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46 FEB. 7. 1928

Osborne Cornish & Scheck
attys for deft - respondent

ON BRIEFS

New Jersey Court of Errors and Appeals

MURRAY APFELBAUM, INC., a cor-
poration,
Plaintiff-Appellant,
vs.
KALMAN BERNSTEIN, trading as
K. Burns & Sons,
Defendant-Respondent.

*Action
at Law.
On Appeal
from Judg-
ment of
Non-suit.*

STATE OF CASE

ISRAEL B. GREENE,
Attorney for Plaintiff-Appellant.

OSBORNE, CORNISH & SCHECK,
Attorneys for Defendant-Respondent.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey State Library

INDEX

	PAGE
Notice and Grounds of Appeal	1
Summons	2
Complaint	3
Answer	6
Postea	7
Motion for a Non-suit	53
Motion Granted	55

TESTIMONY.

For Plaintiff.

Kalman Bernstein,	
direct examination.....	8
cross "	10
Barney Piken,	
direct examination.....	13
cross "	21
re-direct "	32
Isidore J. Auerbach,	
direct examination.....	33
cross "	38
Richard Flood, Jr.,	
direct examination.....	43
cross "	48
Murray Apfelbaum,	
direct examination.....	48
cross "	52
re-direct "	53

EXHIBITS.

	Off'd
P. 1. Lease, Kalman Bernstein and New Broad Company	9
P. 2. Agreement	10
P. 3. Lease, Defendant to Morris Lobel..	10
P. 4. Letter	16
P. 5. Letter	51

Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed October 12, 1927.

New Jersey Supreme Court

ESSEX COUNTY.

10

MURRAY APFELBAUM, INC., a corporation,

Plaintiff,

vs.

KALMAN BERNSTEIN, trading as
K. Burns & Sons,

Defendant.

*Action
at Law.*

*Notice and
Grounds of
Appeal.*

20

To Osborne, Cornish & Scheck, attorneys for defendant:

TAKE NOTICE that the plaintiff in the above-entitled cause appeals to the New Jersey Court of Errors and Appeals, from the judgment of non-suit entered in the above-entitled cause, in favor of the defendant and against the plaintiff on the following grounds:

1. Because the Supreme Court (Trial Judge) erred in directing a judgment of non-suit against the plaintiff, and in favor of the defendant, when thereunto moved by counsel for the defendant, whereas said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issue.

ISRAEL B. GREENE,
Attorney for Plaintiff-Appellant.

Dated October 11, 1927.

40

Summons.

SUMMONS.

10 The State of New Jersey to Kalman
 Bernstein, trading as K. Burns & Sons,
 (L. s.) YOU ARE SUMMONED to answer the an-
 nexed complaint of Murray Apfel-
 baum, Inc., a corporation, in an action
 at law in the New Jersey Supreme Court. AND
 TAKE NOTICE that unless you file your answer
 to said complaint with the Clerk of the said
 Supreme Court, at Trenton within twenty days
 after the service upon you of this writ, and the
 annexed complaint, the plaintiff may proceed in
 the suit and judgment may be entered against
 you.

20 WITNESS, WILLIAM S. GUMMERE, Justice of the
 New Jersey Supreme Court at Trenton, this 21st
 day of October, 1926.

EDWARD J. KELLEHER,
 Clerk.

ISRAEL B. GREENE,
 Attorney.

30

40

TELEPHONE MARKET 6119

November 16, 1927.

Mr. Israel B. Greene,

60 Park Place, Newark, N. J.

CASES ON APPEAL
 BRIEFS
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30 copies, State of Case -

Murray Apfelbaum, Inc.,

vs

Kalman Bernstein, trading as

K. Burns & Sons.

\$ 64.50

City of Newark) on the gross rentals and other

Complaint.

consideration paid by the purchaser of said leasehold, or by the tenant, as the case may be.

10 4. Plaintiff accepted said employment and in pursuance of said agreement, plaintiff, and, on or about July 27, 1925, did procure Morris Lobel, of the Town of Weehawken, Hudson County, New Jersey, as a tenant for said store, on the terms hereinafter mentioned, and the defendant accepted said tenant.

5. On May 1, 1926, the defendant and the said Morris Lobel entered into a written indenture of lease, whereby the defendant demised and let said premises to the said Lobel for a term of five years and two months, commencing on June 15, 1926, at the following annual rentals:

20 At the rate of \$14,500 per annum until October 1, 1926, and at the rate of \$15,000 per annum from October 1, 1926, to the end of the demised term, payable in equal monthly instalments on the first day of each and every month in advance, together with any additional rent which the defendant may become obligated to pay, under the terms of his indenture of lease from the New Broad Corporation, his landlord. That as
30 Lobel paid unto the defendant the sum of \$28,000 in cash.

6. Plaintiff has performed all the terms and conditions of the agreement by it undertaken.

40 7. There is due to the plaintiff, from the defendant, for said services, a commission of \$5,481.65, the same being the usual and customary commission for such services, fixed by the Real Estate Board of the City of Newark, as follows:

Complaint.

10% commission on \$28,000 cash consideration	\$2,800.00	
3 1/2% commission for total rental for first 5 years of term (\$74,833)	2,619.15	
2 1/2% commission for rental for balance of term (2 months) (\$2,500)	62.50	
		10
Total commission	\$5,481.65	

8. Defendant has refused to pay said commission.

Plaintiff demands judgment for \$5,481.65 with interest thereon from May 1, 1926.

ISRAEL B. GREENE,
Attorney for Plaintiff.

20

30

40

Answer.

ANSWER.

Filed November 10, 1926.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

MURRAY APFELBAUM, INC., a corporation,

Plaintiff,

vs.

KALMAN BERNSTEIN, trading as K. Burns & Sons,

Defendant.

Action at Law.

Answer.

20

Defendant, residing in the City of East Orange, County of Essex and State of New Jersey, says that:

1. He admits paragraph one.
2. He denies the allegations of paragraphs two, three and four.
3. He admits paragraph five.
4. He denies that any agreement existed between him and the plaintiff as intimated in paragraph six, and denies the allegations of the said paragraph.
5. He denies the allegations of paragraph seven.
6. He admits that he has not paid plaintiff any commission and denies that any commission is due to the plaintiff.

OSBORNE, CORNISH & SCHECK,
Attorneys for Defendant.

40

Postea.

POSTEA.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

MURRAY APFELBAUM, INC., a corporation,

Plaintiff,

vs.

KALMAN BERNSTEIN, trading as K. Burns & Sons,

Defendant.

Action at Law.

Postea.

10

This case was tried before Judge Nelson Y. Dungan with a jury at the Essex Circuit on October 5, 1927. The plaintiff submitted its evidence, and the Court, being of the opinion that it was not sufficient to entitle the plaintiff to recover, ordered judgment of non-suit to be entered against it.

20

NELSON Y. DUNGAN,
Circuit Court Judge.

30

40

Kalman Bernstein, direct.

TESTIMONY.

NEW JERSEY SUPREME COURT.

Wednesday, October 5, 1927.

10

MURRAY APFELBAUM, INC., a corporation,

vs.

KALMAN BERNSTEIN, trading as K. Burns & Sons.

Action at Law.

Before Hon. Nelson Y. Dungan, *J.*, and a jury.

For the plaintiff appears Israel B. Greene.

20

For the defendant appear Osborne, Cornish & Scheck (by Emanuel P. Scheck).

(A jury is called and sworn.)

Mr. Greene opens in behalf of plaintiff.

Mr. Scheck opens in behalf of defendant.

KALMAN BERNSTEIN, sworn in behalf of plaintiff.

30

Direct examination by Mr. Greene.

Q Under what name did you trade in the jewelry business in 1925? A A. K. Burns & Son.

Q Where was the business located? A 641 Broad street, Newark.

Q And you had a store there? A I did.

Q What were the dimensions of your store?

A 14½, I believe, by 65 or 70 feet.

40

Q And you had a lease on the premises? A I did.

Kalman Bernstein, direct.

Q Whom from? A From the New Broad Company.

Q When did you enter into this lease? A 1921.

Q How many years did that lease have to run in July, 1925?

10

Mr. Scheck: I object on the ground that the lease speaks for itself.

Mr. Greene: I demanded the production of the lease.

(Defendant's counsel hands paper to plaintiff's counsel.)

Mr. Green: I have here and I offer in evidence the original lease between Kalman Bernstein and the New Broad Company dated March 31, 1921.

20

(The paper referred to is marked Ex. P. 1.)

Q Can you say offhand, approximately, how long this lease has to run?

The Court: Suppose you tell us what the term was.

Mr. Greene: The lease ran until the 30th day of September, 1941, at \$14,000 per annum to September 30, 1923, and \$14,500 from October 1, 1923, to September 30, 1926, and with the annual rental of \$15,000 from October 1, 1926, to September 30, 1931, and \$17,500 from October 1, 1931, to the end of the term.

30

Q Did you, on April 7, 1926, enter into an agreement with Mr. Morris Lobel for the leasing of this store? A I did.

40

Kalman Bernstein, cross.

Mr. Greene: I offer in evidence the original agreement between this defendant and Morris Lobel dated the 7th day of April, 1926.

(The paper referred to is marked Ex. P. 2.)

10

Q Did you, pursuant to that agreement, execute and deliver a lease for this store to Mr. Lobel on the 1st day of May, 1926? A I did.

Mr. Greene: I offer in evidence duplicate original of lease made by the defendant to Morris Lobel dated the first day of May, 1926.

(The paper referred to is marked Ex. P. 3.)

20

Q Have you paid any commission to any broker for effecting or consummating this lease? A I didn't.

Q And did you receive the sum of \$28,000 as stated in the agreement? A I did.

Q Besides the rental reserved in the lease? A I did.

30 *Cross examination by Mr. Scheck.*

Q I call your attention to the fact that in this agreement of April, 1926, there is a provision as to subletting and subdividing. Did you subdivide the corner building? A Yes, sir.

Mr. Greene: I object to that as not cross examination.

The Court: Objection overruled.

40

Witness: I did.

Kalman Bernstein, cross.

Q Did you assign or sublet the corner premises as one unit?

Mr. Greene: I object as not cross examination.

The Court: Overruled.

10

Witness: I didn't.

Mr. Greene: Your Honor will realize that there are two separate stores and commission is being asked on one. This corner store is an entirely different store and has nothing to do with this transaction on which commission is sued, so that it has no relevancy in this case at all. We are asking for a commission on 641 Broad street with reference to a lease which he subsequently bought in May, 1926.

20

The Court: It was entirely different property?

Mr. Greene: Yes.

Mr. Scheck: Excepting the lease and agreement with Lobel is based on this agreement which is offered in evidence and I want to bring out what is in this agreement. On the corner of Broad and New streets where Loew's theatre building is, there are two stores facing Broad north of the lobby into the theatre. Formerly those two stores were only one. There is a store which is south of the lobby which is 641 Broad street.

30

The Court: And they are both involved in the suit of March 31, 1921?

Mr. Scheck: No, sir, only the lease at 641, but this agreement provides that Mr. Bernstein should not assign his lease for

40

Kalman Bernstein, cross.

10 641 Broad street to Lobel unless he subdivides the corner store into two, so that he could move over and take one for himself. Mr. Bernstein bought a lease from a bankrupt firm on the corner of Broad and New. That was one big store. Mr. Bernstein had the store south of that. Mr. Lobel wanted to take from Mr. Bernstein his lease for that store south, but made this agreement—K. Burns says, “If I subdivide this store into two stores so I may have one for myself I will lease to you my present store.”

The Court: As a matter of fact, subsequent to that time they made a lease?

20 Mr. Scheck: That is also introduced. Then, regardless of what he said he need not do, he did do it.

The Court: I will sustain the objection.

Defendant’s counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 Mr. Greene: May I ask for an exception at this time in as much as the question was admitted over my objection?

The Court: Yes.

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

Exception noted as ground of appeal.

40 Q This agreement of April 19, 1926, which has been introduced in evidence provides for a consideration of about \$28,000 and an agreement on the part of Mr. Lobel to pay the rent which you had agreed to pay in your lease.

Barney Piken, direct.

Can you tell us how that consideration was arrived at?

Mr. Greene: I object to that as not proper cross examination.

The Court: Objection sustained.

10 Defendant’s counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

BARNEY PIKEN, sworn in behalf of plaintiff.

Direct examination by Mr. Greene.

Q You are a licensed real estate broker of the State of New Jersey? A I am. 20

Q In 1925 were you employed by Murray Apfelbaum, Incorporated, real estate brokers, plaintiff in this case? A I was.

Q Did Mr. Bernstein, the defendant in this suit, know that you were associated with that company?

Objected to.

Objection sustained. 30

Q Did you in 1925 know Mr. Bernstein, the defendant in this suit? A I did.

Q How did you come to know him? A I have known him a good many years. I worked for him before I went into the real estate business.

Q In July, 1925, did you receive authorization from Mr. Bernstein to lease this store? A I did. 40

Barney Piken, direct.

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

10 Q Where did you have a conversation with him? A In his store, 641 Broad street.

Q On what date was that? A July 15, 1925.

Q Do you remember what day of the week that was? A I don't know.

Q What was the conversation? A I had been in the habit of stopping in and talking to Mr. Bernstein and saying, "Hello," to him, when I passed in the neighborhood, I wanted to do business as to his store, I wanted a proposition definitely. He said he would take \$30,000.00, the value—he gave me the dimensions of the store. I noted them.

20 Q What were they? A 14½ feet front, 65 feet deep and balcony across the rear of the store and a selling basement the same size as the store, the same size as the store, 14½ by 65.

30 Q What other terms did he want or mention? A \$30,000 a year rental over the period of 16½ years that he had to go on his original lease. He wanted a cash security of \$15,000. He wouldn't give up possession of the place until after his Christmas season, some time in January.

Q Was anything said as to the use to which that store would be put? A Not for jewelry and not to conflict with any of the existing tenancies in the building.

40 Q What did you say to that proposition? A I thought it was negotiable and asked him

Barney Piken, direct.

if he meant business, and he said he did, and I said we would be entitled to our commissions if we make that deal, and he said he would be glad to pay it if we made a deal.

Q Did you specify the commission? A The Real Estate Board Commission. There is only one commission. 10

Q What? A Three and a half per cent, on the first three years and two and a half on the balance, on the sixteen year lease, where a lease is only ten years or under it is three and a half on the first five years and two and a half on the balance.

Q Did you figure the approximate commission at the time? A I did.

Q What did it run up to? A In the neighborhood of \$13,000. 20

Q Was anything said about the rent, whether you thought it was fair or high or low? A He said at that price he would do business. He said if I couldn't get him that price I could get him very close to it, so that the price was reasonable or that he would have something tangible to work on.

Q What did you do? A I tried to get him a proposition. 30

Q Did you get any paper from him, any authorization? A Yes, sir.

Q (Showing witness paper.) I show you a copy of a letter addressed to K. Burns & Son, 641 Broad street, and ask you what this is? A This is a letter I dictated confirming the proposition and had sent to Mr. Bernstein.

(The paper referred to is marked Ex. P. 4 for identification.) 40

Barney Piken, direct.

Mr. Greene: Pursuant to a demand, I ask now for the production of the original letter.

Q Is this the only letter you sent to K. Burns & Son? A It is.

10 Q Did Mr. Bernstein ever tell you whether he received it or not? A Yes.

Q When? A When we had a conference in our office July 27th.

Q What did he say with respect to this letter? A When he came in the office and he was presented to Mr. Lobel, Mr. Auerbach and Mr. Apfelbaum, I think it was Mr. Apfelbaum who opened it. He said, "You have my proposition, you have my proposition; why ask now?"

20 Mr. Greene: I offer in evidence Ex. P. 4 for identification.
(Marked Ex. P. 4.)

Q You dictated the letter yourself? A I did.

Q I notice that in this letter you speak of the authorization made the day before the letter. Were you certain as to the exact date? A The letter would be correct.

30 Q During the conversation did you tell Mr. Bernstein that you were associated with Murray Apfelbaum, Inc.? A I did.

Q When was the next time you saw Mr. Bernstein? A I had seen him once or twice before we had this conference. It must have been within the following week.

40 Q What efforts, if any, did you make, or the office of the plaintiff make to obtain a tenant for the store? A I personally negotiated with Klinghoffer, who ran the millinery store—

Barney Piken, direct.

Mr. Scheck: I object. That has nothing to do with the lease in question.

The Court: The objection will be overruled.

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

Exception noted as ground of appeal. 10

Witness: Klinghoffer and the Empire Shoe and Kay's Millinery, and Misroch, who ran Stevens' store on Broad street near Academy, they were all looking for new locations, and I tried to interest them.

Q You had these people listed in your office?
A I knew them personally and went to see them personally.

Q Did you act with any other brokers about this store? A We did. 20

Q With whom? A Kislak, of Hoboken.

Q Does the office of the plaintiff specialize in any particular kind of locations? A Central property, both leasing and selling.

Q What happened on July 27th when this conference was held in Mr. Apfelbaum's office? Were you present? A I was.

Q Who else were present? A Flood, of Kislak's office and Mr. Auerbach, both of whom handled chain store property, and Mr. Apfelbaum and young Apfelbaum—but he wasn't present in the conference—and myself. 30

Q Who brought Mr. Bernstein up to the office? A When Mr. Lobel arrived with Mr. Auerbach and Mr. Flood, I called K. B. and he came to the office—

Q Speak of the full name. A I called him and asked him to come to the office and we 40

Barney Piken, direct.

waited some time and I knew he was delinquent in keeping appointments—

The Court: That will be stricken out.

Witness: I asked Mr. Flood to go down to the store and bring Mr. Bernstein up.

10

Q When was it he came to the office? A It was late morning, eleven or half-past eleven.

Q How long did this conference last? A Probably until one o'clock.

Q What was said at that conference? A We discussed the store.

Q First of all, was there an introduction? A There was. Mr. Apfelbaum introduced Mr. Bernstein to Mr. Flood and Mr. Auerbach.

20 Q Anything said at the time of the introduction? A Just the ordinary greetings.

Q What were they? A "Glad to know you", "How do you do?" Shook hands.

Q What were the propositions that were offered? A Mr. Apfelbaum asked Mr. Bernstein for his proposition— "What can we do for you, what can we do to make this deal?" He said, "You have got my proposition. Barney has it. You confirmed it. I talk about my proposition and now you must have it." And Mr. Apfelbaum said he thought it was a little high, "Couldn't we negotiate that thing? We have got a buyer who is ready and willing and able to do business and he is responsible." And after arguing pro and con Mr. Lobel offered \$25,000 a year for that store. Later he came to \$26,000 a year and Mr. Bernstein came down to twenty-eight, and it was left that way. We tried to arrange it so there would be a lower figure at the beginning and

40

Barney Piken, direct.

increase it at the end so that we could get the average. He wouldn't do that. The best proposition he offered was \$26,000. He was supposed to pay the \$15,000 securities in cash.

Q Was anything said at that meeting with respect to the commissions and why the \$15,000 security was demanded? A I am trying to recall whether that was mentioned. I don't recall that it was.

10

Q What was the upshot or result of this conference? A Mr. Lobel was trying to keep in contact with Mr. Auerbach and Mr. Flood regarding that. At present he couldn't see his way clear to go over \$26,000, but if he could arrange it he would pay the \$28,000. He wasn't satisfied at that time to pay \$28,000.

Q And was any time set for further negotiations or conference? A Nothing except that we were to hear within a few days.

20

Q What efforts, if any, did you make after this conference to either bring the parties together again or interest someone else? A I think Mr. Lobel said that he had to talk to a brother-in-law—I am not sure of that.

Q (Question read.) A We did get in touch with Kislak's office, we couldn't get to Lobel. We kept in touch with Mr. Auerbach and Mr. Flood.

30

Q Did you report to Mr. Bernstein? A Certainly.

Q What did you report to him and when? A From time to time I would step in there within that week saying that we were expecting word from Kislak's office, we haven't heard yet, they haven't been told yet whether or not Mr. Lobel agreed to the figures, simply waiting, marking time.

40

Barney Piken, direct.

Q How long a period of time did you keep in communication with Mr. Bernstein or Mr. Auerbach or Mr. Lobel?

10 Mr. Scheck: I object to that. That question is too broad. It ought to be confined to either one or the other of these two people.

The Court: The objection will be overruled.

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

Exception noted as ground of appeal.

20 A Mr. Lobel, I couldn't get in touch with at all. That was Mr. Auerbach's and Mr. Flood's customer and I didn't talk directly at all. I called at his office two or three weeks after that for word. Mr. Bernstein I spoke with for over a month later because I had been dickering in the meanwhile with other people, the people I mentioned before, in addition to Kislak's office.

30 Q When was the first time that you learned that Mr. Bernstein had made the lease with Mr. Lobel? A Just about the time Mr. Lobel opened up—after he opened up.

Q What year and what month? A It was in 1926, I think, in the month of May.

Q Did you go over to see Mr. Bernstein? A I did.

Q When? A Immediately, as soon as I learned that Lobel was in the store.

40 Q What conversation did you have with Bernstein? A I told him that I see he made a deal with Lobel "why didn't you consult us again on the thing, he was our customer, we

Barney Piken, cross.

introduced him." He said that he made the deal himself, there was no commission paid, didn't intend to pay any commission.

Q Did you ask him what the terms of the lease were? A I did.

Q What did he say to that? A He wouldn't give them to me. 10

Q What did you say to that? A Well, if we couldn't get together on this amiably we would have to sue him for our commissions.

Q What did he say to that? A "Go ahead and sue."

Q Did he ever tell you that he had known Mr. Lobel before? A No.

Q Shook hands when they came together in Mr. Apfelbaum's office? A Absolutely. 20

Cross examination by Mr. Scheck.

Q When were you employed by Mr. Bernstein? A From November, 1921, to February, 1922, approximately.

Q Didn't you work for him after that? A Only once or twice at the Christmas seasons, helping out during the Christmas season.

Q During what year? A I couldn't tell you—yes, I can. It was before I worked for Apfelbaum and that was before 1924. 30

Q That means during the Christmas of '22 and '23? A Yes.

Q You went back and worked with Mr. Bernstein? A Just over Christmas, helping him out, Saturdays and afternoons.

Q For how long a period would those temporary employments be? A About two weeks.

Q You were working for Mr. Bernstein when Misroch had this store next door? A Yes, sir. 40

Barney Piken, cross.

Q Do you know whether Lobel had part of that store? A I don't remember.

Q Do you know whether he did or not? A I wouldn't know.

10 Q What sort of business did Misroch do there? A Ladies' dresses, coats.

Q Did you ever go in that store? A Never.

Q They had millinery there? A I believe they did.

Q Did they have shoes? A I don't know. They might or might not have had it.

Q What? A I don't know.

Q Do you know whether they had children's clothing? A I don't know.

20 Q You don't know who were the tenants of that store excepting Misroch? A I didn't know that he had any other tenants.

Q You didn't know anything about it? A No.

Q When you went back to work for Bernstein in 1926, who had the store next door, the corner store? A I don't recall.

Q You were there for two weeks? A No, sir. As a matter of fact, that year I worked in the Market street store nights.

30 Q You didn't work in the Broad street store? A Not that year.

Q How about '23? A The same thing, Market street.

Q You didn't work in the Broad street store either? A Only the four months that I worked for Mr. Bernstein.

Q During the Christmas season of '22 and '23 you didn't work in the Broad street store? A I didn't.

40 Q Did you ever go to the Broad street store? A Very likely.

Barney Piken, cross.

Q How frequently? A I worked probably four days during the season and I may have gone there once or twice during those four days?

Q Where were you employed? A In Market street.

Q By whom? A Mr. Abe Bernstein. 10

Q You are quite sure of that? A Positively.

Q You didn't go to the Broad street store to get your money? A No, sir.

Q Did you ever go up there to get any merchandise? A Perhaps.

Q Is it possible? A Yes; I said so before.

Q When you went there in 1922, you didn't notice who kept the corner store? A No, sir.

Q And you answered the same way as far as 1923 is concerned? A 1923, I am pretty sure 20 that Fain was in there. I know they were in there.

Q How do you know they were there? A I was in the real estate business at that time. It was my business to know that.

Q Christmas of 1923? A Yes, sir.

Q Weren't you in the real estate business in 1922? A Yes.

Q Why didn't you know it then? A Because 30 at that time I was handling dwelling property and not central property.

Q For whom? A Apfelbaum.

Q Were you interested in any central property in 1922? A South Broad street properties.

Q How far from Market street, how about 262 Market street? A Which one is that?

Q A building on Market street between Broad and Mulberry, the south side of the street? A Is that the Rich building?

Q Yes. A 1922? 40

Barney Piken, cross.

Q Yes. A I don't think that I had any interest in it at that time.

Q You confined your activities to selling stores on South Broad street? A No, I tried to negotiate several properties on South Broad street—not stores. I was unsuccessful at that
10 time. They were dwellings.

Q When you started in the real estate business you were not interested in stores centrally located? A Not at that time.

Q And because of that you didn't know who occupied the corner store; is that correct? A Absolutely.

Q When did you first go with Murray Apfelbaum? A 1924.

Q What month? A August—it was August,
20 1923.

Q You began then to work on Central property? A I want to make sure of that date. I have been with Mr. Apfelbaum three years, August will have been three years. That makes it 1924 that I have been with Mr. Apfelbaum.

Q How did you know in Christmas, 1923, that Fain had that corner store? A Only from publicity, from having passed there, from from—

Q Because you were then with Apfelbaum and in the real estate business and from publicity and passed up there? A Yes, sir.
30

Q Did you pass up there in 1922, and Misroch was there? A Yes, sir.

Q Did you see Misroch occupy it? A I assume he was there, if you say he was there.

Q Did you tell Mr. Bernstein what you were doing? A Certainly.

Q Did you tell him you were associated with Apfelbaum? A Yes, sir.

Q Did you tell him that on all of your visits?
40 A No.

Barney Piken, cross.

Q Do you remember testifying on the day when you stopped in to discuss this lease and those terms, the terms that are contained in your letter of July 25th, telling him that you were with Apfelbaum and did you testify that on the day you wrote this letter which has been introduced
10 in evidence you stopped in Mr. Bernstein's store and told him that you were associated with Mr. Apfelbaum? A I don't know that I testified on that day. I mentioned it—I may have or I may not have.

Q You don't recall whether or not you so testified on your direct examination? A I don't know that I specified on that particular day that it was mentioned.

Q When you first went with Mr. Apfelbaum on August 15, 1924, did you immediately go in
20 to see Mr. Bernstein about using his store? A I don't know that I did.

Q Do you remember when you first went in there for that purpose? A The exact day, no.

Q Do you know whether you went in there more than one time to discuss with him the question of leaving his store? A I discussed it with him at the time I went in there and I was in there probably a dozen times or more.

Q Can you recall the first time you discussed
30 this question with him? A No, I can't.

Q Do you know how soon after you joined Mr. Apfelbaum's firm that that was? A Definitely, no, but it must have been within a few weeks.

At 1 o'clock P. M. the Court took a recess for one hour.

Barney Piken, cross.

AFTER RECESS.

BARNEY PIKEN, resumes the stand in behalf of plaintiff.

Cross examination (continued) by Mr. Scheck.

10

Q You testified that Mr. Kislak was Mr. Lobel's broker? A They, as brokers, were seeking a location for Mr. Lobel.

Q And they engaged your firm to help them get a location for Mr. Lobel? A Yes, sir.

Q When they visited your office you had several locations to submit to them, didn't you? A No, we didn't.

Q Did you submit just the one location? A
20 Just the one.

Q Did your office, to your knowledge, submit any other location to Mr. Lobel at that conference? A Not to my knowledge.

Q You were there throughout the entire conference? A Exactly.

Q And you didn't hear any conversation about another store? A No, I didn't.

Q Is it possible there might have been some conversation you didn't hear? A No.
30

Objected to.

Q Did you hear any conversation about a store on South Broad street? A No, sir.

Q You telephoned to K. Burns? A Yes.

Q In the same room they were sitting? A Yes, sir.

Q And in that room was sitting Mr. Auerbach, Mr. Lobel and Mr. Flood? A And Mr. Apfelbaum.
40

Barney Piken, cross.

Q Did you send Mr. Flood or did you telephone first? A Telephoned first.

Q Why did you send Mr. Flood? A It was hard for him to get away because he had business in the store, and it was hard to get away, if somebody went after him it would be easier to get him away.
10

Q Do you recall who left the conference first, Mr. Bernstein or Mr. Lobel?

The Court: You mean after Mr. Bernstein had been there?

Mr. Scheck: Yes, after the conference was over.

A Mr. Bernstein left first.

Q How long after that did Mr. Lobel continue there? A I don't think it was very long afterwards.
20

Q How long? A Twenty minutes or so.

Q Were you in the room those twenty minutes? A Yes, sir.

Q During that twenty minutes was there anything said about a store in Paterson? A Not that I remember.

Q You are sure there was nothing said about a store in Paterson? A No, I am not sure of that.
30

Q You are giving your best recollection? A My best recollection.

Q Do you know whether anything was said about the store on South Broad street, Newark? A We were working on one location and we wouldn't switch to another location. My sense of reasoning tells me that we didn't talk about any other location.
40

Barney Piken, cross.

Q From your sense of reason and not your recollection? A Yes, sir.

Q And you are sure there was nothing said in that conference regarding the store in Pater-son or the store in South Broad street? A Quite possible.

10 Q Are you sure about that? A Quite.

Q Can you repeat to us the conversation at that conference when Mr. Bernstein came in concerning the introduction of Mr. Bernstein to Mr. Lobel? A Word for word, I cannot repeat it. I can give you the general sense of it. "Mr. Bernstein, this is Mr. Auerbach, this is Mr. Flood, and this is Mr. Lobel," and they all shook hands.

Q What did Mr. Bernstein say, if anything?

20 A "What can I do for you, gentleman?"

Q Did he say anything that would indicate that he had known Mr. Lobel? A No, sir.

Q There was nothing said to the effect, "Oh, I have known Mr. Lobel for a long time?" A No.

Q And you are sure Mr. Lobel did not say, "I know Mr. Bernstein, I have been a neighbor of his for quite some years"? A No, sir.

Q Nothing that you recall? A Yes, sir.

30 Q Can you recall the scene of the conversation? A The scene I can recall.

Q Will you tell us what was said about the terms of the proposed lease? A Mr. Bernstein, Mr. Apfelbaum wanted to know if he couldn't make that deal.

Q What did he say? A He said, "We are here now all together, see if we can't close the deal and see what is the best you can do." Mr. Bernstein says, "You have gotten my proposi-
40 tion, why go into that now, can you do business

Barney Piken, cross.

on those terms?" It was discussed further in detail—

Q No, what was said. A I can't remember the exact conversation. Don't misunderstand me. I am not quoting word for word, I am talking the general sense of the conference.

Q And then what? A Mr. Lobel offered \$25,000 for the remainder of the lease. 10

Q Did Mr. Lobel do the talking for himself or to Mr. Auerbach or Mr. Flood altogether? A Both.

Q You mean all three talked? A Yes, sir.

Q You are quite positive Mr. Lobel said, "I will give \$25,000 a year"? A Yes.

Q There is not any mistake about that, in your mind? A Not in my mind. 20

Q Who answered that, if anybody, that proposition that Lobel would give \$25,000 a year? A Mr. Bernstein.

Q What did he say? A He wouldn't take that.

Q What did he say? A Whether he said he would take twenty-eight then or after Mr. Lobel offered twenty-six I don't know, but before the conference was over Mr. Bernstein said he would take \$28,000 a year, and that is the best he would do. 30

Q Have you given us all the conversation? A Very much all of it, yes, all that I can recall.

Q You say the whole conference lasted for two hours? A No.

Q What time was the conference over? A I should think about 1 o'clock. We started about 11:30, late morning.

Q So the conversation lasted an hour and a half? A Approximately. 40

Barney Piken, cross.

Q And of that entire hour and a half conference you can recall only what you have given us? A Exactly.

Q Nothing more? A That is all.

Q After the conference was over you say that you saw Mr. Bernstein two or three times during that week, kept after him? A Yes.

Q What was your conversation with him those two or three times? A That we were still waiting to hear from Mr. Lobel.

Q Did you try to get him down from \$28,000, you say, to \$27,000? A No, it wasn't necessary yet.

Q Why not? A When I had a proposition from Mr. Lobel, to get a better proposition from Mr. Lobel, and you offered that.

Q Didn't you try to make a compromise between the two propositions? A No.

Q You didn't try to get Mr. Bernstein down from \$28,000 to \$27,000 a year? A No, I didn't.

Q All you told Mr. Bernstein was, "I am waiting to hear from Mr. Lobel?" A Exactly.

Q And you did that, you say, three times? A Exactly.

By the Court.

Q I thought you said your conferences with Mr. Bernstein after this talk at the office was to report to him the information that had come to you from Kislak? A Exactly.

Q If no information came from Kislak, why did you report to him? A Just that we were waiting to hear.

By Mr. Scheck.

Q And you say you dropped in to Mr. Bernstein's place about three times during the week preceding July 27th? A About that.

Barney Piken, cross.

Q You didn't see him after that? A I saw him two or three times a week.

By the Court.

Q You never did hear from Kislak about Lobel after that conference? A Just what do you mean by that?

Q Just exactly what I said. A We kept in touch with Kislak's office—

Q I say, you never got any report from Kislak after the conference with Mr. Lobel, after July, 1927? A We were trying to reach them.

Q You had no occasion to report? A No.

By Mr. Scheck.

Q You went back to Bernstein's store about three times a week succeeding the conference? A Yes.

Q And then two or three weeks after that? A Yes, sir.

Q And at each of these visits of yourself to Mr. Bernstein you kept telling him the same thing, you hadn't yet heard from Mr. Lobel? A Possibly a week or so, possibly two. After that I told him who else I was working with, I was working with the other people.

Q I am only referring to Mr. Lobel. A That may have gone two weeks, but not beyond that.

Q Not longer? A No, sir.

Q So for two weeks following July 27th you didn't talk with K. Burns any further about Lobel? A No, I didn't, not until after he was in the place.

Q You said you had been in touch with Kislak for about two weeks? A Yes, sir.

Q That is the same two weeks? A Yes, sir.

Barney Piken, re-direct.

Q And the only report you got from Kislak was that he could not get in touch with Lobel? A That is right.

Q Did you ask the Kislak people where Lobel was? A I assumed that they did.

10 Q I am asking you if you asked anybody connected with Kislak where Lobel was in person during those two weeks that they reported to you? A They could not locate him. They said they had been trying to reach him by wire and by mail and couldn't make a definite appointment. I don't know exactly what you mean by that—whether he was out of town.

Q Did you make any effort to find out where Lobel was? A No.

20 Q You were satisfied with the report of Kislak that they didn't know where Lobel was? A Absolutely.

Q And you didn't make any other effort to locate Lobel to take this lease? A Absolutely not.

Q And you then continued your efforts to bring about a lease between Mr. Bernstein and Lobel? A That is right.

Re-direct examination by Mr. Greene.

30 Q Why didn't you go to Kislak's office and communicate with Lobel—do you know?

Objected to.

Objection sustained.

40 Q You were asked on cross examination whether you tried to bring Mr. Bernstein down from \$28,000 a year rent after the conference, and your answer is no. I ask you now whether it was that conference you tried to get it down?

Isidore J. Auerbach, direct.

A At the conference we tried to get him to accept that \$26,000.

Q What did he say? A He said he would do no better than \$28,000 a year.

10

ISIDORE J. AUERBACH, sworn in behalf of plaintiff.

Direct examination by Mr. Greene.

Q What is your business? A I am a member of the firm of J. I. Kislak, Incorporated.

Q The question was, what is your business? A Real estate broker.

Q With whom are you connected? A J. I. 20 Kislak, Incorporated.

Q You are a member of that firm? A Yes, sir.

Q What is the business of J. I. Kislak & Company? A We are an organization of fifty-three men who operate in various departments—

Q What is the business of Kislak & Company? A Real estate.

Q Where is your office? A Hoboken and 30 Jersey City.

Q Do you know Mr. Lobel, Morris Lobel? A Yes.

Q Involved in this case? A Yes, sir.

Q Were you present with Mr. Lobel at the office of Mr. Apfelbaum at Newark on July 27, 1925? A I was.

Q Tell us who were present at that time? A Mr. Lobel, Mr. Apfelbaum, Mr. Flood, Mr. Burns, and the former witness.

Q Mr. Piken? A Yes.

40

Isidore J. Auerbach, direct.

Q How did you come to be present at this conference? A I had made the appointment with Mr. Lobel to meet Mr. Apfelbaum at his office.

10 Q For what purpose did you bring Mr. Lobel to Newark? A For the purpose of leasing him a store in the one hundred per cent location.

Q Who gave you the information about this store that caused you to bring Mr. Lobel? A Mr. Murray Apfelbaum's office.

Q When did he give you this information? A The first information he gave me was early in July about Kraemer's store on Broad street near Hahne's.

Q Did you take Mr. Lobel out there? A We took Mr. Lobel out there.

20 Q How far is that store from the Burns store? A I should judge it is about a block north of Broad street.

Q You didn't succeed in interesting him? A He wasn't interested in that proposition.

Q What was said at this conference in Mr. Apfelbaum's office held on July 27th?

30 Mr. Scheck: I object. I think this ought to be directed to the time that Mr. Bernstein was there.

Q What time did you come to Mr. Apfelbaum's office with Mr. Lobel? A I should judge it was around eleven o'clock.

Q When had you made that appointment? A Two days previous.

Q And when you arrived there was Mr. Bernstein there? A He was not.

40 Q Was anyone sent to him? A They telephoned first.

Isidore J. Auerbach, direct.

Q And after they telephoned what happened? A We waited awhile and Mr. Bernstein didn't come, so we sent Mr. Flood around to his store to bring him up.

Q And did he come? A He came there alone while Mr. Flood was going up there.

10 Q In other words, he had left— A They probably crossed each other.

Q When he came there will you tell us how long the conference lasted? A I should judge at least an hour and a half.

Q What was said at this conference? First state whether there was any introduction and describe it and then tell the conversation that took place? A When I came in I introduced Mr. Lobel to—

20 The Court: You are asked to tell what took place after Mr. Bernstein came.

A After Mr. Bernstein came I introduced Mr. Lobel to Mr. Bernstein.

Q What was said? A I said, "We are here trying to make a deal and Mr. Lobel is interested in your store, we brought him out for that purpose, and if we can get together on the rates, why, we can make a deal." And then 30 Mr. Murray Apfelbaum, I asked him "What do you think—" this was in the presence of everybody, we were sitting in Mr. Murray Apfelbaum's private office. I said, "What do you think, Murray, you can do with Mr. Bernstein, the rate seems to be high, \$30,000 a year, and if you can urge Mr. Bernstein to take a rate less than that, why, we probably would get together." Mr. Apfelbaum then asked Mr. Bernstein—he said the same thing to him, "How much less 40

Isidore J. Auerbach, direct.

will you take"—no, before that came I believe Mr. Apfelbaum asked Mr. Burns, "What is your rate?" And Mr. Burns said, "You know that you have a memorandum, you sent me a letter," something to that effect; and then Mr. Apfelbaum said, "That rate is too high entirely." We negotiated back and forth and tried every way possible to get a lower rate, but after arguing, about, I should judge, three-quarters of an hour, we finally induced Mr. Bernstein to come down to \$28,000. At that time we had raised Mr. Lobel from twenty-five to \$26,000 a year, and then we were deadlocked, we couldn't seem to move either one, we tried sending him back to Murray and Murray back to Bernstein, I would take Lobel out to the outer office and I asked him if he wouldn't go a little higher, as we had in our business—

The Court: You are asked to tell what was said.

Witness: The final conference was when Mr. Bernstein would not go any lower than \$28,000 and Mr. Lobel wouldn't go over \$26,000, and we couldn't get together, and Mr. Burns left and before Mr. Burns left said that he wouldn't hold the matter open—I insisted on that and Murray Apfelbaum said, "I will take care of that," and Mr. Bernstein went away, and a little later—I don't recall just exactly whether it is fifteen or twenty minutes, we left with Mr. Lobel with the understanding—

The Court: That is not part of the conversation.

Q Where did you go? A Back to Jersey City.

Isidore J. Auerbach, direct.

Q Besides the rent that was discussed was there anything discussed at this conference with respect to security? A \$15,000 was to be the security.

Q That was security between the parties? A Yes, if the transaction was to go through.

Q And in term did Mr. Lobel want the \$26,000 a year? A He was talking over the term of the head lease. I believe Mr. Bernstein had the head lease, what we term the head lease, ten years, and I don't recall how many weeks.

Q What efforts, if any, did you make after this conference to see Mr. Lobel and close this deal? A May I state what you told Mr. Lobel after leaving?

Q (Question read.) A We had an understanding that I was to see him within a few days and let me know if I would come to the terms that Mr. Bernstein asked for. Not hearing from him in two days we 'phoned his store in West New York, and they said Mr. Lobel wasn't there. We tried, I don't know on how many occasions, to get Mr. Lobel, but no matter what time we called we could never get in touch with him on the wire from that time on, and then Mr. Flood, my assistant, was sent there to see him and he couldn't see him—

Objected to.

Q Just testify to what you personally did. A I tried personally to get him on the wire a number of times, and always the same, "He is not in."

Isidore J. Auerbach, cross.

Q Did you make any appointment with his office? A No, I didn't. I tried to get him and sent my assistant for him.

Q Did you ever see Mr. Lobel after your attempt to get in communication with him, did you ever personally see him, after making these various efforts and being unsuccessful? A I did not.

Cross examination by Mr. Scheck.

Q You say that you introduced Mr. Bernstein to Mr. Lobel? A Yes, sir.

Q Do you know Mr. Bernstein? A Well, I knew who he was when he came in, that he was Mr. Bernstein.

Q You didn't know him, you had never met him before? A No, but—

Q But that made no difference to you? A I generally know my people.

Q You mean you can tell by looking at him? A No, but we have been waiting and expecting him, and he walked right in.

Q You introduced him? A Yes, sir.

Q What did he say? A I said, "This is Mr. Lobel, Mr. Bernstein."

Q What did they say to each other? A The usual greetings.

By the Court.

Q Did you ever see Mr. Bernstein before? A No, I didn't.

Q So without any introduction to him you introduced him to Lobel? A I am sure I did because we had sent for him and we were expecting him and we were in the outer office when he walked in.

Isidore J. Auerbach, cross.

By Mr. Scheck.

Q There were other people came in the office there. You were not in the outer office then?

A No.

Q You were in the waiting room? A Outside.

Q There were other people who came in? A Yes, this is the same office.

Q You don't know whether they greeted each other as strangers? A I wouldn't say that.

Q You don't know whether they had ever met before? A I wouldn't say that.

Q Why wouldn't you say that? A I don't know.

Q Was Mr. Apfelbaum out in the outer office? A We were all there.

Q Was Mr. Apfelbaum out there? A Yes, sir.

Q And he stood up and you did the introducing? A Yes, sir.

By the Court.

Q Was Mr. Piken there? A He was there.

Q And he said nothing in the way of introduction? A I don't recall now.

By Mr. Scheck.

Q You say that you are the ones who brought Mr. Lobel up from Hudson County to look at another store on Broad street? A That was a previous time.

Q Who recommended that store to you? Did Mr. Apfelbaum's office suggest that store to you? A Yes, sir.

Q And they also suggested a store in Paterson for Mr. Lobel, didn't they? A Yes, sir.

Isidore J. Auerbach, cross.

Q And the Paterson store proposition was discussed at that conference after Mr. Bernstein left, wasn't it? A Not a word.

Q Not a word was said about it? A No, sir.

10 Q Was the Paterson store proposition still pending at the date of this conference? A I don't think so.

Q Was it over the negotiations in that sort of thing? A No, because the location didn't suit.

Q Didn't suit whom? A Mr. Lobel.

Q How long before this conference of July, 1925, had you shown him that Paterson store? A I didn't show it to him.

20 Q Who did? A He went to look at it himself.

Q At whose request? A Our request.

Q And it was previous to this conference? A Yes.

Q How long previous? A It was before he came out, I believe, to see the Kraemer store on Broad street.

30 Q He came out with Mr. Lobel to see the Kraemer store? A I think somewhere around the 8th of the month. I won't say the exact date, but around that date.

Q July, 1925? A Yes, sir.

Q And a few days before that Mr. Lobel at your suggestion had gone up to look at the store in Paterson? A He said he was going to look at it.

Q When did he say that? A Between the time we referred the proposition to him.

40 Q Between that date and what other date? A Between that and the time he came out to Newark to look at the Kraemer store.

Isidore J. Auerbach, cross.

Q During that time you didn't know whether Mr. Lobel had been to Paterson? A Yes, he said he would look at it and when we asked him about it he said it wouldn't do.

Q When did you ask him about it? A During that period before he came out to Kraemer's.

10 Q So all three propositions were being discussed during July, 1925? A In July Mr. Bernstein's proposition wasn't discussed until we had word from Mr. Apfelbaum, the other places not suiting Mr. Lobel's purpose, we told Apfelbaum about it and he said "You can get Bernstein's place." We came out to look at Bernstein's place. At that time there was nothing else discussed except the Bernstein store.

20 Q You know that Mr. Lobel came to Newark to Mr. Apfelbaum's office in July, 1925? A I believe that is the date.

Q Is there any doubt in your mind that is the date? A No, there is no doubt.

Q Through the office of Kislak Company Mr. Lobel looked at the store of Kraemer on Broad street about eight days before that? A No, about the 8th.

Q The 8th of July, 1925? A Yes, sir.

30 Q That is the same month? A The same month.

Q When did you refer him to the Paterson store? A Previous to the 8th.

Q How long previous? A I can't say exactly.

Q What? A I couldn't say.

Q What month? A No, it might be a week or ten days, something like that.

40 Q So that if it was ten days it would be the last of June, 1925, or the 1st of July, 1925?

Isidore J. Auerbach, cross.

Objected to.

Objection sustained.

Q Do you recall when Mr. Lobel told you that he was not interested in any store in Paterson?

10 Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q After the conference of July 27, 1925, did you write any letters to Mr. Lobel? A I don't recall whether I did or not.

20 Q You recall you ever went to his place of business in West Hoboken or to his residence to see him? A Myself personally?

Q Yes. A No, sir.

Q Did you do anything except go to the telephone? A No, except send my assistant there.

Q Who was that? A Mr. Flood.

30 Q When was that with reference to the conference? A After two or three days had expired we tried for two or three days to get him on the phone and we couldn't get him and Mr. Flood went up there to see if he could see him.

Q How long was that after the conference? A A week or ten days.

Q After that did you do anything to get Mr. Lobel to take this store? A We lost confidence in Mr. Lobel after that and didn't bother with it.

The Court: The answer will be stricken out. Answer the question.

40 The Witness: We did not.

Richard Flood, Jr., direct.

By the Court.

Q So that from the 1st of August, 1925, until after this deal was consummated in the spring of 1926, you did nothing—did you or did you not?

A About a week or ten days, we did not, no.

Q We will say the middle of August? A 10 About.

RICHARD FLOOD, JR., sworn in behalf of plaintiff.

Direct examination by Mr. Greene.

Q What is your business? A Real estate.

Q And with whom are you associated? A 20 The firm of J. I. Kislak, Incorporated.

Q How long have you been connected with them? A Just a little over four years.

Q And you are a licensed real estate broker? A Yes, sir.

Q Were you present at the office of Murray Apfelbaum, Incorporated, the plaintiff in this case, at his office in Newark, on July 27, 1925? A Yes, sir.

Q With whom did you go there? A With 30 Mr. Auerbach, Mr. Lobel and one of Mr. Lobel's employees.

Q About what time of the day did you arrive there? A Shortly before noon, I believe, about eleven.

Q How long did you remain there? A Close to 1 o'clock.

Q When you arrived with Mr. Auerbach and Mr. Lobel, who was at the office of Mr. Apfelbaum? A Mr. Piken, Mr. Apfelbaum, Jr., two 40

Richard Flood, Jr., direct.

of his secretaries, and, of course, Mr. Lobel, he was with us.

Q How soon after you got there did Mr. Bernstein arrive? A Half an hour.

Q Did you go after him? A Yes, sir.

10 Q Who sent you? A I don't know who it was personally, but I know that I was asked to go and bring Mr. Bernstein in—Mr. Burns, as I knew him.

Q Did you actually bring him? A No, I did not.

Q Why not? A I went to Mr. Burns' place of business and I spoke with his brother after waiting a few minutes and I believe they told me he had left, and I hurried right on back to the office of Mr. Apfelbaum and Burns had just arrived as I followed in after him.

20 Q What was the conversation that was had at that conference after Mr. Bernstein came there? A There was a formal introduction of the principals. I don't know whether it was done on the part of Mr. Auerbach or Mr. Apfelbaum, but the principals were introduced.

Q What did they say? A Nothing more than just an ordinary greeting.

30 Q What do you mean by an ordinary greeting? A If there was any friendship—

Q No; what do you mean when you say there was an ordinary greeting. What did they say or do? A I don't know the exact wording, but it was, "How do you do?" or "I am glad to meet you."

Q Did they shake hands? A Yes, sir.

Q And they talked about the lease? A Yes, sir.

40 Q And what was said during the two hours approximately that they sat there? A It was

Richard Flood, Jr., direct.

five minutes or so before they got to the point of really discussing business. It was a general discussion of property or was something else before they got to the point of negotiating a transaction.

10 Q What was said with respect to the transaction? A The price was laid down on the part of Mr. Apfelbaum, the figures that both principals had offered. He said he didn't see any reason why the deal could not be negotiated. Mr. Burns was making a deal, Mr. Lobel was interested in negotiating a deal, wasn't a great difference, and they were both there for the purpose of making a deal.

Q What figures were made by Mr. Bernstein and Mr. Lobel? A Mr. Bernstein emphatically said, "My figures"— It appeared to me—

20 Q What did he say? A He said, "You have got my figures, \$30,000. Have you got that offer?" Mr. Apfelbaum told him no, that he had a proposition, but not got that much money.

Q What was the counter offer by Mr. Lobel? A Mr. Lobel offered us \$25,000 and pay for the balance of the existing lease, fifteen years and three or four months.

30 Q And what was Mr. Bernstein's reaction to that offer? A Well, he can't, he leave it down as not the money he wanted and the money he wouldn't accept.

40 Q What was the final upshot of this conference with respect to offers and counter-offers that were made? A There was quite a controversy over the whole matter. Mr. Lobel made the first concession, he offered \$26,000, and Mr. Burns made the second. Mr. Burns reduced his price \$28,000, but not without a great deal of persuasion on the part of Mr. Apfelbaum.

Richard Flood, Jr., direct.

Q And then what was the result? A That was the end of the result.

Q Was any appointment made after this conference or what was the arrangement of the renewing the negotiations? A A request was made of Mr. Burns since Mr. Lobel had indicated
10 his desire to lease the place and evidently wanted to hold the matter in abeyance for a few days. I believe it was Mr. Piken suggested that he be allowed three days to allow Mr. Lobel to definitely make up his mind as to whether or not he wanted to pay the rent that was asked.

Q When you told Mr. Lobel that you were coming to Newark to Mr. Auerbach's office did you tell Mr. Lobel what store he was going to look at?

20

Objected to.

Objection sustained.

Q After this what did you do with respect in trying to bring the negotiations to an end? A I most certainly was anxious to make the deal.

The Court: That will be stricken out.

30

Q The question is, what did you do?

The Witness: I phoned Mr. Lobel after a period of two or three days had expired quite regularly on the phone, went to his place, his place of business, in West New York several times to try to see him. Finally on one occasion I did, after a great deal of effort, locate Mr. Lobel so that I might talk with him and we had a very lengthy discussion and he thought that since he had given the matter consideration the rate was
40

Richard Flood, Jr., direct.

very high. I wanted him to try and raise his price. He said that the volume of business that he would have to do there in a small space that he had to do business in, hardly warranted the price he was being asked. However, he said, "The matter is not definitely closed, but I can't arrive at a decision right now." That happened more
10 than once, that sort of conversation, so plainly Mr. Lobel led me to believe that his interest in the proposition had died off.

Q And then that was the end of your further effort in connection with the matter? A That was the thing.

Q How long a period of time after the conference of July 22nd did you try to reach Mr. Lobel or how long after this conference did you have this conversation that you have just related? A I would say that it was a week or more before I really got to see Mr. Lobel. I tried several times on the telephone and always got the reply that he wasn't there, after leaving my name, and then I talked to him—I would say that before I finally got negotiations on the transaction that it was almost three weeks.
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Q When you say you had difficulty in locating Mr. Lobel what do you mean? A Mr. Lobel is a very busy man and does a very large business that takes him away from his store quite often.
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Q Did you ever make any appointments with him that you didn't keep? A No, I didn't.

Q Did you leave word to call you back? A Every time I phoned.

Q Did he call you back? A No, sir.

Q When was the first time that you knew that Lobel had leased the store on Broad street? A
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Murray Apfelbaum, direct.

On Sunday I was taking my mother and family for a ride on Broad street and I saw the announcement in the window.

The Court: Can you fix the date?

10 A About six months later.

Q What months? A That was the first of the year, perhaps February or March; I am not sure.

Q Did you talk with Mr. Lobel about his lease? A No, sir I did not.

Cross examination by Mr. Scheck.

20 Q Mr. Lobel did not make the lease until May, 1926? A I don't know.

Q You continued to try to get Mr. Lobel to take this store, you say, for a period of at least three weeks? A Yes, sir.

Q And after that you didn't make any efforts? A No, sir.

30 MURRAY APFELBAUM, sworn in behalf of plaintiff.

Direct examination by Mr. Greene.

Q You are the president of Murray Apfelbaum, Incorporated, the plaintiff in this case? A Yes, sir.

Q What is your business? A Real estate.

Q How long have you engaged in the real estate business? A Fifteen years.

40 Q You are a licensed broker? A Yes, sir.

Murray Apfelbaum, direct.

Q And you are a member of the Board of Governors of the Real Estate Board of the City of Newark? A Yes, sir.

Q Do you remember a conference being held at your office on July 27, 1925, with Messrs. Auerbach, Flood, Bernstein and Piken? A Yes, sir. 10

Q Who had arranged this meeting? A Mr. Auerbach of Kislak's.

Q When had you arranged this conference? A Two days previous.

Q How did Mr. Auerbach learn that you were interested in this store? A We submitted them several stores on the street.

Q Do you operate through them in Essex and Hudson County? A Yes, sir.

Q And you submitted that to Mr. Auerbach on what day? A That was submitted probably a couple of days after I got the authorization. 20

Q That was on the 25th that you made the appointment? A The appointment was made on the 25th or 27th to meet Mr. Auerbach and his client.

Q About what time of the day did Mr. Auerbach and Mr. Lobel and Mr. Flood arrive at your office? A Around about eleven o'clock. 30

Q How long did the conference last? A I think it was around about an hour or an hour and a half.

Q About what time did Mr. Bernstein arrive at your office? A About half an hour after Mr. Lobel and Mr. Auerbach and Mr. Flood arrived.

Q How did you communicate with them about coming up? A I think I had Mr. Piken call up Mr. Bernstein to come up.

Q And did anyone send for him? A We sent Mr. Flood. 40

Murray Apfelbaum, direct.

10 Q What happened when Mr. Bernstein came to your office, was there an introduction? A I knew Mr. Bernstein probably ten years before that and it was a formal introduction, introducing one to the other in just a formal way, telling him "We have got the buyer, here is the buyer for his store," just an offhand introduction.

Q What did the principals afterward do, what did they say or do upon being introduced? A I told Mr. Bernstein, "This is the gentleman that we got for his store, but his price was too high, but we probably can get together."

20 Q What else was said? A We had a discussion there for probably half an hour to an hour pro and con trying to make the deal all kinds of shapes and forms.

Q What was Mr. Bernstein's proposition? A Mr. Bernstein's proposition was \$30,000 a year. After a lengthy discussion pro and con he dropped to twenty-eight. Mr. Auerbach and Mr. Lobel went out in the other room and Mr. Lobel comes back and said he gives twenty-six, and then we tried to get together, twenty-seven, off and on, but Mr. Bernstein absolutely refused to take less than twenty-eight.

30 Q What was said about security there? A The security was O. K. \$15,000.

Q That had been agreed upon? A That had been agreed upon.

Q How long a lease was Mr. Lobel to get? A He was to get the lease when Mr. Bernstein had the balance of the term of lease, approximately sixteen years.

40 Q What was the final upshot of this conference? A The final upshot of the conference was that Mr. Lobel was supposed to let Mr.

Murray Apfelbaum, direct.

Auerbach know whether he would go up to the price of \$28,000. I think Mr. Bernstein at that time wanted his answer right away, and I think Mr. Piken persuaded him to give a few days in order to get that price.

10 Q You left the matter after this conference in the hands of Mr. Piken? A Yes, sir.

Q Did you communicate with Mr. Auerbach? A I was in communication with Mr. Auerbach myself.

Q What report did you get? A He didn't have any report to give me.

Q Did you make any effort to interest anyone else in this property? A We sent out quite a few letters, all my salesman had a letter and got several people interested.

20 Q What effort did you make with others?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q Have you the Real Estate Board rules here for the year 1925? A Yes, sir.

30 Q What are the rates of letting for less than ten years when there is a consideration for the lease? A Ten per cent. of the purchase price of the lease, plus the period of a lease for another ten years, for the first five years three and a half and the balance two and a half. That is for lease under two years.

Mr. Greene: I offer a letter from the attorney of the plaintiff dated September 22, 1926, to the defendant.

(Marked Ex. P. 5.)

Murray Apfelbaum, cross.

Cross examination by Mr. Scheck.

Q I understand you to say that you submitted other propositions to Kislak for Lobel in Newark? A Not for Lobel; for different clients that he had.

10 Q And you have a working agreement between you? A Yes, sir.

Q Didn't you submit the Broad street store to Lobel? A I don't know whether it was for Lobel, but for one of our clients.

Q And you submitted a store in Paterson? A I don't know whether we did or not.

Q Do you know whether somebody else in your office did? A Probably.

20 Q The conference at which you were to meet Mr. Lobel was arranged two days before the actual conference? A Yes, sir.

Q And you had never met Mr. Lobel? A No, sir.

Q That conference wasn't for the purpose of introducing Lobel to Bernstein, was it? A Yes, sir.

Q Why did you tell Mr. Bernstein the last minute about this? A We had a proposition from Mr. Bernstein.

30 Q You said the meeting was arranged for the purpose of introducing the two men? A Yes, sir.

Q And it was done two days before the conference? A I made up two days before to bring his client out. This was on a Saturday.

40 Q You say now you attended that at that conference, did you, personally, so that you might submit the premises? A He called up and he said he had a client for that store and he wanted to know if I would be in on Monday. This

Motion for a Non-suit.

was Saturday, in fact, he wanted to bring him in on Saturday and I told him it was a holiday and so I told him to bring him Monday.

Q You just said that the conference was arranged for the purpose of introducing Bernstein to Lobel? A I don't know.

Q You arranged it, did you not? A I don't know if I did. 10

Re-direct examination by Mr. Greene.

Q You didn't know who Lobel was, did you? A No, sir.

Q What time of the day on Saturday was it that this appointment was made, morning or afternoon? A Saturday morning.

Q You didn't know whether they would keep the appointment or not? A I didn't know whether they would keep it or not. 20

PLAINTIFF RESTS.

Mr. Scheck: I make a motion for a non-suit. The ground upon which, for the purpose of my application for a non-suit, is that there is nothing to show that the plaintiff was the exclusive agent of the plaintiff; that the plaintiff had discontinued efforts to effect a lease between Lobel and Bernstein in August, 1925, and did nothing further thereafter; that the lease between the defendant and Lobel was not made until the following year, a term of eight or nine months; that the plaintiffs indicated an intention during that period of abandoning further work in connection with this transaction and left the matter for the defendant to transact for himself; that the plaintiff was not the procuring cause of the lease. 30 40

Motion for a Non-suit.

The Court: (After argument.) I have never understood that the commissions of the broker were earned by the mere introduction of a buyer to the owner of real estate or lessor of real estate, but that the broker must have been, in the words of the cases, the efficient procuring cause of the contract between seller and purchaser, lessor and lessee. Substantially what has been shown in this case is that there was a meeting at the office of Murray Apfelbaum on the 27th day of July, 1925, at which an attempt was made to get Mr. Bernstein and Mr. Lobel together. The intending lessee offered a maximum of \$26,000; Mr. Bernstein offered a lease for \$28,000 a year and that is the nearest they got together. They left the office of Mr. Apfelbaum with those figures. That is all there was to the negotiations at Mr. Apfelbaum's office except as to the \$15,000 deposit, which seemed to be satisfactory to the parties. It appears that over seven and a half months later a lease was made between these parties, which was upon terms entirely different than those discussed in Mr. Apfelbaum's office. For instance, the only term discussed at Mr. Apfelbaum's office was the balance of the term of Mr. Bernstein's lease, which was more than sixteen years. Nothing was said at the Apfelbaum office about a lump sum which was to be paid in addition to the lease by Mr. Lobel to Mr. Bernstein, while in the lease which was actually executed, the term is only five years and two months. Instead of being \$28,000 a year it amounted to \$29,000 a year, which was \$14,500 to Mr. Bernstein's lessor, and \$14,500 to Mr. Bernstein, and, in addition to that, a lump sum of \$28,000 was agreed to be paid and was paid because Mr. Bernstein says he received it

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Motion for a Non-suit.

from Mr. Lobel. This was an entirely different contract from anything that was discussed at the office of Mr. Apfelbaum; but, perhaps, more decisive than that—and perhaps if that was all there was in the case it would be sufficient to go to the jury. That the plaintiff was not the efficient and procuring cause is certainly shown by the testimony of Mr. Piken, who says that he continued his efforts with Mr. Bernstein and with the firm of Kislak for about two weeks, to use his own words, he discontinued his efforts as to Lobel and he talked with Mr. Bernstein about other property. Mr. Flood, who carried on the negotiations for his firm, says that he continued his efforts for about three weeks and that he discontinued his efforts and that he dropped the negotiations.

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It seems to me that there is no question in this case that there are no inferences from which the jury could find that Apfelbaum or Kislak, acting with Apfelbaum, was the efficient procuring cause of this lease which was actually executed between these parties in May, 1926.

The result of these views is that a non-suit must be granted.

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

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Exception noted as ground of appeal.

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46 FEB. T. 1928

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Service of 3 copies of within brief is hereby
acknowledged this 24th day of January 1928

Arthur W. Cross
attorney for defendant respondent

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

MURRAY APFELBAUM, INC., a corporation, Plaintiff-Appellant,	} Action at Law. On Appeal from Supreme Court.
vs.	
KALMAN BERNSTEIN, trading as K. BURNS & SONS, Defendant-Respondent.	} Sat Below, DUNGAN, C. C. J.

APPELLANT'S BRIEF.

Statement.

The plaintiff-appellant was non-suited in an action to recover commissions for leasing the defendant's store, in the City of Newark, to one *Morris Lobel*, and hence brings this appeal.

The Pleadings.

In substance, the complaint alleged that in July, 1925, the defendant owned a lease-hold on a certain store (639-641 Broad street), in the City of Newark; that on or about July 15, 1925, he employed the plaintiff to procure a purchaser for the lease-hold, or a tenant for the store, under an agreement to pay plaintiff the usual renting commissions, approved by the Real Estate Board of the City of Newark; that plaintiff accepted the employment, and in pursuance thereof did, on or about July 27, 1925, procure a tenant, one *Morris Lobel* of Weehawken, N. J., whom it introduced to the defendant; that on May 1, 1926, the defendant and said *Lobel* entered into a written lease for said store for

a term of years, at certain specified rentals, and that as part of the consideration for said lease, Lobel paid the defendant \$28,000 in cash; by reason whereof, plaintiff became entitled to \$5,481.65 commission, according to the rates of the said Real Estate Board.

The defendant, in his answer, admitted the ownership of the leasehold, and that he entered into the lease with Lobel, upon the terms and for the consideration alleged in the complaint, but *denied* the other material allegations thereof.

The Evidence.

To support its case, the plaintiff called the *defendant* and four other witnesses.

The *defendant* testified that in July, 1925, he was engaged in the retail jewelry business in the store in question (p. 8); that he then held a lease thereon which still had about sixteen and one-half years to run (p. 9); and that on May 1, 1926, he leased the store to Lobel, on the terms alleged in the complaint (p. 10). The lease was offered in evidence and marked Exhibit P. 3 (p. 10). See Exhibit P. 3, page 62.

The *lease* is strangely *silent* about the \$28,000 cash consideration, but the payment of this purchase money is referred to in a prior agreement between the parties made on April 7, 1926, which was offered in evidence and marked Exhibit P. 2 (p. 10). See Exhibit P. 2 at page 61. The defendant admitted receiving the money (p. 10).

Barney Piken, one of the plaintiff's salesmen testified that on or about July 15, 1925, the defendant authorized him to obtain a tenant for the store and agreed to pay the usual commis-

sions approved by the Real Estate Board of the City of Newark (pp. 13, 14 and 15). He told the defendant that he was employed by the plaintiff (p. 16, ll. 30-32). The defendant gave him the dimensions of the store and basement (p. 14). His asking terms were: \$30,000 rent per year, \$15,000 security on lease, possession to be given after the Christmas season, and the store not to be used for the sale of jewelry or for any purposes conflicting with existing tenancies in the building (p. 14). On the basis of the proposed terms the commission was computed at about \$13,000 and the defendant said that "*he would be glad to pay the commissions if the deal was made*" (p. 15).

The defendants' asking terms were not absolute, but were subject to negotiation. The defendant wanted a *proposition*. Piken testified that the defendant said, "*If I (Piken) couldn't get him that price, I could get him very close to it, so that the price was reasonable or that he would have something tangible to work on*" (p. 15).

The defendant's authorization was confirmed by letter from plaintiff, dated July 14, 1925, and offered in evidence as Exhibit P. 4 (p. 15). See Exhibit P. 4, page 67.

Pursuant to the authorization, Piken interviewed a number of prospective tenants for the store, among them being *Klinghoefer*, *Empire Shoe Co.*, *Kays*, *Misroch*, and also enlisted the aid of a co-broker, the firm of J. I. Kislak & Son, of Hoboken and Jersey City, which specializes in leasing central locations (pp. 16, 17).

On July 27, 1925, Messrs. Auerbach and Flood, of the office of J. I. Kislak & Son, brought Mr.

Lobel to plaintiff's office (p. 17). The defendant was sent for (pp. 17, 18, 27). He came to plaintiff's office, and was introduced to Mr. Lobel as the person interested in leasing the store (pp. 18, 27).

The parties and the brokers negotiated for several hours (pp. 18, 19). The brokers did what they could to make a deal. All the terms were agreed to by the parties excepting the rent. The defendant at first insisted upon \$30,000 per year. Lobel first offered \$25,000 per year. After some negotiations the defendant reduced his price to \$28,000, and Lobel increased his offer to \$26,000 per year. After several hours of bargaining, the conference adjourned, Lobel saying that he wanted to think the matter over, and promised to notify the brokers of his decision within a few days (p. 19).

Piken's testimony of what transpired at the meeting was fully corroborated by Auerbach (pp. 33-38); Flood (pp. 43-48) and Apfelbaum (pp. 48-53).

After the conference, Piken did not negotiate directly with Lobel, but left him to be handled by Auerbach and Flood, whose client he was (p. 20). However, Piken kept in touch with Auerbach and Flood for several weeks to learn what progress they were making with Lobel, and reported to the defendant (pp. 19, 20, 30, 31). Several weeks thus elapsed without any definite word from Lobel. Piken not having received any encouraging news from Auerbach or Flood, thereupon directed his efforts to interest the prospective tenants above mentioned to take the store (p. 20). Piken kept in communication with the defendant, two or three times a week (p. 31).

Mr. Flood testified that he kept after Lobel for about three weeks after the conference (pp. 47, 48). He called Lobel many times, but Lobel never called him back, and Lobel's telephone operator told him that Mr. Lobel wasn't in (p. 47). Mr. Flood testified (p. 46):

"I phoned Mr. Lobel after a period of two or three days had expired quite regularly on the 'phone, went to his place, his place of business, in West New York several times to try to see him. Finally on one occasion I did after a great deal of effort, locate Mr. Lobel so that I might talk with him and we had a very lengthy discussion and he thought that since he had given the matter consideration the rate was very high. I wanted him to try and raise his price. He said that the volume of business that he would have to do there in a small space that he had to do business in, hardly warranted the price he was being asked. However, he said '*The matter is not definitely closed, but I can't arrive at a decision right now.*' That happened more than once, that sort of conversation, so plainly Mr. Lobel led me to believe that his interest in the proposition had died off."

In May, 1926, Piken discovered that Lobel was in possession of the store (p. 20). Piken thereupon called upon the defendant and requested information about the particulars of the lease, but the defendant refused to furnish them, saying that he made the deal himself, that no commission was paid, and that he didn't intend to pay any (p. 21).

Inquiry disclosed that on May 1, 1926, the defendant leased the store in question to Lobel for a term of five years and two months from June 15, 1926, at a rental of \$14,500 per annum until October 1, 1926, and \$15,000 from October 1, 1926, to the end of the demised term; and

that as part of the consideration for said lease, Lobel paid the defendant \$28,000 in cash, which sum was agreed as the purchase price for the letting (see Exhibit P. 2, p. 60, last line).

Upon making this discovery, the plaintiff immediately demanded a commission on the rental and consideration of the lease, in accordance with the rules of the Real Estate Board of the City of Newark, amounting to \$5,481.65. The *quantum* of the commission is not disputed in this suit.

The Non-Suit.

Such, in substance, was the testimony on behalf of plaintiff, when it rested its case. Thereupon counsel for the defendant moved for a *non-suit*, and urged these reasons:

(1) That the plaintiff was not the exclusive agent of the defendant.

(2) That the plaintiff had discontinued efforts to effect a lease between Lobel and defendant in August, 1925, and did nothing further thereafter.

(3) That the lease between the defendant and Lobel was not made until May 1, 1926.

(4) That plaintiff indicated an intention during the interim of abandoning further work in connection with the transaction and left the matter for the defendant to transact, himself.

(5) That the plaintiff was not the procuring cause of the lease.

The trial judge granted the motion, holding that the plaintiff was *not* the "*Efficient procuring cause of the lease,*" because Piken and Flood had "*dropped*" the negotiations after several

weeks (p. 55). In passing, he observed that but for that, "** * * perhaps * * * it would be sufficient to go to the jury*" (p. 55). In granting the motion, the trial judge said (p. 55):

"That the plaintiff was not the efficient and procuring cause is certainly shown by the testimony of Mr. Piken, who says that he continued his efforts with Mr. Bernstein and with the firm, of Kislak for about two weeks, to use his own words, he discontinued his efforts as to Lobel and he talked with Mr. Bernstein about other property. Mr. Flood, who carried on the negotiations for his firm, says that he continued his efforts for about three weeks and that he discontinued his efforts and that he dropped the negotiations. It seems to me that there is no question in this case that there are no inferences from which, the jury could find that Apfelbaum or Kislak, acting with Apfelbaum was the efficient procuring cause of this lease, which was actually executed between the parties in May, 1926. The result of these views is that a *non-suit* must be granted."

To the ruling of the trial judge an exception was duly taken and noted as a ground of appeal (p. 55).

ARGUMENT.

I.

In the case of *Vreeland v. Vetterlein*, 33 N. J. L. 247, Chief Justice Beasley, speaking for our Supreme Court laid down the rule of law applicable to this class of cases. He said, at page 249,

"It is certainly true, as a rule of law, that under ordinary circumstances, where a broker, employed to sell property, *brings about an introduction of a buyer, and when a negotiation, resulting in a purchase ensues on that foundation, the owner and the buyer*

cannot, by any arrangement, disappoint the claim of the agent for remuneration."

"If this could be done, it is obvious the agent would, in all cases, be in the power of his employer, who, by taking matters into his own hands, could, at will, defeat the just expectations and equitable rights of the brokers or middleman. *In this class of cases, the question then is always, whether under the peculiar conditions of the given case, the agent was the efficient cause of the sale; and, when there is real doubt upon that point, such doubt must be solved by the jury.* To this extent there seems to be entire uniformity in the decisions." (Italics are mine.)

This rule has since been uniformly approved and followed in this Court. *Clark v. Griffin*, 95 N. J. L. 508; *McLaughlin v. Campbell*, 78 *Id.* 541; *Littman v. Slack*, 135 A. 776; 5 A. R. 139 and in the Supreme Court *Queen v. Jennings*, 93 *Id.* 353; *Weeks v. Smith & Sons Co.*, 79 *Id.* 388; *Hudson Real Estate Co. v. Bauer*, 74 *Id.* 90; *Somers v. Wescoat*, 66 *Id.* 551.

In *Weeks v. Smith & Son Co.*, *supra*, our Supreme Court (Swayze, Trenchard and Parker sitting) held the following to be a substantially correct statement of the law:

"An agent employed to sell real estate who first brings it to the notice of the person who ultimately becomes its purchaser, is entitled to his commission on its sale, nor can the owner avoid liability by selling the property when a reduction is made through another broker."

And in *Crowley v. Meyers*, 69 N. J. L. 245, this Court held that although the terms accepted by the defendant are different from those contained in the authorization, he is nevertheless liable for the commissions on the accepted terms. See also *Fornara v. Wolde* (Ariz. 1924) 226 P. 203 (Lease case).

II.

The facts in the case at Bar are free from doubt. It is undisputedly established that the plaintiff was employed by the defendant to procure a tenant for his store; that the plaintiff alone introduced *Lobel* to the defendant; that the plaintiff and its associates urged *Lobel* to lease the store; and that *Lobel* eventually did lease the store on terms satisfactory to the defendant, without the aid or intervention of any other broker.

It is respectfully submitted that this state of facts brings the case *sub judice* directly within the operation of the rule in the *Vetterlein* case, that "the owner * * * cannot * * * disappoint the claim of the agent for remuneration," and that whether the plaintiff was "the efficient cause of the lease" was a jury question. The correctness of these legal conclusions from the stated facts seems not to have been denied by the Trial Judge for he said " * * * and perhaps if that was all there was in the case it would be sufficient to go to the jury" (p. 55). Even if he were in doubt, as the word "perhaps" might indicate—even then, it was a jury question under the case above cited.

Now the evidence which was stressed by the Trial Judge as decisively establishing that the plaintiff was not the "efficient cause of the lease" was the testimony of *Piken* and *Flood* that they ceased negotiations about two or three weeks after July 27th. But nowhere in his opinion does the Trial Judge suggest that *Lobel* abandoned all interest in the proposition, or that his interest, having once completely waned, was again rekindled by the defendant or any other person. Plaintiff's agency was unlimited as to time, and

so far as the record shows, was never revoked, and still continued as late as May 1, 1926. Haste was not necessary because, in any event, the defendant did not want to give possession of the store until about January 1, 1926. The delay may have been due to Lobel's slowness in "arriving at a decision." Under these circumstances, the mere lapse of time alone, between the introduction of Lobel and the consummation of the lease, was not sufficient evidence of abandonment of the negotiations. In *4 Ruling Case Law*, p. 318, under the head of "Brokers," it is said,

"As to what constitutes abandonment on the part of the broker, it should be observed that the mere fact that some time elapsed after the broker has discontinued his efforts to effect a sale, before the sale is made in fact by the owner, is not evidence of itself that there has been a complete abandonment of the negotiations."

And in *Hartford v. McGillicuddy*, 68 A. 860, 16 L. R. A. (N. S.) 431, the Supreme Judicial Court of Maine, said,

"The principal, in 1896, conferred upon the agent the authority to sell the real estate at a given price. It is true that no definite period of time was expressly agreed upon during which the agency was to continue. That was unnecessary. Its duration was fixed in another way. It was established for a particular purpose and was therefore in the contemplation of the parties to continue until that purpose was accomplished, unless sooner terminated by revocation or otherwise. *Clark & S. Agency*, Sec. 154. The plaintiff was appointed to sell this land, and his agency, once established, was presumed to continue until the sale was effected, and the burden was on the defendant to rebut the presumption."

Since in the case at Bar, the plaintiff's employment was for a specific purpose not limited as to time, and since that purpose was fulfilled during

the term of its agency, by the defendant leasing to plaintiff's customer, the defendant is clearly liable.

It is important to observe that the defendant's answer did not set up an "abandonment" by Lobel, as a defense. An abandonment being an affirmative defense, it should have been specially pleaded. An abandonment by Lobel was not even urged as a ground for the non-suit. The defendant did not even contend that the plaintiff had actually abandoned its efforts; his plea was merely that the plaintiff "indicated an intention * * * of abandoning further work * * * and left the matter for the defendant to transact for himself" (p. 63). This concession is opposed to the view of the Trial Judge that there was an absolute abandonment by the plaintiff. The decision of the Trial Judge seems to be predicated upon a theory outside of the issues involved in the pleading, and is therefore erroneous. *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441. *Bierman v. Steifel*, 82 *Id.* 658.

III.

The conclusion of the Trial Judge that the plaintiff was not the procuring cause, appears to be rested principally upon the plaintiff's cessation of effort in relation to Lobel after the middle of August, 1925.

The view thus adopted by the Trial Judge can be justified only on the notion that the employment of a broker to secure a tenant implies that the broker must not only procure the tenant, but must also continue in the presence of the parties and direct their negotiations from beginning to end; that he must actually effect the lease; and that he must not permit the parties to negotiate

out of his presence, under penalty or risk of losing his commission.

It is respectfully submitted that this test is too narrow and legally unsound. The fallacy of this view arises from a misconception of the nature of the employment under which the commission was promised. In such an employment, the principal merely agrees to pay for certain services, and confers upon the broker no authority to bind him. Strictly speaking, as was observed by *Mr. Justice Garrison*, speaking for our Supreme Court in *Payne v. Twitchell*, 81 A. 350, 81 N. J. L. 193:

“* * * such employments are in law assimilated not with the relation of principal and agent, but rather with those special employments by which one is engaged to seek out a particular person, or a person answering to a particular description, and bring such person into communication with his employer. A person who has been injured in a collision may desire to be put in communication with those who witnessed the accident. A solicitor may be seeking an heir to an estate; a mother may wish to have her child adopted and a host of such cases may be imagined in all of which the character of the employment is not legally distinguishable from that of one who desires to be put in touch with a person who will pay a certain price for a certain piece of land. * * * ”

The method by which the person so sought is brought into communication with the brokers' principal, is quite immaterial, so long as it results from the efforts of the broker. Thus the parties may be brought together by an advertisement, 9 C. J. 613 (Note 12); by an introduction *Somers v. Wescoat, supra*; by the broker giving the name of his principal to a probable customer, *Derrickson v. Quimby*, 43 N. J. L. 373. A personal introduction is not even required 9 C. J. 615

and cases in note (22); and the broker's presence during the negotiations or at conclusion of the transaction is not necessary. *Vreeland v. Vetterlein, supra*, and cases in 9 C. J. 615 (Note 25). The broker may be the procuring cause, even though the defendant has no knowledge that the customer procured came in consequence of information obtained through the broker. *McLaughlin v. Campbell*, 78 N. J. L. 541; 74 A. 530. These cases illustrate the principle that whether one is the "procuring cause" may be determined by the quality of his effort and its causal relation with the transaction that is consummated, as well as by the amount, duration and extent of his personal service. *Cleveland etc. Co. v. Gamble*, 201 Fed. 329, 119 CCA 567. It is enough that the effort of the broker, acting upon the tenant is the efficient cause of his offer and purchase, but it need not be the sole cause. *Handley v. Shaffer*, 177 Ala. 636 at 648, 69 S. 286. The procuring cause is the proximate, primary, or motivating cause and not necessarily the immediate or precipitating cause. Thus, even where the negotiations are suspended, but are subsequently resumed and a sale made, the broker is considered the efficient and procuring cause. *Van Doren v. Jellife*, 1 Misc. 354, 20 N. Y. S. 636.

IV.

The Trial Judge seems to have labored under the impression that the evidence conclusively showed that Lobel's interest completely subsided in the middle of August, 1925. But this inference is not justified by the evidence. On a motion for a non-suit, the Court cannot weigh the evidence, but must take as true all evidence which supports the view of the plaintiff and *must*

give him the benefit of all legitimate inferences which may be drawn therefrom in his favor. *Andre v. Mertens*, 86 N. J. L. 626. A judgment of a jury may rest upon such *legitimate inferences* which the jury may draw from the testimony, *Queen v. Jennings, supra*.

Flood testified that on the several occasions when he met Lobel, the latter said "*The matter is not definitely closed but I can't arrive at a decision right now,*" that such conversations occurred more than once (p. 46); and that he discontinued his efforts upon Lobel because *Lobel led him to believe that* his interest in the proposition had cooled off. It thus appears, that as late as the middle of August, 1925, Lobel was still interested in the proposition, at least to some extent. There is nothing in the evidence to show that Lobel's interest had completely waned at any time during the seven months which elapsed, nor is there anything in the evidence to show that such interest, having died down in the interim, suddenly flared up anew in April when the agreement (Exhibit P. 2) was made. It is a fair inference that Exhibit P. 2 was in negotiation for a reasonable time before it was made. The lease involves about \$107,000 in rentals and cash consideration. Common sense and experience suggest that such a lease would not be entered into on the spur of the moment. Lobel was very enthusiastic about the lease on July 27, 1925, so much so, that he was willing then and there to pay \$26,000 a year for a 16½ year term and deposit \$15,000 cash security. Had this rental been acceptable to the defendant, the lease would have been closed immediately. If the lease had been consummated in July, Lobel would not have obtained possession of the store until about January 1st of the ensuing year, according to the de-

fendant's own terms. The defendant was still interested in the lease, as late as the middle of August, 1925, and his interest again manifested itself in April, 1926. In the absence of any evidence to the contrary, it is a fair inference that Lobel's initial interest, aroused by the plaintiff and its associates in July, 1925, continued during the consummation of the lease, and that he *only* "arrived at a decision" in April, 1926. If the facts were to the contrary, the burden was upon the defendant to establish them on his defense.

The cases of *Somers v. Wescoat* and *Hudson Realty Estate Co. v. Bauer, supra*, are closely analogous to the case at Bar. In the former of the cited cases, the plaintiff a real estate broker was employed by the defendant to sell his property. *Plaintiff first brought the purchaser to the attention of the defendant*, and carried two propositions to the defendant, both of which were declined. Thereafter a sale was consummated on different, but substantially the same terms as the proposition submitted through plaintiff. Over valid legal objection the Trial Judge permitted one Conover to testify that he had told the purchaser that the defendant's property was for sale, but it appeared without dispute that this was before the purchaser called upon the plaintiff and before the plaintiff submitted the said two propositions to the defendant. There was no testimony that the purchaser acted upon Conover's statement or that the defendant knew of Conover's statement. From this testimony the Trial Judge found that Conover was the procuring cause and gave judgment for the defendant. On appeal, the Supreme Court (*Justice Gummere and Fort sitting*) reversed the Court below. Justice Fort who wrote the reversing opinion, after pointing out that Conover's testimony was il-

legally admitted said "With this out, *the legal results deduced by the Judge from the undisputed facts cannot be sustained.*"

In the *Bauer* case, the plaintiff was authorized by the defendant to rent his premises in Jersey City and to sell the same on a commission of 2½% on the purchase price. This was in January, 1905. The plaintiff listed the property for sale and rent and in February leased the premises to one Tafero. Six months later, in July, 1905, the property in question was sold for \$2,800 to Tafero. About a month after Tafero rented the property, he learned from the plaintiff that the purchase price was \$3,000. In April, 1905, Tafero's wife went to Mrs. Linder (wife of one of the defendants who in April superseded the plaintiff as agent, and took charge of the collection of the rents) and Mrs. Linder suggested to Mrs. Tafero that she buy the property. About two weeks later Mrs. Linder again offered the property to Mrs. Tafero for \$2,800. Mr. Tafero subsequently negotiated the sale with Mr. Linder for the purchase of the premises, with the adjoining property which sale was effected as before stated. The Trial Judge, without a jury gave judgment for the defendant. On appeal it was contended that the judgment should be reversed upon the law as laid down in *Somers v. Wescoat*, and *Vreeland v. Vetterlein, supra*. Justice Hendrickson, who wrote the opinion for the Supreme Court agreed with the view of the appellants that the case was controlled by principle laid down in the *Vetterlein* case. He said,

"And 'in this class of cases' as was stated by Chief Justice Beasley in *Vreeland v. Vetterlein*, 53 N. J. L. 247-249, the question then always is whether under the peculiar conditions of the given case the agent was the efficient cause of the sale; and when there

is real doubt, upon that point such doubt must be solved by a jury * * *

"Now the question whether the plaintiff under the case here presented was the efficient cause of the sale is a question of *fact*, and as such it is beyond the power of this court to review * * *. We think there was evidence in this case which would support the finding of the Trial Judge."

In other words, the Supreme Court in that case held, that notwithstanding the evidence that the sale was effected about 7 months after the plaintiff introduced Tafero to the defendant, and about six months after plaintiff told Tafero that the property was for sale; that plaintiff conducted no negotiations with the owner or Tafero for the sale of the property; that Mr. and Mrs. Linder had something to do with bringing about the sale—it was nevertheless a question of *fact* for the jury, whether the plaintiff was the procuring cause of the sale. The only reason the Supreme Court refused to disturb the verdict was because it could not review a *finding of fact* by the Trial Judge sitting without a jury.

The facts in the case at Bar are much more favorable to the broker than the facts in the cited cases, because they are undisputed, and it is not contended that the deal was closed through the efforts of another broker.

V.

But there is still another angle to the case. Piken testified that even after the middle of August he continued calling upon the defendant two or three times a week, and continued working on other prospects (p. 20). Presumably these visitations continued down to May, 1926. The agreement for the lease (Exhibit p. 2) was

executed on April 7, 1926. It must have been under negotiation for sometime prior to that date. Yet, the defendant kept silent about his negotiations with Lobel. When Piken learned about the lease, he asked the defendant about its terms, but the defendant refused to furnish the particulars. The lease mentions only the base rentals, but is singularly silent about the \$28,000 cash consideration. The plaintiff learned about this consideration through an examination before trial. Lobel's attitude was equally suspicious. Flood testified that he encountered great difficulty in communicating with Mr. Lobel and that although he telephoned Lobel on numerous occasions, Lobel didn't call him back, or otherwise communicate with him. Lobel was the client of Auerbach and Flood, yet he at no time asked them to renew negotiations, and withheld from them the fact that he had closed the lease with the defendant.

From these facts, the jury would have been justified in drawing the inference that Lobel's apparent disinterest in August, 1925, was feigned so as to discourage the plaintiff and its associates from continuing their efforts and thus rid himself of the plaintiff in order that he and the defendant might subsequently close the deal on more advantageous terms without the need of paying commissions. The jury might also infer that the defendant was a party to this arrangement.

VI.

From the foregoing analysis of the evidence, it is clear that fair-minded men might honestly differ as to the conclusions or inferences to be drawn from the facts of the case, even though the facts were uncontroverted; and that being so a jury question was presented.

In *Longstreet v. Korb*, 64 N. J. L. 112, our Supreme Court held in an action to recover a commission by a real estate broker, that where under all the evidence and circumstances, different conclusions can be drawn, the question of whether the agent was instrumental in making the sale, is one for the jury. And in *Bennett v. Busch*, 75 N. J. L. 240 at p. 244, the same Court held:

"The rule which controlled the action of the trial judge on the motion to direct the verdict was this: That, where fair-minded men might honestly differ as to the conclusions to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury."

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF NON-SUIT WAS ERRONEOUS AND SHOULD BE REVERSED AND A VENIRE DE NOVO AWARDED.

ISRAEL B. GREENE,
Of Counsel with Plaintiff-Appellant.

Stipulation.

STIPULATION.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

MURRAY APFELBAUM, INC., a corporation, <i>Plaintiff-Appellant,</i>	}	<i>Action</i>	10
<i>vs.</i>		<i>at Law.</i>	
KALMAN BERNSTEIN, trading as K. Bruns & Sons, <i>Defendant-Respondent.</i>	}	<i>On Appeal</i>	
		<i>from</i>	
		<i>Judgment</i>	
		<i>of Non-suit.</i>	
		<i>Stipulation.</i>	

It is hereby stipulated by and between the parties in the above-entitled cause that Exhibit P. 1 offered in evidence at the trial of this cause (being lease between Kalman Bernstein and New Broad Company, dated March 31, 1921) need not be printed in the state of the case on appeal herein. 20

Dated, December 29, 1927.

ISRAEL B. GREENE,
Attorney for Plaintiff-Appellant.

OSBORNE, CORNISH & SCHECK, 30
Attorneys for Defendant-Respondent.

Exhibit P. 2.

EXHIBIT P. 2.

This AGREEMENT made this 7th day of April, 1926, by and between Kalman Bernstein of the City of East Orange, Essex County, New Jersey, trading under the name of K. Burns and Son, of the first part, and Morris Lobel of the Town of Weehawken, Hudson County, New Jersey, of the second part.

WHEREAS, the party of the first part is the lessee of a certain store and basement thereunder located at 641 Broad Street in the City of Newark, Essex County, New Jersey, under lease from the New Broad Company dated March 31st, 1921, which lease runs to September 30th, 1941, and

WHEREAS, it has been agreed between the parties hereto that the said Kalman Bernstein has agreed to lease the said store and basement to the said Lobel for a period of five (5) years beginning June 15th, 1926, or sooner as hereinafter set forth, on the terms and conditions as hereinafter specified and the said Lobel has agreed to hire and take the said premises for the said period under the said terms and conditions.

NOW THEREFORE, in consideration thereof of the sum of One Dollar (\$1.00) paid by each of the parties to the other, and of the mutual covenants hereinafter set forth, it is agreed as follows:

1. The party of the first part agrees to lease the said store and basement to the party of the second part and the party of the second part agrees to hire and take the said premises for a period of five years beginning June 15th, 1926, or sooner if both parties agree that the said lease

Exhibit P. 2.

shall begin at a sooner date than June 15th, 1926, at the same rental and under all of the terms and conditions provided for and set forth in the lease between the New Broad Company and the said Kalman Bernstein which is hereinabove mentioned; the said rent to be paid at the times and in the manner provided in the said lease, only that the said rent shall be payable to the said Kalman Bernstein at the store herein demised or at such other place in the City of Newark as the said Kalman Bernstein shall designate in writing.

2. It is distinctly understood and agreed between the parties hereto that they shall enter into the said lease only if the party of the first part does not on or before June 15th, 1926, sublet or assign in its entirety, the lease which he has for the store on the southwest corner of Broad and New Streets, and the two floors above the said store. If he sub-lets his lease for the said corner premises (that is the store and the two floors above) as one entire unit on or before June 15th, 1926, or assign his said lease, he shall not be obligated to enter into the lease with the party of the second part mentioned in paragraph one.

3. If, however, the party of the first part divides the said corner store into two stores on or before June 15th, 1926, this agreement to lease the store at 641 Broad Street to the said Lobel, shall be and become effective.

4. If the party of the first part divides the said corner store, and sub-lets a part of the said corner store on or before June 15th, 1926, he agrees to notify the party of the second part forthwith of the said sub-lease, and immediately

Exhibit P. 2.

upon said notification the party of the second part shall execute a lease for the said store at 641 Broad Street; the terms of which lease shall be as set forth in paragraph one of this agreement and possession under the said lease shall be given to the party of the second part, and rent shall begin to accrue on a date satisfactory to both of the parties hereto, but not later than sixty (60) days from the date of the execution of the said lease:

5. In addition to the terms set forth in paragraph one of this agreement, the said lease shall provide that the party of the second part shall have the right to use during the term of the lease, the show window panels, ceiling panels in the windows, doors leading to the windows, mirrors in the windows, all the electric wiring in the store and in the windows, all the wall cases and office and other partitions in the basement and also the cork floor in the store; all of which the party of the second part shall use with care and return to the party of the first part at the termination of the said five (5) year lease in approximately as good condition as at the beginning of the term, ordinary wear and tear excepted. The party of the second part is to use the said store for the retail sale of infants' and children's wearing apparel.

6. The party of the second part agrees to pay to the party of the first part as consideration for the sub-letting of the said premises by the party of the first part to the party of the second part at the same rental which he, the party of the first part pays under this lease, and as the purchase price of the said five (5) year term, the sum of Twenty-eight Thousand Dollars (\$28,000.), which purchase price is payable as follows:

Exhibit P. 2.

\$1,000. at the time of the signing of this agreement, receipt whereof is hereby acknowledged.

\$27,000. in cash at the time of the execution of the said lease.

If the said lease is not executed by reason of the fact that the party of the first part does not subdivide the corner store above referred to on or before June 15th, 1926, then and in that event, the party of the first part shall return the said sum of One Thousand Dollars (\$1,000.) to the party of the second part, one day after June 15th, 1926; and in that event neither party hereto shall be liable or obligated to the other. The said sum of Twenty-eight Thousand Dollars (\$28,000.) is payable by the party of the second part in addition to all of the rent reserved and provided to be paid under the terms of the said lease between the party of the first part and the New Broad Company, dated March 31st, 1921.

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

Morris Lobel L. S.
Kalman Bernstein L. S.

Witness:

E. Alice Gibbs

May 1/26

The check of \$1000 above referred to has been returned to me.

M. Lobel

Exhibit P. 3.

AGREEMENT.

Between

Kalman Bernstein, trading under the
name of K. Burns & Son,

—and—

Morris Lobel.

Dated: April 7th, 1926.

EXHIBIT P. 3.

THIS INDENTURE made this first day of May,
Nineteen Hundred and Twenty-six, between KAL-
MAN BERNSTEIN, of the City of East Orange,
County of Essex and State of New Jersey, party
of the first part, and MORRIS LOBEL, of the Town-
ship of Weehawken, County of Hudson and State
of New Jersey, party of the second part;

WITNESSETH

1. That the said party of the first part has
let and rented and by these presents does let and
rent unto the said party of the second part all
that certain store, floor and basement thereunder
located in the premises known as No. 641 Broad
Street, in the City of Newark, Essex County, New
Jersey, with the appurtenances, for the term of
five years and two months from the fifteenth day
of June, 1926, at the yearly rent or sum of Four-
teen Thousand Five Hundred Dollars (\$14,500.)
until the first day of October, 1926, and the yearly
rent of Fifteen Thousand Dollars (\$15,000.) from
the first day of October, 1926, until the expira-
tion of the term herein agreed upon, to be paid
in equal monthly payments at the times herein-

Exhibit P. 3.

after specified; and it is agreed that if any rent
shall be due and unpaid, or if default shall be
made in any of the covenants herein contained,
or if the party of the second part shall violate
any covenant, clause or provision of this lease,
then it shall be lawful for the said party of the
first part to re-enter the said premises and to
remove all persons therefrom. Upon such a re-
entering the party of the first part shall have
the right to re-let the premises and apply the
rent first to the cost of re-entering and second
to the rent reserved in this lease.

2. The said party of the second part covenants
and agrees to pay to the said party of the first
part the said rent as herein specified as follows:
The sum of Twelve Hundred and Eight Dollars
and Thirty-three Cents (\$1208.33) on the fif-
teenth day of each and every month in advance
from the fifteenth day of June, 1926, until the
fifteenth day of August, 1926, (inclusive) and
the sum of Six Hundred and Four Dollars and
Sixteen Cents (\$604.16) on the fifteenth day of
September, 1926, which will be the rent for the
period of time beginning with the fifteenth day
of September, 1926, and ending on the thirtieth
day of September, 1926; and the sum of Twelve
Hundred and Fifty Dollars (\$1250.) on the first
day of October, 1926, and on the first day of each
and every month thereafter until the expiration
of the time herein agreed upon. The party of
the second part further covenants and agrees to
pay as additional rent all of that certain addi-
tional rent which the party of the first part is
obligated to pay for the said demised premises
under and by virtue of a lease between the party
of the first part as lessee, and the New Broad

Exhibit P. 3.

Corporation, a corporation, as lessor, dated March 1st, 1921.

3. It is further agreed and understood that the said rent shall be payable to the said KALMAN BERNSTEIN at the premises herein demised or at such other place in the City of Newark as the said KALMAN BERNSTEIN shall designate in writing.

4. It is further agreed and understood that the party of the second part shall have the right to use, during the term of this lease, the show window panels, ceiling panels in the window, doors leading to the windows, locks in the window, all electric wiring in the store and in the window, all the wall cases and office and other partitions in the basement and all the cork floor in the store; all of which the party of the second part shall use with care, and return to the party of the first part at the termination of the said five year lease in approximately as good condition as at the beginning of the term, ordinary wear and tear excepted.

5. It is further agreed and understood that the party of the second part is to use the said premises for the retail sale of infants and childrens wearing apparel and for no other business.

6. It is understood and agreed that the party of the second part shall not assign or sub-let this lease or any part thereof, nor the said premises or any part thereof, without the written consent of the party of the first part.

7. It is further agreed and understood that this lease is entered into by the parties hereto, subject to all of the terms, conditions, provisions, covenants and agreements contained in the lease hereinabove referred to made on the thirty-first day of March, 1921, between the New Broad

Exhibit P. 3.

Company as lessor and the said KALMAN BERNSTEIN as lessee, which said lease relates to the demised premises in question, and which said lease it is agreed shall form a part of this lease, subject however to the extent that the same has been modified and amended by the said New Broad Company, as evidenced by its written agreement dated the first day of May, 1926, and the party of the second part covenants and agrees to execute, perform and abide by all of the terms and conditions of the said lease in the same manner as if all of the said terms and conditions were expressly set out herein.

8. The party of the first part covenants and agrees that he will not use any portion of the building of which the demised premises form a part and over which he has control for the sale of infants and childrens wear, nor permit such use; nor lease any portion of the said premises for said use.

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

Kalman Bernstein L. S.
Morris Lobel L. S.

Witness:
E. P. Scheck
H. Hussleberg.

LEASE.

Kalman Bernstein,

—to—

Morris Lobel.

Dated: May 1st, 1926.

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*Exhibit P. 4.***EXHIBIT P. 4.**

Copy.

169 Market Street, Newark, New Jersey,
July 15, 1926.

10 K. Burns & Son,
639 Broad Street, Newark, N. J.
Attention Mr. Kalman Bernstein

Dear K. B.:—

This is to confirm the conversation and verbal authorization you gave me yesterday, on your store located at the above address. You say you will sub-lease your store, size of which is 14½ by 65' with the full basement on the following basis:—

20 \$30,000.00 per year gross for the balance of your term, which is approximately 16 years, and you will give possession Jan. 1, 1926. This proposition is open to any line but jewelry and the people must be responsible and you want \$15,000.00 cash security.

Should we close this deal with our customers, there will be due us from you, as stated to you yesterday, the commission as set down by the Real Estate Board of Newark, New Jersey, which
30 is 3½% on the first 3 years and 2½% for the balance thereof. This amounts to a little less than \$13,000.00.

We are confident that we will be able to close this deal and give you the best service we can.

Yours very truly,

Murray Apfelbaum, Inc.

By Barney Piken

BP*RK

*Exhibit P. 5.***EXHIBIT P. 5.**

ISRAEL B. GREENE,
Counsellor at Law
60 Park Place, Newark, N. J.

Sept. 22, 1926.

10

Kalman Bernstein, Esq.,
639 Broad St., Newark, N. J.

Dear Sir:

Murray Apfelbaum, Inc. has placed with me for collection a large claim for broker's commissions due from you, for procuring Mr. Lober, as a tenant for your store at 639 Broad Street, Newark.

I am under instructions from my client that unless the matter is adjusted by Monday of next
20 week, to institute suit against you, without further notice.

Very truly yours,

Israel B. Greene.

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46 FEB. T. 1928

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

MURRAY APFELBAUM, INC., a corporation, <i>Plaintiff-Appellant,</i> <i>vs.</i> KALMAN BERNSTEIN, trading as K. Burns & Sons, <i>Defendant-Respondent.</i>	}	<i>Action at Law. On Appeal from Supreme Court. Sat below, DUNGAN, C. C. J.</i>
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RESPONDENT'S BRIEF.

This is an action by an agent to recover commissions on a lease. There was no exclusive agency and it, therefore, became necessary for the plaintiff to show, as a basis of its cause of action, that it was the efficient cause of the agreement between the parties.

The trial judge granted a non-suit on the ground that the plaintiff had not shown that it was the efficient cause of the lease which was actually executed between the parties (Case, p. 55, ll. 21 to 26). He based this decision on the following facts appearing from the plaintiff's testimony.

First, the lease which was actually entered into was entirely different in its terms from the lease which the landlord offered at the time the agent was conducting the negotiations (Case, p. 54, l. 22 to p. 55, l. 23).

Second: The agent, as well as his associates, admitted that before an agreement was reached they discontinued their efforts to bring these two parties together (Case, p. 55, ll. 12 to 20).

We think that another fact, shown by the evidence of the plaintiff, leads to the same conclusion, namely: the defendant, at the only conference between the principals (July 27, 1925), refused to keep the matter open more than two or three days (Case, p. 36, l. 29; p. 46, ll. 8 to 15; p. 51, ll. 2 to 5).

The plaintiff had no direct communication with the prospective tenant. He, Lobel, was produced by another agent, working in co-operation with the plaintiff. Their testimony is that, although Lobel said he would consider the matter further, they never were able to reach him, nor talk with him (p. 38, ll. 7 to 11; p. 46, ll. 30 to 40), except on one occasion, about a week after July 27th, when one of the agents did see Mr. Lobel and was informed that the matter was not definitely closed as far as he was concerned (p. 46, l. 30 to p. 47, l. 10). No effort was made to keep in contact with Lobel after a period of three weeks from the date of the conference (p. 48, ll. 21 to 25).

With the above facts before the trial judge, by the evidence of the plaintiff, a non-suit was granted. From that non-suit this appeal is taken, the plaintiff contending,

1st. That it was a jury question as to whether or not the plaintiff was the efficient cause of the lease (Point II).

2nd. That abandonment was not specifically pleaded as an affirmative defense (Point II).

3rd. That the construction which the trial judge put upon the term "efficient cause" was erroneous (Points III and IV).

4th. That there was a presumption that the visitations of the plaintiff (the agent) to the de-

fendant continued to the time of the execution of the lease (Point V).

5th. That fair minded men might differ as to the conclusions or inferences to be drawn from the testimony. This is substantially the same as the 1st.

THE LAW.

The legal rules applicable to the claims of agents for commission are too well settled to require extensive citation of authority. They may be briefly stated as follows:

1. Where there is no exclusive agency, an agent, who has been authorized by the owner to sell, is entitled to his commission if, and only if, he is the efficient cause of the sale.

Vreeland v. Vetterlein, 33 N. J. L. 247.

2. To have been the efficient cause of the sale there must have been a meeting of the minds of the purchaser and seller through the procurement of the broker, or the broker must have produced a purchaser who fulfills the requirements of the seller.

Resky v. Meyer, 98 N. J. L. 168.

3. Where there is doubt as to whether or not the broker was the efficient cause of the sale, it is a jury question.

Vreeland v. Vetterlein, *supra*.

4. An introduction of the parties by the agent, later followed by an agreement of the parties, alone, does not entitle the agent to a commission, although it may be evidential of the fact that the agent was the efficient cause.

A familiar instance of where an introduction of the parties to a sale has been made by a broker

without his becoming entitled to a commission is where, after the failure of the parties to agree as a result of the agent's efforts, another agent succeeds in getting the parties to agree on other terms. This was the situation in *Vreeland v. Vetterlein, supra*, the leading case cited by the plaintiff.

ARGUMENT.

The radical change in the terms, as evidenced in the agreement between the principals made in April and in the lease made in May, 1926, from the terms offered by the defendant in July, 1925, and the fact that in an interim of seven months no communication was had by the agent with his principal, might well lead a jury to determine that the agent had not brought about a meeting of the minds of the principals, but, as the trial judge said and as we concede, without more this determination would properly have been left to the jury.

But the situation which the plaintiff has itself disclosed is quite different. The defendant was put on the stand as the witness of the plaintiff, but was not asked by the plaintiff's attorney as to how he was finally brought into agreement with the lessor. The plaintiff's agent, Pikin, and his associates, confessed to a complete lack of knowledge as to what took place in the interim between the conference of July 27, 1925, and the execution of the agreement in April, 1926. They had an opportunity, by means of a witness that did know what happened in the meantime (the defendant) to show whether or not the transaction was, in fact, the result of the efforts of the plaintiff but they chose to rely, for their case, on the presumption which they apparently supposed would be created by the

mere testimony as to the introduction of the principals and the later agreement. No doubt the case would have been submitted to the jury if it had not been for these other facts disclosed by themselves.

First, as pointed out by the trial judge, they admitted that shortly after the conference in July, and while there was admittedly no meeting of the minds of the principals, the agent, Pikin, discontinued his efforts to bring the parties together.

The plaintiff's attorney in his brief (p. 4, at the bottom of the page) says,

"Pikin kept in communication with defendant two or three times a week" (p. 33).

and on p. 17, Point V, says,

"But there is still another angle in the case. Pikin testified that even after the middle of August, he continued working on other prospects (p. 20). Presumably these visitations continued down to May, 1926."

Of course, what Pikin did with respect to other prospects is not evidential as to his being the procuring cause in the agreement between the principals in this case, and there is no evidence that he had, or communicated, any other offer to Bernstein.

In making the statement that the visitations presumably continued down to May, 1926, the attorney for the plaintiff no doubt forgot the specific and unequivocal statement by Pikin that after about two or three weeks from the time of the July conference, and while the parties were admittedly not in agreement, he *discontinued his efforts* to bring about a lease between Mr. Bernstein and Mr. Lobel (Case, p. 32, ll. 25 to 28).

Pikin's admission that he discontinued his efforts to bring about a meeting of the minds, at a time when there was admittedly no meeting of the minds, would seem to effectually dispose of any presumption that he was the efficient cause of an agreement thereafter entered into different from the terms proposed by the lessor.

Second. The situation is further illuminated by the testimony of the agents, who were associated with the plaintiff and who had produced the prospective lessee (Lobel) and by the understanding, which they testified to, as having been arrived at when the conference terminated. At the termination of that conference, according to the testimony of Auerbach, the defendant said that he *wouldn't hold the matter open* (p. 36, l. 29).

The plaintiff's attorney in his statement of facts (brief, p. 4, 2nd para.) alleges that all the terms were agreed to by the parties, excepting the rent. There is no such evidence in the case. So far as the testimony shows, the negotiations were confined entirely to price and when the conference broke up, the defendant had reduced his demand of \$30,000 a year to \$28,000, and the prospective lessee had increased his offer from \$25,000 to \$26,000.

According to Auerbach, as stated above, the defendant refused to keep the matter open, although Mr. Apfelbaum, one of the members of the plaintiff corporation, said he would take care of that.

Flood, who was associated with Auerbach in attempting to get Lobel to lease the property, states that

"A request was made of Mr. Burns since Mr. Lobel had indicated his desire to lease

the place and evidently wanted to hold the matter in abeyance for a few days. I believe it was Mr. Pikin suggested that he be allowed three days to allow Mr. Lobel to definitely make up his mind as to whether or not he wanted to pay the rent that was asked" (p. 46, ll. 8 to 15).

Mr. Murray Apfelbaum says (p. 51, ll. 2 to 5):

"I think Mr. Bernstein at that time wanted his answer right away and I think Mr. Pikin persuaded him to give a few days in order to get that price."

As to the efforts made with Lobel after the conference, Pikin testifies that he couldn't get in touch with Mr. Lobel at all (p. 20, ll. 18 to 19).

Auerbach testifies that he had an understanding with Lobel at the break-up of the conference as follows:

"We had an understanding that I was to see him within a few days and let me know if I would come to the terms that Mr. Bernstein asked for. Not hearing from him in two days we 'phoned his store in West New York and they said Mr. Lobel wasn't there. We tried, I don't know on how many occasions, to get Mr. Lobel but no matter what time we called we could never get in touch with him on the wire from that time on" (p. 37, ll. 21 to 31).

We never saw Lobel after the conference (p. 38, ll. 7 to 12).

He further testifies on p. 43, lines 5 to 9, question by the Court:

"So that from the first of August, 1925, until after this deal was consummated in the Spring of 1926, you did nothing— Did you or did you not? A About a week or ten days we did not, no."

Flood, Auerbach's associate, after many efforts to get in touch with Lobel, succeeded in seeing him and was told that

"The matter is not definitely closed, but I can't arrive at a decision right now" (p. 47, ll. 9 to 11).

He was then asked the question,

"And then that was the end of your further effort in connection with the matter?"

A That was the thing" (p. 47, ll. 16 to 18).

And he further testified,

"You continued to try to get Mr. Lobel to take this store you say for a period of at least three weeks? A Yes.

Q And after that you didn't make any efforts? A No, sir" (p. 48, ll. 21 to 25).

Summarized, the testimony is that

The principals were brought together on July 27, 1925. They failed to agree. The defendant definitely stated that he would not keep the matter open more than a few days. The agents continued their efforts to bring the parties together for a matter of three weeks and then definitely ceased their efforts before there had been a meeting of the minds of the principals.

Months afterward the principals entered into an agreement.

It is perfectly obvious that whatever the cause of the agreement of the principals, neither the plaintiff nor his associates were responsible. They failed to bring about an agreement and then quit. The thing was dead. There must, therefore, have been an intervening cause, perhaps another agent, perhaps the later initiation of new negotiations by the principals themselves, but certainly the plaintiffs did nothing more.

We confess that we do not understand the argument of plaintiff's attorney on the question

of abandonment. There is no question of abandonment of a completed cause of action. It is true that the plaintiff *threw up*, or abandoned, his job before he had completed it, but that is not a matter which must be pleaded as a defense.

It is the plaintiff's duty to show, in order to maintain his cause of action, that he was the efficient cause of procuring the sale. If he testifies that he abandoned or threw up his job before he completed the sale, he fails to show *prima facie*, that he has a cause of action and that is the only respect in which abandonment, so called, enters into this situation.

It is respectfully submitted that there is no doubt but that the plaintiff has failed to show that he was the efficient cause of the sale and that, therefore, the non-suit was properly granted.

Respectfully submitted,

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