that where a person brings a purchaser, bankrupt if you please, to the owner and the owner says, "All right, I will take him," and he signs a contract with him, that is the end of it; he accepts him as being personally responsible and capable, and ready, willing and able.

Mr. Dunn: That is true, if there was not a secret agreement between a party whose interest was adverse. In this case there is this secret agreement between these parties.

The Court: Where have you pleaded it?

30 Mr. Dunn: I do not think we have. We have just entered a general denial of this.

The Court: That is fraud, and you must allege it.

40 Mr. Dunn: Then I would like to amend my pleadings to include a first separate defense, that the broker, the plaintiff in this case, fraudulently induced McCullough, the landlord, to enter into this lease by representing to him that this man was financially responsible, where as a matter of fact he had a secret agreement for the payment of this \$1,050.

James A. Nelligan, direct.

The Court: What do you say to that, Mr. Townsend?

Mr. Townsend: I appreciate that the matter of amending pleadings is entirely in the discretion of the Trial Court, that our only remedy is to plead surprise and have the case go off for the term. We want to try this case and have it decided on the merits now. When they filed their answer we moved before the Supreme Court Justice to strike out their answer on the ground it was a sham defense. They submitted affidavits and I have copies of the affidavits that they served upon us to use, in which they went into this alleged defense at that time. That matter was up in January. Now three months has elapsed. Mr. Dunn is a lawyer and he knew what his defense was. He knew if he had a defense of fraud he should have applied to amend his pleadings. I submit that under the circumstances at this time the Court should not allow him to amend. He denies everything in the answer. He even denies that we are incorporated. If he chooses to draw an answer in that manner he ought to suffer the penalty. 10
20
30

The Court: I will permit the amendment, but if Mr. Townsend thinks it is not proper to go on—

Mr. Townsend: I move surprise, but I will try it catch as catch can.

Mr. Dunn: I now offer the letter.

Mr. Townsend: I object to it on the ground that that is not any evidence of fraud. Assuming it were evidence of fraud, there is no proof in this case at the present time warranting that letter going in. 40

James A. Nelligan, direct.

The Court: I cannot see any fraud yet.

Mr. Dunn: Will your Honor allow me at this time to withhold offering that in evidence?

10 Q. At the time you entered into this lease with Mr. McCullough did you have any agreement with Mr. Berkeley of A. Makray? A. Yes, I did.

Q. What was that agreement?

Mr. Townsend: I object as immaterial, irrelevant and incompetent.

Mr. Dunn: I will withdraw the question.

20 Q. Did you have an agreement with A. Makray, Incorporated? A. Through that letter. I had the written agreement of that letter, signed by Mr. Berkeley.

Q. And anything else? A. No.

The Court: Now let us understand each other. Do you or do you not allege that this brokerage contract was secured in fraud?

30 Mr. Dunn: Exactly—because of this secret agreement—that is, in that there was a secret agreement with the tenant and had we known of that we would not have entered into any of these agreements whatsoever.

The Court: In what do you allege the fraud consisted—because he went up and tried to borrow money from the broker?

Mr. Dunn: Yes, and had we known he had to go out and borrow the money we would not have entered into it. Secondly, that the money was never paid over to us—

40 The Court: How would it lie in your mouth to contend that?

James A. Nelligan, direct.

Mr. Dunn: Because the broker happened to know in this particular case that that was the fact. I will be able to couple that up very well.

The Court: All right, go on. I am going to withdraw a juror and let you come up before me or before Judge Cutler next week when you get your pleadings in shape. 10

Mr. Townsend: I am perfectly willing to go on with the pleadings as they are now.

The Court: I do not think it is fair to you, and it certainly is not fair to the Court. I am frank to say I do not think your opening has stated a thing but a mere conclusion.

Mr. Townsend: I am willing to let him go on on those conclusions and take my chances with the Court and the jury. 20

The Court: All right, but I warn you now that in view of that statement I cannot bar his attempted variation of that contract.

Mr. Townsend: I will take my chances.

Q. What agreement did you have with A. Makray, Incorporated? A. That they were to advance the money—

Mr. Townsend: I object on the ground it appears that that agreement was reduced to writing, which has been produced to the Court, and the letter is the best evidence. 30

The Court: That is the very reason I suggested this adjournment, because the rule of law is that if there is an allegation of fraud in the making of the contract they may go on to show by parol what the arrangement was at that time, bearing on the question of fraud. 40

James A. Nelligan, direct.

Mr. Townsend: But my understanding is that this witness's testimony is that this agreement he now speaks of is that letter which your Honor has seen. That is my objection.

10 The Court: Even so, if it is a contract that the statute of frauds requires to be in writing, if there is an element left out or it has been induced by statements made at the time it was engrossed and signed, that all may be shown.

Mr. Townsend: I will not make any objection then.

A. That they were to advance me the money to pay this as security for the leasing of this property 835 Communipaw Avenue.

20 Q. How much were they to advance you? A. \$1,050.

Q. Did you ever tell Mr. McCullough that you were to borrow that money from A. Makray, Incorporated?

Mr. Townsend: I object as immaterial.

The Court: Objection sustained.

Mr. Dunn: Exception.

30 Q. When was that agreement made, Mr. Nelligan, was it made before the lease was drawn or afterwards? A. Before.

Q. Before the lease was drawn? A. Yes.

Q. When did you enter into possession of the premises? A. Along the 28th of August.

Q. And did you pay Mr. McCullough the \$1,050 as required under the lease? A. No, I did not.

Q. Did you ever pay it to him? A. No, I did not.

40 Q. Did you ever offer it to him? A. No, I did not.

James A. Nelligan, direct.

Q. Did he ever demand it from you? A. Yes, he did.

Q. When was the first time he demanded it from you? A. Right after September the first.

Q. Around the first? A. Yes.

Mr. Townsend: I object.

10

Q. On the first of September? A. I think either the first or the second. It was the first of the month.

The Court: When did he?

A. I would not say positively it was the first day or the second. I think it was either the first or the second day of the month.

Q. What did you tell him?

20

Mr. Townsend: I object as immaterial.

Mr. Dunn: I withdraw it.

Q. Did you pay him? A. I did not.

Q. Did he ever demand it after that? A. Yes, he did.

Q. When? A. He demanded it a number of times. In fact every other day he called up and wanted to know what I was going to do about it.

Q. And what did you tell him?

30

Mr. Townsend: I object as immaterial.

Mr. Dunn: Withdraw it.

Q. Did you give it to him? A. No, I did not.

Q. Why didn't you pay him this money, Mr. Nelligan?

Mr. Townsend: I object as immaterial. In the first place it calls for a conclusion and in the second place it is after he has entered into possession under the terms of his

40

James A. Nelligan, direct.

written lease which specifically provides certain things to be done.

The Court: I will allow it.

A. Because I did not have it.

10 Q. You testified to an agreement with A. Makray, Incorporated, whereby they agreed to lend you the money? A. Yes.

Q. Had you made a demand on A. Makray, Incorporated for the money? A. Yes.

Q. When did you make demand? A. The 31st of August I called up the office.

Q. Did they ever pay over the money to you? A. No, they did not.

20 Q. Did they ever refuse to pay over the money to you? A. Yes, they did.

Q. When was the last time Mr. McCullough saw you with reference to this \$1,050 due him? A. Along in the latter part of September.

Q. Did he demand it at that time? A. Yes, he did.

Q. And did you pay it to him? A. No, I did not.

Q. Why didn't you pay it to him then? A. Because I did not have it.

Q. Are you a tenant there now? A. Yes.

30 Q. Are you a tenant under the lease?

Mr. Townsend: I object.

The Court: That is a conclusion.

Mr. Dunn: Withdraw it.

Q. What kind of a tenancy have you, Mr. Nelligan?

Mr. Townsend: I object.

The Court: Let him state the facts.

40 A. A month to month tenant.

James A. Nelligan, direct.

Mr. Townsend: I ask that that be stricken out.

The Court: He cannot say it is from month to month. He can say how he pays his rent and so on. I will strike out the last answer.

10

Q. Are you paying the same rental as you were under the lease? A. Yes.

Q. Are you under the lease at the present time? A. No.

Mr. Townsend: I object.

The Court: Objection sustained and I will strike the answer out.

Q. Did Mr. McCullough take any proceedings against you when you did not pay the \$1,050?

20

Mr. Townsend: I object.

Mr. Dunn: One of the most important elements in this lease is that \$1,050, which the broker knew was the most important element in it.

The Court: If when they saw nothing was being done they started proceedings it would show whether or not there was a waiver of the payment of the \$1,050 as security.

30

Mr. Townsend: It is my understanding that if any proceedings were started at all it was not until the month of October, sometime in the middle of October, the 16th of October. The time is as of September the first, not as of October 16th. I do not know what the two of them may have done under the advice of counsel.

The Court: I will allow the question.

40

Mr. Townsend: Exception.

James A. Nelligan, direct.

A. Yes, he did.

Q. What proceedings did he take?

Mr. Townsend: I object on the ground that the record of the court action is the best evidence.

10

The Court: It is only collateral matter, I will allow it.

Mr. Townsend: Exception.

Q. When and what proceedings did he take?

A. He sent me a dispossess notice.

The Court: When?

A. I could not state positively unless I saw the letter.

20

Q. Do you know approximately when? A. It was along about in the middle of September.

Q. Had you paid any rent up to that time? A. I paid the first month's rent when I signed the lease.

Q. Have you paid any more rents to him?

A. No.

Q. Was any rent due? A. No.

Q. Did you ever pay him October's rent? A. Yes.

30

Q. When? A. I could not state just when, I think along about the 8th or 9th.

Q. Did you pay it to him before or after the dispossess proceedings? A. Oh, after.

Q. After the dispossess proceedings? A. Yes.

Q. After you were served with dispossess proceedings what did you do? A. I got in touch with you. I came down to see you to see what could be done about it.

40

Q. What was done? A. You said you would allow me to stay there as a monthly tenant.

James A. Nelligan, direct.

Q. And that is how you are there now? A. Yes.

Mr. Townsend: I object and ask that that be stricken out.

The Court: It will be stricken out.

10

By the Court:

Q. You never were dispossessed, were you? A. No.

By Mr. Dunn:

Q. Are you a tenant under this lease at the present time? A. No.

Mr. Townsend: I object.

The Court: It is a conclusion.

Mr. Dunn: I will withdraw it.

20

Q. Did you ever demand from A. Makray, Incorporated, \$1,050? A. Yes.

Q. On how many occasions and when? A. I called up their office August 31st and asked for Mr. Berkeley. I called up in the morning and they said he was out and would be in in the afternoon. I called up again in the afternoon and they said he was out. I called up again September the first in the morning and the girl answered the phone. I told her on August the 31st who I was and that I wanted to get in touch with Mr. Berkeley to close the matter of a loan. When I called up September first she put me in connection with some man who said he was Makray. He said, "Berkeley was looking for you yesterday." "Well," I said, "I called your office twice—"

30

Mr. Townsend: I object to this conversation with somebody. I do not know who he

40

James A. Nelligan, cross.

is referring to. He says a telephone conversation.

Mr. Dunn: He said Makray.

Q. Do you know Mr. Makray? A. No.

10 Q. Did you ever talk to him on the telephone?
A. Not that I know of, unless it was he that answered the phone.

Q. At any time did you ever tell Mr. McCullough about this agreement with Mr. Berkeley? A. Not until after the middle of September.

Q. You told him about it then? A. Yes.

Q. And what happened then?

Mr. Townsend: I object.

Mr. Dunn: I withdraw that.

20 The Court: You see your rights depend on what happened on September 1st.

Mr. Dunn: If we did not waive those rights I think we could still insist upon them.

Cross examination by Mr. Townsend:

Q. Is your memory very good? A. As good as the average.

30 Q. How do you fix the time of this dispossession having been served on you about the middle of September; what refreshes your recollection about that? A. Because Mr. Dunn and Mr. McCullough were after me all the time for the security.

Q. But what made you tell the Court and the jury just now that this was about the middle of September? Was it due to any conversation you had at lunch time with anybody?

Mr. Dunn: I object as not proper cross examination.

40 The Court: It is very proper.

Mr. Dunn: All right, I will permit the question.

James A. Nelligan, cross.

A. No one particular conversation.

Q. Was it due to any general conversation you had at lunch time? A. At what time?

Q. Lunch time today? A. No, sir.

Q. What is there about the situation that caused you to recall that this dispossession was served on you on the 15th of September? A. Because I am pretty sure that is when it was to the best of my recollection. 10

Q. Has your recollection always been that way?

A. Just as I tell you, I think I have a fairly good recollection, as good as the average.

Q. Have you looked into the matter at all since this thing happened, since September the first, to refresh your recollection as to when this dispossession was served on you? A. No, I have not. 20

Q. Have you talked to anyone at all about it? A. Outside of Mr. Dunn?

Q. Yes. A. I talked to Mr. Sleigh, I think.

Q. Since September the 15th, whereby you fix the time as this dispossession having been served on you in the middle of September? A. No.

Q. You have not? A. No.

Q. Do you know a Mr. William McIntyre—Walter J. McIntyre, a lawyer? A. Not that I recall, no.

Q. He is associated with Mr. Dunn, isn't he? A. Oh, yes, yes, I have met him in Mr. Dunn's office. 30

Q. You made an affidavit before Mr. McIntyre, didn't you, on December the 30th, 1925? A. I think so.

Q. You swore to it, didn't you? A. Yes.

Q. Was it the truth? A. It was the truth.

Q. Well, you swore in that, didn't you, that this dispossession was served on you on or about the 16th of October? 40

James A. Nelligan, cross.

Mr. Dunn: If there is an affidavit the original must be produced.

The Court: It must be shown.

Mr. Townsend: I call on you to produce it.

10 Mr. Dunn: I refuse to produce it on the ground that I have not had proper notice. Under the statute I am entitled to two days.

Mr. Townsend: The paper is in the court room. I demand it. If I call for it it is his duty to produce it for the benefit of the court and the jury.

Mr. Dunn: There is not any objection to producing it, but I am entitled to two days notice.

20 Mr. Townsend: Have you the paper in the court room?

Mr. Dunn: I am not called upon to testify to it.

Mr. Townsend: Do you deny to the court that that affidavit is right there before you?

Mr. Dunn: When the court asks me I will answer.

The Court: Have you it there?

Mr. Dunn: I have, your Honor.

30 The Court: He has asked you to produce it.

Mr. Dunn: I refuse on the ground I have not had two days notice. If your Honor insists upon my producing it I will be very glad to produce it.

The Court: I do.

Mr. Dunn: Very well, your Honor.

(Produces paper.)

40 Mr. Dunn: I object to having been required to produce that, on the ground that under the statute I am entitled to two days

James A. Nelligan, cross.

notice. All notices to produce must be given at least two days before the case is moved for trial.

The Court: Do you think that is so?

Mr. Dunn: I may be mistaken about that.

The Court: I think the rule is if it is in court it has to be produced. 10

Mr. Dunn: I will withdraw the objection.

Q. That is your signature, isn't it? A. Yes.

Q. And that is Mr. McIntyre's signature? A. Yes.

Q. That is the same Mr. McIntyre that has an office with Mr. Dunn? A. Yes, as far as I know.

Q. In this affidavit which you prepared to submit to the Supreme Court in this action you did swear to this, didn't you, that on or about the 17th day of October, 1925, the said William McCullough caused a notice to be served upon this deponent wherein and whereby the said McCullough notified this deponent to quit the premises on the first day of November, 1925. You swore to that, didn't you? 20

A. I swore to that affidavit.

Q. Why did you swear in there it was the 16th of October and why do you swear today it was the 15th of September? A. Because to the best of my recollection it was September he served the notice. 30

Q. Then why did you swear in that affidavit last December it was the 16th of October? A. If he has it down there the 16th and he produced the affidavit showing me it was the 16th, I swore to it.

Q. You did swear to it, didn't you? A. Yes, but as I say, to the best of my recollection that notice was served— 40

James A. Nelligan, cross.

The Court: Just a minute. We can all hear you. You do not have to yell.

10 Q. Why did you swear in there it was the 16th of October the dispossess was served on you, if it was not the fact? A. If he showed me the date, the 16th, then it was the 16th of October.

Q. Oh, you mean Mr. Dunn told you to say that, did he? A. No, he did not.

Q. Why did you say it? A. Why did I say what?

Q. That it was the 16th of October that he served this dispossess on you? A. Because he naturally showed me the notice.

Q. Then is that affidavit right? A. If the notice was dated the 16th this affidavit is correct.

20 Q. Then you do not know now? A. I am not positive. It is quite some time ago. I did not refresh my memory on these details.

Q. And you are perfectly willing to come on this stand and swear as to your recollection of the 15th of September without being positive or looking it up? A. Along in the middle of September, I think.

Q. You are still in business, aren't you? A. Yes.

Q. Doing what? A. Painting automobiles.

30 Q. You and Mr. McCullough are very friendly, are you not? A. No, we are not.

Q. When did you pay your last rent? A. I do not just recall.

Q. About when? A. It was along the 7th or 8th or 9th, along in there.

Q. 7th or 8th or 9th of what—of March? A. Of March, yes.

Q. For the month of March? A. Yes.

Q. You paid how much? A. \$350.

40 Q. Do you owe him any rent today? A. Yes, I do.

James A. Nelligan, cross.

Q. Other than for the month of April? A. Only for the month of April.

Q. Do you owe him anything else? A. No, sir, I do not.

Q. So you have been in possession of those premises since the first of September? A. Yes. 10

Q. Paying \$350 a month rent? A. Yes.

Q. When you got this dispossess notice you spoke about who was your lawyer? A. Morris Barrison.

Q. Did you go to Mr. Barison about this? A. Yes.

Q. And conferred with Mr. Barison? A. Yes, I did.

Q. You and Mr. Barison called down to Mr. Dunn's office, did you? A. He called Mr. Dunn up. 20

Q. Did he go down to Mr. Dunn's office with you? A. No, I do not think he did.

Q. Now this agreement that you speak of with Mr. Makray, is this the agreement you refer to—referring to D-1 for identification? A. That is the agreement.

Q. Does that embody all the terms of it? A. That embodies practically the terms under which he was to loan the money.

Q. Are there any other terms not embodied in that? A. None that I recall. 30

Q. You did not go to Mr. Makray's office on September the first? A. No, I called up before.

Q. You wanted to give him a note for five years, didn't you? A. At Mr. Berkeley's suggestion.

Q. I did not ask you that. I say you wanted to give him a note for five years? A. At Mr. Berkeley's suggestion.

Q. Why didn't you give your note for six 40

James A. Nelligan, cross.

months? A. Because it was Mr. Berkeley's first suggestion—five years.

Q. You said this embodied all the terms of the contract, just a moment ago. A. This was finally drawn up after he decided he would not take the
10 note at five years.

Q. That provided for a six months' note, didn't it? A. That is what we finally agreed upon.

Q. He was going to discount for you? A. Not for me, for himself.

Q. Whose note was it going to be? A. My note.

Q. You were going to give him this note for \$1,000, weren't you? A. Yes,—\$1,050.

Q. Payable six months after that? A. Yes.

Q. On August 31? A. Yes.

20 Q. Did you draw the note? A. No, I did not.

Q. And the fact is, is it not, that you made a proposition to Mr. Berkeley that if he took your note for five years for a thousand dollars you knew someone who would buy it for five hundred dollars? A. After he made the suggestion that I get someone to buy it.

The Court: Buy what?

The Witness: Buy my note.

30 Q. You were the fellow who was going to buy your own note for five hundred dollars, weren't you? A. No, sir.

Q. Who was the fellow that was going to buy it?

Mr. Dunn: I object as immaterial. Withdraw the objection.

A. Mr. Schuster.

Q. Where does Mr. Schuster live? A. On West Newark Avenue.

40 Q. What number? A. I do not recall the number; 800 and something.

James A. Nelligan, cross.

Q. What business is he in? A. Real estate business.

Q. It was not your suggestion at all that this note be five years; it was Mr. Berkeley's suggestion? A. Yes, positively.

Q. And you would not agree to that, you insisted on the note being for six months, didn't you? A. No, sir. 10

Q. Didn't you demand it be six months? A. No, sir. It was after quite a little conversation that Mr. Berkeley came to me and said he talked the matter over with Mr. Makray and he found it would be impractical to take a five year note.

Q. What did you demand the time of the note to be? A. I demanded nothing.

Q. You demanded nothing, you were perfectly willing to make it any time they wanted? A. No, not any time. This agreement was only signed after a good deal of wrangling. 20

Q. Do you have a thousand dollars today? A. Have I?

Q. Yes. A. In cash?

Q. I do not care whether it is cash or security or real estate or what it is.

Mr. Dunn: I object. I do not think that makes any difference. 30

The Court: That is not material. The question is, at that time.

Q. On September the 15th you did have a \$1,050, didn't you? A. No, I did not.

Q. I do not mean in cash, but in property. A. No, I did not.

Q. Didn't you own any real estate? A. No, sir.

Q. You have never owned any? A. I have, yes.

Q. At that time? A. Not at that time. 40

James A. Nelligan, cross.

Q. When did you sell it? A. The last piece of property I had in my name was sold I guess about two years previous to that.

Q. Did you have any property in anybody else's name? A. Yes.

10 Q. Whose? A. My wife's.

Q. Did you have that in September? A. Yes.

Q. Is it still in her name? A. Yes.

The Court: Is it your property?

The Witness: No, it is not.

Q. I understood you to say it was your property. A. No, sir. I beg your pardon.

Q. How many men do you employ down in your plant? A. We have eight, today.

20 Q. How many did you have in September, 1925? A. I think around the same number—six or seven or eight.

Q. You just occupy one floor of this? A. One floor is all there is there.

Q. You occupy the entire building? A. Yes.

Q. How big is that building? A. I think it is about 75 by 125.

Q. You have your painting plant in there? A. Yes.

30 Q. Painting automobile bodies? A. Yes.

Q. Where had you been in the painting business before? A. Corner of Montgomery Street and Baldwin Avenue.

Q. You moved from that property to the McCullough property? A. Yes.

Q. How did you get in the McCullough property? A. Through Mr. Berkeley.

Q. How did you get in the door? A. How did we get in the door?

40

James A. Nelligan, cross.

Q. Yes—the door was locked, wasn't it? A. Yes, but the key was across the street, because they were working down there.

Q. Across the street where? A. In a grocery store.

Q. Do you mean McCullough had left it there? A. I can't say who left it there. 10

Q. You went and got the key and broke in? A. Yes.

Q. And moved in? A. Yes.

Q. On the 28th of August? A. About the 30th of August.

Q. And it took you a couple of days to make alterations? A. Yes.

Q. That is what you were doing there on September the first? A. Yes. 20

Q. And on September the first you started in your business? A. We were ready to start in any time.

Q. When was the first time that you were in communication with Mr. Dunn? A. Along in May some time.

Q. May, 1925? A. Yes.

Q. When was the next day? A. I cannot recall. I have been in conference with him quite some since then. 30

Q. How soon after you moved in the property the first time was it that you saw Mr. Dunn after that? A. I saw him just before Labor Day.

Q. Labor Day was about the fourth of September? A. Yes.

Q. How many days before Labor Day? A. The second of September.

Q. Was Mr. McCullough with him? A. No.

Q. Where did you see him at that time? A. I 40

James A. Nelligan, cross.

was going down to get a permit for them to work Sunday and I ran into him, I think he was coming up to see me.

Q. Had you seen Mr. McCullough before that time? A. Yes.

10 Q. Where and when? A. Up in Mr. Makray's office.

Q. When was that? A. Along in I think the latter part of April, or the first part of May, when we first started discussing this.

Q. When did you first see him after you finished that discussion? A. I think I met him down in the building, he was down there looking after the alterations.

Q. When you moved in? A. No, sir, before.

20 Q. Did you have a conversation with him then? A. Well, a general conversation.

Q. And he was making some alterations in the building? A. Yes.

Q. And he was still making them when you moved in? A. Yes.

Q. And he continued to make those for some time after you moved in? A. Yes. There were some little alterations made there afterwards.

Q. He was there superintending the job? A. No.

30 Q. What was he doing there? A. Just would be in and look around and walk out.

Q. Did you say good morning to him? A. Why, naturally.

Q. That was the day you moved in, wasn't it? A. He was there the day I moved in? I do not recall that he was there.

40 Q. You say he was there making alterations and you said good morning. Was that the day you moved in? A. I do not recall if I saw him the day we moved in or not.

James A. Nelligan, redirect.

Q. Well, you saw him there right along. A. Yes.

Q. How many days did it take you to move in? A. I guess we were moving in for a couple of days.

Q. You started on the 28th of August? A. I think about the 28th. 10

Q. So by the first of September you had finished? A. Yes.

Q. What day in October did you pay him for your rent? A. I cannot say, I think about the 8th or 9th or 10th or along there; I cannot say positively, unless I see the date on the check.

Q. Have you the check with you? A. No, I have not.

Q. You did not go into any court to testify in any proceedings? A. No. 20

Redirect examination by Mr. Dunn:

Q. As to the October rent, was it before you were served with the notice of dispossess or afterwards?

Mr. Townsend: I object as leading.

The Court: Objection overruled.

A. If my memory serves right, it was after. 30

Q. And after you had seen your lawyer, Mr. Barrison? A. Yes.

The Court: What was after?

The Witness: I paid the rent after I was served with a dispossess notice.

Q. Was there any other dispossess notice other than the one of October 16 served on you? A. No.

Q. That is the one you refer to when you say 40

James A. Nelligan, redirect.

a notice for dispossess was served on you? A. Yes, that is the one.

Q. Is there any other member of Mr. Barrison's office who represented you in this matter—any other attorney? A. No.

10 Q. Just Mr. Barrison? A. Just Mr. Barrison.

Q. This letter contains all the terms of the agreement between you and A. Makray, Incorporated? A. Yes, that is what it was finally boiled down to.

Mr. Dunn: I now offer this letter in evidence.

20 The Court: You intimated before that you had alleged fraud was perpetrated upon your client by this plaintiff. Do you mean to insist that the plaintiff here was actuated by bad faith and concealed things which should have been known to the principal?

Mr. Dunn: The last part of that is true, that he should have told of this secret agreement with Mr. Nelligan, that he should have laid all the facts before the principal in this case, that it was his duty to do it, and the conclusion of that is that he acted in bad faith.

30 Q. Why did you enter into this agreement with A. Makray, Incorporated?

Mr. Townsend: I object on the ground it is immaterial. There is the agreement itself.

The Court: Yes. You see you have a written agreement right here. You do not allege that that is fraud.

40 Mr. Dunn: I will withdraw the objection and offer the agreement in evidence at this time.

James A. Nelligan, redirect.

The Court: Have you any objection to that?

Mr. Townsend: I do not think it is competent. It has been examined upon, however.

The Court: It may be marked. 10

(Admitted and marked Exhibit D-1 of this date.)

Q. Before this lease was actually signed was there any discussion as to the terms of the lease?

Mr. Townsend: I object as immaterial.

The Court: You mean between whom?

Mr. Dunn: Between McCullough, Berkeley and himself, the three.

Mr. Townsend: I object on the ground 20
the lease speaks for itself.

The Court: That is true. There is no doubt about that, except upon this question of fraud. I do not know what he is going to bring out later on.

Q. Was there any discussion as to the security to be paid under this lease, between you and Mr. Berkeley and Mr. McCullough? A. Yes, there was.

Q. And what was that discussion? A. The discussion was that Mr. Berkeley came back and said Mr. McCullough demanded \$1050—three months' security. 30

Q. What did you do then? A. I told him if he demanded that, that the deal was off.

Q. And then what happened? A. Then he said—

Mr. Townsend: I object. It now appears that this conversation was not in the presence of the three of them. 40

James A. Nelligan, recross.

The Court: It was between Berkeley and this party.

Mr. Townsend: Yes, and after the lease was executed.

10 The Court: Berkeley is not a party to this suit.

Mr. Dunn: I will withdraw the question.

Recross examination by Mr. Townsend:

Q. Where did you get the \$350 you paid Mr. McCullough at the time you signed the lease? A. I presume I collected it from cars that we had painted.

Q. Where did you get the money you paid as the rent for October? A. From the same source.

20 Q. Did you pay the October rents by check or cash? A. Check.

Q. Did he refuse to take it? A. No.

Q. He took it, didn't he? A. I mailed it to him.

Q. Well, your check came back cancelled—it had passed through the bank, paid? A. Yes.

Q. This Mr. Schuster is a friend of yours, this real estate man? A. I have done business with him. I do not know as he is a very particular personal friend.

30 Q. What bank do you do business with? A. The First National.

Q. You did during all the year 1925? A. I think so.

Q. Can you recall any other bank you did business with at that time? A. Yes, sir. I do not know whether we had an account with the Commercial Trust or not.

Q. In whose name was the account? A. Under my name.

40 Q. Your name individually? What is the name

James A. Nelligan, redirect.

of your company? A. The Duro Gloss Auto Painting Company.

Q. Is that a trade name or a corporation? A. It was at the time a trade name.

Q. And now a corporation? A. Yes, sir.

Q. When was it incorporated? 10

Mr. Dunn: I object as immaterial.

Q. Was it incorporated after you moved into the McCullough property or before? A. No, after.

Q. How long after? A. It was only incorporated I think the 12th of this month—March.

Q. Were the bank accounts kept in your individual name in 1925? A. Yes.

Q. Do you now swear to the court and jury that in 1925 you did not have in the bank \$1,050? Now think over it before you answer. A. At any one time? 20

Q. Yes, at any one time. A. Well, I could not state as to that unless I would look up my balances.

Q. You cannot state that you did not have? A. I do not think I did.

Q. You do not state that on October the 1st, 1925, you did not have over a thousand dollars to your credit in the First National Bank? A. I do not think I did. 30

Q. Or the Commercial Trust Company? A. I do not think I did. I am almost positive I did not.

Redirect examination by Mr. Dunn:

Q. If you had \$1,050 in the bank would you have turned it over to Mr. McCullough?

Mr. Townsend: I object.

The Court: Objection sustained. 40

William McCullough, direct.

WILLIAM McCULLOUGH, recalled.

Direct examination by Mr. Dunn:

10 Q. At the time this lease was signed did you know of this agreement between Mr. Nelligan and Mr. Berkeley whereby A. Makray, Incorporated, was to lend to Mr. Nelligan \$1,050? A. No.

Q. Do you know of it now? A. Yes.

Q. When was the first time you ever learned about it? A. I think around the 8th of September.

Q. After Mr. Nelligan went in there as a tenant? A. Yes.

Mr. Townsend: I object as leading.

20 The Court: Do not lead him.

Q. September the 8th? A. About the 8th.

Q. Who told you about it? A. Mr. Nelligan.

Q. Did you ever demand payment of the \$1,050 under the lease? A. Yes.

Q. When was the first time? A. I think it was the 3rd of September.

30 Q. Prior to that time had you or anybody for you demanded payment? Had you authorized anybody to demand payment? A. I authorized you.

Q. When was that? A. I think it was after the 3rd of September that I told you that I had not got the \$1,050 and why didn't I have it?

The Court: Why didn't you demand this rent before September the 3rd inasmuch as the tenant was in possession.

40 The Witness: The building was not quite ready for the man and Mr. Langan, the contractor, was working there still. That was one reason that I did not.

William McCullough, cross.

Q. Who was your attorney through this entire lease matter? A. You were.

Q. As such attorney did I have authority to make demand of that security? A. Yes.

Q. At whose suggestion was this original proposition for \$1,050 security put in the lease? 10

Mr. Townsend: I object.

The Court: Objection sustained. It is in there.

Q. Why was this put in the lease?

Mr. Townsend: I object.

The Court: Objection sustained.

Mr. Dunn: Withdraw it.

Q. When Mr. Nelligan told you about this agreement with A. Makray, Incorporated, what did you do? 20

Mr. Townsend: I object as immaterial.

The Court: I will allow it.

A. I went down to your office and I told you all about it and I asked you what we should do.

Q. And you were advised? A. Yes.

Q. Did you personally ever demand payment after that? A. Demand payment of the \$1,050? 30

Q. Yes. A. I think I stopped in there one day and Mr. Nelligan was there and I asked him if he had the \$1,050 yet, and he said he did not get it off Makray.

Mr. Townsend: I object.

The Court: Strike out what he said.

Cross examination by Mr. Townsend:

Q. Mr. Makray has frequently demanded this commission from you? A. Yes. 40

William McCullough, cross.

Q. And you with the help of Mr. Dunn have been trying ever since last September to avoid payment of it, haven't you? A. I do not say I have done that.

10 Q. You have gone to Mr. Berkeley and told him— A. No, sir.

Q. You have not? A. No, sir.

Q. Well, suppose I finish the question and maybe you might change your mind. You have told him you are perfectly willing to pay him his commission provided he will take it on a monthly basis when you collect the rent each month, haven't you? A. Yes.

20 Mr. Dunn: I object on the ground that if it is for the purpose of compromise it is not admissible in this suit—withdraw the objection.

Q. Do you know a Mr. Schuster in the real estate business? A. No, sir, not as I can remember.

Q. About the time you were conducting these negotiations with Mr. Nelligan you did have a man come to see you and try to rent that property from you, didn't you? A. Yes.

30 Q. He wanted to rent it for a paint shop, for painting automobiles? A. Yes.

Q. Did you find out who the man was he represented? A. No, I did not.

Q. Will you say that Mr. Schuster? A. Sir?

Q. Will you say that was not Mr. Schuster? A. I cannot say whether it was him or not.

Q. You refused to do any business with him, didn't you? A. Yes.

Q. You sent him to Mr. Berkeley? A. Yes.

40 Q. And you never saw or heard from him again?
A. Not that I can remember.

William McCullough, cross.

Q. Now I ask you, is it not a fact that he was sent there at the suggestion of Mr. Nelligan? A. I cannot answer a question like that; I do not know.

Q. And it is a fact, isn't it, that Mr. Berkeley brought Mr. Nelligan to you? A. Yes.

Q. You have bought and sold real estate many times in your life? A. Yes. 10

Q. And it has always been your practice to pay a real estate agent a commission? A. The first time I ever had to pay anybody a commission would have been Mr. Berkeley. Any time I would have paid anybody would have been Mr. Berkeley.

Q. You knew Mr. Berkeley was in the real estate business? A. Yes.

Q. And the fact is, although Mr. Nelligan is down there now and is paying you \$350 a month rent, you have not paid a single penny to anyone as commission for bringing that tenant to you? A. No, only the \$6,000 in repairing the building. 20

Q. And you call that a commission, do you? A. No, I do not call that a commission.

Q. But you have not paid one penny to one broker or anyone for bringing Mr. Nelligan to you? A. No, sir. Just as I say, only the contractor.

Q. How long had that building been vacant before Mr. Nelligan moved in? A. Six months. 30

Q. What had been the business of the prior tenant? A. A garage.

Q. What number Communipaw Avenue is that? A. 835-7-9.

Q. Is that below West Side? A. Yes.

Q. You are now living in Rutherford? A. I am living in Hasbrouck Heights. My garage is in East Rutherford.

Q. You run a garage business? A. Yes. 40

Jerome Dunn, direct.

JEROME DUNN, sworn as a witness, testifies:

The Witness: At the time this lease was entered into between McCullough and Nelligan it was understood—

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Mr. Townsend: I think I should know what counsel's questions are going to be.

The Court: That is entirely right. Otherwise you could not object to the question. You shall have to ask yourself questions.

Q. At the time of the drawing and execution of this lease and the proceedings beforehand and since then, did you represent William McCullough? A. The answer is, yes.

20

Q. During that time did you have any conversations with Mr. Berkeley, the Vice-President of A. Makray, Incorporated?

Mr. Townsend: I object as leading.

The Court: I will overrule the objection.

A. Yes.

Q. Was anything said in connection with the \$1,050 security for the carrying out of the terms of the lease?

30

Mr. Townsend: I object as incompetent and immaterial.

The Court: Do you claim Mr. Berkeley did not have authority to represent the plaintiff?

Mr. Townsend: Oh no. When was this conversation?

The Witness: About the 15th of May—or just before.

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Mr. Townsend: I object as incompetent and immaterial, and their agreements were reduced to writing afterwards.

Jerome Dunn, direct.

The Court: The defense of fraud allows it to go in. I will allow it.

Mr. Townsend: Exception.

A. Yes.

Q. State the conversations.

10

The Court: This is with whom?

A. Mr. Berkeley, Vice-President of A. Makray, Incorporated.

Mr. Townsend: Who was present at the time?

The Witness: No one else, just myself.

Mr. Townsend: Where was this?

The Witness: At my office.

Mr. Townsend: I do not yet see how it is material or relevant. 20

The Court: I understood from the manner in which you suggested this question that the defendant was there.

The Witness: I represented the defendant.

Mr. Townsend: I object on the ground it would be a self serving declaration.

The Court: Here we have the plaintiff represented and the defendant represented, both by representatives. I presume statements made between them would be binding upon the two parties. 30

The Witness: I stated to Mr. Berkeley that under no condition would this lease be entered into unless we received \$1,050 to guarantee the carrying out of the terms of this lease. I made that statement because I had full authority from my client to make

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Jerome Dunn, direct.

it, having obtained that authority previous to that time.

Mr. Townsend: Was that authority in writing?

The Witness: No, it was not.

10 Q. When Mr. Nelligan entered into possession did you make any demand for the sum of \$1,050 security? A. I did.

(Testimony continues on next page.)

Mr. Townsend: What date?

20 The Witness: On August the 31st I met Mr. Nelligan on Communipaw Avenue, I being on my way down to see him at the time, and he was about to enter the Fourth Precinct Police station to obtain, as he told me, permission—

The Court: Never mind.

The Witness: I then asked him, and in fact he went down to his garage later and he promised me he would be in my office the following Tuesday, which was the day after Labor Day.

30 Q. At any time thereafter did you make any demands upon Mr. Nelligan for the money? A. Yes, I had conversations with him and his lawyers, Barrison and Kriegel in connection with this matter and was just stalled along from day to day and promised the \$1,050.

Mr. Townsend: I object to that and ask that it be stricken out.

The Court: The "stalled along"?

Mr. Townsend: Yes.

40 The Court: I will strike out the "stalled along." It is a conclusion.

Jerome Dunn, direct.

Mr. Townsend: And the conversation with Barrison and Kriegel?

The Court: Yes, I'll strike that out too.

A. I had several conversations with Mr. Nelligan, and on each occasion he promised me that he would pay the money on another occasion—
at another time.

10

Mr. Townsend: I ask that that be stricken out on the ground it is a conversation after September the 1st, outside the presence of this plaintiff.

The Court: Yes, it would not be binding on the plaintiff—any extension of time.

Mr. Dunn: I will consent that that be stricken out.

20

The Court: Strike that out.

Q. Did you ever have any conversations with Mr. Berkeley of A. Makray, Incorporated, after September the 1st, in connection with the \$1,050 security for rent? A. Yes; on several occasions I requested him to obtain this money from Mr. Nelligan and deliver it to me and he promised me that he would.

Mr. Townsend: I ask that that be stricken out as having no bearing on this case.

30

The Court: You waited until it was in.

Mr. Townsend: I could not object to the question; it was competent; but I submit his statement should be stricken out.

The Court: I will strike that out.

Q. Did you know at any time of the agreement entered into between Mr. Nelligan and A. Makray, Incorporated?

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Jerome Dunn, cross.

Mr. Townsend: I object as immaterial.

The Court: I will allow that.

A. No, I did not.

10 Q. What was the first time you knew about this agreement?

Mr. Townsend: I object as immaterial.

The Court: I will overrule that objection.

A. When Mr. McCullough told me about it in September.

Mr. Dunn: That is all. Cross examine.

Cross examination by Mr. Townsend:

20 Q. How do you fix the date as having met Mr. Nelligan on the street on the 31st of August? A. Well, I was called up by Mr. McCullough and told to go down and see how Mr. Langan, the contractor, was making out with the work he was doing there.

Q. My question is, how do you fix the date of August the 31st instead of August the 28th or August the fourth or fifth? A. I am trying to explain that, how I come to fix that date.

30 Q. Is it because you went to the premises on that date? A. Exactly, because under the terms of the lease Mr. Nelligan was to come in the next day, which was the first of September. I did not know Mr. Nelligan was in there.

Q. That was one thing Mr. McCullough had not told you? A. No one told me.

Q. When you got there you say on the 31st he promised to pay you the money, when? A. The day after Labor Day.

40 Q. That was how many days away? A. About four or five days I think it was.

Jerome Dunn, cross.

Q. Is that all you said to him at that time? A. I told him we insisted upon receiving it at that time, that we had gone to considerable expense in fixing this garage.

Q. So what you told him was that you insisted upon receiving that deposit on the following Tuesday? A. Exactly. 10

Q. Which was the Tuesday after Labor Day? A. Exactly, yes.

Q. And he said he would have it for you then, didn't he? A. He did, yes.

Q. And that is all you said to him? A. I explained to him—

Q. I mean about that fact. A. Yes.

Q. And you were fully authorized by Mr. McCullough at that time to act for him in the premises? A. Oh yes, surely. 20

Q. As his attorney. And to make that demand and act whichever way you thought best? A. Exactly, surely.

Q. Whichever way your judgment dictated? A. Exactly, the way my judgment dictated, yes.

Q. You knew at that time, on August the 31st, that he was moving in, didn't you? A. I think he was moving in that time. Yes, he was moving in, surely, because I went back with him to the garage. 30

Q. And you knew that he was in there on September the first, didn't you? A. Not on August the 31st, I didn't know that.

Q. But you did know that he was going in the next day. A. That he was moving in at that time, yes. The repairs were going on at the same time.

James A. Nelligan, cross.

JAMES A. NELLIGAN, recalled.

Further cross examination by Mr. Townsend:

The Court: Is this an omitted question?

10 Mr. Townsend: It is not an omitted question, but it is a question about this dispossess that was served on him.

The Court: It is for further cross examination?

Mr. Townsend: Yes.

Q. Have you had an opportunity to refresh your recollection as to when this dispossess was served on you? A. No, I have not.

20 Q. Can you refresh your recollection? A. If I could look at the dispossess.

Mr. Dunn: I will produce the dispossess and admit it was October the 16th.

Q. That changes your statement then; it was served on October the 16th and not September 15th? A. If that is the date of the notice and that was the notice that was sent to me, that changes it in that particular.

Q. That is what your counsel says.

30 (Defendant rests.)

LANDON BERKELEY, recalled.

Direct examination by Mr. Townsend:

Q. On August the 31st, did Mr. McCullough or Mr. Nelligan come to your office for this \$1,050? A. Not while I was there.

40 Q. Did he at any time tender you his note for six months? A. Never.

*Eugene Makray, direct-cross.**Cross examination by Mr. Dunn:*

Q. Do you know whether he called your office or not? A. Mr. Makray told me he had called subsequent to that time, several days later, just when I cannot place.

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EUGENE MAKRAY, sworn as a witness, testifies:

Direct examination by Mr. Townsend:

Q. On August 31 did Mr. Nelligan come to your office at all? A. He did not.

Cross examination by Mr. Dunn:

Q. Were you in the office all day August 31? A. I really cannot say whether I was in the office all day on October 31. I probably went out to lunch. There was always somebody in the office.

20

Q. But you were not there all day, were you? A. Pretty much all day, business hours.

Q. How do you happen to remember that at the present time? A. Very clearly. I was waiting for Mr. Nelligan. I am the man that signs the checks.

Q. Did you have a check waiting for him? A. Yes.

30

The Court: So he could have gotten this money you promised to loan him if he had called?

A. Yes.

Q. Did he ever call after that or telephone? A. Mr. Nelligan telephoned about—well, the exact date I cannot remember. It may have been the third or fourth of September. At any rate it was three or four or five days after he was supposed to call. He telephoned and asked for Mr. Ber-

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Eugene Makray, cross.

keley. I spoke to him and told him to get in touch with Mr. Sleigh, that Mr. Sleigh was handling that matter.

10 Q. If Mr. Nelligan called on the telephone August 31 and asked for Mr. Berkeley would he have gotten you? A. Not unless he made his wishes known, if Mr. Berkeley was not there.

Q. Yes, I mean if Mr. Berkeley was not there.
A. Yes.

GEORGE SLEIGH, sworn as a witness, testifies:

Direct examination by Mr. Townsend:

Q. You are a member of the bar of New Jersey?
A. Yes, I am.

20 Q. You are my partner? A. Yes.

Q. Did Mr. Nelligan at any time call to see you in September or in August, 1925? A. No, sir, he did not.

(No cross examination.)

(Testimony closed.)

30 Mr. Townsend: I move for a direction of a verdict in favor of the plaintiff on the ground it appears under the evidence that this money is due and owing and the plaintiff is entitled to it. No defense has been made out of fraud or any defense to this action. The fact is the tenant is in possession; the fact is, as now appears, that Mr. Dunn let him in. Mr. Dunn, who drew this lease and knew all about it, let him move in on his agreement that he would put up this deposit "next Tuesday"—three or four days after September 1.

40 Mr. Dunn very conclusively waived the whole provision.

Charge.

The Court: I will deny the motion.

Mr. Townsend: Exception.

(Counsel summed up to the jury.)

The Court thereupon charged the jury as follows:

The Court: This action is brought by A. Makray, Inc., against William McCullough, to recover commission alleged to be due from this defendant to the plaintiff upon a written brokerage contract dated May 29, 1925, wherein it is provided that Mr. McCullough is to pay A. Makray, Incorporated, five per cent. commission upon a total rental for a period of five years amounting to a commission of \$1,050, for securing James A. Nelligan as a tenant of premises belonging to this defendant. The burden of proof, gentlemen, rests upon the plaintiff to prove the brokerage contract and the breach thereof to your satisfaction by a fair preponderance of the evidence. Of course, if this corporation has not done so it is not entitled to your verdict.

Now, the plaintiff claims that even though the contract provided for the payment of this five per cent. brokerage on or before the tenant took possession, nevertheless even though it is a fact that the security for the rent, this sum which was to be put up as security for the rent, was never deposited, that that provision was waived by this defendant. The burden rests upon the plaintiff to prove that to your satisfaction by the fair preponderance of the evidence in this case.

The reason, gentlemen, that a waiver would be an excuse for the non-payment of this deposit money as agreed for the rent is that that was a matter exclusively between the tenant and the

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Charge.

landlord, and waiver has been defined to be an abandonment or relinquishment of a known right. And so in this case, gentlemen, if you think the security was not deposited when the tenant went into possession of these premises, that being the date fixed for the payment of the brokerage commission for securing the tenant, nevertheless if that provision was waived by the defendant, of course, since it was a voluntary act on the part of the defendant, he could not set up the fact that this deposit for security was not paid when the tenant went into possession as a defense. However, the defendant insists that there was not a waiver, and he further insists that this brokerage firm, the plaintiff in this case, acted in fraud of the owner's rights; he claims that this broker acted in bad faith. That is practically what the charge means as the amendment has been put on the record. That defense was not set up in the answer as originally filed, but as you will recall, an amendment was allowed by the Court during the trial.

The burden rests upon the defendant to prove bad faith on the part of the plaintiff and to prove it by a fair preponderance of the evidence if he would have the benefit of such defense. If he has not proved it by that degree of proof he is not entitled to have the benefit of such defense.

Now, it is the law that the first duty of the agent is to exercise good faith toward his principal, and failing this he forfeits his right to commission. As a general rule an agent who is guilty of fraud upon his principal in the transaction of his agency is not entitled to compensation for his services; that is he generally forfeits compensation where he is guilty of misrepresentation or concealment or non-disclosure with reference to facts material to the

Charge.

subject-matter of the agency, and a contract to pay a fixed compensation may likewise be invalidated by the agent's non-disclosure of material facts. You will notice, gentlemen, that throughout the statement of that duty of an agent runs the word "material." An agent is not obliged to disclose to his principal an immaterial fact. And so, gentlemen, the mere fact in this case that there may have been an agreement whereby this plaintiff was to loan to the prospective tenant of this defendant the money required as security for the costs, standing alone and of itself would not be a fraud if it were not disclosed. We have to look deeper than that, because it is elementary that a tenant who wishes for some reason or other to borrow money with which to pay security for costs may look where he pleases to borrow it. It is not bad faith on the part of the agent to lend it. The question is, has the defendant satisfied you by the evidence in this case? And that is all you can base your verdict upon, and the inferences that naturally arise therefrom—as to whether or not this agent, the plaintiff in this case was guilty of bad faith in the transaction with respect to the rights of his principal. If he was not, and the payment of the security for costs at the time when the tenant went into possession was waived, then this plaintiff is entitled to the verdict and entitled to the sum of \$1,050 with interest from September 1, 1925. But, if on the other hand you find that there was not a waiver of that provision requiring the payment of security for costs by Mr. Nelligan on or before his taking possession of this property—I think it is expressed in the lease of September 1, 1925,—why then of course that provision of the brokerage agreement has never been fulfilled.

Charge.

Now ordinarily, gentlemen, a broker earns a commission when he produces a tenant ready, willing and able to rent the property upon the terms fixed by the landlord, in the contract of brokerage, or upon such terms as he may otherwise agree to; but where the broker has produced a tenant and that tenant has been accepted by the landlord in that they enter into a written lease, the landlord takes the responsibility then as to the capacity of the tenant to make good under the terms of his lease, unless there has been some bad faith on the part of the agent under the definition I have given you of bad faith and fraud. So I say if you find in this case that there was a waiver of that provision with respect to the time when the deposit for security for costs was to be paid and that there was bad faith on the part of this agent, then the plaintiff is entitled to your verdict for \$1,050 with interest from September 1, 1925. If on the other hand the defendant has established the defense hereby a fair preponderance of the evidence, and that there was bad faith on the part of the agent, or fraud, as it has been referred to, and you further find that the plaintiff has not shown that there was a waiver here in the manner I have stated he must show in order for you to find a verdict, then of course the defendant is entitled to a verdict against the plaintiff of no cause of action.

It has been suggested that I tell you that the interest as computed by the attorney for the plaintiff is \$36.75. I do not state that as the exact amount which you may find if you find for the plaintiff, but it has been suggested that that is the exact sum.

Exhibit P-2.

THIS INDENTURE, made the 29th day of May, 1925, between WILLIAM McCULLOUGH, of the Town of Little Ferry, in the County of Bergen and State of New Jersey, party of the first part, and JAMES A. NELLIGAN, of the City of Jersey City, in the County of Hudson and State of New Jersey, party of the second part: 10

WITNESSETH, That the said party of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained, on the part and behalf of the party of the second part, to be paid, kept and performed, hath leased, demised and to farm let, and by these presents doth lease, demise and to farm let, unto the said party of the second part: All that certain lot, plot and premises together with the buildings erected thereon known as No. 835-839 Communipaw Avenue, in the City of Jersey City, in the County of Hudson and State of New Jersey. 20

To have and to hold the said above mentioned and described premises, with the appurtenances, unto the said party of the second part for a period of five (5) years, thence next ensuing, beginning from the first day of September, 1925, and fully to be complete and ended, yielding and paying therefor, unto the said party of the first part, a yearly rental in the sum of forty-two hundred (\$4200.00) Dollars, to be paid in equal monthly installments of three hundred and fifty (\$350.00) dollars, payable in advance on the first day of each and every month, and the party of the second part is also to pay the water rents on the said premises as and when the same become due and payable; provided always, nevertheless, that if the yearly rent above 30

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Exhibits.

reserved or the water rents, or any part thereof, shall be behind or unpaid on any day of payment whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants herein contained, on the part and behalf of the said party of the second part, to be paid, kept and performed, then and from thenceforth it shall and may be lawful for the said party of the first part, into and upon the said demised premises and every part thereof, wholly to re-enter, and the same to have again, repossess and enjoy, as in his first and former estate, anything hereinabove contained to the contrary thereof in anywise notwithstanding.

The party of the second part agrees to pay to the party of the first part at the time of making and executing this agreement of letting the sum of three hundred and fifty (\$350.00) dollars, which said sum shall be applied against the payment of rent for the first month of the original term of this lease, and the said party of the second part is to pay to the said party of the first part on or before the 31st day of August, 1925, the sum of one thousand and fifty (\$1050.00) dollars as and for security for the performance and carrying out of the covenants of this lease and the payment of rent as aforesaid by the said party of the second part, and in the event the said party of the second part fully performs and carries out the covenants and agreements herein contained and pays the rents and water rents hereinbefore provided and in the manner hereinabove set forth, then the said party of the first part will apply the said sum of one thousand and fifty (\$1050) dollars as and for payment of the rent for the last (3) months of the original term of this lease, otherwise the said party of the first part is to retain the said deposit of \$1050.00

Exhibits.

as and for liquidated damages for any breach of this lease or any covenant thereof.

And the said party of the second part, doth covenant and agree, to and with the said party of the first part, by these presents, that the said party of the second part, shall and will, yearly, and every year, during the term hereby granted, well and truly pay, or cause to be paid, unto the said parties of the first part the said yearly rent above reserved, on the days, and in the manner, limited and prescribed, as aforesaid, for the payment thereof, together with the water rents, as aforesaid, without any deduction, fraud, or delay, according to the true intent and meaning of these presents; and that on the last day of the said term, or other sooner determination of the estate hereby granted, the said party of the second part shall and will peaceably and quietly leave, surrender and yield up, unto the said party of the first part all and singular the said demised premises. And the said party of the first part, doth covenant and agree, by these presents, that the said party of the second part, paying the said yearly rent above reserved, and performing the covenants and agreements herein mentioned on his part, the said party of the second part shall and may at all times during the said term hereby granted, peaceably and quietly have, hold and enjoy the said demised premises, without any let, suit, trouble or hindrances, of or from the said party of the first part, or any other person or persons whomsoever.

And the said party of the second part further covenants, that he will permit the said party of the first part or his agents, to enter said premises, for the purpose of making repairs or alterations;

Exhibits.

and also, that if the said premises, or any part thereof, shall become vacant during the said term, the said party of the first part may re-enter the same, by either force or otherwise, without being liable to any prosecution therefor; and re-let the
10 said premises as the agent of the said party of the second part, and receive the rent thereof, applying the same, first to the payment of such expense as they may be put to in re-entering, and then to the payment of the rent due by these presents; and the balance, if any, to be paid over to the said party of the second part.

And it is further agreed, that in case the building on said premises shall, without any fault or neglect on his part, be destroyed by fire or otherwise, or be so injured by the elements, or any
20 other cause, as to be untenable and unfit for occupancy, and in the event that after a period of ninety (90) days from the date of the fire or other damaging cause the building has not been rebuilt or repaired so that the same is in as good condition as the premises were prior to such fire or other damaging cause, the tenant shall not be liable or bound to pay to the landlord, lessors or owners thereof the said rent, and may quit and surrender
30 possession of the premises, and the covenants and agreements herein contained shall then and in that event come to an end.

In the event that the building is rebuilt or repaired so that the same is in as good condition as the said premises were prior to the first or other
damaging cause, within a period of ninety (90) days, the lease shall continue in full force and effect, except, that the tenant shall be relieved of
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Exhibits.

the payment of rent during the time he was deprived of the full use and occupancy of the premises.

During the term of this lease or any renewals thereof, the fire insurance on the buildings shall be carried by the owners of the building.

10

The party of the second part shall, during the term of the lease, keep and maintain the said premises and sidewalks, and all fixtures and additions thereto in good and substantial repair, except ordinary wear and tear to premises, and shall have the privilege of making alterations, additions or improvements to the building or buildings standing on the leased premises in the event that such alterations, additions and improvements shall not decrease the value of the building as now constructed, and provided that he shall first submit a sketch or plan and specifications indicating the nature and extent of the work to be done to the party of the first part, such work to be subject to the written approval of the party of the first part.

20

All liability insurance and sidewalk liability insurance is to be carried by the party of the second part, at his expense and must be effected by the party of the second part at or before taking possession of the said premises under this lease. In the event, by reason of the occupancy of the party of the second part, the fire insurance rate on the said building is increased during the tenancy of the party of the second part, such increase in rate is to be paid by the said party of the second part.

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It is further covenanted and agreed that the party of the first part will well and truly make all of the repairs and alterations designated in Schedule A, attached hereto and made a part hereof,

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Exhibits.

10 prior to the first day of August, 1925, and in the event of his failure to complete the said work, on or before the said first day of August, 1925, the party of the second part may at his option either complete the said work and deduct the reasonable cost thereof from the rent herein reserved, or he may surrender this lease and recover from the party of the first part, by way of damages, any and all moneys which he may have paid to the party of the first part under the terms of this agreement.

20 Throughout the entire term of the lease and forever afterwards, the party of the second part shall save harmless the owner of the building for and against any and all liability arising from injury during the said term to persons or property occasioned wholly, in part, by any act or commission by the party of the second part, or of the guests, servants, agents or under-tenants of the said party of the second part. And the party of the second part shall take out and deliver to the party of the first part, insurance policies in an adequate amount from an insurance company satisfactory to the party of the first part for the liability mentioned herein, and shall pay the
30 premiums thereon, in addition to the rent reserved herein.

The party of the second part may, with the written consent of the party of the first part first obtained, assign, underlet, or sublet the said demised premises.

40 All improvements of a permanent nature made by the party of the second part to or upon the demised premises shall when made at once be deemed to attach to the freehold and at the end or expiration of the term shall be surrendered

Exhibits.

to the owners in as good order and condition as they were when installed, reasonable wear and tear excepted. Fixtures shall be deemed to be movable when they may be removed without damaging the realty or leaving it in such condition as to require repairs.

10

The party of the second part shall have the privilege to renew this lease, at the monthly rental of \$400.00 per month, and the same covenants and conditions at its expiration; for a succeeding period of five (5) years, and in the event that the party of the second part shall exercise this option or privilege, he shall give the party of the first part notice in writing to this effect not later than May 1st, 1930.

The party of the second part shall have the option at any time during the first three years of this lease to purchase the demised premises for the sum of Fifty Thousand (\$50,000.00) Dollars, to be paid as follows: Ten thousand (\$10,000.00) Dollars in cash, and the balance, Forty Thousand (\$40,000.00) Dollars on mortgage to run for a period of ten years, bearing interest at the rate of 6% per annum and during the remainder of this lease, and any renewal there of the tenant shall have first option to purchase on the same terms.

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It is further mutually covenanted and agreed between the parties hereto that the covenants and conditions contained in this lease shall bind the respective parties, and their heirs, executors, administrators and assigns.

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Exhibits.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

WILLIAM McCULLOUGH (L. S.)

JAMES A. NELLIGAN (L. S.)

10

Signed, sealed and delivered in
the presence of
JEROME J. DUNN.

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

20

BE IT REMEMBERED, that on this 29th day of May, in the year of our Lord, One Thousand Nine Hundred and twenty-five, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared WILLIAM McCULLOUGH and JAMES A. NELLIGAN, who, I am satisfied, are the parties mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they, signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

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JEROME J. DUNN,
Master in Chancery of New Jersey.

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Schedule A.

The landlord, the party of the first part, hereby agrees to well and truly make and execute the following described repairs and alterations to the demised premises, the said work to be completed on or before August 1st, 1925:

Heating Plant: To be overhauled and put in first class condition. 10

The center doors to be replaced with doors having skylight glass from top to half way to ground.

The easterly and westerly doors to be moved and replaced by show windows.

Floor to be leveled with smooth concrete.

Ten skylights 6' x 8' each to be placed, five on the easterly and five on the westerly side of the roof.

A finishing room of approximately 25' x 45' to be constructed in southwest corner of building, of single tongue and grooved roofer boards. This is to be equipped with sliding doors of sufficient size and quality to insure being able to move cars in and out at all times. 20

A spray room of approximately 25' x 57' to be constructed in southeast or northeast corner of building of single tongue and grooved roofer boards. To be divided into four sections of equal size not less than 14' x 25' each. 30

A door 3' x 7' west of center doors as entrance to office.

WILLIAM McCULLOUGH,
Landlord.

JAMES A. NELLIGAN,
Tenant.

Exhibit D-1.

A. MAKRAY, INC.

REAL ESTATE

THE TRUST COMPANY OF NEW JERSEY BUILDING

SIP AND BERGEN AVENUES

At Summit Avenue Tube Station

10

TELEPHONES
BERGEN 7806-2868

JERSEY CITY, N. J.
May 29, 1925.

Mr. James A. Nelligan,
Jersey City, N. J.

Dear Sir:

20

This will serve to confirm our recent conversation with respect to advance of moneys to you.

30

We will loan to you the sum of One Thousand Fifty (\$1,050.00) Dollars on August 31st, 1925, for which you will deliver to us your promissory note to bear interest at six percent, to fall due six months from August 31st, 1925. This loan will be made to you only upon condition that you use it for the purpose of paying to William McCullough the sum required under the terms of a lease executed between McCullough and yourself, as security for rental, concerning premises #835-839 Communipaw Avenue, City.

If for any reason you do not enter into possession of the premises on September 1st, 1925, or a controversy arises whereby the date of the payment of security of rental to Mr. McCullough by you is postponed, this offer is null and void.

If, on the due date of the note, you do not wish to pay the same in full, we will accept the pay-

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Exhibits.

ment of One Hundred (\$100.00) Dollars on account of the principal and a new note for the balance for another period of six months. We will extend to you the same privilege at the expiration of the renewal note and continue to do so until the indebtedness is fully paid.

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Very truly yours,

A. MAKRAY, INC.,
L. C. BERKELEY,
Vice-President.

LB:DW

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