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Notice of Appeal.

NOTICE OF APPEAL.

Filed December 27, 1924.

Essex County Circuit Court

MICHAEL BARON,

Plaintiff,

vs.

WALTER WISNOWSKI and HELEN
WISNOWSKI, his wife,
Defendants.

10

*Action at
at Law.*

*Notice of
Appeal.*

To Cohen & Klein, Esqs., attorneys of plaintiff:

TAKE NOTICE that the defendants above named
do hereby appeal to the New Jersey Supreme
Court from the whole and every part of the judg-
ment entered in favor of the plaintiff and
against the defendants in the above-entitled
cause.

20

Dated, December 27, 1924.

Respectfully yours,

JAMES L. R. LAFFERTY,
Attorney of Defendants.

30

Service of the above notice of appeal acknowl-
edged this 27th day of December, 1924.

COHEN & KLEIN,
Attorneys of Plaintiff.

40

Grounds of Appeal.

GROUND OF APPEAL.

Filed February 4, 1925.

NEW JERSEY SUPREME COURT.

10	MICHAEL BARON, <i>Plaintiff-Appellee,</i> <i>vs.</i> WALTER WISNOWSKI and HELEN WISNOWSKI, <i>Defendants-Appellants.</i>	}	<i>On Appeal.</i> <i>Grounds of Appeal.</i>
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To Cohen & Klein, attorneys of plaintiff-appelle:

20 The appellants state the following grounds of appeal in this cause:

1. The Court denied the motion of defendants-appellants for a non-suit.

2. The Court denied the motion of defendants-appellants for a direction of verdict.

3. The following question was admitted: To witness, Mariana Riccardi: "Who is Antonio Ragonesi?"

30 4. The following question was admitted: To witness, Mariana Riccardi: "Did you ever talk to Antonio Ragonesi about this property?"

5. The following question was overruled: To witness, Mariana Riccardi: "Did you know what were the terms of that contract which you purchased?"

Dated, February 2, 1925.

40 JAMES L. R. LAFFERTY,
 Attorney of Defendants-Appellants.

Summons.

We hereby acknowledge due and legal service of the within grounds of appeal and consent to filing as of time, February 2, 1925.

COHEN & KLEIN,
Attorneys of Plaintiff-Appellee.

10

SUMMONS.

The state of New Jersey to Walter Wisnowski and Helen Wisnowski:

You are summoned to answer the annexed complaint of Michael
(L. s.) Baron, in an action at law in the Essex County Circuit Court, and
TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the Circuit Court of Essex County within twenty days after 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, NELSON Y. DUNGAN, Judge of the Essex County Circuit Court, at Newark, this 12th day of January, 1924.

JOHN H. SCOTT,
Clerk.

30

COHEN & KLEIN,
Attorneys.

40

Summons.

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

10 Charles Pfeifer, Deputy Sheriff of the County
 aforesaid, being duly sworn, on this oath deposes
 and says that on the 14th day of January, A. D.
 1924, he delivered personally to the said defend-
 ants, Walter Wisnowski and Helen Wisnowski,
 a true copy of the within summons and com-
 plaint with a ten days' notice endorsed thereon.

CHARLES PFEIFER.

Subscribed and sworn to this 15th
 day of January, A. D. 1924.

HARVEY W. KEOUGH,
 Notary Public of New Jersey.

20

30

40

Complaint.

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

MICHAEL BARON, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> WALTER WISNOWSKI and HELEN WISNOWSKI, <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Action at Law.</i>	10
		<i>Complaint.</i>	

Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, says:

1. Plaintiff is and for some time has been a duly licensed real estate broker of the State of New Jersey. 20

2. On November 23, 1923, the defendants requested the plaintiff to secure for them a purchaser for their real estate located at #386-388-390 Hunterdon street, Newark, New Jersey, for the purchase price of Twenty-four Thousand Five Hundred Dollars.

3. Defendants on said date did promise to pay to the plaintiff a commission of Eight Hundred Dollars for selling said real estate, and authorized and empowered said plaintiff to secure a customer for the same. 30

4. On or about said date the plaintiff, in accordance with the aforesaid authorization and agreement, and within five days after the making of said agreement, procured as a customer for said real estate one Mariano Riccardi, for the said purchase price of Twenty-four Thousand Five Hundred Dollars. 40

Complaint.

5. Said Mariano Riccardi was ready, willing and able to purchase said premises, in accordance with the authorization aforesaid, but the defendants then and there refused to convey said real estate to him.

10 6. Subsequent thereto, to wit, on November 24, 1923, the defendants entered into an agreement for the sale of said premises to one Antonio Ragonesi; that the said Antonio Ragonesi on November 28, 1923, assigned said agreement to Mariano Riccardi, aforesaid, and Carmelo Gaglaiano.

7. Plaintiff, on November 26, 1923, addressed a registered letter to the defendants, a copy of which follows:

20

November 26, 1923.

Mr. Wladyslaw Wishniewski and Mrs. Wladyslaw Wishniewski, 386 Hunterdon street, Newark, New Jersey.

Dear Sir & Madam:

30

Please be advised that I, the undersigned, claim a commission of \$800.00 as and for my commission for #386-388-390 Hunterdon street, Newark, New Jersey, pursuant to an agreement between you and me, whereby you agreed to pay to me a commission of \$800.00 for selling the aforesaid property to the said Mariano Liccorai for \$24,500.00.

I refer to the agreement made between you and me on Friday, November 23, 1923, at your residence.

Very truly yours,

MICHAEL BARON.

40

Complaint.

8. Plaintiff has demanded from said defendants the sum of Eight Hundred Dollars in payment of commission due to him as aforesaid, which defendants have failed to make.

Plaintiff demands judgment for the sum of Eight Hundred Dollars, together with interest and costs of suit to be taxed.

10

COHEN & KLEIN,
Attorneys of Plaintiff.

On Back:

To the within defendants:

TAKE NOTICE, that if a copy of the within summons and complaint is served upon you personally, and if you intend to make a defense to the cause of action contained in the said complaint, you are hereby required to file an affidavit of merits, setting forth that you have a just and legal defense to the action on the merits of the case, within ten days after the service thereof upon you; and that in default thereof judgment will be entered against you.

20

COHEN & KLEIN,
Attorneys of Plaintiff.

30

I hereby appoint and depute Charles Pfeifer to serve the within writ.

Witness, my hand and seal this 14th day of January, 1924.

(SEAL) HARRY B. O'CONNELL,
Sheriff.

By Alfred C. Walker,
Under Sheriff.

Sheriff's Fees \$3.70.

40

Complaint.

Served the within summons and complaint Jan. 14th, 1924, upon the within named defendants personally upon Walter Wisnowski and personally upon Helen Wisnowski at their usual place of abode, No. 388 Hunterdon St., Newark, N. J.

10

HARRY B. O'CONNELL,
Sheriff.

By Charles Pfeifer,
Special Deputy.

20

30

40

Affidavit of Merits.

AFFIDAVIT OF MERITS.

Filed January 21, 1924.

ESSEX COUNTY CIRCUIT COURT.

MICHAEL BARON,

Plaintiff,

vs.

WALTER WISNOWSKI and HELEN
WISNOWSKI,

Defendants.

*Action
at Law.*

*Affidavit
of Merits.*

10

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

Walter Wisnowski, of full age, being duly sworn according to law, upon his oath deposes and says: I am one of the defendants named in the above-entitled cause. I have a legal and meritorious defense to the same. 20

WALTER WISNOWSKI.

Sworn to and subscribed before me
this 19th day of January, 1924.

JAMES L. R. LAFFERTY,

Master in Chancery of New Jersey.

30

40

Answer and Notice of Motion.

ANSWER AND NOTICE OF MOTION.

Filed January 26, 1924.

ESSEX COUNTY CIRCUIT COURT.

10

MICHAEL BARON,

Plaintiff,

*Action
at Law.*

vs.

WALTER WISNOWSKI and HELEN
WISNOWSKI, his wife,

Defendants.

*Answer and
Notice of
Motion.*

20

Defendants, residing in the City of Newark,
County of Essex and State of New Jersey, an-
swering the complaint in the above-entitled ac-
tion, say:

1. They have not sufficient knowledge or in-
formation to admit or deny the allegations of
paragraph 1, and leave the plaintiff to his proof
thereof.

2. They deny the allegations of paragraph 2.

30

3. They deny the allegations of paragraph 3.

4. They deny the allegations of paragraph 4.

5. They deny the allegations of paragraph 5.

6. They admit that on November 24, 1923,
they entered into an agreement for the sale of
premises mentioned in the complaint to Antonio
Ragonesi, but they deny each and every allega-
tion of paragraph 6.

40

7. They admit the allegations of paragraph 7.

Answer and Notice of Motion.

8. They deny that any commission is due from defendants to plaintiff, but admit the remaining allegations of paragraph 8.

FIRST SEPARATE DEFENSE.

Prior to November 26, 1923, defendants notified plaintiff that he was no longer authorized to procure a purchaser for defendants' property known as Nos. 386-388-390 Hunterdon street, Newark, New Jersey. 10

SECOND SEPARATE DEFENSE.

Prior to November 26, 1923, defendants notified plaintiff that defendants refused to and would not sell the premises known as Nos. 386-388-390 Hunterdon street, Newark, New Jersey, to Mariano Reccardi, who was mentioned in the complaint as plaintiff's customer. 20

NOTICE OF MOTION.

TAKE NOTICE, that at or before the trial of the above-entitled cause defendants will move to strike out the complaint filed herein, because it does not set forth a cause of action at law in that it:

(a) Neither alleges that plaintiff was solely authorized by defendants to sell the real estate mentioned therein. 30

(b) Nor alleges that plaintiff was the efficient and procuring cause of the sale mentioned therein.

(c) Nor alleges that defendants had knowledge of or consented to the assignment of agreement mentioned therein. 40

Answer and Notice of Motion.

(d) Nor alleges that the customer named therein was either ready, willing or able to purchase the real estate mentioned therein upon the terms and conditions of sale, either originally propounded by defendants or settled by the defendants and the alleged customer.

10

JAMES L. R. LAFFERTY,
Attorney of Defendants.

20

30

40

Affidavit of Merits.

AFFIDAVIT OF MERITS.

Filed January 21, 1924.

ESSEX COUNTY CIRCUIT COURT.

MICHAEL BARON,

Plaintiff,

vs.

WALTER WISNOWSKI and HELEN
WISNOWSKI,

Defendants.

*Action
at Law.*

*Affidavit
of Merits.*

10

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

Helen Wisnowski, of full age, being duly sworn according to law, upon her oath deposes and says: I am one of the defendants named in the above-entitled cause. I have a legal and meritorious defense to the same.

20

HELEN WISNOWSKI.

Sworn to and subscribed before me
this 18th day of January, 1924.

(L. S.) ELEANOR R. COBURN,
Notary Public of New Jersey.

30

Commission expires May 25, 1927.

40

Reply and Notice of Motion.

REPLY AND NOTICE OF MOTION.

Filed February 6, 1924.

ESSEX COUNTY CIRCUIT COURT.

10	MICHAEL BARON, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> WALTER WISNOWSKI and HELEN WISNOWSKI, his wife, <div style="text-align: right;"><i>Defendants.</i></div>	} <i>Action at Law.</i> } <i>Reply and Notice of Motion.</i>
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Plaintiff, Michael Baron, replying to the answer of the defendants filed herein, says:

- 20
1. He joins issue with the defendants on the first, second, third, fourth, fifth, sixth, seventh and eighth paragraphs of the answer.
 2. He denies the allegations contained in the first separate defense.
 3. He denies the allegations contained in the second separate defense.

NOTICE OF MOTION.

30 At or before the trial of this cause the plaintiff will move to strike out the first and second separate defenses contained in the answer of the defendants, on the following grounds:

1. Said separate defenses do not set forth a valid or legal defense.
2. Said separate defenses are sham, frivolous and untrue.

COHEN & KLEIN,
Attorney of Plaintiff.

Michael Baron, direct.

ESSEX COUNTY CIRCUIT COURT.

December 17, 1924.

MICHAEL BARON,

vs.

WALTER WISNOWSKI and HELEN
WISNOWSKI, his wife,

*Action
at Law.*

10

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiff appears Philip Klein.

For the defendants appear Porter, Zink & Lafferty (by James L. R. Lafferty).

20

Mr. Klein opens in behalf of plaintiff.

Mr. Lafferty opens in behalf of defendants.

MICHAEL BARON, sworn in his own behalf.

Direct examination by Mr. Klein.

Q What is your business? A Real estate.

Q On or about November 23, 1923, what was your business? A It was the same thing, real estate and insurance.

30

Q Are you a licensed real estate broker in the State of New Jersey? A Yes.

Q Have you your license card with you at the present time? A Yes.

Mr. Klein: I will admit, if your Honor please, that he has the license.

40

Michael Baron, direct.

By Mr. Klein.

Q Do you know Walter Wisnowski and Helen Wisnowski? A Yes.

Q Did you ever have any business dealings with them? A Yes.

10 Q Tell us what transactions you had with the Wisnowskis. A On the 23rd day of November, 1923, my salesman and I went up to Mr. Wisnowski's house and asked him what was the lowest price at which he would sell that property.

Q What number on Summer street was it?
A I don't recall just the number. Mr. Wisnowski came up. He was downstairs somewhere. We were discussing about this matter. Finally we arrived at the terms, and that they were
20 willing to sell the property for \$24,500 and out of that sum they were willing to pay me \$800 commission. And so we got a figure on the following day. We went up to a purchaser which we had spoken to before about it. In the afternoon this purchaser, his brother-in-law and his sister and I ourselves went all in the machine to the Wisnowski house and looked at the property. We examined it down cellar. The purchaser says he is satisfied to buy the property
30 and to pay the price asked for.

Q What is the name of the purchaser? A Marianna Ricciardi.

By the Court.

Q You say that on the day after you made this arrangement you took the purchaser to the property? A On the following day.

Q Who went with you? A The purchaser, his brother-in-law, his sister and myself.
40

Michael Baron, direct.

Q Did you talk to the defendants on that occasion? A I did.

Q To whom? A To both of them.

Q On the following day what happened? A On the following day when we went with the purchaser and his brother-in-law and sister, they examined the property, and the purchaser said they were perfectly satisfied to pay the price and were willing to buy the place. 10

Q To whom did he say that? A To Mrs. Wisnowski in their apartment. He asked Mrs. Wisnowski if she desired him to put a small deposit on the property now or at some other time. Mrs. Wisnowski said she is satisfied to let the purchaser buy this property. She is agreed to the price, but her husband is working at present and that we should come out about seven o'clock in the evening and then she would be willing to go to the lawyer and make an agreement and accept the full deposit then. So, at seven o'clock in the evening the purchaser, his brother-in-law and his sister came up with the machine to my office, and they went out to the premises with my salesman, Komarzanski. We came up. Mrs. Wisnowski, the wife—both of them were out and the girl was in the house. We asked the girl whereabouts was her father and mother. She said she didn't know, that some gentleman with a machine came up and took them away. So we were sitting there for ten minutes waiting for them, and the purchaser said at the time that there is no use to wait there; we might as well go home. We came back to the office, but half an hour later I sent my salesman again to the Wisnowski's property to find out whether they had returned. When he came back he says— 20 30 40

Michael Baron, direct.

Mr. Lafferty: I object.

By Mr. Klein.

Q Never mind what he said to you. Is that salesman in court? A Yes.

10 Q To your knowledge, were the premises in question sold to Marianna Ricciardi, the purchaser that you had procured? A Not sold that day, because it was sold to someone else.

Mr. Lafferty: I object to that.

The Court: Isn't that a question of law or a question of fact to determine whether it was sold or not? We are here to say whether it was sold or not. It is not for this man to say.

20 Mr. Klein: If your Honor please, our claim for recovery of the commission is based on the 1918 statute, the Brokers' Commission Act. It has been testified to already that an agreement was made with the broker.

30 The Court: Are you going to prove that the purchaser entered into a contract, a written contract, to buy the property or are you going to rely on an oral contract? Did that happen or didn't it?

Mr. Klein: It is a peculiar situation that arose. It was sold to some relative, as I understand it, of the purchaser that he had produced. That relative later assigned this contract to our purchaser. The title, after all was said and done, went back to the original vendee of the contract.

40 The Court: I see.

Michael Baron, direct.

Mr. Klein: The point I want to make now is that we are trying to substantiate in our course of action on the section of the 1918 act which relates to the making of oral agreements between owner and broker. The answer in this case admits the truth of the allegations in paragraph 7 of the complaint.

10

I wish to offer this letter in evidence (exhibiting a paper).

Mr. Lafferty: All right.

The Court: Mark it and let me look at it.

(The paper referred to was received in evidence and marked Exhibit P. 1.)

Mr. Klein: I wish to offer the envelope, by consent, in which the letter was sent. It shows the date of receipt. It is one exhibit.

20

(The letter was put in the envelope, both being one exhibit.)

Mr. Klein: I think that the defendant will admit that Walter Wisnowski and his wife were the owners of the property at that time.

The Court: That is admitted.

Mr. Lafferty: That is correct.

By Mr. Klein.

30

Q On the occasion when you were in the apartment of the Wisnowskis together with Marianna Ricciardi, your customer, how much did Marianna Ricciardi agree to pay for this property? A \$24,500.

Q What did Mrs. Wisnowski say to that? A She said she was satisfied that he is the buyer, but the agreement cannot be made at the present time on account of her husband was at work; that her husband will come home at seven

40

Michael Baron, cross.

o'clock, and that we might come in at seven o'clock and we will go over to a lawyer, make the agreement, and accept a deposit.

Q Did you ever demand your commission of \$800 from Mr. and Mrs. Wisnowski? A I did.

Q Did you ever receive it or any part of it?
10 A No, sir.

Cross examination by Mr. Lafferty.

Q What time of the day or evening on November 23rd did you call at the home of the defendants? A It was somewhere around about six or seven o'clock. It was dark. I don't just exactly recall as to the hour, because it was dark.

Q Was anybody else there besides you and
20 Mr. and Mrs. Wisnowski? A At the time when I called Mrs. Wisnowski was alone. Her little daughter was in the kitchen, the little girl. Mr. Wisnowski was in the cellar. She called him upstairs and he came up.

Q Is that all who were present? A That is all I remember.

Q Had you had any purchasers or buyers looking at this property prior to that time? A
30 Yes, sir. We had this present purchaser there at the time.

Q While he was looking at it prior to November 23, 1924, you had no agreement about commissions? A Not before that time, no.

Q You hadn't asked the defendants whether they would pay you a commission before that time? A Yes, I did, on November 23rd in the evening.

Adjourned until tomorrow morning.
40 December 18, 1924, at ten o'clock, A. M.

Michael Baron, cross.

SECOND DAY.

December 18, 1924.

Continued pursuant to adjournment.

Counsel present as before stated.

MICHAEL BARON, resumes the stand. 10

Cross examination (continued) by Mr. Lafferty.

Q How many times prior to November 23rd had you called on the defendants with Mr. Ricciardi as your client? A About two or three times.

Q When was the first of these calls made? A I don't recall the date. 20

Q When was the second made? A It was not long before November 23rd.

Q A week before? A Not as long as that.

Q But it was before. A I imagine about three or four days before.

Q Was that the last call prior to November 23rd, that you now speak of? A I believe it was the last call, yes.

Q Then that other one was about November 21st? A No, before that. 30

Q About November 19th? A About a week before that.

Q At that time did you have any agreement with the defendant as to the payment of your commission? A Not then.

Q Had you talked about the matter of commissions then? A No, sir.

Q Did you ever talk about these commissions prior to November 23rd? A No, sir. 40

Michael Baron, cross.

10 Q What was the cause of your talking about commissions to them on November 23d when you had some clients that you were producing? A Because the price was not settled before that time. I asked them what their price was and they said \$26,500; but on November 23rd, I went there with my salesman and asked Mr. Wisnowski for what price we can purchase that property.

Q You went to Mr. Wisnowski's house? A We went to Mr. Wisnowski's house and we determined the exact price for which we could sell the house.

Q You say that your salesman was with you on that occasion? A Yes.

Q You didn't say that yesterday, did you? A Yes, I did.

20 Q Didn't you tell us that you and Mr. and Mrs. Wisnowski and the daughter were the only persons present? A That is on their part, himself, his wife, and little girl, and myself and my salesman.

Q On the occasion about one week prior to November 23rd did you call alone on your part? A No, sir; I was also there with the salesman.

30 Q You were both present? A At the time Mrs. Wisnowski and the daughter was alone in the house.

Q You were both present, you and your salesman? A Yes, sir.

40 Q On the one occasion prior to that who was present? A I was there with the salesman also at the time when Mr. Ricciardi was there and his brother-in-law and sister were there and we examined the property; and just about when we were ready to leave another automobile came in there on the same property.

Michael Baron, cross.

Q What was the date of that occurrence? A I don't remember.

Q How long prior to November 23rd? A It was about a couple of weeks or so.

Q Was Mr. Komarzanski present? A We were outside at the auto ready to leave. Another machine came in there. I said, "I suppose that is another party coming to look at the property." Mr. Ricciardi said, "That is my brother." We went on with our machine. 10

Q Was your salesman there on that occasion? A Yes.

Q Do you know what day of the week November 24th was? A I don't remember.

Q On November 24th when you called, did you see Mr. Wisnowski at all? A No, sir.

Q Were the terms of the sale which you say was to be made with Mr. Ricciardi discussed? A It was that Mr. Wisnowski was to take a \$3,000 second mortgage, Mr. Ricciardi to pay \$5,000 in cash, and the balance I was supposed to be responsible for the loan. 20

By the Court.

Q How much was the first mortgage? A There was a small first mortgage which we took no consideration of on account we had in mind that we would take out a new one. 30

Q You were going to pay that off and take a new one? A Right off.

By Mr. Lafferty.

Q You say there was a small first mortgage? A There was a small mortgage. I didn't take any heed of it on account we were in mind to get a new loan on it. 40

Michael Baron, re-direct.

Q Have you any idea how much that mortgage was? A I don't recall. I didn't pay much attention to it.

Q You were to get a loan for the full amount?
A Yes, he wanted \$5,000 in cash, \$3,000 second mortgage, and the balance we were to get at the building & loan association.

Q Didn't you know that there were building and loan mortgages on that property totalling \$15,000? A I think there was a mortgage on there. It was quite sometime ago. But it was much too big shares. We didn't care to accept it. We wanted to take a new loan.

Q When you wrote the letter of November 26th, which is in evidence and Marked P. 1, you hadn't made the sale of that property to your client? A At the time my client did not buy it because the other party bought it.

Q Is your answer to my question yes or no?
A No, sir.

Re-direct examination by Mr. Klein.

Q Why not? A Because the other party bought it.

Q Who was the other party?

Mr. Lafferty: I object.

The Court: I will admit it.

Mr. Lafferty: I except.

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

Exception noted as ground of appeal.

A I don't know the name of the party that bought the property.

Michael Baron, re-direct.

Q Do you know whether he was any relative to your client?

Mr. Lafferty: I object to that. There is no allegation of any fraud or conspiracy in this complaint. It makes no difference what the relationship may have been, if there was any. 10

The Court: I sustain the objection.

By Mr. Klein.

Q In answer to Mr. Lafferty's question, you said that at the time you wrote the letter of November 26th you had not yet made the sale to your client? A No, sir.

Q What was the date when you had Ricciardi at the home of the Wisnowskis? A The last time. 20

Q The last time. A November 23rd, in the afternoon.

Q The 23rd or the 24th? A The 24th.

Q You had a conversation with Mrs. Wisnowski at that time? A Yes, sir.

Q In the course of your conversation was it agreed by Mrs. Wisnowski to sell this property for \$24,500 to Ricciardi? 30

Mr. Lafferty: I object.

By Mr. Klein.

Q Did Ricciardi agree to purchase the property from the Wisnowskis for \$24,500?

Mr. Lafferty: I object to that.

The Court: I sustain the objection.

Mr. Klein: I ask for an exception. 40

Michael Baron, re-direct.

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

Exception noted as ground of appeal.

By Mr. Klein.

10 Q Relate the conversation that was had on that day between the parties who were present.

A The conversation was this: At that time we had different prices set on the property.

Mr. Laffery: I move to strike that out as not responsive.

By Mr. Klein.

Q Confine yourself to the conversation on that day. A You mean to say on the 24th?

20 Q Yes.

By the Court.

30 Q You had Ricciardi with you, did you? A Yes, sir, and his sister and brother-in-law. That was in the afternoon. When we came into Mrs. Wisnowski's kitchen, there was no one at home except herself and little girl. I asked Ricciardi if he would care to look at somebody else's property somewhere else, and he said he didn't care to. The sister said she would like to look at the cellar. We went down to the cellar and came back again, and I said, "Are you satisfied," and she said, "Yes. Everything is satisfactory." I said, "Mrs. Wisnowski, we are willing and ready to buy the property and this purchaser is willing to pay you \$24,500, the price that you wanted. If you care to accept any deposit temporarily we are willing to give it to you now." 40 She said, no; it wasn't any use to do anything.

Michael Baron, re-cross.

We might as well wait until seven o'clock; her husband would be home then and then we will go to any lawyer we want to and put the deposit there. I said, "How about my commissions?" She said, "You will get the commission you are entitled to according to the regulations." I said, "It comes about \$817.50 according to the rules and regulations." She said, "What is the use of adding on the \$17.50?" I said, "All right, let it be \$800 even." We parted and were ready to go there that evening. 10

Q Did you say anything to Mrs. Ricciardi?

A She said she was willing to do anything her husband agreed to do.

Re-cross examination by Mr. Lafferty.

Q You had a talk with Mr. and Mrs. Wisnowski on November 23rd as to what you were going to receive as commissions? A Yes, on the 23rd. That was in the evening. 20

Q You have testified that you had an agreement on that date, have you not? A Not definitely.

Q So that you had no agreement whatever on November 23rd about commissions? A Yes, I did. 30

Q But on November 24th? A I repeated it. That wasn't what it came to. According to the rules it came to \$817.50.

Q On that date you and Mrs. Wisnowski talked about reducing it to \$800, did you? A Yes, we agreed on \$800 even.

Q I say, did you agree on that amount on November 23rd? A On November 23rd we spoke about commissions, but did not come to figuring the exact amount. 40

Michael Baron, re-cross.

By the Court.

Q When did you see Mr. Wisnowski after the meeting you had with his wife on November 24th? A Mrs. Wisnowski, she was in the house in the afternoon when we arrived with the customers and Mr. Wisnowski was at work. We
10 were willing to deposit temporarily and were willing to pay the price. Mrs. Wisnowski said we should wait until seven o'clock when her husband would come home then go all together to any lawyer we might suggest and draw the agreement and pay the deposit there.

Q When did you see Mr. Wisnowski after the meeting you had with his wife on November 24th? A I didn't see him at all on that day.

Q You didn't see him after that? A I
20 didn't see him after that. As a matter of fact Mrs. Wisnowski was the real conductor of all the transactions.

Q If no commissions were actually figured out on November 23rd and you didn't see Mr. Wisnowski again, how can you claim that he owes you any commissions? A I told him we were entitled to get a commission according to the rules and regulations provided in Newark for
30 brokers.

Q You didn't say that in the notice that you sent them. In fact, you didn't say in your notice what you have said here. In that letter of November 26th, 1923, you told them that they had agreed to pay you commissions of \$800 for selling the aforesaid property to Marianna Ricciardi for \$24,500. A That was the understanding between us.

Q You didn't sell the property to him on November 23rd when this contract was made. The
40

Sam Komarzanski, direct.

property wasn't sold on the 23rd; it was sold on the 24th. A I was willing with the customer to buy the property on November 24th.

SAM KOMARZANSKI, sworn in behalf of plaintiff. 10

Direct examination by Mr. Klein.

Q What is your business? A Salesman for Mr. Baron.

Q Are you a real estate agent for Mr. Baron? A Yes.

Q Did you work for him in November, 1923? A Yes.

Q Do you know Mr. and Mrs. Wisnowski? A Yes. 20

Q Where was she living at that time? A On Hunterdon street, 386-388-390. That is three houses.

Q They owned that property? A Yes.

Q Did you ever show that property to anybody for sale? A A couple of times I showed it before.

Q Do you know Mr. Ricciardi? A Yes, sir. 30

Q Did you ever show him the property? A Yes.

Q When? A I showed him the property three times, three or four times.

Q What was the last time that you and Ricciardi were at the property? A I showed Ricciardi the property and he said he liked this property.

Q What was the last time that you were there? A November 23rd was the last time. 40

Sam Komarzanski, direct.

Q Were you ever at the home of Mr. and Mrs. Wisnowski with Mr. Baron? A On November 23rd I went with Mr. Baron to Mr. and Mrs. Wisnowskis.

Q Who was at home? A Mr. Wisnowski and his wife.

10 Q Whom did you talk with? A We talked with Mr. and Mrs. Wisnowski. Mr. Baron said, "I have a customer for \$24,500."

Q Who had the customer? A Mr. Baron had a customer for them. Mrs. Wisnowski said, "I am satisfied to sell my property for \$24,500."

By the Court.

Q Did Mr. Baron at that time, on November 23, say that he had a customer? A Yes.

20 Q And she said she was willing to accept that amount? A Yes.

By Mr. Klein.

Q Did Mr. Wisnowski say anything? A Sure.

Q What did he say? A He said, "All right."

Q Was there anything else said? A Yes.

30 Q On that day? A Sure.

Q What did they say? A They said on November 23, Mr. Baron said, "We will come tomorrow afternoon at three o'clock. We have got a customer ready to give you the price."

Q What did they say to that? A On the 24th?

Q You don't understand my question. You said that Mr. Baron said that he would be there tomorrow at three o'clock with a customer. What did Mr. or Mrs. Wisnowski say to that? A She

Sam Komarzanski, direct.

said, "All right. Bring your customers, and if I am satisfied I will sell my property."

Q Was anything said about commissions? A Yes.

Q What? A \$800.

The Court: We had better not pass that so quickly. 10

By the Court.

Q What was said about commissions? A \$800 commissions.

Q What was said about it? They didn't just say "\$800" and then let it stay in the air that way. Who suggested the \$800 commission? A He said, "\$800."

Q Who said that? A Mr. Wisnowski. 20

Q Is that all that was said? He said, "\$800?" A Yes, sir, \$800 commissions.

Q Did Mr. Baron say anything about commissions? A Sure.

Q That is what I am trying to find out. What did they say about the \$800 commissions? A Before November 23?

Q No. I thought you had got to November 24. A On November 24 we had the customer there to give the deposit. 30

Q Let us get back to November 23. What did they say about commissions? That was the time that you said you went there to Mr. Wisnowski's house with Mr. Baron, who said he had a customer. You said that Mrs. Wisnowski said that she was willing to accept \$24,500 and so was her husband. Was anything said about commissions then? A Yes.

Q What was it? A I don't remember. 40

Sam Komarzanski, direct.

Mr. Klein: I think perhaps we can use the interpreter to advantage.

The Court: He seems to get along with you all right. Maybe he doesn't understand.

By the Court.

10 Q Tell everything that was said on November 23rd. Tell everything that Mr. Wisnowski said or Mrs. Wisnowski, and everything that Mr. Baron said. Just tell the jury what took place on November 23. A 23rd?

Q Yes, when you and he went to the house. A Tonight six o'clock.

Q Just tell the jury about it. Tell everything that happened on that date. A On November 23 I go to Mr. Wisnowski with Mr. Baron at six o'clock. They were down cellar. Mrs. Wisnowski says, "Mr. Wisnowski working in the cellar."

Q Go ahead. A And Mr. Wisnowski came in the house. Mr. Baron said, "Mr. Wisnowski, I got ready customers for your property." Mr. Wisnowski said, "That is all right. I got for sale the property, if you bring the customers." Mr. Baron said, "You are satisfied for \$24,500 and our commissions?" Mr. Wisnowski said, 30 "All right. I will for \$24,500 sell my property." That is all.

By Mr. Klein.

Q What happened on the next day, the 24th? A I don't know.

Q You weren't there? A No.

Q What was the name of the customer that Mr. Baron had? A Marianna Ricciardi.

Q Is he in court today? A Yes. 40

Sam Komarzanski, cross.

Cross examination by Mr. Lafferty.

Q Do you speak the Polish language? A Yes, Polish.

Q Did you act as interpreter on November 23? A What?

Q Did you act as interpreter on November 23? A (No answer.) 10

Q I will withdraw that question and reframe it this way: Did you translate for Mr. Baron and Mr. Wisnowski on November 23? A Yes.

Q And the conversation with Mr. Wisnowski was in the Polish language, was it not? A No.

Mr. Lafferty: If your Honor please, I doubt very much whether the witness understands any questions. I don't want to interrupt at this time, except to request your Honor to instruct the witness to speak when he does not understand the question. Perhaps he is a little shy about it. 20

Mr. Klein: He ought to understand as well on cross examination as on direct. I have no objection if you want to get the interpreter.

(The remainder of the testimony of this witness was given through the official Polish interpreter.) 30

By Mr. Lafferty.

Q On November 23 the conversation which took place between Mr. Wisnowski and Mr. Baron was in the Polish language? A Yes. They talked Polish.

Q And the conversation with Mrs. Wisnowski was in the Polish language? A Yes. 40

Sam Komarzanski, cross.

Q When you were asked the question as to whether anything was said as to commissions while you were on this stand a few minutes ago, Mr. Baron nodded his head to you, didn't he?
A No, I knew myself that. There was supposed to be a commission. We went to Mr. Wisnowski on account of the commissions.

10 Q That was on November 23 that you went on account of the commissions? A Yes.

Q And when you were acting as interpreter, did you tell Mr. Baron that you were talking about commissions? A I did.

Q Did you tell Mr. Baron that the Wisnowskis said to come back at three o'clock on November 24? A Mr. Baron was there. I didn't have to tell him that.

20 Q On November 23 what commissions did Mr. Baron originally ask for? A \$800. He said eight hundred straight.

Q Did you say anything about \$817.50? A He did say so, but he said eight hundred straight will be all right.

Q Did Mr. Wisnowski say that would be all right? A Yes.

30 Q Who first suggested eight hundred? A Mr. Wisnowski. Both said so.

Q What do you mean by both? A They both were satisfied with that amount.

Q Whom do you mean by both? A Mr. Wisnowski and Mrs. Wisnowski.

Q Who first suggested the figure of \$800, Mr. Baron, Mr. Wisnowski or Mrs. Wisnowski? A Mr. Baron was the first one perhaps. He says, "Will you be satisfied to sell the property at \$800?" and I said, "Yes."

Marianna Ricciardi, direct.

Q Was anything said about the amount of cash to be paid if the property was sold to Ricciardi? A Yes, that was done before that.

Q Before what? A A few days before. There was a new building and loan and a second mortgage.

Q How many days before November 23 did that happen? A Three or four days. 10

Q Was Mr. Baron there on that occasion three or four days before November 23? A He was.

Q Was Mr. Ricciardi there? A No, it was not necessary for him to be there.

Re-direct examination by Mr. Klein.

Q When was the first time that the Wisnowskis agreed to sell this property for \$24,500? A 20
It was about two weeks before that. He had it on the market for quite some months before that, but he didn't have any customers.

MARIANNA RICCIARDI, sworn in behalf of plaintiff (through the interpreter.)

Direct examination by Mr. Klein. 30

Q Do you know Michael Baron? A Yes.

Q How long have you known him? A One year and a half.

Q Did he ever show you any property for sale? A Yes.

Q Where was the property located? A On Hunterdon street.

Q Do you know the numbers? A I don't remember. 40

Marianna Ricciardi, direct.

Q Who was the owner of that property; do you know? A A Polish man. I don't know his name.

Q Is he in court? A Yes.

Q Will you please point out Mr. and Mrs. Wisnowski? A (The witness points.)

10 Mr. Lafferty: There is no doubt about that.

By Mr. Klein.

Q When did Mr. Baron show you this property? A In the month of November.

Q What year? A 1923.

Q Did you ever have a talk with Mr. and Mrs. Wisnowski or either of them while Mr. Baron was present? A We talked together about the price.

20 Q What was the last time that you talked together about the price? A The 23rd or 24th of November.

Q Who was present on that occasion? A Mr. Baron, myself, a lady (my sister), and the wife of the owner.

Q Was your brother-in-law there? A My brother-in-law was there.

30 Q What is his name? A Carmelo Caliano.

Q What conversation was had at that time? A We talked about a deposit.

Q Did you say anything about buying that house? A Yes.

Q What did you say and what did Mrs. Wisnowski say? Let us have the whole conversation. A Mrs. Wisnowski was satisfied that I would buy the house for \$24,500.

40 Q Did you accept it? What did you say to that? A She said, "You come back at seven

Marianna Ricciardi, direct.

o'clock tonight. My husband will be home. We will talk it over. In the meantime I will talk it over with my lawyer."

Q What did you do at seven o'clock that evening? A I sent my brother-in-law to Mr. Baron's house. He didn't find Mr. Baron at home. He came back and said that the house was sold to someone else. 10

By the Court.

Q When was that, that evening? A That evening, yes, sir.

By Mr. Klein.

Q Who is Antonio Ragonesi?

Mr. Lafferty: I will object to the question. 20

The Court: I will admit it.

A He is an uncle to my brother-in-law.

Q Did you ever talk to Antonio Ragonesi about this property?

Mr. Lafferty: I object to that.

Mr. Klein: I just asked him whether he had a talk with Ragonesi. I didn't ask him what the conversation was. 30

The Court: I sustain the objection.

Mr. Klein: I ask for an exception.

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

Exception noted as ground of appeal.

By Mr. Klein.

Q Did you ever have any dealings with Antonio Ragonesi concerning this property? 40

Marianna Ricciardi, direct.

Mr. Lafferty: I object to that as immaterial.

10 The Court: Why is it? The plaintiff alleges in the complaint that on November 24 the defendants entered into an agreement for the sale of the premises to Antonio Ragonesi, and that then on November 28 they assigned the agreement to this man who was called on the witness stand Carmelo Caliano.

20 Mr. Lafferty: The allegation is that there is no basis for the claim or to support an agreement to pay commissions by the defendants in this case. It makes no difference what Antonio Ragonesi may have done, when he assigned it to. It is immaterial what he did about it.

The Court: If it is immaterial, why did you admit it in your answer.

Mr. Lafferty: I think I did not.

Mr. Klein: That was admitted, that portion of the paragraph.

Mr. Lafferty: I think I admitted the sale.

30 The Court: You say that you admit on November 24th they entered into an agreement for the sale of the premises mentioned to Antonio Ragonesi.

Mr. Lafferty: I deny the balance of the paragraph.

The Court: I will admit it.

Mr. Lafferty: I ask for an exception.

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

40 Exception noted as ground of appeal.

Marianna Ricciardi, direct.

Mr. Klein: Will you please repeat the last question, Mr. Stenographer.

(The stenographer read the last question as follows: "Did you ever have any dealings with Antonio Ragonesi concerning this property?")

A I went there to talk about the property and I found him there and he asked me what I was doing there and I told him that I was going to buy the property. 10

Q Did you ever have any other conversation with Mr. Ragonesi about this property? A A week before.

Q I mean after that? A After that he met me and he says, "That was a nice thing you done." 20

Q How did he say that? A I said to him, "That wasn't a nice thing that you done." He said, "Well, I will sell you the agreement so there won't be any hard feelings."

Q Did he sell you the agreement? A Yes.

Q Do you know Mr. Ragonesi's signature? A I don't know. I have never seen it.

Q Do you know whose signature that is (handing a paper to the witness)? A No. 30

By the Court.

Q Was Mr. Baron the first person that showed you this property? A Yes.

By Mr. Klein.

Q Did you have Ragonesi's contract assigned to you? A Yes.

Q That was the contract for the same property on Hunterdon street that Mr. Baron had 40

Marianna Ricciardi, cross.

told you was owned by the Wisnowskis? A The same property.

Cross examination by Mr. Lafferty.

10 Q And you re-assigned that contract to Mr. Ragonesi, did you not?

Mr. Klein: I object to what he did after the contract was assigned to him.

The Court: I will admit it.

A I did re-assign the contract to Mr. Ragonesi because the landlady said she was going to give me a \$3,000 second mortgage and then she changed her mind and said I had to re-assign to Mr. Ragonesi.

20 Q Did you know what were the terms of that contract which you purchased?

Mr. Klein: I object to that. I think the contract is the best evidence of that. The contract is not in evidence.

Mr. Lafferty: He has testified that he purchased the contract.

30 The Court: I sustain the objection.

Mr. Lafferty: May I have an exception?

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

Exception noted as ground of appeal.

By Mr. Lafferty.

40 Q The vendor named in that contract did not refuse to perform for your benefit, did he? A Yes, it was to my benefit.

Marianna Ricciardi, cross.

Q Whom did you mean by the landlady?

A I don't know.

Q You said that the landlady refused to give you a \$3,000 mortgage. Who did you mean?

The Interpreter: I misunderstood your question. I thought you mentioned a man's name. 10

(The Interpreter re-stated the question to the witness.)

A Mr. Wisnowski.

By Mr. Lafferty.

Q The reason you re-assigned this contract to Mr. Ragonesi was that you could not carry out its terms? 20

Mr. Klein: I object. It seems to me that it is immaterial as to the reason why he re-assigned it.

The Court: I will admit the question.

Mr. Lafferty: I ask for an exception.

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

Exception noted as ground of appeal. 30

The Court: You see, you allege that you had a purchaser, ready, willing, and able to buy the property. I will admit it.

Mr. Lafferty: Will you please read the last question?

(The stenographer read the last question as follows: "The reason you re-assigned this contract to Mr. Ragonesi was that you could not carry out its terms?") 40

Motion for a Non-suit.

A It was because the owner did not give me a \$3,000 mortgage.

Q And what day of the week was it that you called on the Wisnowskis for the last time? A I cannot remember.

Q Do you remember the day of the month?

10 A It may have been the 26th or 27th.

Q Did you see Mr. Wisnowski? A I saw his wife.

PLAINTIFF RESTS.

Mr. Lafferty: I move at this time for a non-suit. This is an action under the 18th amendment to the statute of frauds, in which there is a specific provision as to the circumstances under which a real estate broker or agent may recover commissions, having acted upon an alleged verbal contract. The express condition is, reading from the amendment, referring to the broker, "Who shall actually effect the sale or exchange pursuant to such oral agreement." In two other parts of that amendment there are conditions under which a broker may put himself in a position to recover his commissions. The part reads "prior to the actual sale or exchange of said property by said agent." There is no testimony whatever that Mr. Baron, the plaintiff, effected a sale of this property. There is no testimony whatever that his client purchased this property through his efforts. There is testimony, of course, that he took an assignment from a person to whom we had previously agreed to sell the property, but it is not alleged that the actual purchaser was brought

20

30

40

Motion for a Non-suit.

forth by the efforts of the plaintiff. There is no proof that in accordance with the taking of that assignment the property was ever conveyed to Ragonesi. If an actual sale means the making and executing a contract of sale, there has been no compliance in that manner. Furthermore, and directed particularly to the defendant Walter Wisnowski, there has been no evidence whatever that he agreed to pay the commissions. On those grounds, I expect a non-suit. 10

(Argument.)

The Court: I will deny your motion.

Mr. Lafferty: May I have an exception?

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

Exception noted as ground of appeal. 20

The Court: Do you want me to state my reasons?

Mr. Lafferty: I should like you to.

The Court: My reason is that under the statute if there was a contract with a broker to pay a commission of \$800 for the sale of this property for \$24,500, and if, before that contract was repudiated or revoked, the broker produced a customer who was ready, willing, and able to consummate such a contract, the broker upon those findings of fact would be entitled to his commission. Whether such an agreement was made and whether the customer produced was ready, willing, and able are questions for the jury to determine. 30

As to the second ground upon which the non-suit is requested, as far as I have been

Walter Wisnowski, direct.

10 able to follow the testimony on account of
the fact that the witnesses either have not
pronounced some of their words distinctly
or have spoken in a way so that I could not
understand them, I have gained the impres-
sion that there was testimony that the de-
fendant, Mr. Wisnowski, did make such a
promise. I do not want to take the case
from the jury where there is any doubt in
my mind. It is very difficult sometimes to
follow witnesses who cannot speak English
well, especially when they are turned away
from me. I think there was testimony that
both of the defendants, when asked for the
least price they would sell the property
for, said they would be willing to dispose
20 of it for \$24,500 and that they would be will-
ing to pay the plaintiff \$800 commission.
If you find that to be so, that would bear
out my recollection of the testimony. I will
not dispose of the case or non-suit the plain-
tiff on the second ground for that reason.

30 WALTER WISNOWSKI, one of the defend-
ants, sworn in his own behalf, (through the
Interpreter.)

Direct examination by Mr. Lafferty.

Q You are one of the defendants in this
case? A Yes.

Q When was the first time you ever saw the
plaintiff, Michael Baron? A The first time was
in 1923.

40 Q What month? A November.

Walter Wisnowski, direct.

Q What day? A It was the 10th or 11th.

Q What was the next time you saw him? A I have not seen him since.

Q On the 10th or 11th was there any conversation about the amount of commissions to be paid to him for the sale of your property?

A No. All we spoke about was the price of \$24,000. 10

Q Did you ever see Marianna Ricciardi? A I saw him once but I didn't know who he was.

Q What was that time? A I believe it was the 23rd or 24th of November.

Q Where did you see him? A In the yard.

Q What yard? A In the house that I sold.

Q What time of the day? A It was in the evening when I was home from work.

Q Did you have any conversation with him? A Yes. 20

Q What was that conversation? A He told me he was a moving man. He wanted to move me.

Q Was there any other conversation? A That is all.

Q Was there any conversation about the sale of your property to him? A Yes.

Q What was the conversation about that? A He said he was willing to buy. 30

By the Court.

Q He said what? A He was willing to buy.

Q Willing to buy what? A The house.

By Mr. Lafferty.

Q What did you say in reply to that? A I said, "All right."

Helen Wisnowski, direct.

Q What time in the evening was that? A About seven in the evening.

Q Had you entered into a contract to sell this property prior to that? A With the same people?

10 Q What man do you refer to now? A There were more real estate men there.

Q I am asking about Marianna Ricciardi. What conversation did you have with him? A He said he wants to buy. That is all.

Q Did you enter into any contract to sell to him? A No.

Q Did you enter into a contract to sell this property to anybody? A No, with no one.

20 HELEN WISNOWSKI, one of the defendants, sworn in her own behalf (through the Interpreter).

Direct examination by Mr. Lafferty.

Q You are one of the defendants in this case? A Yes.

Q Do you know the plaintiff, Michael Baron? A I saw him twice.

30 Q When was the first time? A A week before the second time.

Q When was the second time? A On the 24th.

Q Where did you see him on the 24th? A At my house.

Q Who was there? A He came with a customer. He said he had a customer.

40 Q Do you know who the customer was? A I don't know who he was, but it is the man who has been on the stand. He is an Italian man.

Helen Wisnowski, direct.

Q Did you talk with the customer that day?

A No, because I could not understand English.

Q Was any interpreter with this man? A No, Mr. Baron spoke Polish.

Q What conversation did you have with Mr. Baron on that day? A Mr. Baron said, "This is a customer. He wants to look at the house. Maybe he will buy." 10

Q Did you say anything about the price? A Yes.

Q What? A \$24,000.

Q Did you have any further conversation with either of them? A The first time he came alone. The first time he came with his partner and he asked if the house was for sale.

Q What else? A I told him, "If you bring me the right customer, you can sell." 20

Q Anything else? A He asked if he was going to get a commission.

Q What did you say? A I told him the most he can get is three or four hundred.

Q What did he say to that? A He said, "All right. I am satisfied." He came about ten times and always said it was \$300. Honest, that is true.

Q Did you have any further conversation with him the first time he called on you? A No, the first time he just came and asked if the house was for sale. I said, "Yes, if you bring the right customer, I will sell." 30

Q What was the date on which he called the last time? A The 24th of November.

Q What day of the week? A Saturday.

Q Was your husband at home when he called? A He asked me about my husband and I told him he would be home any minute. 40

Helen Wisnowski, direct.

Q Did he have a customer with him on that day? A Yes, he did.

Q Did you talk about the sale of the house?

A He only asked for my husband.

Q Did you tell him what time he would come back? A I expect him any minute.

10 Q Did you see him again that day? A Who?

Q Mr. Baron. A I did not.

Q Did you ever see him from that time until today? A No.

Q Did you sell this property to someone other than Mr. Ricciardi? A Yes.

Q Did you ever consent to the assignment of the contract?

20 Mr. Klein: I object to that. I think it is a question of what the contract provided. If the contract was assigned, it would be immaterial whether she consented to it or not.

The Court: What difference does that make, whether she consented to the assignment of the contract?

Mr. Lafferty: I will withdraw that question.

30 *By Mr. Lafferty.*

Q I show you a contract and ask you if that bears your signature. (Handing paper to witness.) A Yes.

Q Do you know the other signatures on there? A My husband.

Q Is that all you know? A And Antonio Ragonesi.

40 Q Did you see Mr. Ragonesi sign that contract? A Yes.

Helen Wisnowski, direct.

Mr. Klein: I won't object to this contract going into evidence, provided that along with it there will go in a copy of the contract which I have.

The Court: Do you both consent to its being put in evidence?

Mr. Klein: Yes.

10

Mr. Lafferty: I offer the contract without consenting to the copy.

The Court: How is this material?

Mr. Lafferty: It is material to show that they did not enter into any contract to convey this contract to the man whom Mr. Baron claims is his client. It settles that question.

The Court: I will admit it.

20

Mr. Klein: I ask an exception.

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

Exception noted as ground of appeal.

(The paper referred to was received in evidence and marked D. 1.)

By Mr. Lafferty.

Q Did you ever agree to pay Mr. Baron \$800 commission for selling your property? A Never.

30

Q Did you see Mr. Baron on November 23? A No. On the 24th was the only time. He wasn't there on the 23rd.

Q Was anyone from his office there on the 23rd? A No, not in my house.

Q When you saw Mr. Baron on the 24th of November, did you tell him to come back at seven o'clock? A No, I didn't. He just asked

40

Helen Wisnowski, cross.

me for my husband and I told him I expect him any minute.

Cross examination by Mr. Klein.

10 Q What did he say to that, then? A He didn't say anything.

Q You speak English, don't you? A (Speaking in English.) I cannot understand it.

Q You understand a word or so? A Just a little bit.

Q See if we cannot get along without the interpreter.

20 The Court: No, I prefer not. I have asked the interpreter to translate throughout the other counsel's case and I prefer him to continue through yours.

Mr. Klein: The reason I ask is this: She has testified that she had no conversation with Ricciardi—

The Court: Because he spoke Italian.

Mr. Klein: Because she did not speak English.

30 The Court: The interpreter will remain throughout the testimony.

Mr. Klein: I except.

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

Exception noted as ground of appeal.

By Mr. Klein.

40 Q You say you did not see Mr. Baron on November 23? A (Speaking through the interpreter.) I did not.

Olga Wisnowski, direct.

Q Was Mr. Baron ever at your house together with his salesman? A Yes, he was once, but not on the 23rd.

Q And how many times did Mr. Ricciardi come to your house? A Twice.

Q And the last time was on November 24? A Yes.

Q How much did he offer you for your property? A \$24,000.

Q Was there any talk about \$24,500? A We said at first we want \$24,500, but when it came to selling we took twenty-four thousand straight.

Q You said you would take twenty-four thousand straight and Mr. Ricciardi offered \$24,000; is that right? A He didn't say anything.

Q Didn't you just testify in answer to my question or previously in answer to your counsel's question that Ricciardi offered \$24,000? A He didn't talk to me at all. He didn't tell me he wants to buy, because I could not speak English. I spoke only to Mr. Baron.

Q Did Mr. Ricciardi make you any offer? A No.

OLGA WISNOWSKI, sworn in behalf of defendants.

Direct examination by Mr. Lafferty.

Q Were you at home on November 24, 1923? A Yes.

Q Did you see Mr. Baron on that day? A Yes, sir.

Q Did you hear a conversation between him and your mother? A He said—

Olga Wisnowski, cross.

Q Did you hear the conversation? A Yes.

Q What was said? A He asked my mother "When is your husband coming back home?" She said, "I expect him any minute."

10 Q Was there any other conversation? A No. He says they would like to look at the property. My mother says, "I will come and let you in."

Q Was any one with him at that time, with Mr. Baron? A Yes, his customer.

Q Was anything said on that day about price? A No.

Q Were you at home on the evening of November 23? A No, I had never seen him before that.

20 Q Were you at home on the evening of November 23? A No.

Q What time of the day was it that you refer to? A Some time in the afternoon. I don't remember.

Q Early or late in the afternoon? A About four o'clock, I think.

Q Did you see him again that day? A No.

Cross examination by Mr. Klein.

30 Q Where did you work on November 24th? A I didn't work.

Q Have you any sisters? A One small sister, twelve years old.

Q Was she at home on that day? A Yes.

Q Are you sure that you were at home? A I don't remember. This is a long time ago. I cannot remember very well.

40 Q In what room of your apartment did Mr. Baron and his customer converse with your mother? A In the kitchen.

Michael Baron, direct.

Q Where were you? A In the dining room.

Q You saw Mr. Baron and his customer? A Yes.

Q Did you talk to Mr. Baron? A No.

Q Did you come into the kitchen during that time? A Yes.

Q Did you say there was nothing said about the price? A No. 10

Q Mr. Ricciardi made no offer to your mother? A Not that I heard.

Q Did you or your mother say anything to Mr. Ricciardi about what your mother wanted for the property? A No.

DEFENDANT RESTS.

20

MICHAEL BARON, plaintiff, sworn in his own behalf in rebuttal.

Direct examination by Mr. Klein.

Q On November 24, 1923, when you were at the Wisnowskis' home together with Ricciardi, was there any conversation about the purchase price? A Yes, sir; there was.

Q What was that conversation? A I said that Mr. Ricciardi is satisfied to pay \$24,500. 30

Q What did Mrs. Wisnowski say then? A She says, "All right. He can buy the property."

Q What was that? Did you say that she said she was satisfied to accept \$24,500 and that he can buy the property? A We should wait until seven o'clock in the evening and she would be willing to go to any lawyer and accept a deposit and draw up an agreement. 40

Marianna Ricciardi, direct—cross.

MARIANNA RICCIARDI, recalled in behalf of plaintiff, in rebuttal.

Direct examination by Mr. Klein.

10 Q On November 24, when you were first at the home of the Wisnowskis with Mr. Baron, was there any talk about the price of the property? A Yes.

Q What was said? A He say no sell the house for less than \$24,500.

Q What did you say? A I say, "All right. I pay this price."

Cross examination by Mr. Lafferty.

20 Q Who did you say that to? A To Mr. and Mrs.

Q To both of them? A Yes.

Q On November 24? A Yes.

Q In the afternoon? A Yes.

Q Was anything said about coming back at seven o'clock? A On November 23?

Q I am talking about November 24.

30 The Court: We must have the interpreter. We have had several witnesses who have flatly contradicted themselves. In one breath they would say one thing and in another breath they had said another thing. That is difficult for the jury.

Mr. Lafferty: I don't know what to do with this man. He is here now and I want to cross examine him.

The Court: Send for the interpreter.

40 (The remainder of the testimony of this witness was given through the official Italian interpreter.)

Marianna Ricciardi, cross.

By Mr. Lafferty.

Q You say that you saw Mr. Wisnowski on November 24? A I talked to his wife in company with Mr. Baron.

Q But you didn't see him on that day? A Not on the 24th.

Q And when you were talking to Mrs. Wisnowski, you were talking about the price of this property; is that correct? A Yes; \$24,500.

Q Did you see them both on November 23? A I saw her husband working in the cellar at six o'clock. She was upstairs.

Q Did you talk with the husband? A I spoke to the husband and told him I was satisfied to buy the house.

Q Did you tell the wife that? A I went upstairs to talk to the wife. She sent me down and told me to talk to her husband.

Q What did Mr. Wisnowski say at that time? A He said, "When you are ready, we will sign the agreement." I told him I would be ready tomorrow night; I mean the 24th.

Q Why did you go back on the 24th if you had an agreement with him on the 23rd? A We didn't have an agreement on the 23rd because I had to bring my sister and my brother-in-law there. That is why we went back on the 24th.

Q So you didn't offer to buy the property on the 23rd of November, did you? A We did talk it over about buying the house and we named the price.

Q But you could not promise for your brother-in-law and your sister, could you? A I told him that what I did my brother-in-law and my sister would do the same.

Motion for Direction of a Verdict.

Q Then why did you have to wait until the next day? A They were working.

Q You had to see them before you could find out what they would do, didn't you? A I told him that tomorrow night would be better because they would not be working tomorrow. We were all coming together.

10 Q Did you all come together on the next day? A Myself, my sister, and my brother-in-law went.

Q And you did not see Mr. Wisnowski that day, did you? A No, I didn't see him, but his wife told us to come back at seven o'clock that night.

Q And that was all that was said when you saw her on November 24? A That is all that was said.

20

PLAINTIFF RESTS.

Mr. Lafferty: I move for a direction of the verdict on the ground on which I moved for a non-suit and on the additional ground that there now appears that there was no contract whatever made with the husband, no consent on his part. The last witness has testified to that fact just now.

30

The Court: I am unable to say that as a fact. These witnesses have been foreigners and they have contradicted one another. I have been sure at times that they did not understand the question. I cannot attempt to straighten out their testimony by deciding a question of fact. I am going to leave it to the jury. I will deny your motion.

40

Charge to Jury.

Mr. Klein sums up in behalf of plaintiff.

Mr. Lafferty sums up in behalf of defendants.

CHARGE.

10

The Court charges the jury as follows:

MOUNTAIN, J:

Gentlemen of the jury. The plaintiff in this case, Mr. Baron, is a real estate broker. He has brought this suit to recover commissions to which he alleges he is entitled because of a contract that he made with the two defendants. He bases his right of recovery upon an oral agreement which he alleges both defendants made with him, whereby, if he found a customer for property which they owned at 386-388-390 Hunterdon street in this city, they would pay him \$800 commission. He says that he produced Marianna Ricciardi and that Marianni Ricciardi, at the time when he was introduced to the defendants or at the time when he met them, was ready, willing, and able to buy the property at the price agreed upon between the defendants and Mr. Baron.

20

30

The plaintiff alleges that this agreement was made on November 23, 1923. On November 26, 1923, he sent a registered letter to the defendants in accordance with the statute of this State in which he stated to them that he claimed a commission of \$800 for producing Ricciardi as a purchaser of the property pursuant to an agreement between himself and them whereby they had agreed to pay him \$800 for selling the

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Charge to Jury.

property to Ricciardi for \$24,500. He referred to the agreement as having been made on Friday, November 23, at their residence. He claims that, when the purchaser was produced who was ready, willing, and able to buy the property at the price agreed upon, his commission was earned.

10 There are two defendants. Perhaps you will find that there was a contract with one of them; perhaps you will find that there was a contract with both of them. They are husband and wife. Mrs. Wisnowski testified among other things on the witness stand, if I understood her testimony, that she told the plaintiff to bring her the right customer and she would sell to him, and that Baron's commission would be at the most \$300; but she denied that any such buyer was produced.

20 Ricciardi seems to have been more or less the storm center of this controversy. He said, among other things, if I understood him, that either both of the defendants or one of them agreed to sell for \$24,500 and that he agreed to pay that price.

If you find as a matter of fact that there was an oral agreement, as claimed by the plaintiff, followed by this letter of November 26, 1923, and if you find as a matter of fact that the plaintiff produced a purchaser who was ready, willing, and able to buy this property at the terms agreed upon between the defendants and the plaintiff, then the plaintiff is entitled to his commissions.

30 You have heard throughout the trial the phrase "ready, willing, and able." The law in this State is that, when a broker under the statute—which I do not want to detail in this

40

Charge to Jury.

instant case because I am afraid it will only puzzle you—having complied with the terms of the statute, produces a customer who is ready, willing, and able to buy the property, and the owners refuse to go on with the transaction, never having revoked the broker's authority to sell or terminated their contract with him, he is entitled to his commission; but it must be proved to the satisfaction in this case, of you gentlemen that Ricciardi was ready to buy, was willing to buy, and was able to buy. Otherwise you may find that the defendant, or perhaps the defendants, are entitled to your judgment. 10

The plaintiff rests his case upon the recovery of the full \$800. He does not allege that he is entitled to a certain percentage of the purchase price, but alleges an oral agreement that \$800 was the amount of the commission to be paid to him if he produced a purchaser. 20

As I understood the defense, there is a denial that a purchaser who was ready, willing, and able was produced. There is testimony, as I have said, that some agreement, at any rate, was made with Mrs. Wisnowski for \$300. Whether or not you are going to find that that was the agreement is of course for you to determine. 30

There is very little law on the case except what I have indicated. The facts you will have to determine from the testimony that has been adduced. Some of the testimony as far as I was concerned, was hard to understand because of the way it was given. Sometimes a witness who is not familiar with the English language will, without any intent to misstate a fact, contradict himself. This often happens when he 40

Charge to Jury.

does not understand the first of two questions that have been asked, and the result is that we are confronted with two statements, one of which is directly contradictory of the other. Of course, it is your duty in such instances to determine which statement you are going to adopt as the truth.

10

You may take the case.

(The jury retires.)

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*Judgment.***JUDGMENT.**

ESSEX COUNTY CIRCUIT COURT.

35445	}	<i>Action at Law.</i>	10
MICHAEL BARON,			
	<i>Plaintiff,</i>	<i>Verdict by a Jury.</i>	
<i>vs.</i>			
WALTER WISNOWSKI and HELEN WISNOWSKI,	<i>Defendants.</i>	<i>Judgment for Plaintiff.</i>	

Amount	\$800.00	
Costs	69.25	
Total	\$869.25	20

Cohen & Klein, attorneys for plaintiff.

This action was tried before Judge Worrall F. Mountain, with a jury at the Essex County Circuit Court on December 18, 1924.

The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the said plaintiff, Michael Baron, and assess the damages against the said defendants, Walter Wisnowski and Helen Wisnowski, at the sum of eight hundred dollars. 30

Whereupon it is adjudged, the said plaintiff recover of the said defendant the sum of eight hundred dollars damages and sixty-nine dollars and twenty-five cents, costs of suit, making in the whole the sum of eight hundred sixty-nine dollars and twenty-five cents. 40

Exhibit P. 1.

Judgment entered and signed December 18,
1924.

WILLIAM S. GUMMERE,
Judge.

10

EXHIBIT P. 1.

November 26, 1923.

Mr. Wladyslaw Wishniewski & Mrs. Wladyslaw
Wishniewski,
386 Hunterdon Street,
Newark, New Jersey.

Dear Sir & Madam:

20 Please be advised that I, the undersigned,
claim a commission of \$800.00 as and for my
commission for producing Mariano Liccoria, as
a purchaser of your property #B86-388-390
Hunterdon Street, Newark, New Jersey, pur-
suant to an agreement between you and me,
whereby you agreed to pay to me a commission
of \$800.00 for selling the aforesaid property to
the said Mariano Liccorai for \$24,500.00.

30 I refer to the agreement made between you
and me on Friday, November 23, 1923, at your
residence.

Very truly yours,
MICHAEL BARON.

40

Exhibit P. 1.

(Envelope)

COHEN & KLEIN
Counsellors at Law
207 Market Street
Newark, N. J.

Registered 106723 10

Mr. & Mrs. Wladyslaw Wishniewski,
386 Hunterdon St.,
Newark, N. J.

Registered Registry Receipt Required
Return Receipt Requested 5324

Return Receipt

POST OFFICE DEPARTMENT
Official Business

20

Registered Article

No. 106723

INSURED PARCEL

No.....

Return to Cohen & Klein

(Name of Sender)

Street and Number,)

or Post Office Box) 207 Market St.,

Newark,

30

New Jersey

Exhibit D. 1.

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

10
(Signature or name of addressee)

.....
Helen Wisnowski
(Signature of addressee's agent)

Date of Delivery, 11/27/23, 192

EXHIBIT D. 1.

20 N. J. Contract for Sale of Property
Short Form—217.

KARKUS BROTHERS, INC.
Law Blank Publishers and Professional Stationery
Perth Amboy, N. J.

ARTICLES OF AGREEMENT

30 made the Twenty-fourth day of November, in the year of our Lord One Thousand Nine Hundred and Twenty-three

BETWEEN Walter Wisnowski and Helen Wisnowski, his wife, residing at #388 Hunterdon Street, of the City of Newark in the County of Essex and State of New Jersey party of the first part;

AND Antonio Ragonesi, residing at #317 Camden Street, of the City of Newark in the County of Essex and State of New Jersey party of the second part;

40

Exhibit D. 1.

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Twenty-three Thousand Nine hundred dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of warranty free of all encumbrances on or before the Twenty-fourth day of February next ensuing the date hereof, ALL that certain lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the City of Newark, in the County of Essex State of New Jersey and known and designated as Numbers Three Hundred Eighty-six, Three Hundred Eighty-eight and Three hundred and Ninety (386-388-390) Hunterdon Street and being Seventy-five feet front and rear by One Hundred Ninety-six feet deep on one side and One Hundred Ninety-four feet deep on the other side and upon which there are situate a four family frame and two and one-half family frame dwelling.

It is expressly understood and agreed that the said party of the second part shall have the privilege of closing title to said premises on any previous date to the above fixed for the closing upon giving one week's previous notice in advance of such intention.

The parties of the first part shall have the privilege of remaining in possession of flat now occupied by them on the second floor right side

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Exhibit D. 1.

of premises #388 Hunterdon Street, City, for the period of six months from the date of closing title, as tenants, at the monthly rental of \$37.00 payable in advance on the first day of each month.

10 AND the said party of the second part, for himself and for his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he, the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Twenty-three thousand Nine Hundred Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

20 On Execution of this agreement for which this is also a receipt,
Five Hundred Dollars..... \$500.
 On Delivery of Deed, cash,
Eighty-five Hundred Dollars..... \$8500.
 By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof, \$1100.
 By assuming a second mortgage in the nominal sum of Four Thousand Dollars 4000.

30 Both of said mortgages being building and loan mortgages and it is represented that the bonus or premium has been paid in advance and there are no defaults. The balance together with withdrawal value of B & L shares. On Bond and Mortgage, same containing usual interest, tax, assessment, insurances and install-

40

Exhibit D. 1.

ment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at six % payable semi-annually for two years..... balance 10

Total \$23900.

This contract is entered into upon the knowledge of the parties as to the values of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And the said party of the _____ part hereby agrees to pay to the licensed and authorized agent _____ a commission of _____ % on the purchase price aforesaid, 20

AND IT IS FURTHER AGREED by the parties to these presents, that the said part _____ of the second part, their heirs and assigns, may enter into and upon the said land and premises on the _____ day of closing title next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

AND IT IS FURTHER AGREED by the parties hereto, that the said deed of Warranty shall be delivered and received at office of F. D. Masucci, 185 Market St., Newark, N. J. between the hours of two in the afternoon and four o'clock in the afternoon on the said _____ day of closing title next ensuing the date hereof. 30

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed. 40

Exhibit D. 1.

Gas and electric fixtures, hot water heaters and chandeliers, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

10 The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

20 It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the **State Board of Tenement House Supervision**, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply.

30 It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments, or by adverse possession.

40 If at any time before the delivery of the deed the premises or any part thereof shall be or shall have been affected by any assessment or assessments which are or may become payable in

Exhibit D. 1.

annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed. 10

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of which they hereby fix and settle as liquidated damages therefor. 20

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

Walter Wisniowski	(L. S.)
Helen Wisnowski	(L. S.)
Antonio Ragonesi	(L. S.)

Signed, sealed and delivered
in the presence of 30

F. D. MASUCCI.

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

WITNESS our hands and seals this
day of A. D. 19 40

Exhibit D. 1.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.:

BE IT REMEMBERED, That on this 24th day of
 November in the year of our Lord One Thou-
 sand Nine Hundred and Twenty-three, before
 me, the subscriber, a Master in Chancery of
 10 New Jersey, personally appeared Walter Wis-
 nowski and Helen Wisnowski, his wife, who, I
 am satisfied are the grantor mentioned in the
 within Instrument, to whom I first made known
 the contents thereof, and thereupon they
 acknowledged that, they signed, sealed and de-
 livered the same as their voluntary act and
 deed, for the uses and purposes therein ex-
 pressed.

And the said Helen Wisnowski, being by me
 20 privately examined, separate and apart from her
 said husband, further acknowledged that she
 signed, sealed and delivered the same as her
 voluntary act and deed, FREELY, without any
 fear, threats or compulsion of her said hus-
 band.

F. F. MASUCCI,
 Master in Chancery of New Jersey.

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Exhibit D. 1.

CONTRACT

FOR THE SALE OF PROPERTY

TO

Date, 19

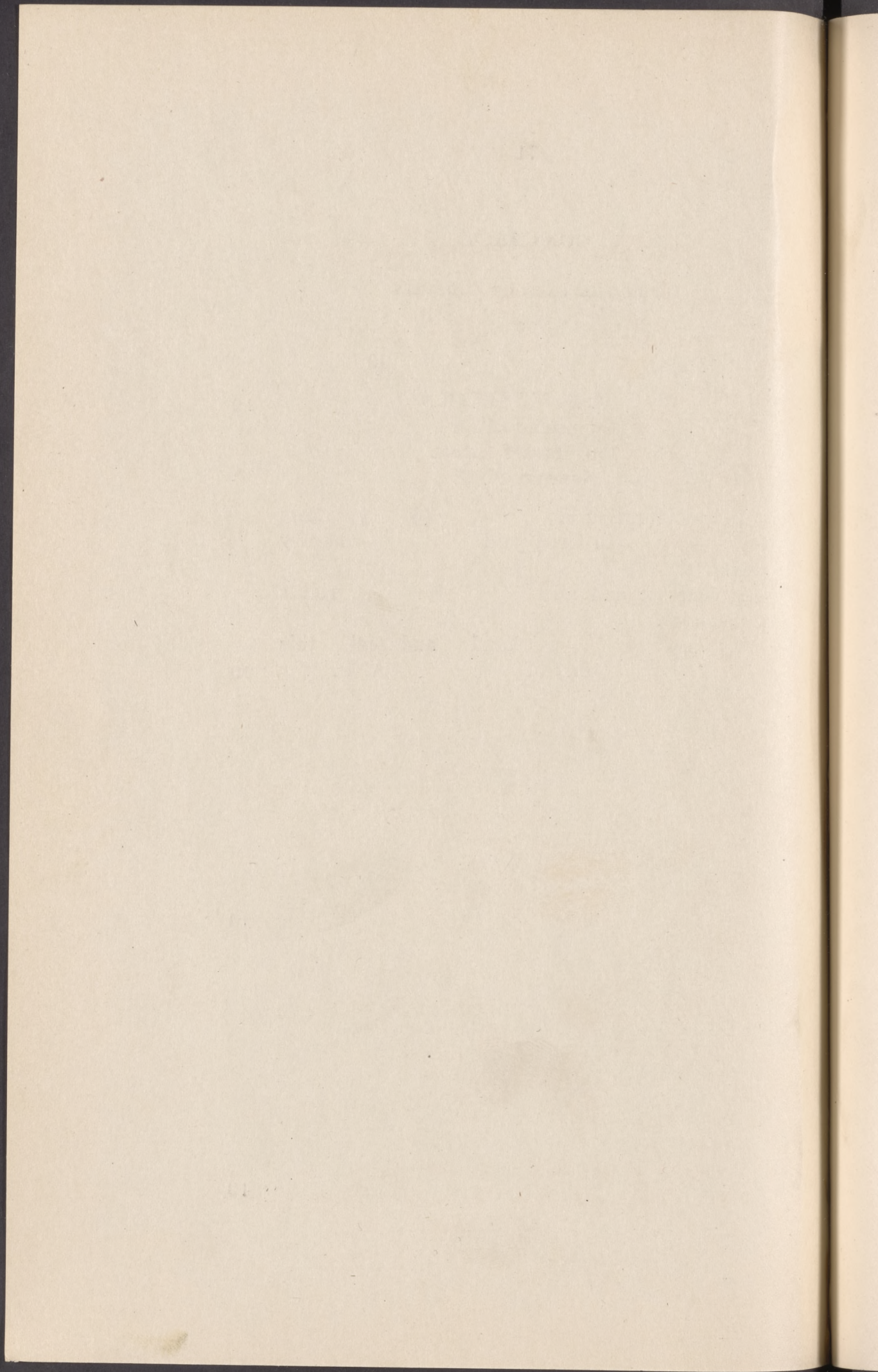
F. D. MASUCCI 10
Counsellor-at-Law
185 Market Street
Newark, N. J.

In consideration of (\$) dollars
to in hand paid hereby
assign to
this contract and all rights
thereunder.

WITNESS hand and seal this
day of A. D. 19 20

30

40



Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed October 6, 1925.

NEW JERSEY SUPREME COURT.

No. 28, May Term, 1925.

MICHAEL BARON,

Appellee,

vs.

WALTER WISNOWSKI, *et al.*,

Appellants.

10

Submitted May 15, 1925; Decided October 1, 1925.

In the amendment of 1918 (P. L., p. 1020) to Section 10 of the Statute of Frauds, relating to commissions of real estate brokers, the words "actually effect the sale" and "actual sale" in the first proviso connote something beyond merely introducing a purchaser able, ready and willing to buy on the terms fixed by the seller; to entitle the broker to commission under that proviso there must have been a conveyance to his client, or at least a binding contract of sale with him.

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Appeal from Essex Circuit Court.

Before Justices Parker, Minturn and Black.

For the appellants, James LeRoy Lafferty.

For the respondents, Cohen & Klein.

The opinion of the Court was delivered by PARKER, *J.*

This is a suit by a real estate broker to recover commissions under the act of 1918, chapter 40

Opinion of Supreme Court.

273 (P. L., p. 1020), amending the tenth section of the Statute of Frauds, C. S., p. 2617. There was no previous written authority as required by that section in its original form, nor was there any subsequent written recognition of such authority as provided by the amendment of 1911, p. 703, Supp. C. S. 747, and consequently the
 10 plaintiff was driven to rely on a notice served, as he claimed, in conformity with the amendment of 1918, *supra*. Plaintiff had a verdict and judgment for the amount of his claim.

In disposing of this appeal we find it unnecessary to consider the rulings on evidence assigned for error, because we conclude that there was error calling for a reversal in the Court's refusal to non-suit or to direct a verdict for defendant.
 20

The sole question involved was a correct construction of the amendment of 1918. Under Sec. 10 as then amended there are four stated situations in which the broker may recover his commission:

1. The original statute: previous written authority specifying the rate (or amount) of commission, and procurement of a "sale" by the broker. The meaning of the word "sale" under
 30 this statute is well settled; the latest case in our court of last resort, gathering up earlier decisions, is probably *Resky v. Meyer*, 98 N. J. L. 168, especially at pp. 172, 173.

2. He may also recover in case of a written and signed recognition stating the commission, and made after the "sale" as provided in the act of 1911, *supra*, which was probably passed in view of such cases as *Stout v. Humphrey*, 69 N. J. L. 436. Three and four are the cases
 40 brought in by the proviso-amendments of 1918.

Opinion of Supreme Court.

These are too long to quote here in full and are therefore epitomized.

3. The first proviso is that any broker (a) employed by oral agreement to sell or exchange (b) and who shall *actually effect the sale* or exchange pursuant to such agreement (c) before the same has been terminated in writing by the owner as later provided (d) and shall have served on the owner within five days after the oral agreement a written notice stating its terms and the rate of commission: shall be entitled to recover if the owner has not repudiated or terminated the agreement prior to the *actual sale or exchange* of the real estate. Then follow provisions about repudiation or termination by the owner not material here. 10

4. The second proviso is that if pursuant to an oral agreement the broker has in good faith entered into negotiations with a prospective purchaser and such negotiations shall be pending at the time of repudiation or termination by the owner, and such sale or exchange is "subsequently *consummated* between such owner and such customer," the broker shall be entitled to recover notwithstanding the repudiation of the agreement. This is in effect an exception to the "terminating" right of the owner established by No. 3. 20 30

In the case at bar there was no written authority by the owners at any time, and consequently there could be no recovery unless the case is brought within the provisos of 1918. And plaintiff's case was rested upon evidence of an oral contract and service of a notice of its terms and the rate of commission. Such evidence tended to show that the oral contract was made on November 23, and the notice was served on the 40

Opinion of Supreme Court.

26th, within the five days. No question is raised as to the sufficiency of the notice. The oral contract contemplated a meeting of defendants with plaintiff's intending purchaser on the evening of the 24th, at which time written contract between vendors and purchaser was to be executed. This appointment defendants failed to keep, having earlier in the day sold to another purchaser.

The Trial Judge in denying motions to non-suit and to direct a verdict for defendant held that under the amendment of 1918, "if there was a contract" (of course meaning an oral contract) "with the broker to pay a commission of \$800 for the sale of this property for \$24,500, and if, before that contract was repudiated or revoked, the broker produced a customer who was ready, willing, and able to consummate such a contract, the broker upon those findings of fact would be entitled to his commission." In so holding he must necessarily have given to the word "sale" as used in the provisos of 1918 the broad and liberal meaning placed on the same word in the original Section 10 as enacted in 1873. To this construction we cannot agree, because a careful reading of the provisos of 1918 should make it plain that the word "sale" is there so qualified as to mean something more than the mere bringing of vendor and purchaser together on price, terms, and ability to perform. The first proviso speaks of a broker who shall *actually effect the sale*; and of repudiation or termination prior to the *actual sale* or exchange; that the employment may be repudiated or terminated at any time after notice by an owner's notice served on the broker prior to the actual sale by such agent. We consider that by this repeated use of the

Opinion of Supreme Court.

word "actual" as applied to "sale" the Legislature intended to limit the right of recovery on an oral contract to cases where the vendor either conveyed to the broker's client, or at most to cases in which a valid and binding contract of sale was entered into between vendor and the purchaser brought in by the broker. This construction, while not specifically enunciated in *Noonan v. Henry*, 97 N. J. L. 446, was necessary to that decision because in that case the broker if he had been employed under written authority would have earned his commission. Our view is fortified, we think, by the second proviso, which as we have said is in effect an exception to the first, and protects the broker even after repudiation or termination, in a case where negotiations are pending between vendor and his client and the "sale or exchange is subsequently consummated between such owner and such customer."

In the present case the broker did not become entitled to commission under either of the two provisos, as we understand their meaning. He did not "actually effect a sale" before repudiation, which in this case was a sale to another; nor did the owner after repudiation sell to his client.

It is suggested that there was an "actual sale" to plaintiff's client because the latter took over the contract made by defendant with the other party, though he did not carry it out and abandoned it. But the owner was not responsible for anything that this other purchaser may have done by way of selling or assigning his contract. *Resky v. Meyer*, 98 N. J. L. 168.

The judgment will be reserved to the end that a *venire de novo* issue.

Order for Reversal.

ORDER FOR REVERSAL.

NEW JERSEY SUPREME COURT.

October Term, 1925.

10	MICHAEL BARON, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> WALTER WISNOWSKI and HELEN WISNOWSKI, his wife, <div style="text-align: right;"><i>Defendants.</i></div>	} <i>On Appeal from Essex County Circuit Court. Order for Reversal.</i>
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20 This cause having been duly submitted on
briefs in the May Term, 1925, at this court by
James L. R. Lafferty, counsel for the appellants,
and Cohen & Klein, counsel for the appellee, and
the Court having inspected the record and judg-
ment below and considered the causes assigned
for error and grounds of appeal therein;

30 It is, therefore, on this eighth day of October,
1925, ORDERED that the judgment of the said
Essex County Circuit Court be in all things re-
versed, set aside and for nothing holden, and
that the record and proceedings be remitted to
the said Essex County Circuit Court to be pro-
ceeded with in accordance with this judgment and
the practice of the said court.

Entered October , 1925, on motion of
James L. R. Lafferty, Attorney of Appellants.

A true copy.

EDWARD J. KELLEHER.

Order for Reversal.

#35445.

Judgment entered 12/18/1924. Bk. 99, p. 390.

Oct. 8, 1925. Filed by Edward J. Kelleher,
Clerk.Dec. 10, 1925. Filed Essex County Clerk's
Office. John H. Scott, Clerk.

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*Notice of Appeal and Grounds.***NOTICE OF APPEAL AND GROUNDS.**

NEW JERSEY SUPREME COURT.

10	MICHAEL BARON, <i>Plaintiff-Appellant,</i> <i>vs.</i> WALTER WISNOWSKI and HELEN WISNOWSKI, his wife, <i>Defendants-Appellees.</i>	}	<i>On Appeal.</i> <i>Notice of Appeal and Grounds.</i>
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*To James L. R. Lafferty, Esq., Attorney of De-
 fendants-Appellees:*

20 TAKE NOTICE that the plaintiff-appellant,
 Michael Baron, appeals to the Court of Errors
 and Appeals in the last resort in all causes in
 New Jersey, from the whole of the judgment
 of the New Jersey Supreme Court, on the fol-
 lowing grounds:

“Because the Supreme Court erred in revers-
 ing the judgment rendered by the Essex County
 Circuit Court.”

30 COHEN & KLEIN,
 Attorneys of Plaintiff-Appellant.

April 27, 1926.

Service of a copy of the within Notice of Ap-
 peal and Grounds is hereby acknowledged this
 27th day of April, 1926.

JAMES L. R. LAFFERTY,
 Attorney of Defendants-Appellees.

08MAY.T.1926

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

New Jersey Court of Errors and Appeals

MICHAEL BARON,
Plaintiff-Appellant,

vs.

WALTER WISNOWSKI AND HELEN
WISNOWSKI,
Defendants-Appellees.

On Appeal.

BRIEF ON BEHALF OF DEFENDANTS- APPELLEES.

POINT I.

There must be in fact a sale or exchange of real estate to or with a broker's customer in order to entitle the broker to recover commissions under section 10 of the Statute of Frauds as amended by P. L. 1918, Chap. 273 (page 1020).

Statement of Facts.

The claim of plaintiff, as stated in the complaint, is that he is entitled to receive from defendants the sum of \$800 for services rendered to defendants pursuant to a verbal contract wherein defendants agreed to pay plaintiff a commission of said sum for selling, at a fixed price, real estate owned by defendants; that, thereafter, plaintiff produced a buyer ready, willing and able to purchase at the stated price; that defendants contracted to sell to a person other than plaintiff's customer, and that, thereafter, and within five days from the date of said agreement to pay such commissions, plaintiff mailed to defendants, by registered mail, a letter setting forth the terms of the verbal agreement and making a claim for the sum of \$800.

For the purpose of the first point to be argued on this appeal, which is based on grounds of appeal No. 1, it may be assumed that all material facts alleged in the complaint were proved.

ARGUMENT.

The legal basis for an action for commissions under circumstances as alleged in this case, if it exists, can be found only in Chapter 273, P. L. 1918 (p. 1020). The statute reads as follows:

“10. No broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such land is in writing, and signed by the owner or his authorized agent, or the authority of the broker or real estate agent to make a sale or exchange of such land is recognized in a writing or memorandum signed by the owner or his authorized agent, whether or not such writing or memorandum is signed by said owner or agent before or after such sale or exchange has been effected, and the rate of commission on the dollar shall have been stated therein; *provided, however,* that any broker or real estate agent who may hereafter be employed by any owner of real estate by oral agreement, to sell or exchange any real estate belonging to such owner, and who shall actually effect the sale or exchange of such real estate pursuant to such oral agreement, before the same shall have been terminated by such owner, in writing, as hereinafter provided, may recover from such owner the amount of commission on such sale or exchange, provided such broker or agent shall within five days after the making of such oral agreement serve upon such owner a notice, in writing, setting forth the terms of such oral agree-

ment and stating the rate or amount of commission to be paid thereunder, and provided said owner shall not have repudiated or terminated such agreement prior to the actual sale or exchange of said real estate; said owner shall have the right, at any time after receiving such notice, to repudiate or terminate such oral agreement by serving upon such broker or agent a notice, in writing, to that effect, and upon the repudiation or termination of such agreement by the serving of such notices upon such agent or broker prior to the actual sale or exchange of such property by such agent, such agreement shall be null and void and no recovery of any commission shall be had thereunder; *provided, however*, that if any broker or agent shall have entered into negotiations with a prospective customer in good faith, under such agreement, for the sale or exchange of such property, and such negotiations shall be pending at the time of the repudiation or termination of such agreement by such owner, and such sale or exchange is subsequently consummated between such owner and such customer, such agent or broker shall be entitled to recover his commission on such sale or exchange, notwithstanding the repudiation or termination of such agreement. The notice provided for herein shall be served either personally or by forwarding the same to the person to be served, by registered mail, to the last known post-office address of such person."

(Note: The 1918 amendment or supplement begins with the first use of the words "provided however" and continues to the end.)

It is the contention of defendants-appellees that the facts alleged and proved do not constitute a cause of action under the statutory language above quoted.

The history of this particular section of the Statute of Frauds is divided into three parts. First, and until 1911, it was necessary that the authority of a broker be in writing and signed by the owner or his agent to entitle a broker to recover a commission. In 1911 the statute was amended and broadened so far as to entitle a broker to recover commissions if his authority was recognized in a written memorandum made either before or after the sale. The first recognition of an oral contract to pay commissions is to be found in the additions to the statute made in 1918. This development is material to a clear understanding of the cases dealing with rights under the statute.

The right of a broker who brings himself within section 10 of the Statute of Frauds, as it read prior to March 5, 1918, as to written evidence of his authority to act, to recover commissions upon proof of the production of a buyer ready, willing and able to buy upon the terms of the seller, is well recognized. It had been well recognized for some time prior to 1918.

Freeman v. Van Wagenen, 90 N. J. L. 358 (decided June 6, 1917);

Hinds v. Henry, 36 N. J. L. 328 (November Term, 1873).

This was the state of the law when the legislature had for its consideration the 1918 amendment and is of considerable aid in determining the legislative intent as expressed by the words of the amendment.

It is also to be remembered that the purpose of the Statute of Frauds, as expressed in its title, is to prevent frauds and perjuries.

Keeping in mind the interpretation of the statute prior to 1918, and the purpose of the

statute, it is submitted that the legislature intended and that the language of the 1918 amendment requires a distinction in interpretation between the words "sale or exchange" as used prior to 1918 and the words "actual sale or exchange" as used in the 1918 amendment.

From the date of original enactment and until 1918 the words "selling or exchanging" and "sale or exchange" were used. In that part of the statute wherein provision is made for recovery of commissions based upon written evidence of authority the same words are used today.

But from the point whereat begins the first authority for recovery of commissions earned or claimed to be earned under oral agreement, the words "sale" and "exchange" are frequently preceded by the word "actual."

The words "sale" and "exchange" as used in the statute now under consideration and as interpreted by the Court prior to 1918 included the production by a broker having written authority to sell, of a buyer ready, willing and able to buy. Therefore, if the 1918 amendment was intended to make no change in the production feature of a broker's activities when he rested his authority on an oral agreement as to authority, there was no reason for the use of the word "actually" in describing the broker entitled to recover as follows, "who shall actually effect the sale or exchange"; or of the word "actual" in dealing with termination of the agreement as follows, "prior to the actual sale or exchange"; or of the word "such" in referring to the sale on which commissions shall be paid as follows, "the amount of commission on such sale or exchange." The last quoted phrase, it is to be noted, follows closely after "who shall

actually effect the sale or exchange," and clearly refers to the sale actually effected.

It is submitted that the above analysis of the language of the statute shows that the right to recover by acting upon an oral agreement must depend upon allegation and proof of the facts of an actual sale by a broker-plaintiff to his client and cannot be rested upon his proof of production of a buyer ready, willing and able to buy.

There is a second line of reasoning which leads to the same result or at least shows a very good reason for such a distinction. This is based upon the fact that the purpose of the Statute of Frauds is to prevent frauds and perjuries.

Originally, in dealing with commissions for the sale of real estate, it was the legislative judgment that a writing fixing the terms of the agreement was essential to the prevention of frauds and perjuries. A writing was fixed upon because that eliminated a certain amount of uncertainty or because it prevented reliance upon memory or understanding. It made for certainty. It eliminated a danger of wrong based on fraud or perjured testimony.

Nothing could be more natural than that, when the safeguard of a writing was eliminated, some other safeguard should be injected into the requirements. The writing was eliminated because advantage was taken of its necessity in that actual sales were often made by persons acting on oral agreements to pay commissions followed by a successful refusal to pay commissions because there was no written evidence of the agreement to pay the commissions. In other words, the statute itself made possible and legal

an unfair refusal to pay a just debt for a service rendered in fact and of benefit of the seller of real estate. The actual sale was a fact. It was within the knowledge of others than the broker and seller. In fact it was required that there be written evidence of the fact. So there was no better safeguard to be substituted than the requirement that the broker shall prove an actual sale, and that is just what the 1918 amendment has done.

Finally, this Court has already expressed its opinion on the subject. *Noonan v. Henry*, 97 N. J. L. 447. Henry was an owner and Noonan a broker. Henry orally agreed to pay Noonan a commission for selling Henry's real estate. Noonan produced a buyer ready, willing and able to buy on Henry's terms of sale. Henry received a check from the buyer through Noonan and promised to meet Noonan and the buyer to execute a written contract of sale. Henry, Noonan and the buyer met. Henry then notified the others that he did not intend to sell, refused to sign a contract of sale and returned the check. Noonan then served the notice required by the Statute of Frauds, section 10, as amended in 1918.

The District Court ruled as follows:

“That there was an oral agreement to pay commissions and that the plaintiff had procured a purchaser, ready, willing and able to purchase the property, on the owner's terms in the person of Pank, but that the refusal of defendant to sign the contract and his withdrawal of the property from sale to the knowledge of the plaintiff before the notice was served by the plaintiff was sufficient repudiation or termination of the oral agreement to pay commissions, and that a verbal authorization could be verbally repudiated up to the time the written notice

was served, and that a written notice served by a broker after he has been notified that the deal is at an end is not a sufficient compliance with section 10 (Pamph. L. 1918, p. 1020), to entitle the broker to recover commissions; hence plaintiff was not entitled to recover, and judgment should go for the defendant."

This Court stated the facts and the legal conclusion to be drawn therefrom to be:

"Henry had authorized Noonan orally to sell his property. No agreement binding upon Henry had been executed with Pank, the purchaser. No agreement binding in law had been made by Henry with Noonan for his commission. Before any notice relating to his commissions was served by Noonan upon Henry, Henry repudiates and terminates the negotiation for the sale of his property and his oral agreement with Noonan for commissions. This, we believe, Henry had the legal right to do and that this right was reserved to him under the clause, 'and provided said owner shall not have repudiated or terminated such agreement prior to the actual sale or exchange of said real estate.' To hold otherwise would be to ignore this portion of the statute. This was the construction given to the statute by the District Court in finding a judgment for the defendant."

If the language of the 1918 amendment were to have the same construction as that given to section 10 of the Statute of Frauds prior to the amendment, the result must have been a judgment in favor of Noonan, because he had produced a buyer ready, willing and able to purchase on Henry's terms.

It is true that this Court then had two repudiations, one of the agreement of sale, and one of the agreement to pay commissions. Referring to these repudiations the Court said,

“This, we believe, Henry had the legal right to do.” Apparently, “this” refers to both repudiations.

The facts as proved in the present case show a repudiation of both agreement to sell and to pay commissions before written notice was given by plaintiff. It is pleaded and admitted that on November 24, 1923, defendants sold their real estate to Antonio Ragonesi (State of Case, p. 6, ll. 9 to 12, and p. 10, ll. 35 to 39). It is pleaded that Mariano Riccardi was plaintiff's client (State of Case, p. 6, ll. 3 to 7). Efforts were made to establish that allegation, and for this purpose we can assume the effort to have been successful. The plaintiff testified that his customer was not ready to buy on November 23, 1923 (State of Case, p. 28, l. 39, to page 29, l. 5). To the same effect is the testimony of Mariano Riccardi, plaintiff's customer (State of Case, p. 55, ll. 27 to 35). The plaintiff's written notice was dated November 26, 1923 (State of Case, pp. 62 to 64, Exhibit P. 1). The defendants entered into an agreement to sell to Antonio Ragonesi on November 24, 1923 (Exhibit D. 1, State of Case, pp. 64 to 71). Plaintiff testified that the contract of sale was to have been made at 7 o'clock on the evening of November 24, 1923, and that he called at defendants' house at that time for that purpose, only to find neither defendant at home (State of Case, p. 17). Plaintiff knew on November 24, 1923, that defendants had contracted to sell the lands in question to someone other than plaintiff's client (State of Case, p. 37, ll. 7 to 10).

It is clear, therefore, that on November 24, 1923, plaintiff knew defendants had sold their lands to someone other than his clients and that

he did not prepare or mail his written notice of claim to commissions until November 26, 1923.

This brings the present case directly within the ruling in *Noonan v. Henry (supra)*, if it follows (a) that this was a repudiation of any alleged oral agreement to sell to plaintiff's clients and (b) that this was a repudiation of any alleged oral agreement to pay commissions to plaintiff.

That it was a repudiation of any alleged oral agreement to sell to plaintiff's client is the accepted interpretation of the action by plaintiff as indicated by the following question and answer:

“Q To your knowledge, were the premises in question sold to Mariana Riccardi, the purchaser that you had procured? A Not sold that day, because it was sold to someone else.”

(State of Case, p. 18, ll. 9 to 12.) An answer to the same effect was made later (State of Case, p. 24, ll. 17 to 23).

The plaintiff also construed the action of defendants as a repudiation of any alleged oral contract to pay commissions to him. The best evidence of that fact is to be found in Exhibit P. 1 (State of Case, pp. 62 to 64, l. 15) and in failure to communicate with defendants other than by Exhibit P. 1. The evidence of such an interpretation so far as contained in Exhibit P. 1 is that the written notice was mailed in an envelope bearing the name of the present attorneys of record and was made returnable to them.

The plaintiff reached the true interpretation of defendants' actions. Those actions spoke more clearly than the words, “I will not sell” and “I will not pay commissions.” They meant,

"I cannot sell to your client and you have not acted for me in selling."

It is, therefore, submitted that the plaintiff should not be entitled to recover commissions from defendants because (a) he made no actual sale and (b) any alleged oral agreement to sell or to pay commissions or both were repudiated by defendants before written notice was given under the 1918 amendment to section 10 of the Statute of Frauds.

POINT II.

A witness having testified to failure to perform under a contract for a specified reason, it is proper cross examination to question him as to his knowledge of his rights under that contract.

The witness Mariana Riccardi, who was plaintiff's client, had testified on direct examination that he had procured an assignment of a contract whereby defendants had obligated themselves to sell to another (State of Case, p. 39, l. 37, to p. 40, l. 5). The first question on cross examination showed that he had reassigned to his assignor. The witness then volunteered as a reason that the landlady had agreed to give him a \$3,000 mortgage and later changed her mind (State of Case, p. 40, ll. 15 to 19). The next question was, "Did you know what were the terms of that contract which you purchased?" Objection was sustained and exception taken.

It is to be noted that the witness was not asked what the terms were. He was asked whether he *knew* what the terms were. The objection was based upon the ground that the contract was the best evidence of the fact

sought by the question. It is apparent that the contract could be no evidence of *knowledge* of the witness. The ground of objection cannot, therefore, be any reason for the ruling.

A witness may be cross examined as to the basis for action taken by him, as to his knowledge of facts on which his reason is based, or as to his credibility. The question now under consideration called for a "yes" or "no" answer.

Assuming that the answer had been "yes" the witness could have been further examined as to what the terms were or the contract could have been put in evidence, showing, as it does, an obligation to take back a mortgage (State of Case, pp. 64, etc., Exhibit D. 1). This could have been supplemented by testimony as to what the amount of the mortgage therein provided for would have been. This was material on the question of whether the witness, who was plaintiff's client, was able to perform. And all of that possible line of testimony, which was foreclosed as to effect, had a direct bearing on the credibility of the witness. And his credibility would have been tested in connection with the subject of the present action.

Had the answer been "No" his credibility would have been open to question at once, because it would have appeared that he assigned a reason for reassignment and failure to perform without knowing whether or not he had the right to insist upon that which he alleged defendants would not do.

It cannot be argued that the answer might have been such as to have no effect upon either the credibility of the witness or the issue, because (a) either of the two possible answers

would have had such effect and (b) one of the answers would have had such effect was sufficient to justify the question.

The opinion of the Supreme Court in support of the judgment from which this appeal is taken is reported in 3 N. J. A. R. 1461 and has been followed by the Supreme Court in the case of *Sattler v. Gott*, 4 N. J. A. R. 792.

It is, therefore, submitted that the judgment entered in this action by the Supreme Court should be affirmed.

JAMES L. R. LAFFERTY,
Attorney of Defendants-Appellees.

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

New Jersey Court of Errors and Appeals

MICHAEL BARON,
Plaintiff-Appellant,

vs.

WALTER WISNOWSKI AND HELEN
WISNOWSKI,
Defendants-Appellees.

On Appeal.

BRIEF OF PLAINTIFF-APPELLANT.

Facts.

Plaintiff, on November 23, 1923, was a duly licensed real estate broker of the State of New Jersey. On said date the defendants orally requested the plaintiff to obtain for them a purchaser for their real estate located at 386-388-390 Hunterdon street, Newark, N. J., for the sale price of Twenty-four Thousand, Five Hundred Dollars (\$24,500.00); and the defendants orally agreed to pay to the plaintiff a commission amounting to Eight Hundred Dollars (\$800.00). On November 24, 1923, the plaintiff produced a customer, one Marianna Ricciardi, who was willing to buy the property at the aforesaid price of \$24,500.00 (Case, p. 16, ll. 28-32). Title to the premises in question was held by the defendants, Walter Wisnowski, and his wife, Helen Wisnowski (Case, p. 19, ll. 23-25). On November 24, 1923, the plaintiff and the purchaser, Marianna Ricciardi, visited the apartment of the defendants and spoke to Mrs. Wisnowski. In this conversation the purchaser agreed to buy the premises at the aforesaid price and the defendant, Mrs. Wisnowski, agreed to sell to said customer (Case, p. 17). Later in the same day,

the defendants, without notifying the plaintiff or his customer, Marianna Ricciardi, entered into an agreement with one Antonio Ragonesi, to sell to him said premises for the price of Twenty-three Thousand Nine Hundred Dollars (\$23,900.00) (Exhibit E. 1). Said agreement between the defendants and Antonio Ragonesi was later assigned to plaintiff's customer, Marianna Ricciardi (Case, p. 39, ll. 37-40). The said Antonio Ragonesi and plaintiff's customer, Marianna Ricciardi, were related to each other (Case, p. 37, ll. 18-23). Within five days from November 23, 1923, the date when the defendants hired the plaintiff as a broker, the plaintiff, in accordance with the provisions of Chapter 273, P. L. 1918, page 1020, served upon the defendants written notice setting forth the terms of the verbal agreement and making claim for his commission of \$800.00. No reply was ever made by the defendants regarding plaintiff's notice. Defendants at no time gave the plaintiff any notice, verbal or written, of a repudiation or termination of the oral agreement to pay commission to the plaintiff for procuring a customer for their premises. Plaintiff obtained a judgment against the defendants, which judgment was reversed by the Supreme Court on appeal by defendants.

ARGUMENT.

Plaintiff was entitled to recover commission from the defendants for the sale of their premises by virtue of Chapter 273, P. L. 1918, page 1020, and the Supreme Court erred in reversing the judgment of the Trial Court below.

In the Supreme Court the defendants attacked the Trial Court's ruling, denying the motion of

defendants for a non-suit and the motion of defendants for direction of a verdict on the ground that the facts alleged in the complaint and proved do not constitute a cause of action under the 1918 Statute above referred to.

The defendants attempt to substantiate their contention by reading a construction into the 1918 amendment, making it imperative that an actually consummated sale or a conveyance of title be effected between a vendor and a broker's vendee before a broker may recover his commission from the vendor upon an oral agreement. It is submitted by the plaintiff that the phrase, "actually effected the sale or exchange," is to be construed at the present time in the same way that the courts of this State have construed it in numerous decisions in the past. In the case of *Dickinson v. Walters*, 125 Atlantic Reporter, page 235, the Supreme Court, in June, 1924, speaking through Mr. Justice Kalisch, said in reply to appellant's contention that "negotiating a sale means consummation of the sale," that "no sound reason has been advanced why such aberration from the normal sense of these phrases should take place," and the learned Justice further said in the same opinion (at p. 236) that "the law is firmly settled in this state that a real estate broker earns his commission when he secures a buyer on the seller's terms," citing *Clark v. Griffin*, 95 Law 508; *Steinberg v. Mindlin*, 96 Law 206, and the learned Justice further stated that "in order to absolve a party from the payment of commissions, it must clearly appear, by contract with his broker, that the payment of commissions was made contingent upon actual transfer of title." The 1918 amendment merely provides a procedure to be followed by a broker

who has produced a customer for a vendor's premises at an agreed price, but who has nothing to rely upon for collection of his commission excepting an oral agreement. This oral agreement between a vendor and his broker may be made as varied and as conditional as any agreement in writing between the same parties could be drawn. In other words, a written agreement between a vendor and his broker may provide that the commissions are to be paid only upon an actual delivery of a deed and payment of the purchase price; and this same condition may be embodied between the same parties in an oral agreement. In the instant case, the plaintiff, Michael Baron, relied upon an oral agreement for the recovery of his commissions, and this oral agreement contained no provision making payment of commissions dependent or contingent upon an actual transfer of title.

In the law covering the relationship of seller and broker, the words "sell" and "sale" have been given definite construction. In the leading case of *Resky v. Meyer*, decided by our Court of Errors and Appeals, November, 1922 (119 Atl., p. 97), at page 98, Mr. Justice Parker said, "It has been uniformly held that the words 'sell' and 'sale,' as applied to the relation between the seller of land and a real estate broker working to secure a purchaser of the land, import no more than the act of bringing the owner and purchaser together on terms satisfactory to both." This case and all the other cases of our State dealing with the relationship of seller and real estate broker decided since the enactment of the 1918 amendment declare the construction of the words "sell" and "sale" to be exactly the same as it was prior to the enact-

ment of said amendment. Our courts have continuously and uniformly held that the distinction between a "sale" and a "transfer of title" exists today as sharply as ever. It is therefore the contention of the plaintiff that with respect to this particular phrase of the 1918 amendment, "actually to effect a sale," that the plaintiff actually effected a sale of the defendants' premises to plaintiff's customer, Marianna Ricciardi, who was the assignee of the contract dated November 24, 1923, between the defendants as vendors and Antonio Ragonesi, a relative of plaintiff's customer, Ricciardi.

The defendants further rely upon the case of *Noonan v. Henry*, 97 Law 447. This case may be distinguished from the instant case in several important particulars. In the first place, Henry refused to sign a contract for sale, whereas the defendants, Wisnowski, actually signed a contract with one who was related to plaintiff's customer, which customer later became the assignee of said contract. In the second place, Henry withdrew his property from sale, but in our case the defendants proceeded to sell. Thirdly, Henry, upon the withdrawal of his property from sale, notified Noonan, the agent, whereas in the instant case, the defendants at no time notified the plaintiff broker of the withdrawal of their property from the market. Fourthly, when Henry withdrew his property from sale, he notified Noonan of the withdrawal before Noonan gave his five-days' notice under the 1918 amendment, but the defendants in our case never notified the plaintiff, Michael Baron, of a repudiation or termination of their oral agreement with him either before or after receipt of the five days' notice from Michael Baron, in accordance with the 1918 amendment, which

notice is marked "Exhibit P. 1" (Case, p. 62). Fifthly, Henry verbally repudiated the verbal authorization before written notice was served, but the defendants, Wisnowski, did not repudiate verbally or otherwise their verbal authorization either before or after receipt of the written notice from the plaintiff broker. In *Noonan v. Henry*, this Court stressed the fact that the seller repudiated not only the oral agreement to pay commissions but repudiated the negotiations of sale, but in the present case we find the fact to be that not only did the defendants, Wisnowski, enter into a contract of sale, but that the very contract they signed was later assigned to plaintiff's customer, Marianna Ricciardi.

In reality, the issue involved in the present case is narrowed down to the simple question of whether or not plaintiff's complaint alleges a legal cause of action against the defendants. The State of Case fails to disclose any motion made on behalf of the defendants to strike out the complaint on the ground that it fails to embody a valid cause of action against the defendants. The argument therefore of the defendants, can avail the defendants nothing at this time in this Court, not having been raised at any time before the Trial Court below.

It is therefore respectfully submitted that the Court properly denied defendants' motion for a non-suit and for a direction of a verdict because

1. "To actually effect a sale" does not mean "actual conveyance of title";

2. Defendants actually entered into a written agreement to sell their premises in question, which agreement was assigned to plaintiff's customer;

3. The defendants admit (Appellants' Brief in the Supreme Court, p. 2, ll. 3-7) that the allegations of plaintiff's complaint were proved at the trial and defendants failed, before or at the trial of the issue joined in this cause, to move to strike out the complaint on the ground that it failed to disclose a legal or valid cause of action against the defendants.

It is therefore respectfully submitted that the judgment of the Supreme Court reversing the judgment of the Essex County Circuit Court be reversed and that the judgment of the Essex County Circuit Court be affirmed.

Respectfully submitted,

COHEN & KLEIN,
Attorneys for Plaintiff-Appellant.

