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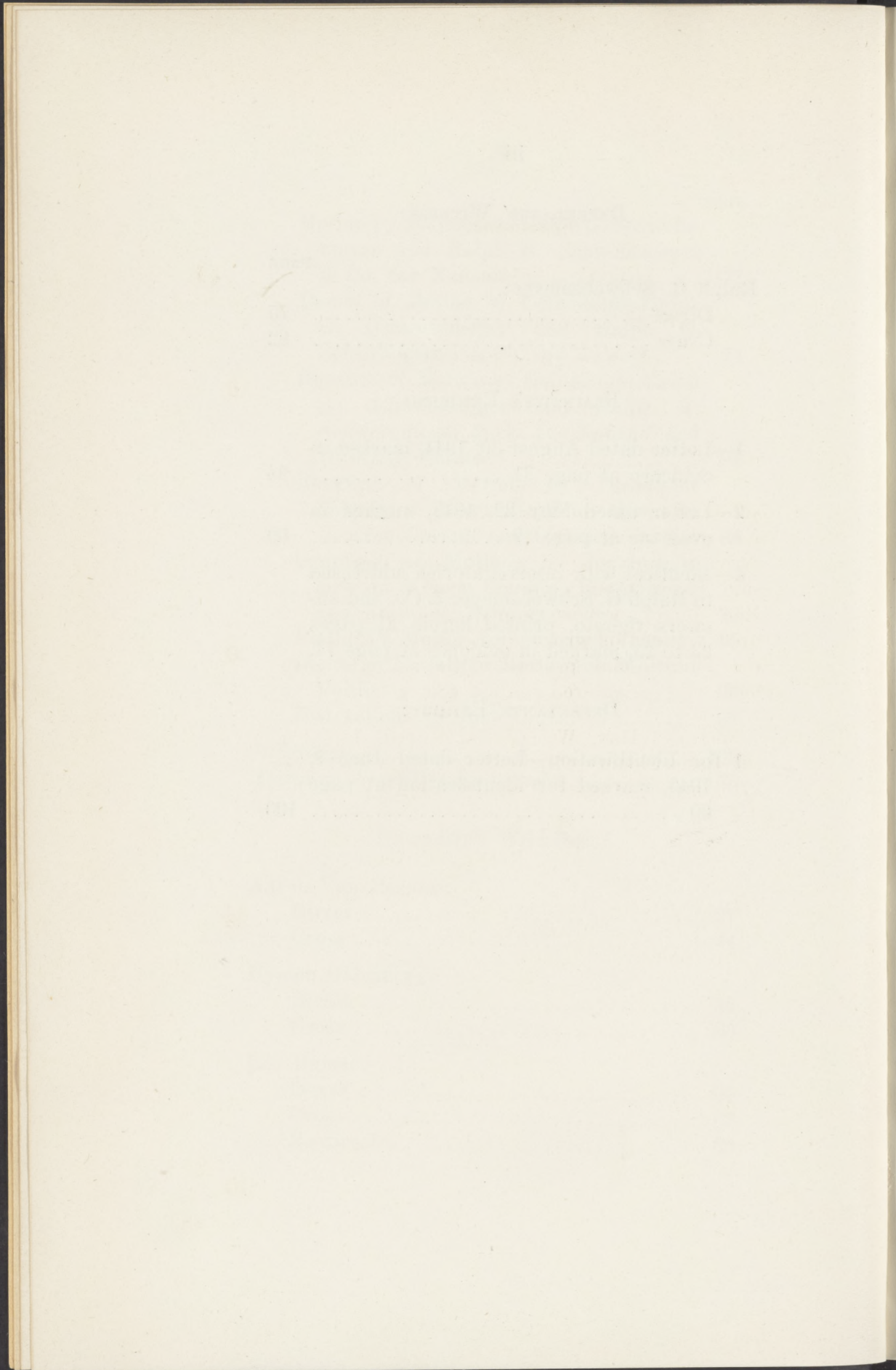
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Summons.

(Filed September 6, 1945.)

THE STATE OF NEW JERSEY, SS:

To: NEWARK & ESSEX BUILDING CORPORATION, a corporation organized and existing under the laws of the State of New Jersey and RALPH SCHWEBEMEYER. You ARE SUMMONED TO ANSWER the complaint of AARON VAN POZNAK, 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 said Essex County Circuit Court, at Newark, New Jersey, 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.

WITNESS, HON. WILLIAM A. SMITH, Judge of the Essex County Circuit Court, at Newark, this 27th day of August, 1945.

RUSSELL C. GATES
RUSSELL C. GATES, Clerk.

LUM, FAIRLIE & WACHENFELD,
LUM, FAIRLIE & WACHENFELD,
Attorneys for Plaintiff.

40

Complaint.

(Filed September 6, 1945.)

ESSEX COUNTY CIRCUIT COURT.

ACTION AT LAW.

10

 AARON VAN POZNAK,

Plaintiff,

vs.

NEWARK & ESSEX BUILDING CORPORATION, a corporation organized and existing under the laws of the State of New Jersey, and RALPH SCHWEBEMEYER,

Defendants.

20

Plaintiff, residing in the City of Maplewood, County of Essex and State of New Jersey, complaining of the defendants, says that:

FIRST COUNT

1. He is duly authorized and permitted to act as a real estate broker in connection with the leasing of real estate.

30

2. In or about August of 1944, the defendant corporation through its agent, servant and employee, authorized the plaintiff to arrange a lease of one of its corner stores in the defendant corporation's building, known as the National Newark and Essex Building and in consideration thereof agreed to pay plaintiff the usual brokerage commission.

40

Complaint.

3. Plaintiff having secured a lessee for the said store, introduced the said lessee to the defendant and participated in discussions and negotiations relative to the lease.

4. As a result said store was leased to the lessee on terms mutually satisfactory and the plaintiff therefore became entitled to a commission. 10

5. Although plaintiff has demanded payment from the defendant of the commission due him, the defendant has refused and neglected so to pay.

Plaintiff therefore demands as damages against the defendant corporation the sum of \$5,000.00, together with interest and costs of suit to be taxed. 20

SECOND COUNT

1. He is duly authorized and permitted to act as a real estate broker in connection with the leasing of real estate.

2. In or about August of 1944, at the instance and request of the said corporation, the plaintiff agreed to perform work and services as a broker on behalf of said defendant in negotiating for the leasing of a vacant corner store in the defendant corporation's building, known as the National Newark and Essex Building, for which work and services the said defendant agreed to pay the plaintiff the reasonable value therefor. 30

3. Plaintiff having secured a lessee for the said store, introduced the said lessee to the de- 40

Complaint.

fendant and participated in discussions and negotiations relative to the lessee.

10 4. As a result, said store was leased to the lessee on terms mutually satisfactory and the plaintiff therefore became entitled to a commission for the reasonable value of the services so rendered.

5. Although plaintiff has demanded payment from the defendant corporation of the commission due him, the defendant has refused and neglected so to pay.

20 Plaintiff, therefore, demands as damages against the defendant corporation the sum of \$5,000.00, together with interest and costs of suit to be taxed.

THIRD COUNT

1. He is duly authorized and permitted to act as a real estate broker in connection with the leasing of real estate.

30 2. The defendant, Ralph Schwebemeyer, in August of 1944, was the renting agent of the defendant corporation.

40 3. In or about August of 1944, the plaintiff agreed to introduce to the defendant, Ralph Schwebemeyer, a prospective lessee for a vacant corner store in the defendant corporation's building, known as National Newark & Essex Building, and the said defendant agreed with the plaintiff that if the said lessee leased the said store, the said defendant and the plaintiff would

Complaint.

divide as co-brokers the commission to be earned for the leasing of the said store.

4. In accordance with the said agreement, the plaintiff introduced to the said defendant, Ralph Schwebemeyer, a prospective lessee for the store and after discussions and negotiations the said lessee leased from the defendant corporation the said vacant store. 10

5. Defendant, Ralph Schwebemeyer, has received a commission for the renting of the said store.

6. Said defendant, Ralph Schwebemeyer, has refused to pay any part thereof to the plaintiff, although requested so to do. 20

Plaintiff demands as damages against the defendant, Ralph Schwebemeyer the sum of \$2,500.00, together with interest and costs of suit to be taxed.

LUM, FAIRLIE & WACHENFELD,
LUM, FAIRLIE & WACHENFELD,
Attorneys for Plaintiff.

To the Above Defendants: 30

TAKE NOTICE that if you intend to make a defense you must file an affidavit of merits within ten days after the service hereof upon you, and an answer within twenty days therefrom and in default thereof judgment will be entered against you. Lawful service upon a corporation shall be deemed personal service.

LUM, FAIRLIE & WACHENFELD,
LUM, FAIRLIE & WACHENFELD,
Attorneys for Plaintiff. 40

**Affidavit of Merits of Defendant
Ralph G. Schwebemeyer.**

(Filed September 1, 1945.)

10

[SAME TITLE.]

State of New Jersey,
County of Essex—ss.:

RALPH G. SCHWEBEMEYER, of full age, being
duly sworn on his oath says, that he is one of
the defendants in the above stated cause, and
he believes that he has a just and legal defense
20 to the said action on the merits of the case.

RALPH G. SCHWEBEMEYER,
Defendant.

(Sworn and Subscribed to August 31, 1945.)

30

40

**Affidavit of Merits of Defendant Newark &
Essex Building Corporation.**

(Filed September 6, 1945.)

[SAME TITLE.]

10

State of New Jersey,
County of Essex—ss.:

ALBERT H. BALDWIN, being duly sworn, deposes and says:

That he is President of Newark & Essex Building Corporation, a corporation, which is one of the defendants in the above stated cause; that he is authorized to make this affidavit; and that he believes that defendant has a just and legal defense to the said action on the merits of the case.

20

ALBERT H. BALDWIN.

(Subscribed and Sworn to September 6, 1945.)

30

40

**Answer of Defendant Ralph G.
Schwebemeyer.**

(Filed September 18, 1945.)

10

—◆—
[SAME TITLE.]
—◆—

The defendant, Ralph G. Schwebemeyer, answering the complaint filed by Aaron Van Poznak, in the above entitled cause, says that:

20

1. Defendant, Ralph G. Schwebemeyer, neither admits nor denies the allegations of the First and Second Counts of this complaint since the defendant, Ralph G. Schwebemeyer, is not made a party in the said counts and no judgment is demanded against the said defendant in the said First and Second Counts.

2. Defendant, Ralph G. Schwebemeyer, denies each and every allegation contained in paragraphs one to six, both inclusive, of the Third Count.

30

/s/ ANDREW B. CRUMMY,
Attorney for Defendant, Ralph G.
Schwebemeyer.

40

**Answer of Defendant Newark & Essex
Building Corporation.**

(Filed September 26, 1945.)

[SAME TITLE.]

10

Defendant, Newark & Essex Building Corporation, a corporation, answering the complaint filed in the within cause says that:

ANSWER TO FIRST COUNT.

1. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 1. 20
2. It denies the allegations of Paragraphs 2, 3, 4, and 5.

ANSWER TO SECOND COUNT.

1. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 1. 30
2. It denies the allegations of Paragraphs 2, 3, 4 and 5.

PITNEY, HARDIN & WARD,
Attorneys for Defendant
Newark & Essex Building
Corporation.

40

**Interrogatories Addressed to Defendant
Ralph G. Schwebemeyer.**

(Filed _____, 1946.)

—◆—
[SAME TITLE.]
—◆—

- 10 To: Ralph Schwebemeyer, defendant, and
Andrew B. Crummy, his attorney,
744 Broad Street,
Newark, N. J.

Sirs:

PLEASE TAKE NOTICE That the plaintiff demands of the defendant Ralph Schwebemeyer answers, under oath, to the following Interrogatories within ten days after service hereof upon you:

- 20 1). Subsequent to August of 1944 did this defendant enter into a lease or leases for the store which is on the north-east corner of Broad and Commerce Streets in the National Newark & Essex Building?
- 2). If the answer to the foregoing question is in the affirmative state on what date the said lease or leases were made and between what parties it or they were made.
- 30 3). If the answer to the first question is in the negative, state in detail by whom and under what terms and arrangements the said store has been occupied since the date of August 1944.
- 4). Furnish a copy of any lease entered into between the defendant Newark & Essex Building Corp. and anyone since August of 1944.

40 LUM, FAIRLIE & WACHENFELD,
LUM, FAIRLIE & WACHENFELD,
Attys. of plaintiff.

**Answers by Ralph G. Schwebemeyer to
Interrogatories.**

(Filed April , 1946.)

[SAME TITLE.]

10

To: Lum, Fairlie & Wachenfeld, Esqs.,
Attorneys for Plaintiff,
605 Broad Street,
Newark, N. J.

Sirs:

Defendant, Ralph G. Schwebemeyer, answering Interrogatories numbers 1, 2 and 3 says he did not "enter into a lease or leases for the store which is on the north-east corner of Broad and Commerce Streets". The lessor and lessee entered into any lease which may have been executed.

20

ANDREW B. CRUMMY,
Attorney for Defendant, Ralph G.
Schwebemeyer.

(Verified April 10, 1946.)

30

40

**Further Interrogatories Addressed to
Defendant Ralph G. Schwebemeyer.**

(Filed .)

—◆—
[SAME TITLE.]
—◆—

10

To: Ralph Schwebemeyer, defendant, and
Andrew B. Crummy, his attorney,
744 Broad Street,
Newark, N. J.

Sirs:

PLEASE TAKE NOTICE That the plaintiff demands
of the defendant Ralph Schwebemeyer answers,
20 under oath, to the following Interrogatories
within ten days after service hereof upon you:

- 1). In August of 1944 was the defendant Ralph Schwebemeyer the renting agent of the defendant Newark & Essex Building Corporation in connection with the rental of space in the building known as the National Newark & Essex Building?
- 2). Did the defendant Ralph Schwebemeyer receive a commission in connection with the leasing of the store on the south-east corner of Broad and Commerce Streets and located in the National Newark & Essex Building, to Hymon Gabriner by the Newark & Essex Building Corporation which leasing took place on or about April 30, 1945?
- 3). If the answer to the foregoing question is in the affirmative, state the amount of the commission so received.
- 40 4). In connection with the leasing of the store on the south-east corner of Broad and Com-

*Further Interrogatories Addressed to
Defendant Ralph G. Schwebemeyer.*

merce Streets and located in the National Newark & Essex Building, to Hymon Gabriner by the Newark & Essex Building Corporation, which leasing took place on or about April 30, 1945, is the defendant Ralph Schwebemeyer to receive any commission not already paid and if so, state the amount of it. 10

LUM, FAIRLIE & FOSTER,
LUM, FAIRLIE & FOSTER,
Attys. of plaintiff.

Answers of Defendant Ralph G. Schwebemeyer to Further Interrogatories. 20

(Filed May , 1946.)

[SAME TITLE.]

To: Aaron Van Poznak, Plaintiff and
Lum, Fairlie & Foster, Esqs.,
605 Broad Street, 30
Newark, N. J.

Sirs:

Defendant, Ralph G. Schwebemeyer, answering most recent set of Interrogatories, says "No" to interrogatories Nos. 1-2-4.

ANDREW B. CRUMMY,
Attorney for Defendant, Ralph G.
Schwebemeyer. 40

(Verified May 21, 1946.)

Order Adding Party Defendant.

(Filed September 30, 1946.)

[SAME TITLE.]

10

This matter having been opened to the court by Lum, Fairlie & Foster on motion returnable Friday, September 27, 1946, for an order permitting the adding as a party defendant a corporation known as Ralph G. Schwebemeyer & Co., and permitting the supplementing of the complaint if the said defendant be added as set forth in Schedule "A" of the said notice of motion,

20

Now therefore, it is on this 27th day of September 1946

ORDERED that the said defendant, to be known as Ralph G. Schwebemeyer & Co., be added as a party defendant and that the complaint may be supplemented as aforesaid.

DANIEL J. BRENNAN,
Judge.

30

We consent to the signing and entry of the above order:

/s/ PITNEY, HARDIN, WARD & BRENNAN,
PITNEY, HARDIN & WARD,
Attys. for Newark & Essex Bldg. Corp.

I consent to the signing and entry of the above order:

ANDREW B. CRUMMY,
ANDREW B. CRUMMY,
Atty. for Ralph Schwebemeyer.

40

Supplemental Summons.

(Filed October 3, 1946.)

THE STATE OF NEW JERSEY, SS:

To: RALPH G. SCHWEBEMEYER & Co., a
 (L. s.) corporation. YOU ARE SUMMONED TO ANSWER the complaint of AARON VAN POZNAK, 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 said Essex County Circuit Court, at Newark, New Jersey, 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.

10

20

WITNESS, HON. WILLIAM A. SMITH, Judge of the Essex County Circuit Court, at Newark, this 30th day of September 1946.

RUSSELL C. GATES
 RUSSELL C. GATES, Clerk.

LUM, FAIRLIE & FOSTER,
 LUM, FAIRLIE & FOSTER,
 Attorneys for the plaintiff.

30

40

Supplemental and Amended Complaint.

(Filed October 3, 1946.)

ESSEX COUNTY CIRCUIT COURT.

10

AARON VAN POZNAK,

Plaintiff,

v.

NEWARK & ESSEX BUILDING CORPORATION, a corporation organized and existing under the laws of the State of New Jersey, RALPH SCHWEBEMEYER, individually and RALPH G. SCHWEBEMEYER & Co., a corp.,

Defendants.

20

Plaintiff, residing in the City of Maplewood, County of Essex and State of New Jersey, complaining of the defendants, says that:

FIRST COUNT

1). He is duly authorized and permitted to act as a real estate broker in connection with the leasing of real estate.

30

2). In or about August of 1944, the defendant, Newark & Essex Building Corporation, through its agent, servant and employee, authorized the plaintiff to arrange a lease of one of its corner stores in the said defendant's building, known as the National Newark & Essex Building and in consideration thereof agreed to pay plaintiff the usual brokerage commission.

40

3). Plaintiff having secured a lessee for the said store, introduced the said lessee to the said

Supplemental and Amended Complaint.

defendant and participated in discussions and negotiations relative to the lease.

4). As a result said store was leased to the lessee on terms mutually satisfactory and the plaintiff therefore became entitled to a commission. 10

5). Although plaintiff has demanded payment from the said defendant of the commission due him, the said defendant has refused and neglected so to pay.

Plaintiff therefore demands as damages against the defendant Newark & Essex Building Corporation the sum of \$5,427.50, together with interest and costs of suit to be taxed. 20

SECOND COUNT

1). He is duly authorized and permitted to act as a real estate broker in connection with the leasing of real estate.

2). In or about August of 1944, at the instance and request of the Newark & Essex Building Corporation, the plaintiff agreed to perform work and services as a broker on behalf of said defendant in negotiating for the leasing of a vacant corner store in the said defendant's building, known as the National Newark & Essex Building, for which work and services the said defendant agreed to pay the plaintiff the reasonable value therefor. 30

3). Plaintiff having secured a lessee for the said store, introduced the said lessee to the said 40

Supplemental and Amended Complaint.

defendant and participated in discussions and negotiations relative to the lease.

10 4). As a result, said store was leased to the lessee on terms mutually satisfactory and the plaintiff therefore became entitled to a commission for the reasonable value of the services so rendered.

5). Although plaintiff has demanded payment from the said defendant of the commission due him, the defendant has refused and neglected so to pay.

20 Plaintiff, therefore, demands as damages against the defendant, Newark & Essex Building Corporation the sum of \$5,427.50 together with interest and costs of suit to be taxed.

THIRD COUNT

1). He is duly authorized and permitted to act as a real estate broker in connection with the leasing of real estate.

30 2). The defendant, Ralph Schwebemeyer, in August of 1944, was the renting agent of the defendant Newark & Essex Building Corporation.

40 3). In or about August of 1944, the plaintiff agreed to introduce to the defendant, Ralph Schwebemeyer, a prospective lessee for a vacant corner store in the defendant's building known as the National Newark & Essex Building, and defendant Ralph Schwebemeyer agreed with the plaintiff that if the said lessee leased the said store, the said defendant and the plaintiff would

Supplemental and Amended Complaint.

divide as co-brokers the commission to be earned for the leasing of the said store.

4). In accordance with the said agreement, the plaintiff introduced to defendant Ralph Schwebemeyer, a prospective lessee for the store and after discussions and negotiations the said lessee leased from the defendant Newark & Essex Building Corporation the said vacant store. 10

5). Defendant, Ralph Schwebemeyer, has received a commission for the renting of the said store.

6). Said defendant, Ralph Schwebemeyer, has refused to pay any part thereof to the plaintiff, although requested so to do. 20

Plaintiff demands as damages against the defendant, Ralph Schwebemeyer, the sum of \$2,713.75, together with interest and costs of suit to be taxed.

FOURTH COUNT

1). He is duly authorized and permitted to act as a real estate broker in connection with the leasing of real estate. 30

2). The defendant, Ralph G. Schwebemeyer & Co., a corporation organized and existing under the laws of the State of New Jersey, in August of 1944, was the renting agent of the defendant corporation, the Newark & Essex Building Corp.

3). In or about August of 1944, the plaintiff agreed to introduce to the defendant, Ralph G. 40

Supplemental and Amended Complaint.

10 Schwebemeyer & Co., a prospective lessee for a vacant corner store in the defendant corporation's building, known as National Newark & Essex Building, and the said defendant agreed with the plaintiff that if the said lessee leased the said store, the said defendant and the plaintiff would divide as co-brokers the commission to be earned for the leasing of the said store.

4). In accordance with the said agreement, the plaintiff introduced to the said defendant, Ralph G. Schwebemeyer & Co. a prospective lessee for the store and after discussions and negotiations the said lessee leased from the defendant corporation the said vacant store.

20 5). Defendant, Ralph G. Schwebemeyer & Co., has received a commission for the renting of the said store, amounting to \$5,427.50.

6). Said defendant, Ralph G. Schwebemeyer & Co. has refused to pay any part thereof to the plaintiff, although requested so to do.

30 Plaintiff demands as damages against the defendant Ralph G. Schwebemeyer & Co. the sum of \$2,713.75, together with interest and costs of suit to be taxed.

FIFTH COUNT

1). The plaintiff repeats the allegations of the Third and Fourth Counts of the Complaint.

40 2). The defendant Ralph Schwebemeyer, in dealing with the plaintiff, was acting as the agent, servant or employee of the defendant Ralph G. Schwebemeyer & Co. but failed to dis-

Supplemental and Amended Complaint.

close his relationship with the said Ralph G. Schwebemeyer & Co. to the plaintiff.

Plaintiff therefore demands as damages against the defendant Ralph G. Schwebemeyer & Co. as an undisclosed principal, the sum of \$2,713.75 together with interest and costs of this suit to be taxed. 10

SIXTH COUNT

1). Plaintiff repeats the allegations of the Third and Fourth Counts of the Complaint.

2). The defendant Ralph Schwebemeyer acted as the agent of the defendant Ralph G. Schwebemeyer & Co. and thereby warranted that he was authorized to act as such agent and in that capacity to bind the defendant Ralph G. Schwebemeyer & Co. 20

3). The said Ralph Schwebemeyer was not so authorized to bind the defendant Ralph G. Schwebemeyer & Co. and thereby breached his warrant of authority.

Plaintiff therefore demands as damages against Ralph Schwebemeyer the sum of \$2,713.75 together with interest and costs of this suit to be taxed. 30

LUM, FAIRLIE & FOSTER,
LUM, FAIRLIE & FOSTER,
Attorneys for plaintiff.

**Answer of Defendant Ralph G.
Schwebemeyer & Company.**

(Filed October 5, 1946.)

◆

[SAME TITLE.]

◆

10

Ralph G. Schwebemeyer & Company, one of the defendants named in the above entitled cause, in answer to the supplemental and amended bill of complaint, says that:

1. This defendant denies each and every allegation of paragraphs 1-5, both inclusive, of the first count.

20

2. This defendant denies paragraphs 1-5, both inclusive, of the second count.

3. The defendant denies paragraphs 1-6, both inclusive, of the third count.

4. This defendant denies paragraphs 1-6, both inclusive, of the fourth count.

30

5. This defendant denies paragraphs 1 and 2 of the fifth count.

6. This defendant denies paragraphs 1-3, both inclusive, of the sixth count.

ANDREW B. CRUMMY,
Attorney for Defendant, Ralph G.
Schwebemeyer & Company.

40

**Interrogatories Addressed to Defendant
Ralph G. Schwebemeyer & Co.**

(Filed .)

—◆—
[SAME TITLE.]
—◆—

10

To: RALPH G. SCHWEBEMEYER & Co.,
a corporation, defendant, and
ANDREW B. CRUMMY, Esq., its attorney,
744 Broad Street,
Newark, New Jersey.

Sirs:

PLEASE TAKE NOTICE That the plaintiff demands
of the defendant Ralph G. Schwebemeyer & Co.,
a corporation, answers under oath to the follow-
ing interrogatories within ten days after service
hereof upon you: 20

1. At any time has the defendant Ralph G. Schwebemeyer & Co. been the renting agent of the defendant Newark & Essex Building Corporation? If so, state between what dates it has been the said renting agent.

2. Subsequent to August of 1944 did this defendant Ralph G. Schwebemeyer & Co., either as renting agent or in some other capacity, participate in the entry or cause to be entered into a lease or leases for the store which is on the southeast corner of Broad and Commerce Streets, Newark, New Jersey, in the National Newark and Essex Building? If it did so participate, state in what capacity. 30

40

*Interrogatories Addressed to Defendant
Ralph G. Schwebemeyer & Co.*

3. If the answer to the foregoing question is in the affirmative, state on what date the said lease or leases were made and between what parties it or they were made.

10

4. If the answer to the second question is in the negative, state in detail by whom and under what terms and arrangements said store has been occupied since the date of August 1944.

20

5. Subsequent to August of 1944, did this defendant Ralph G. Schwebemeyer & Co. receive, as a real estate agent or broker or in any other capacity, a commission in connection with the lease to Hyman Gabriner on April 30, 1945 by the defendant Newark and Essex Building Corporation of the store on the southeast corner of Broad and Commerce Streets? If such a commission was received, state in what capacity it was received.

6. If the answer to the foregoing interrogatory is in the affirmative, state in what amount and on what date or dates such commission was paid.

30

7. If no such commission has been paid, state whether a commission for the said lease is due to be paid to this defendant Ralph G. Schwebemeyer & Co., and, if so, when, in what amount, and on what date or dates is it payable.

LUM, FAIRLIE & FOSTER,
Attorneys of Plaintiff.

40

**Answers of Defendants Ralph Schwebemeyer
and Ralph G. Schwebemeyer & Co. to
Interrogatories.**

(Filed January 23, 1947.)

[SAME TITLE.]

To: Aaron Van Poznak, Plaintiff, and
Lum, Fairlie & Foster, Esqs.,
605 Broad Street
Newark, New Jersey

10

Sirs:

The defendants, Ralph Schwebemeyer, individually, and Ralph G. Schwebemeyer & Co., answering the interrogatories of the plaintiff, say that:

In answer to interrogatory No. 1, Ralph G. Schwebemeyer & Co. has been the renting agent of the Newark & Essex Building Corporation from December 10, 1942 to date.

20

Ralph G. Schwebemeyer & Co., acting as broker and renting agent, did participate in the leasing of the premises located at the southeast corner of Broad and Commerce Streets, Newark, N. J.

This lease was made on May 18, 1945 between Newark & Essex Building Corporation and Hyman Gabriner.

30

Ralph G. Schwebemeyer & Co. received brokerage in connection with the lease between Hyman Gabriner and Newark & Essex Building Corporation. The amount received was \$5,427.50 on May 29, 1945.

ANDREW B. CRUMMY,
Attorney for Defendant, Ralph G.
Schwebemeyer & Co.

40

(Verified January 20, 1947.)

Testimony.

[SAME TITLE.]

Monday, May 26, 1947.

10

Before—HONORABLE DANIEL J. BRENNAN,
Judge, and a jury.

APPEARANCES:

LUM, FAIRLIE & FOSTER (by Charles S. Barrett, Jr.) for the plaintiff.

20

PITNEY, HARDIN, WARD & BRENNAN (by S. Allen Craft) for the defendant Newark & Essex Building Corporation.

ANDREW B. CRUMMY, for the defendant Ralph Schwebemeyer.

(A jury is called and sworn.)

(Mr. Barrett makes an opening statement to the jury on behalf of the plaintiff.)

30

(Mr. Crummy makes an opening statement to the jury on behalf of the defendants Ralph Schwebemeyer and Ralph Schwebemeyer & Company.)

(Mr. Craft makes an opening statement to the jury on behalf of the defendant Newark & Essex Building Corporation.)

AARON VAN POZNAK, SWORN.

Direct examination by Mr. Barrett:

Q. Mr. Van Poznak, where do you live? A.
40 I live at 452 Walton Road, Maplewood.

Aaron Van Poznak—Plaintiff—Direct.

Q. What is your profession? A. I am attorney-at-law and counsellor-at-law.

Q. You have been for how long, sir? A. For twenty years.

Q. Where is your office? A. 744 Broad Street, Newark.

10

Q. Is that the address of the National Newark and Essex Building? A. That's right.

Q. Now, who is the renting agent of that building? A. Ralph G. Schwebemeyer, or Ralph G. Schwebemeyer & Company. I don't know which.

Q. You have paid your rent through them? A. No, I pay my rent to Brown, Wheelock, Harris & Stevens.

Q. You have seen their names on the building? A. Yes, Ralph Schwebemeyer, renting agent, is painted on the windows.

20

Q. Did you have occasion to know and see Mr. Schwebemeyer with regard to a store in this building? A. I did.

Q. Would you tell us where that store is in the building, what portion of the building? A. It is the southeast corner of Broad and Commerce Streets.

Q. Had that store been occupied, to your knowledge, by any tenants prior to 1944? A. Yes, I think in 1931 on, it was rented to Walgreen Drug Company, a drug chain, and they left the premises, and I think it was rented to an outfit known as The Liquor Mart.

30

Q. Prior to the summer of 1944, had it been vacant? A. It had been vacant for a good number of years, except that the Red Cross and temporary tenants were in there on and off.

Q. Some drives or political headquarters or something like that? A. That's right.

40

Aaron Van Poznak—Plaintiff—Direct.

The Court: For all practical intents and purposes it could be construed as vacant. There was no income from it. Is that right?

10 The Witness: I don't know whether any income or not. I think there was but I am not sure.

Q. Were you acquainted with a Mr. Hymen Gabriner? A. Yes.

Q. For how long had you been acquainted with him? A. Well, for several years.

20 Q. What is his business? A. Well, he owned, or rather, his company owned a few stores. I think three or four cigars stores. They were originally the United Cigars, I think, and he purchased them and opened them up in Newark, and he also had a cigar concession in the Kinney Drug Store on Broad and Market. He also ran, I think, a wholesale cigar and candy business at Market Street, below Mulberry.

30 Q. Now, what happened between you and him before you saw Mr. Schwebemeyer with regard to this vacant store? A. Well, I had received a phone call that these people were interested; that is, Mr. Gabriner was interested in the place and to find out whether the place was available and, as a result of that conversation, I went to Mr. Schwebemeyer's office and told him—

Mr. Crummy: Fix the time, please.

Q. About when was that? A. I think that was the latter part of August 1944, and I went to him.

40 Q. You don't recall the exact date? A. No, I don't, and I spoke with Mr. Schwebemeyer and

Aaron Van Poznak—Plaintiff—Direct.

I told him I had somebody who was interested in running a drug store at that corner, and I told him that I wasn't acting as an attorney in this matter, but that I was acting as a broker, because Mr. Gabriner had his own attorney, and although I didn't mention Mr. Gabriner's name at that time— 10

The Court: You did or did not?

The Witness: I didn't, sir.

A. (Continuing) I asked him whether he would recognize me as the broker, and he said that he would.

Q. Did you then have any further discussion with him? A. Yes. 20

Mr. Crummy: Fix the time, please.

Mr. Barrett: It was the same conversation.

A. (Continuing) It was the same conversation. I told Mr. Schwebemeyer that I would take him in as my co-broker, because I felt that it would be better for my client or my customer, whatever it was, to have him cooperate with me in the renting of the store, and that was perfectly satisfactory. 30

The Court: Is that what he said?

The Witness: Yes, Mr. Schwebemeyer said he would be glad to cooperate with me as a co-broker.

Q. All right. Continue. A. Then he told me to write him a letter outlining what my people were interested in, and I wrote him a letter on, I think it was, August 30, and I outlined in the letter— 40

Colloquy of Counsel.

Mr. Barrett: I have a copy of the letter. Do you have the original, Mr. Crummy?

10 I demanded the production of the letter, dated August 30, 1944. Counsel has the original letter, your Honor, but he has some pencil notes on it.

The Court: Does counsel consent to the copy going in as secondary evidence?

Mr. Crummy: It is all right to put it in.

The Court: Counsel for the defendant Schwebemeyer and the corporation is willing that a copy of the letter go in.

20 Mr. Craft: We object to the admission of this copy, because it is not an exact copy of the letter referred to.

The Court: I haven't seen it. I don't know.

Mr. Barrett: I don't know, either. It is the defendants' problem. They have the original.

The Court: There has been a demand for the letter and failure to produce it.

30 Mr. Craft: The copy is addressed to the Newark & Essex Building Corporation.

Mr. Barrett: The notice to produce was served on both.

Mr. Crummy: The copy you gave me is addressed to the Newark & Essex Building Corporation. The original, I think, is addressed to Ralph G. Schwebemeyer & Company.

40 The Court: There is no question about there being a demand for the letter. Is that right?

Aaron Van Poznak—Plaintiff—Direct.

Mr. Crummy: That's correct.

Mr. Barrett: Then I will put the original in.

Mr. Crummy: All I can do is take the notes off. If your Honor will bear with me for a moment, I will do that.

10

The Court: Very well.

Mr. Barrett: Suppose I just read it now without handing it to the jury, and you can take off the notes later.

The Court: Put it in evidence.

Mr. Crummy: I am taking off the notes now. The record may show that some pencil notations have been erased.

Mr. Barrett: They are no part of the letter itself.

20

The Court: All right.

(The letter referred to is marked as Exhibit P-1.)

(Mr. Barrett reads the letter to the jury.)

The Court: Where is this property? It has been referred to as being on the southeast corner, on the northwest corner, and on the northeast corner. Don't you think counsel should be in accord in regard to the location to it?

30

Q. In the letter you referred to it as on the northeast corner. Is that erroneous? A. Yes, it is the southeast. There is a bank on the northeast corner.

Q. This was the store that was vacant? A. That's right.

40

Aaron Van Poznak—Plaintiff—Direct.

Mr. Barrett: I think, if the Court please, possibly the complaint or pleadings may carry the same error.

10

The Court: May it be understood, for the purpose of the record, that the property is located on the southeast corner of Broad and Commerce Streets?

Mr. Crummy: That's right.

The Court: The record will show that counsel consented to have the record read accordingly.

Q. At the time that letter was written, I take it, you hadn't disclosed the name of the prospective customer? A. No, I had not.

20

Q. Did you, within some period thereafter, disclose to Mr. Schwebemeyer the name of the prospective lessee? A. Yes.

Q. How long after, sir? A. Oh, a few days after. I don't know exactly when, but I told him.

Q. That would be still in the latter part of August or first part of September, 1944? A. That's right.

30

Q. You again met with him? A. Well, I think I had a telephone conversation with him. He wanted to know who the people were who were interested, and I gave the name of Mr. Gabriner, so he could check on his credit rating.

Q. Did you have any discussion with him then as to who Mr. Gabriner was and about his financial background? A. I don't know whether I did then, but, subsequently, I did.

40

Q. When did you next meet or talk to Mr. Schwebemeyer with reference to this store? A. Well, I had a conference with Mr. Gabriner and Mr. Marks in my office, and after we had the

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conference, I called Mr. Schwebemeyer and we went up to his office.

The Court: When was this?

The Witness: I think it was September 6. I am not exactly sure of the date, but it was the early part of September. 10

A. (Continuing) And I introduced him to Mr. Gabriner and to Mr. Marks. I think Mr. Schwebemeyer took out a plot plan of the store, and the question was whether or not the drug store would be available, because the Firemen's Drug Store was in the building, but on Clinton Street. I think Mr. Schwebemeyer took out his lease, which showed that under the lease, I think, of Firemen's, or some record to show that a drug store could be permitted on that corner. Discussion was also had as to whether or not we could put in a soda fountain, in view of the fact that a Huyler's was in the building and also the Waldorf Cafeteria. There was a food question there. Mr. Schwebemeyer said that we could put in a fountain because a fountain had been in there when Walgreen's was there. 20

There was a discussion about rents, and Mr. Gabriner offered him a \$1,000 a month; that is, \$12,000 a year. Mr. Schwebemeyer said he couldn't consider \$1,000 a month, or \$12,000 a year, because it would sublet under the arrangement of old stores in the building, because they were on what is known as the minimum rental basis. He gave them an offer of \$16,000, minimum a year, plus a percentage for drugs, cigars, and so forth. 30

Q. Was there any detailed discussion with you about that percentage for drugs and so on? A. 40

Aaron Van Poznak—Plaintiff—Direct.

I don't think at that time there was a detailed discussion, but there was some discussion. Of course, there are different percentages; a percentage for drugs, a percentage for cigars and cigarettes, a percentage for the fountain. They vary.

10 I am not sure about this, but I think Mr. Schwebemeyer took out a chart. We were discussing percentages, and it was my suggestion that they charge five percent on drugs, two percent on tobacco, and eight percent on the fountain. On the basis of my figures, there was a possibility, if they had grossed sufficient money, that it would be above the minimum as set by Mr. Schwebemeyer.

20 Incidentally, before we discussed price, Mr. Schwebemeyer said that he had investigated Mr. Gabriner and found that he was financially responsible and financially stable. In fact, Mr. Schwebemeyer had said he knew Mr. Gabriner because one of Mr. Gabriner's stores was on a piece of land owned by one of his clients, and that is the store on Market Street where, I think, the First Church owns the ground and somebody owns the building, and there was a discussion about that.

30 Q. Mr. Schwebemeyer, as far as you knew, had not met Mr. Gabriner before you brought him up? A. No, no.

Q. He told about having checked upon him in this manner? A. Yes. He hadn't met him. The whole conversation was centered around Mr. Gabriner. In fact, Mr. Gabriner told him at the time the amount of the gross income of the small store on Market Street, and Mr. Schwebemeyer seemed to be surprised that it was as much as it was.

40

Aaron Van Poznak—Plaintiff—Direct.

As a result of our conversation, there were other things said, but Mr. Schwebemeyer made an appointment with Mr. Gabriner, Mr. Marks, and myself to view the premises.

Q. Can you fix the time? A. I think it was later in the day. There was a hiatus between the time of our conversation, because I think Mr. Schwebemeyer's brother had to get the keys, and we went down and went into the premises and we paced off the width of the store. Of course, we had seen the plan, but we wanted to see what could be done with the interior. In fact, we paced off to find out where the soda fountain would be, if we were permitted to put one in. Now, we counted the holes in the floor where Walgreen's had formerly had their soda fountain and found twenty-five to twenty-seven holes, showing that the stools had been placed there.

While in Mr. Schwebemeyer's office, we also discussed the question of a basement, and he told us that we couldn't have the full basement because they had reconverted from oil to coal, and they had to store the coal in the basement and, as soon as they could re-reconvert to oil, that we would have the balance of the basement space. In fact, we went down to the basement to view it and find out how much space could be used there as a stock room.

After we finished, we said, "Goodbye," and I then started to do some work for the purpose of obtaining a liquor license for the premises.

Q. Why was that? A. Because at the rate set by Mr. Schwebemeyer, it would be necessary to have sufficient departments which would pay the cost of the minimum rent, at least. With just a few departments, the tenant would be

Aaron Van Poznak—Plaintiff—Direct.

unable to continue in business if he didn't have a sufficient income there.

Q. What did you attempt to do in regard to a liquor license? A. Well, I had called Mr. Poleschuck.

10

The Court: What difference does it make?

Mr. Barrett: To show continued efforts in regard to this matter.

The Court: Was that at the suggestion of any of the defendants?

Mr. Barrett: It was in furtherance of the plan to lease.

The Court: I think it is immaterial.

20

Mr. Barrett: I want to show what this plaintiff did in furtherance of the efforts to bring about a lease.

The Court: All right.

Mr. Barrett: This was one of the details having to do with that.

The Court: All right.

Mr. Crummy: Fix the time, please.

30

Q. Go ahead. A. Well, over a period of months, Mr. Crummy. I contacted Mr. Poleschuck to find out whether there was any available. I called him to find out if there was one available from the old Firemen's Pharmacy that was on the corner of Clinton and Broad Street, and also whether there was one available from the Liquor Mart, which was Club 44. They had, I think, two licenses. I am not sure about that. A number of times I called him.

40

Q. Who is Mr. Poleschuck? A. He was a person who was interested in liquor licenses and had, I believe, belonged to some liquor organiza-

Aaron Van Poznak—Plaintiff—Direct.

tion, some association, and I knew him and knew he had specialized in taverns and package stores.

The Court: Do you mean in the procurement of licenses?

The Witness: No, in the procurement of stores. 10

A. (Continuing) And to see if there were any available licenses. Some licenses, your Honor, were not being used. Some were bought and were not being used downtown there. Also, there was quite a discussion while I was in Mr. Schwebemeyer's office about the question of purchasing—

Mr. Crummy: May I ask: Is this back to September 6 again? 20

The Court: As I understand the theory of the plaintiff's case, it is based on an agreement to share commissions upon getting a tenant. Is that right?

Mr. Barrett: That's correct. If we performed and if we brought these people together and there was a lease, so far as the Newark & Essex Building Corporation is concerned, we are entitled to recover. So far as the other defendant is concerned, we made the agreement with Schwebemeyer and ultimately there was a lease. Therefore, we are entitled to recover. 30

The Court: The pursuit of the liquor license has nothing to do with it.

Mr. Barrett: I ask this for this reason: We apparently are said not to have done anything. 40

Aaron Van Poznak—Plaintiff—Direct.

10 The Court: Why do you have to anticipate? I have no desire to intrude. As I apprehended the theory of the plaintiff at the present time, it is based on the proposition, as to Schwebemeyer individually, and the corporation, that he, or it, agreed to pay this plaintiff a half of his commission, or whatever the agreement is, for procuring the tenant.

Mr. Barrett: Yes.

The Court: That is his testimony up to now.

20 Mr. Barrett: And also, as far as the Newark & Essex Building Corporation is concerned, he is the procuring cause of this lease.

There is a period between September 1944 and April 1945, when the lease was consummated, and my purpose is to develop what during that period the witness did.

30 The Court: It is purely anticipatory. If what you maintain is so, this plaintiff is entitled to recover, once he can establish that there was an understanding between him and whoever the defendants might be, and that somebody got a commission; I mean, somebody with whom he negotiated to share his commission.

Mr. Barrett: With that, sir, I agree.

The Court: I think it is exploring, at the present time, strange country.

Mr. Barrett: All right.

40 Q. You made some efforts, you have testified, toward the securing of a liquor license during the period between September and the time the

Aaron Van Poznak—Plaintiff—Direct.

lease was consummated. Is that correct? A. That's right, yes.

Q. Did you have any further dealings with anybody in regard to the drug store, known as the Firemen's, in an effort to see what could be done in regard to that and the new drug store contemplated? 10

Mr. Crummy: I object.

The Court: It is objected to on the ground that, presently, it is immaterial. I think, if it is proper at all, it may be in the field of rebuttal.

Mr. Barrett: May I withdraw the question? I think it is objectionable in form.

The Court: Did you ever get the license? 20

The Witness: No, sir.

Q. Did you make any other efforts with regard to the relation of the Firemen's Drug Store to the contemplated drug store?

The Court: I have no desire to be persistently intrusive, but isn't the basis of his claim the fact that this man agreed to give him half commission for getting him a tenant? Isn't that right? 30

Mr. Barrett: That's right.

The Court: He says he got a tenant. Now, what he did extrinsic to that in the procurement is not material, unless or until the issue is raised. You don't have to anticipate it. It is simply on the basis of economy of time and effort because you have already indicated to the Court that you have other commitments in Tren- 40

Aaron Van Poznak—Plaintiff—Direct.

ton tomorrow. I am under the responsibility of your being in the proper place if the case goes over until tomorrow. There is no need to meet an issue which has not been raised testimonially.

10 Mr. Barrett: I will reserve the question.

Q. Did you, sir, at some place learn that these premises had been leased? A. Yes.

Q. When? A. I think it was around March, 1945, or April. I'm not sure.

Q. Did you learn that from Mr. Schwebemeyer? A. No, I went to Mr. Schwebemeyer about it.

20 Q. You learned that from what source? A. I learned that from—I first went to Mr. Gabriner's attorney and asked him whether a lease had been made and he told me it had. It wasn't for publication, and I went to Mr. Schwebemeyer.

Q. Did you go to Mr. Schwebemeyer then? A. Yes.

Q. When was that? A. The same day, ten minutes after.

30 By the Court:

Q. Do you know what the date was? A. I think it was in March or April, sir. I wrote a letter on that day.

Q. March, 1945? A. Yes, sir. I think I wrote a letter on that day and the date would be on that letter.

By Mr. Barrett:

40 Q. Did you have a talk then with Mr. Schwebemeyer about the lease? A. Yes.

Aaron Van Poznak—Plaintiff—Direct.

The Court: Won't you fix the time?

Mr. Barrett: I have a letter dated May 22, 1945.

The Court: His recollection is that it was March.

The Witness: It may have been May. I'm not sure, your Honor. It was in that time. 10

Q. Was it the time you wrote the letter, sir?

A. At the time, I think, that I wrote the letter. I'm not sure. But I went to see Mr. Schwebemeyer when I found out the lease had been entered into, and I think it had been entered into that day or the day before.

Q. What was said by him and by you? A. Well, I was ushered into Mr. Schwebemeyer's office. 20

The Court: Just what was said?

The Witness: I am sorry.

A. (Continuing) I ask Mr. Schwebemeyer whether Mr. Gabriner had entered into a lease of the building and he said he had.

I said to Mr. Schwebemeyer, "You know I was the one that brought Mr. Gabriner to you and I had asked whether you would recognize me as the broker and you said you would, and I took you in as co-broker." 30

He said, "You let the thing lapse and I don't consider that you did anything in this case."

I said, "Mr. Schwebemeyer, you never knew this gentleman until I brought him up and that you made a lease practically on the same terms, I understand, that we discussed."

He said, "It wasn't under those terms," and 40

Aaron Van Poznak—Plaintiff—Direct.

he told me that he had sold a building to Mr. Gabriner and that he had revived the deal.

I asked him whether he thought I was entitled to anything and he said definitely not, and I simply excused myself, and I went out.

10 Q. Between the time of September, 1944, and the time of this meeting with Mr. Schwebemeyer in the spring of 1945, had you met with Mr. Schwebemeyer from time to time? A. I had seen him a number of times, yes.

Q. And had you discussed this matter? A. Yes.

20 Q. Had you met with Mr. Schwebemeyer from time to time in his office? A. Not in his office. I met Mr. Schwebemeyer in the elevator one day. He asked me about this matter and I told him that we were still working on it, and I met him in the hall in the National Newark and Essex Building.

Q. You had a conversation then about the matter? A. Yes.

Q. Did you write a letter May 22, 1945 to Newark & Essex Building Corporation? A. Yes.

Mr. Barrett: I offer the letter in evidence.

30 (The letter referred to is marked Exhibit P-2.)

Mr. Crummy: I want the record to note that there are erasures on the top. There are some pencil notes I had erased before.

(Mr. Barrett reads the letter to the jury.)

Mr. Barrett: May I ask for the original lease, too?

40

Aaron Van Poznak—Plaintiff—Direct.

Q. Did you ever receive any answer to that letter, sir? A. No, I didn't.

Q. Did you then consult attorneys and institute this action? A. Well, I waited a while.

Q. Did you ever see the lease that was actually entered into until after this suit was entered into? A. I did not. 10

Mr. Barrett: May I ask for that lease?

Mr. Crummy: We don't have an original; we have a copy of it.

Mr. Barrett: We agree to offer the copy in lieu of the original. I have asked both defendants to produce the original.

Mr. Crummy: There are a couple of supplemental papers inserted in here. 20

The Court: They are not pertinent? 20

Mr. Crummy: No, they are not, not for this purpose.

The Court: Why don't you take them out?

Mr. Crummy: They are bound in there by a clip.

The Court: I don't want you to mutilate the paper, but I don't want to confuse the jury.

(The lease is received in evidence and marked as Exhibit P-3.) 30

Q. Now, Mr. Van Poznak, had you, prior to this first visit of yours to Mr. Schwebemeyer, back in the latter part of August, 1944, talked to him about that store before? A. Yes, I had.

Q. About securing a tenant? A. Yes, a number of months before that.

Aaron Van Poznak—Plaintiff—Direct.

Q. Had you had any experience in drug stores as a broker before this? A. Yes.

Q. Had you done a lot of work, particularly in connection with drug stores? A. A great deal.

10 Q. As a broker? A. Do you mean a broker in leasing?

Q. Yes. A. Several, but more in the sales and purchase of drug stores.

Q. Did you represent anybody in connection with this store as a lawyer? A. I did not.

Q. Did you receive any pay from anybody as a lawyer? A. I did not.

Q. Have you been paid a commission by any of the defendants? A. No.

20 Cross examination by Mr. Crummy:

Q. What date in March, or rather August, 1944, did you have your first conference with Mr. Schwebemeyer with reference to the leasing of the premises in question? A. I don't know the exact date, Mr. Crummy.

Q. Do you keep any diary? A. Yes, I do.

Q. Do you keep a diary as a lawyer? A. Yes, sir.

30 Q. Do you keep a diary as a broker? A. No, sir.

Q. You have one diary? A. Yes, sir.

Q. How many conferences did you have in August, 1944, with Mr. Schwebemeyer with reference to the leasing of the premises? A. I think I had two, sir.

Q. Two? A. Yes.

Q. When was your first one? A. When I went up to him.

40 Q. What date was that? A. I don't know the exact date. It was in August.

Aaron Van Poznak—Plaintiff—Cross.

Q. Can you give us an approximate date?

A. I think it was before I wrote that letter. It may have been the 28th; it may have been the 27th, but it was in August.

Q. Would it have been the 23rd? A. It might have been; I don't know.

10

Q. You have no idea? A. I have no exact idea.

Q. Prior to writing the letter of August 30, 1944, you say you had two conferences with Mr. Schwebemeyer? A. No, I had one before I wrote that letter.

Q. You had one before you wrote that letter? A. Yes.

Q. After you wrote the letter, did you have any in August? A. Yes, I think it was after I wrote the letter that I had the conference with Mr. Schwebemeyer and Mr. Gabriner.

20

Q. In August? A. In August or beginning of September. I am not sure, Mr. Crummy.

Q. I am sorry. I don't get it straight. How many conferences did you have with Mr. Schwebemeyer in August, 1944? A. I may have had two, or the second one may have been in the early part of September. I'm not sure. I think the second one was the 6th of September.

Q. You had one in August and one in September? A. I think so, yes.

30

Q. On August 30th you wrote to Mr. Schwebemeyer? A. Yes, sir.

Q. When you wrote the letter on August 30 to Mr. Schwebemeyer, you didn't tell him in that letter that you were a co-broker in this transaction, did you? A. No, I didn't.

Q. You said nothing about being a co-broker? A. That's right.

Q. You said nothing about any terms or con-

40

Aaron Van Poznak—Plaintiff—Cross.

ditions of the leasing of the premises; that is, as far as your alleged commission was concerned?

A. We had an understanding.

10 Q. But you didn't make any mention of it in your letter to Mr. Schwebemeyer? A. I didn't think it was necessary.

Q. The fact is you didn't mention it at all? A. I didn't.

Q. You had two conferences with Mr. Schwebemeyer with reference to the leasing of the premises in question. One you had in August and one around September 6, 1944. Isn't that correct? A. Yes.

20 Q. And on September 6, 1944, you went to the office of Mr. Schwebemeyer with Mr. George Marks. Isn't that correct? A. Yes, sir.

Q. And you went with Mr. Gabriner? A. Yes, sir.

Q. Prior to the time you went with these two men, you had a conference with Mr. Leo Danzis? A. No, I had no conference with Mr. Danzis.

Q. Wasn't he in on the deal at all? A. Well, there was some discussion about his being in but I had no conference or any discussion with him at all.

Q. You had none at all? A. No.

30 Q. Do you know Mr. Leo Danzis? A. I know him very well. He is my wife's cousin.

Q. He does considerable business with you? A. He does.

Q. He formerly represented McKesson & Robbins, wholesale druggists? A. He was the head of McKesson & Robbins, Newark branch, for a while.

40 Q. Didn't Mr. Danzis suggest to Mr. Gabriner and Mr. Marks that you go with Gabriner and Marks to Schwebemeyer's office on September 6? A. To whom did he suggest it?

Aaron Van Poznak—Plaintiff—Cross.

Q. Didn't he suggest that? A. To me?

Q. Yes. A. No.

Q. When the three men were together? A. No, I never saw them together, Mr. Crummy.

Q. You knew, did you not, that Danzis, Marks and Gabriner were contemplating the formation of a company to lease the premises? A. There was some discussion about it. 10

Q. Wasn't that the discussion with reference to the three men? A. Not with me, no.

Q. Don't you know the discussion centered around the fact that Mr. Danzis was in the wholesale drug business, Mr. Gabriner in the cigar business, and Mr. Marks had been in the retail cosmetic and drug business on Market Street, and the three of them ought to be able to go along in this venture? A. They may have had the discussion, but not with me. 20

Q. You knew nothing about it? A. I knew they were discussing it, but they didn't have the discussion with me.

Q. How long prior to September 6, 1944, did you know Mr. Hymen Gabriner? A. I think about two years.

Q. Did you ever do any work for him? A. No.

Q. Did you ever do any legal work for him? A. No, never. 30

Q. Did you ever do any work for him as a broker? A. No.

Q. Did you ever lease any property to him or his company? A. No.

Q. Where did you first meet him two years prior to September 6, 1944? A. I think I met him in Mr. Marks', at the Black's cut rate, on Market Street.

Q. Did you meet him or do you just think you did? A. I am pretty sure I met him there.

Q. You are sure you met him there in 1942? 40

Aaron Van Poznak—Plaintiff—Cross.

A. It may have been before that, because Mr. Marks went out of the business, but I don't know the exact date, but I met him.

10 Q. How many times did you meet him prior to September 6, 1944? You met him one time in Marks' drug store on Market Street. How many times have you met him? A. I can't tell you, Mr. Crummy.

Q. Did you discuss business with him? A. No.

Q. You had no discussion of business with him? A. No.

Q. Did you know that Mr. Marks, Mr. Gabriner, and Mr. Danzis were contemplating the formation of a company? A. Yes, there was some discussion of it.

20 Q. Do you recall Mr. Danzis suggesting you, Mr. Aaron Van Poznak, to represent the three men in the discussion before Mr. Schwebemeyer? A. I don't know who suggested. They all—two of them came to my office and asked me to act as broker for them.

Q. Between September 6, 1944 and May, 1945, how many times did you go to Mr. Schwebemeyer's office, if at all? A. I don't think I went there at all.

Q. You didn't go there at all? A. No.

30 Q. How many times between September 6, 1944, when you attended the conference in Mr. Schwebemeyer's office, and the time you were informed the lease was executed, did you speak to Mr. Schwebemeyer about the premises in question, if at all? A. I think on two different occasions, Mr. Crummy.

Q. Where? A. Once in the elevator, when we were both going up on the express side, and another time when we met in the hall.

40 Q. What floor are you on? A. I am on the eighth.

Aaron Van Poznak—Plaintiff—Cross.

Q. Mr. Schwebemeyer is on the 18th? A. I think that is so, sir.

Q. The elevator in that building that you would go on is the local elevator that runs to the 11th floor? A. That's right.

Q. And you met Mr. Schwebemeyer in the express elevator? A. Yes, going up to his office. 10

Q. Were you going to his office? A. No, I wasn't.

Q. You were on the express elevator? A. That's right.

Q. You spoke to Mr. Schwebemeyer. What did you say to him about it? A. He asked me about the drug store matter and I said it was still hanging fire. That's all.

Q. It was still hanging fire? A. That's right.

Q. Did you speak to him on any other occasion between September 6, 1944, and the time you found out the lease was executed? A. Before the lease was executed? 20

Q. Yes, to the date the lease was executed. A. Yes, I had some brief word with him in the hall. I don't remember the content, but it had something to do with the drug store.

Q. What did you say to him? A. I told him that we were still working on the drug store.

Q. What did he say to you, if anything? A. I don't remember his reply, whether he said, "O. K." or what it was. 30

Q. Did you have a conversation with Mr. Gabriner after you heard the lease was executed? A. After the lease was executed?

Q. Yes. A. After I left Mr. Schwebemeyer's office, I went down to Mr. Gabriner's office, I think, at 1028 Broad Street, and I told him that I heard he had entered into a lease, and that I had seen Mr. Schwebemeyer and told him I was the broker in the matter and I had taken him in 40

Aaron Van Poznak—Plaintiff—Cross.

as co-broker, and that I had gone to his office, and Mr. Schwebemeyer, in my words, strayed on me.

The Court: Strayed on you?

10

The Witness: That's right.

A. (Continuing) And he said, "Well, Mr. Schwebemeyer just called me up and asked me to write him a letter of what transpired."

20

Q. Did you tell Mr. Gabriner at the time you had the conference with him—that was after you had been informed the lease was executed—that there would be no skin off his, Gabriner's, hide to go along with you, and you wanted him to bolster your contention that you had some brokerage interest in the deal? Did you tell him that? A. No. What I did tell him though was that Mr. Schwebemeyer didn't recognize me. Did he have any objection if I would let a court determine whether or not I was the procuring or efficient cause in bringing this lease around? He said, "It was no skin off my back, if you do it."

30

Q. Did he tell you at that time that he couldn't stop you if you intended to make any claim, but that in his opinion you had no basis upon which to predicate a claim? Did he tell you that? A. No, he never said that to me. He said he wasn't interested. "If I was entitled to the commission," he said, "Go ahead. There is no skin off my back."

Q. Did he tell you that the deal between Gabriner, Marks and Danzis had fallen through in September, 1944 after they couldn't procure the lease on the premises? A. No.

Q. He didn't tell you that? A. I don't remember his saying that.

40

Q. Did he tell you he had abandoned all hope

Aaron Van Pöznak—Plaintiff—Cross.

of going into the place, after he had not the other two men to go in with him? A. No, he told me the thing was still hanging fire.

Q. After the lease had been executed? A. He never said he had abandoned it at any time.

Q. He never told you he had abandoned it? A. No. The fact is he entered into a lease shows he hadn't abandoned it. 10

Q. Didn't he abandon the proposition of going into business with Marks, Danzis, and Gabriner?

A. I don't know.

Q. You knew those three men originally intended to lease the premises? A. There was some discussion that they were interested, but not with me.

Q. You knew the three men were going into a company and the three men intended to lease the premises around September 6, 1944? 20

Mr. Barrett: I object to this. The question has been answered three or four times before.

The Court: I sustain the objection.

Q. What date did you go to Mr. Schwebemeyer's office and talk to him about sharing commission? A. I think it was the latter part of August. 30

Q. Have you any idea what date it was? A. No, I don't, Mr. Crummy.

Q. You don't know at all? A. No.

Q. Did you tell Mr. Schwebemeyer that you had a client that was interested in the place? A. I told him that I had a tenant. I may have used the word client, but I doubt it. I told him I had a tenant who was interested in it.

Q. When you wrote your letter on August 30, you referred to your client, didn't you? A. That's 40

Aaron Van Poznak—Plaintiff—Cross.

right. Real estate people call their customers clients, too. So do engineers. Most professional men do.

Q. You had your discussing with him some time prior to August 30?

10

Mr. Barrett: I object to that as repetitions.

The Court: I sustain the objection.

Q. What did you say to Mr. Schwebemeyer at that time?

Mr. Barrett: Objected to as repetition, if the Court please.

The Court: I will permit it.

20

Mr. Barrett: I pray an exception.

A. When I went there I told him I had a tenant who was interested in opening a drug store in the ground floor premises. Would he recommend me as broker? And he said he would. We had some discussion about my having made a lease of another drug store at Broad and Market Streets. He told me he had worked on that before I and my associate had consummated that. That was the Kinney Drug Store deal.

30

Q. Who was the tenant you had in mind when you spoke to Mr. Schwebemeyer prior to August 30? A. Mr. Gabriner.

Q. Was there anybody else? A. And his group, if there was any.

Q. And his group? A. Yes.

Q. The group consisted of Hyman Gabriner, George Marks, and Leo Danzis? A. It may have been Mr. Marks. I don't know whether Mr. Danzis was definitely interested in going in the group. It was purely tentative at the time.

40

Aaron Van Poznak—Plaintiff—Cross.

Q. Who was the tenant you represented at the time you spoke to Mr. Schwebemeyer, prior to August 30, 1944? A. Mr. Gabriner.

Q. Alone? A. And possibly the group.

Q. And possibly a group? A. Yes.

Q. Didn't you know whom you represented? A. Yes, I represented the two gentlemen I went up with. 10

Q. And Leo Danzis? A. No, sir.

Cross examination by Mr. Craft:

Q. Mr. Van Poznak, you stated that on a couple of occasions you spoke to Mr. Schwebemeyer on the elevator in the building? A. Once in the elevator and once in the lobby.

Q. What was the date of the last discussion you had with Mr. Schwebemeyer? A. I can't give you the date. I don't know. 20

Q. Can you place it approximately? What month? A. It may have been several months after our discussion or a month after our discussion. It was fairly fresh at the time.

Q. It was in 1944? A. Yes, definitely.

Q. But you can't place it any more definitely than that? A. No, I can't.

Q. Did you receive any payment for your efforts to procure a tenant of this property? A. I received nothing from anybody. 30

Q. You received no payment for your services? A. No.

Q. How about your efforts to procure your liquor license? Did you receive payment for that? A. That was part, sir, of trying to get the lease.

Q. Did you receive payment for that? A. No, sir, I did not. 40

SAMUEL POLESCHUCK, SWORN.

Direct examination by Mr. Barrett:

Q. What is your profession? A. Attorney-at-law.

10 Q. Where is your office, sir? A. Industrial Office Building, 1060 Broad Street.

Q. Have you had any familiarity or specialization in matters having to do with liquor licenses? A. I represent the liquor packers, liquor stores of Essex County.

Q. So you have some familiarity with those liquor licenses available and so forth? A. Yes, sir, at times.

20 Q. Did you have any conversation at any time with Mr. Van Poznak relative to a liquor license for a proposed store at this address?

Mr. Crummy: If your Honor please, I object on the ground that this testimony is immaterial.

The Court: I sustain the objection.

Mr. Barrett: May I point out on this score counsel himself has examined.

30 The Court: He wanted to know whether he was paid. Examination on a limited issue doesn't make it material.

Mr. Barrett: I offer it to show the effort made by Mr. Van Poznak relative to getting this license.

The Court: There is no pleading with respect to that. You rest upon a promise to pay.

40 Mr. Barrett: There is an allegation in the complaint that there were efforts on the part of Mr. Van Poznak. The answer is a general denial of everything. If

Samuel Poleschuck—for Plaintiff—Direct.

they will concede that he made extensive efforts, then, of course, the testimony is immaterial. But I understand they concede nothing. Our allegation in the complaint is that he made efforts.

The Court: I observe that there is a pleading. I will allow it. 10

(Question read.)

A. I met Mr. Van Poznak.

Mr. Crummy: I object. He just asked him if he had a conversation.

The Witness: Yes.

Q. When was that conversation? A. It was some time prior to the time this place was opened up. There were a lot of people talking to me asking questions. 20

Q. You can't fix the time? A. No.

Q. Did you have one or more conversations on the subject of liquor licenses? A. Several telephone calls from Mr. Van Poznak from time to time.

Q. Will you tell us what his request was?

Mr. Crummy: I object, if your Honor please. 30

The Court: I am inclined to permit it.

A. He just inquired whether there were any D licenses available.

Q. A D type license is the type which would be appropriate to a store of that kind. Is that right? A. That's correct.

Q. You asked whether there were any available? A. That's correct.

Q. You gave him what information you had? A. That's right. 40

Hymen Gabriner—for Plaintiff—Direct.

Mr. Crummy: No questions.

Mr. Craft: No questions.

10 HYMEN GABRINER, SWORN.

Direct examination by Mr. Barrett:

Q. Where is your place of business? A. I have several places of business.

Q. What is your business? State it generally, sir. A. Wholesale and retail tobacco products, also drugs and cosmetics.

Q. You now have a lease on the store that is under discussion here on the southeast corner of Broad and Commerce Streets. Is that correct? A. Yes.

Q. In other words, you are the lessee in this lease which is marked Exhibit P-3? A. That's right.

Q. Now, will you tell us when, in relation to 1944, how long prior to that time, had you known Mr. Van Poznak? A. I really don't know how far back I knew him, but I knew him.

Q. Did he represent you at any time as a lawyer? A. No, he did not.

30 Q. Has he represented you as a lawyer at any time? A. No, he did not.

Q. Did he represent you in connection with the making of this lease as a lawyer? A. No, he did not.

Q. You had some other attorney in Newark who represented you as a lawyer in connection with this lease. Is that right? A. That's right.

Q. That lawyer is who? A. Morris Ravin.

40 Q. When did you first have anything to say to Mr. Van Poznak relative to the store that

Hymen Gabriner—for Plaintiff—Direct.

you subsequently leased? A. Well, I don't remember exactly, but I think it was on the day we had the conference with Mr. Schwebemeyer.

Q. And that was some time in August or September, 1944, as far as you know? A. The date I heard was September 6 and that probably was the date. 10

Q. How did you come to have any discussion with Mr. Van Poznak? How did you come to meet with him in regard to that matter? A. Mr. Marks and Mr. Leo Danzis and myself had a few conferences about the store, and we had decided to make an offer on it in regard to renting the store.

Q. How did you come to go to Mr. Van Poznak? A. Well, I think it was at the suggestion of the other two, Mr. Marks and Mr. Danzis. 20

Q. What did you go to Mr. Van Poznak for? A. We went to confer with Mr. Schwebemeyer.

Q. Why did you have Mr. Van Poznak with you? A. Because Mr. Van Poznak was suggested by the other two.

Q. To do what with regard to Mr. Schwebemeyer? A. To leasing the store.

Q. So that you had then met with Mr. Schwebemeyer and had your discussion relative to leasing the store. Is that right? A. That's correct. 30

Q. Was your financial situation discussed at that time? A. I think it was, indirectly, more or less.

Q. Did Mr. Schwebemeyer indicate whether he had knowledge of your financial background or anything of that sort? A. I don't think he did.

Q. Did he discuss with you your financial background? A. I don't think so. 40

Hymen Gabriner—for Plaintiff—Direct.

Q. It was discussed in some fashion, you say, talked about? A. Well, we merely told him the stores we operated and where they were located.

10 Q. You told him your connection with Black's Cigar Stores? A. That's right.

Q. What is your connection, sir? A. I am vice president of the Black's Cigar Stores.

Q. He asked you where their stores were and so forth? A. That's right.

Q. Was there a discussion of the rental at that time? A. Yes.

Q. Who arranged that first meeting? A. Mr. Van Poznak.

20 Q. What was the rental that was discussed then? A. Well, we had offered \$12,000 a year for the store and a percentage on a certain volume of business.

Q. Did you disclose to Mr. Schwebemeyer the names of any prospective associates which you may have had? A. Well, he knew of Mr. Marks and I told him that there was a third man, whose name we couldn't disclose.

Q. Who might be interested? A. He was interested, but we didn't disclose his name.

30 Q. Did you thereafter examine the store and basement? A. Yes.

Q. Did Mr. Van Poznak accompany you? A. I think he did.

Q. Was a question of the departments to be operated in the store and the percentages that were to be paid the landlord discussed? A. That was discussed at Mr. Schwebemeyer's office. That was in conjunction with our offer of \$12,000.

40 Q. That was discussed with Mr. Van Poznak,

Hymen Gabriner—for Plaintiff—Direct.

Mr. Schwebemeyer, and you present? A. And Mr. Marks.

Q. Did you go down into the basement and examine into that? A. Yes, I was there.

Q. Subsequently, did you meet Mr. Schwebemeyer in relation to the leasing of this store?

A. I didn't get your question. 10

Q. Subsequently, did you meet Mr. Schwebemeyer in regard to the leasing of the store? A. That was many months later.

Q. Under what circumstances? A. Well, we had closed title to a piece of property on Broad Street, and at the closing Mr. Schwebemeyer's employee, or representative from his office, was there and I at that time took the matter up with him, and a few days after I had a meeting with Mr. Schwebemeyer. 20

Q. You then finally consummated the deal and made the lease. Is that right? A. Yes, sir.

Q. Your rentals were to be for the first three months \$1,000 a month? A. That's right.

Q. Of course, you don't know what arrangements, if any, Mr. Van Poznak had with Mr. Schwebemeyer? A. Well, I knew something about a partial commission that Mr. Van Poznak was to get, but I don't know when I got the information, whether I got the information in August or some time after that. 30

Q. In other words, you had heard something about a partial commission relation between Mr. Schwebemeyer and Mr. Van Poznak? A. Yes.

By the Court:

Q. Did you hear any discussion between Mr. Van Poznak and Mr. Schwebemeyer at the meeting you attended relative to any commission? A. No, I didn't. 40

Hymen Gabriner—for Plaintiff—By the Court.

Q. Either in whole or in part? A. I don't remember any discussion.

By Mr. Barrett:

10 Q. That meeting had been arranged by Mr. Van Poznak with Mr. Schwebemeyer, that first meeting of yours? A. For ourselves, yes.

Q. You paid Mr. Van Poznak nothing in connection with this deal? A. No, I did not.

Cross examination by Mr. Crummy:

Q. Mr. Gabriner, I show you here a letter on your letterhead, dated June 8, 1945, and ask you if you wrote that letter. A. Yes, I did.

20

Mr. Crummy: May I have it marked for identification?

(The letter referred to is marked Exhibit DS-1 for Identification.)

Q. Will you look over that memorandum for the purpose of refreshing your recollection?

30

The Court: That is not the way to refresh recollection. In the first place, he has not said his recollection needs refreshing, because he has not been interrogated. If he says he wants to refresh his recollection, then this piece of paper can be produced.

Mr. Barrett: I object, then, to the examination.

The Court: It is in now.

Mr. Barrett: I have no essential quarrel with that.

40

Hymen Gabriner—for Plaintiff—Cross.

The Court: All right. I don't want to intrude myself, except I want to establish what the true technique is of refreshing recollection.

Q. Mr. Gabriner, who first approached you in connection with the leasing of the premises in question? Who first spoke to you about it? A. Mr. Marks, I believe. 10

Q. When did Mr. Leo Danzis come into the picture? A. Well, when I had my conference with Mr. Marks and Mr. Danzis.

Q. You three men, Gabriner, Marks, and Danzis, had formulated a plan about going into a partnership? A. Well, we were discussing it.

Q. Mr. Danzis was to be a silent partner in the affair? A. Mr. Danzis was to be a partner in it. 20

Q. His identity was not to be known? A. At that particular time it wasn't supposed to be known.

Q. Because of the position he then held? A. I assume so, but I don't know.

Q. When you and Mr. Marks met to go to Mr. Schwebemeyer's office, who suggested that Mr. Van Poznak go with you? A. I think it was Mr. Danzis and Mr. Marks, both, or possibly one of them. I don't remember who it was. 30

Q. At the suggestion of Danzis or Marks, or both of them, Mr. Van Poznak went with you and Mr. Marks to Mr. Schwebemeyer's office? A. That's right.

Q. At the conference on September 6, 1944, you made an offer of \$1,000 a month for the premises? A. That's right.

Q. And you didn't make any offer on any percentage basis on the profits or sales, did you? A. I think there was some discussion of that. 40

Hymen Gabriner—for Plaintiff—Cross.

Q. There was discussion but no offer made?
A. Well, there were tentative figures, I think, Mr. Van Poznak had spoken about.

10 Q. Shortly after that conference had been concluded, you and Danzis and Marks abandoned any question about going into a partnership and leasing of the premises in question. Isn't that a fact? A. Well, we just didn't talk about it. We waited some time. I thought the thing would revive itself.

Q. How long did you wait? A. A few months.

Q. The thing never revived itself, did it? A. No, it didn't.

Q. You never had any conference with Mr. Schwebemeyer from September 6, 1944 up to and including December 31, 1944? A. I didn't.

20 Q. You never had any occasion until after the closing of the title down at 1028 Broad Street?
A. That's right.

Q. Which was a separate and distinct deal?
A. That's right.

Q. After you reconsidered the matter of going into the leasing of the premises in question, did you go around and ask Mr. George Marks to come in as a partner with you? A. No, I didn't.

30 Q. Did you go around and ask Mr. Leo Danzis to come in as a partner with you? A. No, I didn't.

Q. Did you take Mr. Van Poznak to the office to see Mr. Schwebemeyer with you? A. No, I didn't.

Q. You went all alone, didn't you? A. Yes.

Q. You concluded the deal all alone? A. That's right.

40 Q. There wasn't one of these men that had anything to do with the lease that you concluded with Mr. Schwebemeyer? A. That's right.

Hymen Gabriner—for Plaintiff—By the Court.

By the Court:

Q. Do you mean they were not co-signers?

A. No, sir.

Q. You were the person who solely undertook the lease? A. That's right.

10

By Mr. Crummy:

Q. When you went originally to Mr. Schwebeyer's office on September 6, 1944, there were to be three men responsible on this lease. Isn't that so? A. There were supposed to be three partners.

Q. After you had leased the premises, did Mr. Van Poznak come to your office? A. Yes, I believe he did.

20

Q. You had a conference with him? A. Well, he asked me whether I had leased the premises.

Q. You told him you had leased the premises? A. Well, I admitted it. It wasn't supposed to be published, because we had agreed for some reason or other not to divulge the information for some time.

Q. When he came to your office did he tell you at that time there was no skin off your hide and invited you to bolster his contention that he had some brokerage interest in the recent deal? A. He discussed his interest in the deal. He thought he was entitled to some commission out of it.

30

Q. Did you tell him at that time that he had no claim at all to commission?

Mr. Barrett: If your Honor please, I object to that as immaterial whether he told him or not.

40

Hymen Gabriner—for Plaintiff—Cross.

The Court: I overrule the objection, because he was interrogated on that on his direct examination.

10 Q. Did you tell him in your words, "I told him that I couldn't stop him if he intended to make any claim but that, in my opinion, he had absolutely no basis on which to predicate a claim"? Did you tell him that? A. That was my opinion, sir.

Q. You told Mr. Van Poznak that after you had executed the lease with the Newark & Essex Building Company? A. Yes, I advised him not to sue.

20 Mr. Craft: No cross examination.

LEO DANZIS, SWORN.

Direct examination by Mr. Barrett:

Q. Mr. Danzis, what is your business? A. I am house manager of the wholesale drug house known as E. J. Barry in New York City.

30 Q. You know the plaintiff in this case? A. I do.

Q. In fact, in some manner you are related to him? A. That's right.

Q. In what manner? A. His wife is my first cousin.

The Court: He is not related to him at all.

The Witness: By marriage.

40 Q. Coming to the matter regarding the proposed lease of this drug store, when did you

Leo Danzis—for Plaintiff—Direct.

first become interested in that? A. Some time prior to August, 1944.

Q. Had you had some discussion with somebody concerning it? A. Yes, I had discussions with Mr. George Marks and Mr. Hymen Gabriner.

Q. Under what circumstances, in so far as you know, did Mr. Van Poznak come into the picture? What did he have to do? A. He was supposed to represent our leasing the premises.

10

Q. As a lawyer or a broker? A. As a broker.

Q. Did you attend any meeting with Mr. Schwebemeyer? A. No, I never met Mr. Schwebemeyer.

Q. Did you know who arranged any such meeting? A. Yes, it was my understanding Mr. Van Poznak arranged such a meeting.

20

By the Court:

Q. Did you know that of your own knowledge? A. I knew that from Mr. Marks.

Q. Mr. Marks told you? A. That's right.

The Court: Obviously that is hearsay and not admissible.

By Mr. Barrett:

30

Q. You didn't go to that meeting? A. No.

Q. Thereafter, after that meeting took place, did you at the request of Mr. Van Poznak do anything in regard to furthering the deal? A. Yes, I did.

Q. What was that? A. I made contact with one of our customers, the Firemen's Pharmacy. I believe Mr. Beldon was president of that corporation, and it was my suggestion to Mr. Marks

40

Leo Danzis—for Plaintiff—Direct.

and Mr. Gabriner that, if we could purchase the assets of that corporation and move it into this location at 744 Broad, it would make it possible to meet the demands of the landlord. I believe that, as a result of my conference with Mr. Beldon, Mr. Gabriner—

10

By the Court:

Q. Do you know that or did somebody tell you? A. I spoke to Mr. Beldon, your Honor, on several occasions. In fact, I spoke to him at our office at Summer Avenue, in Newark. There was a very large mortgage on the store. Mr. Beldon was anxious to retire, and willing to sell the store for a fair figure. There was a large mortgage on the store held by Mr. Rippel. It was Mr. Beldon's opinion that Mr. Rippel would settle the mortgage for a lesser figure than what was due.

20

Q. You were negotiating with Mr. Beldon for what? A. For the sale of the Firemen's Pharmacy with the idea of moving the Firemen's Pharmacy into this location.

By Mr. Barrett:

30 Q. Were those discussions you had, discussions with Mr. Van Poznak by you and so on? A. I believe they were. I don't recall it exactly.

By the Court:

Q. You don't know whether they were or not? A. I believe they were, your Honor.

Q. Wait a minute. Do you know whether they were or not? I am not trying to confuse you, but did you or did you not have any discussions with Mr. Van Poznak? A. Oh, I definitely did.

40

Leo, Danzis—for Plaintiff—Direct.

By Mr. Barrett:

Q. The answer is what? A. I had discussions with Mr. Van Poznak, sure.

Q. Did you become a partner in any proposed lease? A. No, I did not.

10

Q. Had you had any definite understanding on the subject? A. Yes, I was offered a part of this first lease that they contemplated going into and, of course, I did nothing openly, because if the lease had been gone into at this time—

The Court: How is this material? He never saw the party or was present at the discussions with Gabriner, as I understand it.

20

The Witness: I never met him.

Cross examination by Mr. Crummy:

Q. You, George Marks, and Mr. Gabriner were to form a partnership and lease the premises in question, were you not? A. Well, I don't know whether we were to form a partnership or not. We were supposed to be interested together.

Q. Or a corporation? A. That's right, in some manner.

30

Q. In which you were to have a one-third interest? A. That was never discussed.

Q. You were to have some monetary interest? A. That's right.

Q. But it didn't materialize? A. That's right.

Q. Looking to getting the lease, you interested yourself to see Mr. Beldon of the Firemen's Pharmacy on behalf of the partnership? A. Yes, sir.

40

Leo Danzis—for Plaintiff—Cross.

Q. Mr. Van Poznak has represented you as a lawyer? A. That's right.

Q. In many deals? A. That's right.

Q. At the time that you were an employee of McKesson & Robbins. Isn't that so? A. That's right.

10 Q. You were working for that concern and you didn't want your identity disclosed at the time? A. That's true.

Q. You didn't attend the conference at Mr. Schwebemeyer's office for that reason? A. That's right.

Q. You left the negotiation of that to the two men who were going into this venture with you, Marks and Gabriner? A. That's right.

20 Q. Mr. Van Poznak went along with them? A. I wasn't there, but I heard he did.

Q. Didn't you suggest to Mr. Gabriner that your attorney, Mr. Van Poznak, go with Gabriner and Marks to Mr. Schwebemeyer's office? A. Either George Marks or myself.

Q. You suggested that Van Poznak go to Mr. Schwebemeyer's office? A. That's right.

Q. At either your suggestion or Mr. Marks' suggestion, Mr. Van Poznak went to the office? A. I heard that he did.

30 The Court: He doesn't know whether he did or not. He wasn't there.

Mr. Crummy: No, but he said he did. Maybe the two partners had told him.

The Court: That doesn't make any difference who told him. It would be hearsay just the same.

40 Q. After September 6, 1944, do you know of any activity on your part, or the part of

Leo Danzis—for Plaintiff—Cross.

Motion by Defendant Newark & Essex Building Corporation for Nonsuit.

Gabriner or Marks, looking toward the leasing of the premises for the three men who were to form this company? A. My negotiations with Firemen's Pharmacy were subsequent to September, 1944. 10

Q. But the deal between the three parties fell through, or contemplated deal? A. My recollection is that my opportunity to go into the deal was going to be more or less on a permissive basis. I could go in with them, Mr. Crummy, if I cared to.

Q. That deal fell through? A. I was never told about it.

Q. You know nothing about it to this day? 20
A. I know what I have heard.

Q. As far as you are concerned, your going in was just permissive? A. That's right.

Re-direct examination by Mr. Barrett:

Q. Mr. Van Poznak never represented you in this matter as a lawyer? A. He never did.

PLAINTIFF RESTS.

30

Mr. Craft: If your Honor please, the Newark & Essex Building Corporation, wishes to move for a nonsuit.

The Court: If it does, the argument will have to be in chambers, because we don't have that before the jury.

(The jury retires.)

Mr. Craft: There are, at least, I think, three reasons why a nonsuit could be granted. I think the best one is that 40

Argument on Motion by Defendant Newark & Essex Building Corporation for Nonsuit.

10 there has been no proof that the defendant, Newark & Essex Building Corporation, authorized Mr. Schwebemeyer, for the Ralph G. Schwebemeyer Company, to make any agreement for the hire of a broker or the payment of any commission to Mr. Poznak. That is the first reason.

The Court: I think that is a matter in defense. Don't you?

Mr. Craft: No, sir, I think that is a matter of proof.

The Court: Is there any denial of his agency or their agency?

20 Mr. Craft: Yes, sir. There is no denial that Mr. Schwebemeyer, or Schwebemeyer and Company, was the agent for the Newark & Essex Building Corporation. But the allegation in the complaint says that through an agent, the Newark & Essex Building Corporation agreed to pay Mr. Van Poznak a commission.

30 The Court: The question then is whether the principals are bound by that. Don't you think it is a matter of proof? My first impression was otherwise but reflection convinces me that you have to go forward to the extent of establishing the limit of his agency.

Mr. Craft: I think that is a matter of proof for the plaintiff. I think it is a matter for him to establish for this particular purpose.

40 The Court: If you admitted it in the pleadings, doesn't that dispense with proof of the fact?

*Argument on Motion by Defendant Newark &
Essex Building Corporation for Nonsuit.*

Mr. Craft: There is no mention of the fact in the complaint that Mr. Schwebemeyer, or Ralph G. Schwebemeyer and Company, was the particular agent in question.

10

Mr. Barrett: May I do this? I think I am derelict in this respect: The interrogatories should be put in evidence. May I reopen and put in the interrogatories?

I also have to prove the item of commission that was paid, which I opened on, and that is in the interrogatories. May I get them, sir?

The Court: I don't know whether you have to prove it or not, if it is admitted in the pleadings. If it is not admitted in the pleadings, I will let you open to that extent after, but not now.

20

Mr. Barrett: All right.

The Court: The interrogatories admit the agency relationship?

Mr. Barrett: The interrogatories say that Ralph G. Schwebemeyer and Company is the renting agent of that building and they also say, and this is an item of proof, that there was paid the sum of \$5,427.50 to Ralph G. Schwebemeyer and Company.

30

The Court: It is made the subject matter of the so-called supplemental amended complaint?

Mr. Barrett: That's correct. That came after the interrogatories. I ask leave to reopen my case to put in those interrogatories.

The Court: I will allow you to do that.

40

Argument on Motion by Defendant Newark & Essex Building Corporation for Nonsuit.

I will hear your other grounds, Mr. Craft.

10 Mr. Craft: All right, sir. And secondly, the evidence doesn't show that the plaintiff, Mr. Van Poznak, was the procuring cause of the lease, because from the evidence adduced so far it is clear that negotiations were broken off some time in 1944. Mr. Van Poznak himself testified that the last time he saw Mr. Schwebemeyer and spoke to him about the matter at all was—he was rather indefinite.

20 The Court: September, 1944 is the best date he had.

Mr. Craft: He said he wasn't sure. Then almost nine months elapsed before the time the lease was entered into and, when it was entered into, it was on entirely different terms, and then without the intervention of Mr. Van Poznak at all.

For that reason, Mr. Van Poznak was not the procuring cause of the lease. I would cite to your Honor the case of *Apfelbaum v. Bernstein*, 104 N. J. L. 664.

30 The third ground, your Honor, is that the evidence doesn't show—in fact it shows the contrary—that the plaintiff actually consummated the lease. Now, there is a principle of law, so far as the brokers are concerned, that where the agency is not an exclusive agency (in other words, assuming Mr. Van Poznak was the agent of the Newark & Essex Building Corporation), he must actually bring the lease to

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*Denial of Motion by Defendant Newark & Essex
Building Corporation for Nonsuit.*

*Motion by Defendants Ralph G. Schwebemeyer
and Ralph G. Schwebemeyer & Co. for Nonsuit.*

consummation in order to be entitled to a commission.

The Court: In other words, it must be concluded *inter partes* in accordance with the terms of the original offer. 10

Mr. Craft: That's correct. I cite the case of *Vreeland v. Vetterlein* in 33 N. J. L. 247. In that case there were several brokers employed. The plaintiff wasn't the broker that carried to its conclusion. In fact, it was an entirely different broker.

The Court: You rest on the proposition that the mere introduction of the parties, the result of which subsequently proved abortive, raises no right in the sharing of the commission. Is that right? 20

Mr. Craft: That's right.

The Court: I deny the motion with leave to renew at the end of the case, not for a nonsuit at that time, but for a directed verdict.

Mr. Crummy: I move for a nonsuit and urge as a ground for the defendant, the grounds alleged by my brother lawyer here on the second ground; that is, that Mr. Van Poznak had nothing to do with the procuring of this second lease. Even if there was an agreement to give him a commission, or part of a commission, that with with reference to the people whom he brought in there at the beginning, and that deal fell through, flat. Some nine months later one of the men who were brought in on that deal originally came 30 40

*Motion by Defendants Ralph G. Schwebemeyer
and Ralph G. Schwebemeyer & Co. for Non-
suit—Denied.*

10 into the office of Mr. Schwebemeyer and leased the premises in a new deal on a different footing and different terms and conditions from those originally given to Mr. Schwebemeyer. For that reason I say Mr. Van Poznak wasn't the procurer of this lease and he should be nonsuited.

The Court: There will be the same ruling as to your motion, with leave to renew at the close of the case.

(The jury returns.)

(A recess is taken from 1 p. m. to 2 p. m.)

20 Mr. Barrett: May I at this time, sir, open my case to put in interrogatories?

The Court: Very well. I assume there is no objection.

Mr. Crummy: There is no objection.

The Court: The Court will permit the plaintiff to open his proof to put in certain interrogatories therein.

Mr. Barrett: I first submit interrogatories addressed to the defendant—

30 The Court: You may as well put this in as a whole and then read from them.

Mr. Barrett: Two sets?

The Court: Whatever they may be. There is no objection. I would put them in as independently marked exhibits and it will give you the privilege of reading them to the jury if you so desire.

(The papers referred to are received and marked as Exhibits P-4 and P-5.)

40

Ralph G. Schwebemeyer—Defendant—Direct.

Mr. Crummy: There are four papers, one containing the interrogatories and one the answers to the interrogatories, not four sets of interrogatories.

The Court: That's all right. They are the interrogatories and answers as referring to all defendants. 10

Mr. Barrett: That's correct. The first group marked P-5 are questions that are addressed to the defendant, the Newark & Essex Building Corporation, by the plaintiff, and answered formally under oath. They are called interrogatories and answers to interrogatories. I will read first to you, ladies and gentlemen of the jury, questions and then give the answer to each question. 20

(Mr. Barrett reads from the interrogatories marked Exhibit P-5.)

Mr. Barrett: Exhibit P-4 consists of questions directed to Ralph B. Schwebemeyer and Company.

(Mr. Barrett reads to the jury from the interrogatories marked Exhibit P-4.)

Mr. Barrett: I again rest. 30

RALPH G. SCHWEBEMEYER, SWORN.

Direct examination by Mr. Crummy:

Q. Mr. Schwebemeyer, what position do you hold in Ralph G. Schwebemeyer and Company?

A. President and treasurer.

Q. Is that a corporation? A. It is. 40

Ralph G. Schwebemeyer—Defendant—Direct.

Q. Who is the renting agent for the premises known as 744 Broad Street? A. The corporation.

Q. That is, Ralph G. Schwebemeyer and Company? A. That's right.

10 Q. Did you have a conference with Mr. Gabriner, Mr. George Marks, and Mr. Van Poznak on or about September 6, 1944? A. Yes, I did.

Q. Did you have a conference with any one of those three men prior to that date? A. I did, with Mr. Van Poznak.

20 Q. Was it in your office or over the telephone? A. There may have been two instances. I think the first that I heard from him was by telephone, in which he asked the question as to whether the store at the corner was for rent. I told him that it was, and he asked whether he could come in and see me, and I told him he could.

Q. Did he make arrangements to come and see you? A. He did.

Q. He wrote you a letter on August 30 (that is Exhibit P-1), with reference to the possibility of conferring with you about his clients' interest in the building? A. Yes.

30 Q. Did you make an arrangement to meet Mr. Van Poznak and his clients? A. I did.

Q. What date did you meet him? A. On the 6th of September.

Q. Who were at the conference? A. Messrs. Van Poznak, Gabriner, and Marks.

40 Q. What transpired? A. Well, they indicated that they were forming a group and interested in renting the corner store in the National Newark & Essex Building for a drug store and related purposes.

Ralph G. Schwebemeyer—Defendant—Direct.

Q. Now, prior to this time, or at the conference, did Mr. Van Poznak say anything about receiving any compensation in the matter? A. He did.

Q. What did he say? A. After the initial word I had with him, which I think was by telephone, he came in and told me there was a group in formation with which he had contact or relationship, and they wanted to go into the drug business, and he told me that his relationship with them did not provide for any compensation for him, and wanted to know, if he produced them and a deal eventuated, could he look to me for compensation out of our commission, and I told him that he could. 10

Q. That was prior to the conference of September 6? A. It was. 20

Q. What was said at the conference of September 6, when these three gentlemen were present, with reference to the terms of the lease? Tell in detail just what transpired. A. Well, several days before the conference of September 6, I had received from Mr. Van Poznak this letter on August 30, in which he reiterated what he had said to me in private discussion, that this group seemed to be willing to pay \$12,000 a year in rent. 30

I told him that there was nothing that I could do about accepting such a rental, that it was totally out of line, and that our authority was limited to the acceptance of a rent of \$16,000 minimum or better for the store and that, more than that, there were a number of important matters which would have to be cleared and eliminated before we could even entertain a drug store on the corner, inasmuch as the Firemen's Pharmacy, which operated in that 40

Ralph G. Schwebemeyer—Defendant—Direct.

building had a protective covenant in its lease whereby we, or the owners, couldn't rent other space in the building, unless that space were first offered to them, or they waived the effect of that clause. I made all of that clear.

10 Q. Was there talk about the terms of the lease; that is, the length or the duration? A. You refer now to this conference?

Q. Yes. How long did they wish to lease? What was the suggestion? A. The suggestion, which appears on a little memorandum in our file, was made that they were to talk about a twenty-year term at a rental minimum of \$12,000, with some percentages on gross sales of various merchandise, which are also enumerated on that little memorandum. But it didn't progress very far because I had again to make it clear that there was much which would have to be met before it could be entertained.

20 Q. How long did the conference last on September 6? A. To the best of my recollection, an hour or less. I don't know. I can't say.

Q. After September 6, 1944, did you ever discuss the matter with Mr. George Marks, who was present at that conference? A. No, sir, I never did.

30 Q. Did you have a discussion with reference to the leasing of the premises with Mr. Van Poznak after September 6, 1944? A. No, to the best of my recollection, I didn't. I never heard from him again.

Q. When did you learn that Mr. Gabriner might be interested in the leasing of the premises? A. Some time, I think, in April, 1945, which was seven months later. We had, meanwhile, acting for the First Presbyterian Church, sold a property at 1028 Broad Street, in co-

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Ralph G. Schwebemeyer—Defendant—Direct.

operation with an outside broker, to Mr. Gabriner. I didn't meet him in those proceedings at all, but at the close, a Mr. Saltzman of our office, was present, and when he returned to the office, he told me that Mr. Gabriner—

Mr. Barrett: I object to what was told the witness, if your Honor please.

The Court: I sustain the objection.

10

Q. As a result of the report made by Mr. Saltzman to you, what did you do, if anything?

A. Within several days of the date of that report, Mr. Gabriner came to the office and initiated the discussions with me looking to the use of the corner store.

Q. That was approximately what date, Mr. Schwebemeyer? A. I can't say, Mr. Crummy. There are memoranda there, I can't say. I think it was in April, 1945. I am sure it was.

20

Q. How long did it take to negotiate the lease between the Newark & Essex Building Corporation and Mr. Gabriner by you as agents of the company?

Mr. Barrett: Objected to as immaterial, if the Court please.

30

The Court: I suppose you want to fix the time when the lease was ultimately made?

Mr. Crummy: Yes, sir.

The Court: Suppose you ask him that question directly.

Q. You entered into negotiations, you say, in April, 1945? A. That is my recollection.

Q. And the lease was consummated when?

40

Ralph G. Schwebemeyer—Defendant—Direct.

A. I think the 17th of May was when it was delivered to the tenant?

The Court: Here it is. The superscription is dated April 30.

10 By the Court:

Q. You say it was not delivered until the 17th of May? A. Yes, there was something intervening there.

Q. When did they go into possession? A. I think it was in August. I'm not sure.

Mr. Barrett: Do you want the date the lease was made?

20 The Court: On the superscription it is April 30.

Mr. Barrett: It is recited here as April in the interrogatories.

Mr. Crummy: The lease is dated April 30, 1945.

Q. It wasn't delivered until May? A. Until the 17th of May.

30 By Mr. Crummy:

Q. When was possession turned over to them? A. I can't say from memory, Mr. Crummy. It was some time prior to the effective date of the lease, because we were willing to allow them some time to make the premises ready.

Q. Do you recall the rental the first year as shown in this lease, Exhibit P-3?

40 Mr. Barrett: If the Court please, I object to it. I think the lease speaks for itself.

Ralph G. Schwebemeyer—Defendant—Direct.

The Court: The lease speaks for itself. You may refer to the rental and ask him whether that was the rental.

Q. I show you Exhibit P-3. Will you kindly refer to that lease and explain wherein the difference lies between the contemplated lease of Gabriner, Marks, and Danzis in September, 1944, and the lease you have in your hand, Exhibit P-3. 10

Mr. Barrett: If the Court please, that is objected to as immaterial. The cases hold that, if there be a lease made on terms satisfactory to the holder, it is sufficient.

The Court: What do you mean by that circumscription?

Mr. Barrett: The cases indicate, in so far as the broker's right to recover against the owner of the property, that if he has brought the people together and if they enter into a lease, it is sufficient. 20

The Court: If they are the same principals and the like.

Mr. Barrett: Also, in so far as this defendant is concerned, it is immaterial. There was nothing in their agreement that makes terms the concluding factor as to whether they should share commission. 30

The Court: Whether or not there can be a recovery is clearly indicated in the Apfelbaum case.

Mr. Barrett: I can cite to your Honor a number of cases.

The Court: At the proper time and the proper place, we will argue that.

Mr. Barrett: I pray an exception.

A. The lease provides for a term of ten years, Mr. Crummy, and three months, to commence 40

Ralph G. Schwebemeyer—Defendant—Direct.

10 July 1, 1945 and end the 30th of September, 1955. The discussion of September 6, related to an effort to get the premises for a twenty-year term, and the lease provides for rentals, I think, in the first several months, which were arbitrarily fixed as \$1,000 a month. But, thereafter, for the basic ten-year term, the rental averaged \$16,000 per year minimum, which was reached by a plan of \$14,000 a year for the first three, \$16,000 for the next four—

The Court: There were automatic step-ups?

The Witness: Yes, sir.

20 A. (Continuing) To the end we got the expected and anticipated sixteen average. The discussions, of course, on September 6 centered on and were limited to a minimum of \$12,000, which was wholly inadequate, and they were so advised.

30 Q. Did you ever make any agreement with Mr. Van Poznak that he was to cooperate with you or be a co-broker with you in this deal? A. I did not, sir. I agreed, as I told you a few minutes ago, that I would undertake to see that he was compensated out of my commission if and when a deal eventuated as to those people and we got paid ourselves.

Q. That deal with those people, Gabriner, Marks, and Danzis, never eventuated? A. That's right.

Cross examination by Mr. Barrett:

Q. Now, you had known Mr. Van Poznak before he came to see you, hadn't you? A. I knew him as a tenant in our building.

40 Q. Had he ever been in to see you about leas-

Ralph G. Schwebemeyer—Defendant—Cross.

ing the store to anybody else? A. Not to the best of my recollection.

Q. Do you say he had not been? A. I would not say he had not because I don't remember whether he had or not, but I don't remember he did.

10

Q. You don't remember definitely whether he had or not? A. No, sir, I do not.

Q. The store had been vacant for how long, Mr. Schwebemeyer? A. Well, it was occupied intermittently, but I think it had not been productive for a year and a half or two years.

Q. When you say it had been occupied intermittently, had it been occupied by the Red Cross? A. Yes, some charitable organizations and one or two temporary occupants.

20

Q. In other words, it had not been revenue producing for some little time prior to September or August, 1944. Is that right? A. That's right.

Q. Mr. Van Poznak called you before coming in to see you with regard to bringing in somebody about this store, didn't he? A. That is my recollection.

Q. And you kept no particular notes on that score? A. That's right.

Q. Did you have any lengthy discussion over the telephone? A. No.

30

Q. He just said he wanted to see you about a proposed tenancy of that store? A. That's right.

Q. When he came in to see you, that was at your office? A. That's right.

Q. He then told you he had a proposed tenant for the store? A. Yes. He said he knew some people who were planning to get together to operate a store.

Q. He didn't tell you their names? A. He did not.

40

Ralph G. Schwebemeyer—Defendant—Cross.

Q. He made clear to you at that time, did he not, that he wasn't acting as a lawyer? A. Yes, he made that quite clear, and that, I think, was his purpose in that particular session with me.

10 Mr. Barrett: If the Court please, I object to what he thinks the purpose was and ask that it be stricken.

The Court: The inference is what he drew from what the man said. If that is the inference, I sustain the objection. Strike it out.

Q. He made quite clear to you that he was acting as a broker. Is that so, sir? A. He would like to, yes.

20 Q. You understood, therefore, that there was to be some portion of your commission that would go to him? A. I more than understood it after I discussed it with him for a while. I consented to it.

Q. You agreed to it? A. That's right.

Q. But you say that you did not act as co-broker with him. A. That's right.

Q. Do you mean you did not agree on what share of the commission on this he would get?

30 A. No, I don't think I mean that at all.

Q. I am sorry. I don't want to misinterpret you. Do you mean you did have an understanding of what proportion of your commission he was to get? A. Yes.

Q. What proportion was he to get? A. Half of it.

Q. That was understood? A. That's right.

40 Q. It was understood that if the lease eventuated from the introduction he would make to you, there would be a sharing equally of the commission? A. No.

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Q. All right. What then was the understanding? A. The understanding was that, if a lease eventuated with those particular people at or about that particular time, then he would share to the extent of half the commission which we were to collect for making the deal.

10

Q. That is an element I didn't hear you mention before. At or about that particular time? A. That's right.

Q. Did you specify that? A. No, but I think I am too experienced to accept a—

Mr. Barrett: I ask the last portion be stricken out, if the Court please.

The Court: Strike it.

Q. Your answer then is "No," you didn't specify at that particular time? 20

Mr. Crummy: I object. His answer wasn't "No."

The Court: I will permit him to answer the question.

Mr. Barrett: Will the stenographer please read the question?

(The last question was read by the court reporter.)

30

A. I believe I did specify that it was with respect to that particular effort.

Q. You told us a few minutes ago that your agreement was that there must be a lease with this particular group, I think you said, at this particular time. Is that right? A. Yes, sir.

Q. Did you say that to Mr. Van Poznak? A. I don't know what language I used, but that was certainly the basis of the understanding.

Q. By that particular time, you meant it had 40

Ralph G. Schwebemeyer—Defendant—Cross.

to be when they met at your office? A. No, I did not, and it wasn't contemplated on either side. We were talking not at arms-length.

10 Q. You can't tell us what your precise words were with regard to any limitation of time in which the deal had to be consummated? A. No, sir.

Q. You don't remember that? A. No, sir.

Q. You considered that was a part of your arrangement? A. I did.

Q. Of course, you have had real estate deals and leasing deals of importance running into negotiations over a period of many months? It is not uncommon? A. It sometimes happens.

Q. It sometimes runs eight, nine, or ten months? A. It could be.

20 Q. Now, you talk about this particular group. Do you know who these particular people were when Mr. Van Poznak talked to you? A. At what juncture?

Q. At the first time, when you made the agreement about sharing commissions? A. I didn't.

30 Q. It had to be, you say, with a group? A. He told me he had some people who were intending to get together and mentioned one was a retail druggist, one was a wholesale druggist, and one a merchant of other products undisclosed. I didn't know who they were.

Q. You didn't know who they were? A. That's right.

Q. You specified, you say, it had to be with that group? A. That's right.

Q. You didn't know anything about the financial responsibility of any of them then, did you? A. Certainly not.

40 Q. When did you first learn Mr. Gabriner was interested in it? A. I believe it was on the day

Ralph G. Schwebemeyer—Defendant—Cross.

of their arrival at my office, but I am not sure. It developed between the August 30 letter and the conference of September 6.

Q. At some point Mr. Van Poznak disclosed Mr. Gabriner was one of the men? A. Correct.

Q. Did he mention Mr. Danzis? A. Not by name. He told me that there was a third who, at the moment, was to remain undisclosed. 10

Q. You couldn't make any check on the financial responsibility of Mr. Danzis, could you? A. No.

Q. You never did? A. No.

Q. You did on Gabriner, didn't you? A. Not at that time.

Q. At some time? A. Subsequently, before we accepted him as a tenant. 20

Q. At the time that you met in the office with Mr. Van Poznak and Mr. Gabriner, did you then make any inquiry as to Gabriner's financial responsibility? A. No, there was a general discussion as to who the men were, what their businesses were, and where they were operating.

Q. You knew what business Mr. Gabriner was in after he left that day, didn't you, or during the course of your conversation? A. Decidedly.

Q. You recognized the locations at which he was running other stores? A. Yes. 30

Q. You recognized his operations, apparently at least, were on a substantial scale. Isn't that so? A. Yes.

Q. You knew of some particular location where he was renting, didn't you? A. He was our sub-tenant in one of the properties which we manage.

Q. That gave you some assurance as to who he was, some financial aspect? A. I didn't know a thing about his financial picture until we looked specifically into it. 40

Ralph G. Schwebemeyer—Defendant—Cross.

Q. Did you discuss at that meeting the terms of percentages of sales that you were to take as part of your rental? A. Yes, there was discussion as to what percentage would apply to certain lines of merchandise.

10 Q. I don't know whether that is entirely clear to the Court and ladies and gentlemen of the jury. How does that work out?

The Court: It is perfectly clear to me. There was a minimum rental, and I suppose, if the percentage on the sales didn't equal the minimum rental, the same would be credited.

20 Q. Did you discuss certain percentages on different articles to be sold? A. We did, superficially as to three or four items and recorded on a memorandum in my file, but there was nothing reached, no conclusion made.

Q. This was an exploratory meeting, a preliminary meeting? A. Correct.

30 Q. And amount was given to you that Gabriner said would be paid of \$1,000 a month? Isn't that so? A. He didn't say it, as I remember. I think that it was just representative of the letter.

Q. And that was offered and you said it had to be a higher amount? A. I said it was no good.

Q. Subsequently you came together on terms with Gabriner. Is that right? A. But long, long after.

Q. Subsequently you came together on terms with Gabriner on an amount that was mutually satisfactory? A. That's right.

40

Ralph G. Schwebemeyer—Defendant—Cross.

Q. It started at \$1,000 a month? A. Only for the three-month period.

Q. It started at \$1,000 a month. Is that right? A. It did.

Q. It also contained provisions having to do with percentages. Is that right? A. Sure.

10

Q. You have had other leases in which the first meeting didn't bring the final understanding as to the amount which was to be paid, haven't you? A. Decidedly.

Q. In fact, that is the usual thing? A. Yes, I think it is more often so than not.

Q. Particularly on a store of this size, this is rather an important location, isn't it? A. Yes.

Q. Was there discussion at that time as to the Firemen's situation and whether there could be a store located in the same building in which the Firemen's Pharmacy had a store? A. Yes, I made it very clear we had no right, as owner or owner's agent, to presuppose that consent which we first had to get.

20

Q. That was subsequently obtained? A. Some time after.

Q. You don't know what efforts were made with regard to that difficulty by Mr. Van Poznak or Mr. Danzis or anybody else? A. I have no way of telling.

30

Q. Were there discussions of a liquor license? A. I think liquor was referred to at the conference of September 6. I don't know whether licenses were.

Q. Was there a discussion of the possibility of purchasing the Firemen's Drug Store by Gabriner or those with him? A. I don't remember any, no.

Q. Did you, subsequent to that meeting, ar-

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Ralph G. Schwebemeyer—Defendant—Cross.

range to have Gabriner and Van Poznak go down into the store? A. I thought we adjourned from my office and went downstairs and they looked at it.

10 Q. You went down with them? A. I don't know whether I did or not.

Q. Either you went or you sent somebody with them? A. That's right.

Q. And did they go in the basement? A. I wouldn't know. I don't remember.

Q. The basement was part of the subject of discussion? A. Yes, it probably was.

20 Q. It was a question as to whether some space in the basement would be available because of your heating problems at that time. Is that right? A. Very likely, yes, because he had the problems.

Q. You never, you say, talked to Mr. Van Poznak again about this store? A. Not to the best of my recollection.

Q. Did you ever meet him in the building again after that? A. I couldn't tell you.

30 Q. You are the renting agent of the building? You are in it, through it, and around it? A. All the time, in and out. It is very likely I would run into him as anybody else, but I don't remember.

Q. Would you say you didn't run into him and ask him how the drug store deal was coming along? A. I would be willing to say that affirmatively, that I did not. If he was to tell me when it was I was supposed to run into him, but I can't generalize, and I don't know. From my best recollection, I don't remember having met him.

40 Q. You don't remember having met him at

Ralph G. Schwebemeyer—Defendant—Cross.

Renewal of Motion by Defendants Ralph G. Schwebemeyer and Ralph G. Schwebemeyer & Co. for Nonsuit and Directed Verdict.

any time and asking him how the drug store deal was coming? A. No, sir, I do not.

Q. When Mr. Gabriner was coming in to you again with regard to the deal for the drug store, did you make any inquiry from him then about Mr. Van Poznak? A. Certainly not. 10

Q. Did you make any inquiry from Mr. Van Poznak? A. No, sir.

Q. You just didn't bother with him at all? A. It wasn't a matter of not bothering. I just didn't relate it to any prior experience.

Q. You received or your company received the amount of commission on this deal which has been mentioned. Is that correct? A. Yes, sir. 20

Q. You have paid no portion of it to Mr. Van Poznak? A. No, sir.

Mr. Barrett: That's all.

Mr. Craft: No questions.

Mr. Crummy: We rest.

Mr. Craft: The defendant Newark and Essex Building Corporation rests.

I wish to renew my motion.

The Court: You have no rebuttal? 30

Mr. Barrett: I have no rebuttal.

(The jury retires.)

Mr. Crummy: If your Honor please, I wish to renew my motion for a nonsuit and a directed verdict on the following grounds: I base it particularly upon the law in the Apfelbaum case.

These three individuals, Gabriner, Marks, and Danzis were interested, according to Gabriner's testimony, in the formation of a partnership. Danzis didn't want to be known in the deal be- 40

Renewal of Motion by Defendants Ralph G. Schwebemeyer and Ralph G. Schwebemeyer & Co. for Nonsuit and Directed Verdict.

cause of his position with McKesson and Robbins and, as Mr. Gabriner testified, it was either Marks or Danzis who suggested that Van Poznak
 10 go with Marks and Gabriner to see Mr. Schwebemeyer.

Mr. Schwebemeyer admits to the conference and admits that he told Mr. Van Poznak that he would be compensated if a lease between these three individuals eventuated. At that time they offered to take a lease at \$12,000 a year for twenty years. Mr. Schwebemeyer testified he told them at that time that they would not give a lease for twenty years and it would not be \$12,000 a year. There was a discussion of
 20 other items on the lease, such as normally come up in any business; minimum rental with percentage of profit on the sale of certain items.

Mr. Schwebemeyer testified that, from September 6 until the time of the consummation of the lease in October, he never had a further conference with Mr. Van Poznak with reference to these three men, that he never had a conference with George Marks, and that he never had any dealings with Danzis whatsoever, although admits his going into the picture was
 30 only permissive.

The Court: His testimony was explicit on that point, that it was permissive. There was no obligation and, as he put it himself, it was a yes or no offer.

Mr. Crummy: He was much interested in the matter and his testimony shows that, and that he went to Mr. Beldon of the Firemen's Pharmacy to talk to him about getting him to find out whether or not they could take over the
 40

Renewal of Motion by Defendants Ralph G. Schwebemeyer and Ralph G. Schwebemeyer & Co. for Nonsuit and Directed Verdict.

premises or would forfeit their right under the lease. The officer testified he was trying to buy out the Firemen's and maybe move in that place but Mr. Rippel wasn't agreeable to releasing his mortgage on there. That was in or around September, the last conference Mr. Schwebemeyer had with Mr. Van Poznak, Mr. Gabriner, and Mr. Marks, with reference to this particular group at the time they wanted the twenty-year lease at \$1,000 a month, and the proposition was turned down. 10

Now, nine months expired from September 6, until May 17, a little over nine and a half months, when the lease is consummated. The lease was consummated as of April 30 and the delivery took place on the 17th of May as testified to. 20

The terms and conditions of the lease are entirely different from those originally talked of at the September conference. Mr. Gabriner got a ten-year lease and the minimum amount of that, over the period, amounts to \$16,000 a year. The first three months was for \$1,000 a month, but that was the time they were getting ready in the premises. The next period is \$14,000. Then it jumps to \$16,000 and then to \$18,000. There were no such terms in the original lease at all, and they never even discussed them. There was discussion of a twenty-year lease at \$12,000. When you look at the lease in evidence, you will find the terms and conditions, as set forth in that lease in great detail, are entirely different from those negotiated. 30

I think, under the Court of Errors and Appeals rulings, on the basis of Judge Dungan's opinion that a broker cannot get a commission 40

*Renewal of Motion by Defendant Newark &
Essex Building Corporation for Nonsuit and
Directed Verdict.*

for the mere introduction of people, I am entitled to a nonsuit and a direction of a verdict.

10 Mr. Van Poznak didn't introduce Mr. Gabriner and Mr. Marks. He was really representing Danzis at the time. The very fact that the lease was never consummated and the fact that nine months later one of those three men came back and negotiated a lease under different terms and conditions do not entitle Mr. Van Poznak to any commission. I respectfully submit the nonsuit should be granted.

Mr. Craft: Does your Honor wish to hear argument now?

20 The Court: You made the argument on the motion for a nonsuit.

Mr. Craft: I have a further question on agency. Do you wish to hear it now?

The Court: I think not. I am satisfied as to that.

Mr. Craft: I wish to renew my motion for a nonsuit and a directed verdict.

(Counsel argue.)

30 Mr. Barrett: I would like to make a statement in so far as Ralph G. Schwebemeyer & Company is concerned. There is, of course, the right to recover if we were the procuring cause. There is also the right to recover against the Ralph G. Schwebemeyer and Company, if the jury believes that there was the agreement to share as a co-broker. I don't see how they can miss the fact that there was an agreement. Then we are entitled to recover, if, in fact, there was a lease, regardless of whether we were the procuring cause or not and that, under the case
40 cited to your Honor this morning, *Braelow v.*

Granting of Motions by Defendants Newark & Essex Building Corporation and Ralph G. Schwebemeyer.

Schlesinger, Inc., 109 N. J. Eq. 472; affirmed in 112 N. J. Eq. 88.

The Court: I will deny Mr. Crummy's motion and say now that the limitation of my projection of the issue to the jury will be as to whether Mr. Van Poznak was the producing cause. 10

Mr. Crummy: I may say there is nothing in the pleadings at all which states Mr. Van Poznak had an agreement with Mr. Schwebemeyer as a co-broker. 19

The Court: Mr. Schwebemeyer's position is he acting as the corporation, inferentially, at least. If there is an agreement, there would be a division of commission in the event of a sale. Whether he was the producing cause of the ultimate sale, I am going to submit to the jury. 20

Mr. Barrett: I disagree with counsel's comments of what is in the pleadings. We charge we were co-broker.

The Court: It is academic anyhow, in the light of my pronouncement as to Schwebemeyer and Company. As to the defendant the Newark & Essex Building Corporation, I will direct a verdict as to it, as well as to the individual defendant Schwebemeyer. 30

Mr. Barrett: May I have an exception?

Mr. Crummy: May I have an exception to your Honor's ruling?

Mr. Barrett: I move for a directed verdict on behalf of the plaintiff against the defendant, Ralph Schwebemeyer and Company, on the ground that the testimony is that Mr. Van Poznak had an agreement to share in any commission as a co-broker, and that he is entitled to recover 40

Plaintiff's Motion for Directed Verdict—Denied.

10 one-half of the amount that Schwebemeyer and Company admitted receiving, regardless of whether he was the procuring cause or not and regardless of what efforts were made by him; the theory being that, if there were such an agreement, then, there is an inuring to the benefit of each of the work of the other. I cite to your Honor in that connection, the case of *Braelow v. Schlesinger, Inc.*, 109 N. J. Eq. 472; affirmed 112 N. J. Eq. 88.

The Court: That motion, too, will be denied. You may have an exception.

Mr. Barrett: I may have exceptions to the other rulings, too?

The Court: Yes.

20 (The jury returns.)

(Mr. Crummy sums up to the jury on behalf of the defendant.)

The Court: May I interrupt for a moment? I am interrupting counsel, with their consent, and I think for the benefit of all of you, to tell you, ladies and gentlemen of the jury, that at the proper time and in the proper place I expect to direct a verdict for two of the defendants, the Newark & Essex Building Corporation and Mr. Schwebemeyer, individually.

30 I say that to you because you may wonder in your own minds, as counsel proceed with their summations, why they do not make a general reference to all the parties. The reason why they do not is because I have limited the question of liability strictly between the plaintiff, Mr. Van Poznak, and the defendant, Schwebemeyer and Company, a corporation, as the one defendant left. I do that, as I say, for the purpose of clarification and with the consent of
40 counsel so that you will not be confused as to

Instructions to Jury.

why there is no general reference to all parties defendant who were indicated at the opening by counsel. You may proceed and I am sorry for the interruption.

(Summation continues.)

(Mr. Barrett sums up to the jury for the plaintiff.) **10**

(A recess is taken until 10 a. m. Tuesday, May 27, 1947.)

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Exhibit P-1.

(Letterhead of Aaron Van Poznak.)

August 30, 1944

10 Ralph G. Schwebemeyer & Co.
744 Broad Street
Newark, N. J.

Att: Mr. R. G. Schwebemeyer

Dear Sir:

20 After discussing with you the possibility of renting the northeast corner store at the National Newark & Essex Bldg., I conferred with my client and he has advised me that he and his associates would be willing to pay \$12,000.00 a year as a minimum rental for the store premises and the basement under the store. Said store to be used as a retail drug outlet for the sale of drugs, sundries, cigars, cigarettes, with a soda fountain and liquor department to be added if and when the necessary arrangements can be made for such departments. The percentage above the minimum will be mutually agreed upon by our clients.

30 Kindly advise me whether or not the premises are available on the above terms and oblige.

Very truly yours,

AARON VAN POZNAK
AARON VAN POZNAK

AVP:P

Exhibit P-2.

(Letterhead of Aaron Van Poznak.)

May 22, 1945

Newark & Essex Bldg. Corp.
744 Broad Street
Newark, N. J.

10

Att: Mr. Ralph G. Schwebemeyer

Dear Sir:

If you will recall, several months ago I brought to your office, Mr. Hyman Gabriner of Black's Cigar Stores, Inc., for the purpose of renting the ground floor premises—northeast corner store of the National Newark & Essex Building. At that time I discussed the brokerage with you and we agreed that we were to act as co-brokers. I understand that a lease has been entered into with Mr. Gabriner and/or his company for the leasing of these premises. As the person who originally produced the tenant, I am entitled to my share of the commission in this matter.

20

Will you kindly communicate with me and advise me what arrangements are to be made to recompense me as a producing broker in this matter.

30

Very truly yours,

AARON VAN POZNAK
AARON VAN POZNAK

AVP:P

CC to Newark & Essex Bldg. Corp.
c/o Brown, Wheelock, Harris, Stevens, Inc.
67 Wall Street, New York City

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Exhibit P-4.

Identical with interrogatories addressed to Ralph G. Schwebemeyer & Co. and answers thereto, printed herein at pages 23 to 25.

10

Exhibit DS-1 for Identification.

(Letterhead of H. Gabriner.)

June 8th. 1945

Mr. Ralph Schwebemeyer
744 Broad Street
Newark, New Jersey

20 My dear Mr. Schwebemeyer:

The following events occurred prior to my leasing the Broad & Commerce corner store.

Late in the summer of 1944, Mr. Geo. Marks approached me with a view to leasing the above store, as a drug store. Mr. Marks thought that he, an experienced retail drug man, Mr. Leo Danzis, an experienced wholesale drug man, and myself should form a partnership and go into the drug business. Soon after this discussion with Mr. Marks a conference was held with Mr. Leo Danzis, Mr. Geo. Marks and myself. Mr. Danzis suggested his attorney, Mr. Aaron Van Poznak, represent us in our discussions with you, which led to a meeting with yourself, Mr. Marks, Mr. Van Poznak and myself, at your office. At this conference, a verbal offer was made to you, which wasn't acceptable to yourself. The matter was left hanging, nothing further was said to me by Mr. Danzis nor Mr. Marks.

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40 During the Winter of 1944 I again discussed the

Exhibit DS-1 for Identification.

matter with Mr. Marks at my office. Mr. Marks at that time was reluctant to carry on any further with this store. In the early spring of 1945, I again talked this store to Mr. Marks, at my home, and mentioned to him at that time, that I would like to lease the store by myself, if his interest had entirely waned. He, at that time, told me to go right ahead by myself, resulting in a lease between the Nat'l Newark & Essex Building and myself. 10

Very truly yours,

HYMAN GABRINER

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Judgment.

(Filed May 27, 1947.)

ESSEX COUNTY CIRCUIT COURT

83446

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 AARON VAN POZNAK

Plaintiff

vs.

NEWARK & ESSEX BUILDING CORPORATION, a corporation organized and existing under the laws of the State of New Jersey and RALPH SCHWEBEMEYER individually and RALPH G. SCHWEBEMEYER & Co. a corp.

20

Defendants

 Action at Law

 Verdict By A Jury
 AND By Order Of The
 Court

 Judgment Entered
 May 27, 1947

30

Damage \$2,713.75

Costs \$ 122.73

Total \$2,836.48

Costs \$74.70—Deft.

JUDGE DANIEL J. BRENNAN

LUM, FAIRLIE & FOSTER, Attys. of Plaintiff

PITNEY, HARDIN, WARD & BRENNAN—Attys. for
Deft. Newark & Essex Bldg. Corp.

40

ANDREW B. CRUMMY, Atty. for Deft.—Schwebemeyer

Judgment.

This action was tried before Judge Daniel J. Brennan with a jury at the Essex Circuit Court on May 27, 1947.

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

They find in favor of the plaintiff Aaron Van Poznak and against the defendant Ralph G. Schwebemeyer & Co. a corp. for the sum of Two Thousand Seven Hundred Thirteen dollars and seventy-five cents (\$2,713.75) damage; and By Order Of the Court they find in favor of the defendants Newark & Essex Building Corporation, a corporation organized and existing under the laws of the State of New Jersey and Ralph Schwebemeyer, individually and against the plaintiff Aaron Van Poznak.

Whereupon it is adjudged that judgment be entered in favor of the plaintiff Aaron Van Poznak and against the defendant Ralph G. Schwebemeyer & Co. a corp. in the sum of Two Thousand Seven Hundred Thirteen dollars and seventy-five cents (\$2,713.75) damage and costs of suit which are taxed at One Hundred Twenty-two dollars and seventy-three cents (\$122.73), making in the whole the sum of Two Thousand Eight Hundred Thirty-six dollars and forty-eight cents (\$2,836.48), judgment be entered in favor of the defendants Newark & Essex Building Corporation, a corporation organized and existing under the laws of the State of New Jersey and Ralph Schwebemeyer, individually and against the plaintiff Aaron Van Poznak in the sum of Seventy-four dollars and seventy cents (\$74.70) Costs of Suit.

Judgment Signed and Entered May 27, 1947.

CHARLES W. PARKER

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Judgment.

10 RUSSELL C. GATES, Clerk of the Circuit Court of Essex County in and by virtue of a special warrant of attorney duly acknowledged from Pitney, Hardin, Ward & Brennan attorneys of this plaintiff in the foregoing record and to me directed, do hereby acknowledge that the said plaintiff is satisfied of the costs as to Aaron Van Poznak.

Dated June 11 A. D. 1947

\$74.70 RUSSELL C. GATES
Clerk

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Notice of Appeal and Grounds.

(Filed July 16, 1947.)

ESSEX COUNTY CIRCUIT COURT.

ACTION AT LAW.

10

 AARON VAN POZNAK,

Plaintiff,

vs.

 NEWARK & ESSEX BUILDING CORP., et al.,
 Defendants.

 20

 To: LUM, FAIRLIE & FOSTER,
 Attorneys for Plaintiff.
Sirs:

PLEASE TAKE NOTICE that Ralph G. Schwebemeyer & Co., defendant in the above entitled cause, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the Judgment entered in this cause on the following grounds, to wit:

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1. Because the Essex County Circuit Court erred in giving judgment to the plaintiff instead of the defendant, in that,

(a) The Court erred in denying defendant's, Ralph G. Schwebemeyer & Co., motion for a non-suit at the conclusion of the plaintiff's case and

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Notice of Appeal and Grounds.

(b) The Court erred in denying defendant's, Ralph G. Schwebemeyer & Co., motion for a directed verdict.

10 (c) The Court erred in submitting the case to the jury.

Respectfully yours,

ANDREW B. CRUMMY,
Attorney for Defendant.

Sat below:

DANIEL J. BRENNAN,
Circuit Court Judge.

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New Jersey Court of Errors and Appeals.

AARON VAN POZNAK,
Plaintiff-Appellee,

vs.

NEWARK & ESSEX BUILDING COR-
PORATION, a corporation, etc.,
and RALPH G. SCHWEBEMEYER,
Defendants,

—and—

RALPH G. SCHWEBEMEYER & Co.,
Defendant-Appellant.

On Appeal from
Essex County
Circuit Court.

Oral Argument by Andrew B. Crummy

BRIEF OF DEFENDANT-APPELLANT.

Statement of the Case.

Ralph G. Schwebemeyer & Co., Defendant-Appellant, is a corporation of the State of New Jersey.

Appellant is the renting agent for the Newark and Essex Building Corporation (S. C., p. 76, l. 5). Mr. Ralph G. Schwebemeyer, President of Appellant, on or about September 6, 1944 (S. C., p. 76, l. 10) had a conversation with Messrs. Gabriner and Marks and the plaintiff. Prior to that date, Schwebemeyer had a conversation with the plaintiff, at which time, plaintiff informed Schwebemeyer that

“* * * there was a group in formation with which he had contact or relationship, and

they wanted to go into the drug business, and he (plaintiff) told me (Schwebemeyer) that his (plaintiff's) relationship with them did not provide for any compensation for him, (plaintiff) and wanted to know, if he produced them and a deal eventuated, could he (plaintiff) look to me for compensation out of our commission, and I told him that he could" (S. C., p. 77, ll. 10-20).

An annual rental of \$12,000 was offered to Schwebemeyer by the three men during the conference on September 6, 1944. They were told by Schwebemeyer that such a rental was totally out of line and that the authority of the Appellant as renting agent was limited to the acceptance of a rent of \$16,000 minimum or better; that there were a number of important matters which would have to be cleared and eliminated before the owners of the building might rent the premises to be used as a drug store (S. C., p. 77). The conference on September 6, 1944 lasted an hour or less (S. C., p. 78, l. 25). After the conference of September 6, 1944, Schwebemeyer never heard from George Marks or Van Poznak, the plaintiff, with reference to leasing the premises in question (S. C., p. 78, l. 35).

Appellant, acting as agent for the First Presbyterian Church co-operating with another broker, in April, 1945 sold a property on Broad Street, Newark, N. J. to Gabriner, one of the three men who were interested at the September 6, 1944 conference (S. C., pp. 78-79).

Several days after the Presbyterian-Gabriner deal was made, Mr. Gabriner came to Appellant's office and initiated a discussion looking to the

leasing of the premises which was the subject of the conference of September 6, 1944 (S. C., p. 79). The negotiations started in April, 1945, seven months after the original meeting had terminated on September 6, 1944. The lease between Gabriner and the Newark & Essex Building Corporation was executed and delivered on May 17, 1945.

It was understood between Van Poznak and Schwebemeyer that, if a lease eventuated with those particular people (Marks and Gabriner group) at or about that particular time (September 6, 1944), then he (Van Poznak) would share to the extent of half the commission which we were to collect for making the deal (S. C., p. 85).

Van Poznak seeks to recover one-half the commission paid Appellant on the ground that he produced the lessee. Nine months, at least, passed between the termination of negotiations with the group on September 6, 1944 and the time Gabriner individually entered into a lease. The executed lease was entirely different in terms and conditions from that which was discussed on September 6, 1944 (S. C., pp. 81-82).

Gabriner, Marks and Danzis were considering the formation of a partnership and going into the drug business (Ex. DS-1, S. C., p. 100; p. 61, l. 18). "There were supposed to be three partners" (S. C., p. 63, l. 15).

After the conference of September 6, 1944, Schwebemeyer never heard from Van Poznak again (S. C., p. 78, l. 35).

Law and Argument.

POINT I.

A broker must produce a purchaser or lessee ready, willing and able to purchase or lease on terms which the owner accepts in order to be entitled to a commission.

The prevailing rule may be expressed as follows:

“A broker employed to find a purchaser or seller is not entitled to a commission * * * unless he produces a purchaser or seller who is able, ready and willing to take or sell the property at a price and on terms which have been specified by the principal or are satisfactory to him. * * * The foregoing rules apply *mutatis mutandis* to brokers employed to effect exchanges or leases of property” (C. J. S. at p. 187).

The rule is set forth in this state in *Steinberg v. Mindlin*, 96 N. J. L. 206, 114 Atl. 451 (E. & A. 1921), in which it was held that in the absence of special agreement a real estate broker acting by virtue of a written agreement earns his commission when he secures a buyer on the seller's terms as originally propounded or as settled by an agreement between the seller and buyer. If, within the time specified in the agreement, the broker procures such a purchaser, he is entitled to his fee, even though the transaction between owner and purchaser is not executed until after the expiration of the agency. *Crowley Co. v. Myers*, 69 N. J. L. 245, 55 Atl. 305 (E. & A. 1903).

Accord:

- Schlesinger v. Burstein Realty Co.*, 123 N. J. L. 190, 8 A. 2d 327 (E. & A. 1939);
Walsh v. Isgro, 121 N. J. L. 165, 1 A. 2d 391 (E. & A. 1938);
Ganley v. Kalikman, 105 N. J. L. 311, 145 Atl. 108 (Sup. Ct. 1928);
Dickinson v. Walters, 100 N. J. L. 62, 125 Atl. 235 (Sup. Ct. 1924).

Van Poznak produced no one who was able, ready and willing to lease the premises in question on the terms of the lessor.

POINT II.

A broker is not entitled to a commission unless he is the procuring cause of the lease.

“Procuring cause” or “efficient cause” has been defined in 12 C. J. S. p. 208.

“As used in that branch of the law relating to brokers’ commissions, the terms ‘procuring cause’, ‘efficient cause’ and ‘proximate cause’ have substantially, if not quite, the same meaning and are often used interchangeably; they refer to a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker. * * * While it is not essential that the broker’s efforts be the sole cause of the sale or other transaction, it is essential that they be the predominating effective cause, and they are not sufficient to entitle him to a commission where

they are merely an indirect, incidental, or contributing cause or one of the links in a chain of causes.”

Chief Justice Beasley, writing the opinion for the Supreme Court in 1869 in

Vreeland v. Vetterlein, 38 N. J. Law 247 at 249,

stated:

“It is certainly true, as a rule of law, that, under ordinary circumstances, where a broker, employed to sell property, brings about an introduction of a buyer, and when a negotiation, resulting in a purchase ensues on that foundation, the owner and the buyer cannot, by any arrangement, disappoint the claim of the agent for remuneration. If this could be done, it is obvious the agent would, in all cases, be in the power of his employer, who, by taking matters into his own hands, could, at will, defeat the just expectations and equitable rights of the broker or middleman. In this class of cases, the question then always is, whether, under the peculiar conditions of the given case, the agent was *the efficient cause of the sale*; and when there is real doubt upon that point, such doubt must be solved by the jury.” (Italics supplied.)

In

Queen v. Jennings, 93 N. J. L. 353, 108 Atl. 379 (Sup. Ct. 1919),

the court said, at p. 356 of 93 N. J. L.:

“The duty which an agent undertakes, the obligation he assumes as a condition of his

right to demand commissions, is to bring the buyer and seller to an agreement. The agent must be the procuring or efficient cause of the sale."

Accord:

Houston v. Siebert, 129 N. J. L. 468, 30 A. 2d 35 (E. & A. 1942);

Walsh v. Isgro, *supra*;

Murray Apfelbaum Inc. v. Bernstein, 104 N. J. L. 664, 141 Atl. 750 (E. & A. 1928);

Weeks v. Smith & Sons Co., 79 N. J. L. 388, 75 Atl. 773 (Sup. Ct. 1910).

The negotiations of September 6, 1944 were terminated honestly. The parties could not and did not agree. The negotiations were broken off. Gabriner, Danzis and Marks did not talk about the matter after September 6, 1944. They waited some time. Gabriner thought the thing would revive itself. It was never revived (S. C., p. 62, ll. 10-15).

"It is not every sale to a customer procured by the broker that will entitle him to a commission, however; he must be the procuring cause of the transaction. Hence, if a broker fails to bring a customer to terms, and then abandons the negotiations, or they are broken off, he is not entitled to a commission where a sale is subsequently made by the owner to the customer through independent negotiations" (9 C. J. p. 621).

"However, to entitle a broker to a commission, where the contract concluded differs from that which the broker was authorized to negotiate, the negotiations commenced by

the broker must have continued uninterruptedly, and he must have been actively instrumental throughout in causing the parties to consummate the transaction" (9 C. J. p. 602).

The Court of Errors and Appeals in 1928 applied the above rule in

Apfelbaum v. Bernstein, 104 N. J. L. 664.

In that case the agent brought owner and prospective lessee together; terms were discussed; the owner wanted \$28,000 annual rent; the lessee offered \$26,000; negotiations terminated. Seven and a half months later, owner and lessee executed and delivered a lease on "terms entirely different" from those discussed seven and one-half months previous. The lower court on motion of defendant-owner granted a non-suit against the plaintiff-agent on the ground that he was not the efficient and procuring cause of the lease. The Appellate Court quoted with approval this language from the opinion of the Court below:

"I have never understood that the commissions of the broker were earned by the mere introduction of a buyer to the owner of real estate or lessor of real estate, but that the broker must have been, in the words of the cases, the efficient procuring cause of the contract between seller and purchaser, lessor and lessee" (104 N. J. L., at p. 664).

Gabriner never discussed the matter with Schwebemeyer after September 6, 1944 until the closing of title to another property in April, 1945. Gabriner reconsidered the matter and did not confer with either Marks, Danzis or Van

Poznak. Gabriner went into the deal alone (S. C., p. 62, ll. 20-40).

Van Poznak wrote Schwebemeyer (Ex. P-1, S. C., p. 98) on August 30, 1944 “* * * I conferred with my client and he advised me that *he and his associates would be willing to pay \$12,000 a year * * **”.

Mr. Van Poznak knew he represented three men who were to deal as partners. After negotiations terminated with the three men and after Gabriner, one of the three, had negotiated a lease as an individual with the lessor on terms entirely different from those mentioned on September 6, 1944, Mr. Van Poznak on May 22, 1945 wrote (Ex. P-2, S. C., p. 99) to Schwebemeyer, “* * * I brought to your office, Mr. Hyman Gabriner of Black’s Cigar Stores, Inc., for the purpose of renting the ground floor premises—* * *.” Here Mr. Van Poznak is endeavoring to get away from the three-man association of Gabriner, Marks and Danzis. He pretends that he brought Gabriner alone. That is not the fact. He, an attorney, was mindful of this Court’s ruling in

Feist & Feist v. Bloomfield Bank, 126
N. J. Law 455 (E. & A. 1941).

In that case the Court held that an agent is not entitled to commission where the brokerage agreement refers to a sale to a certain company, and, after the company fails to buy, the owner sells to the vice-president of the company in his individual capacity.

CONCLUSION.

It is respectfully submitted that the Trial Court erred in refusing to grant a non-suit or direct a verdict in favor of the defendant, Ralph G. Schwebemeyer & Co.

It is respectfully urged that the judgment of the lower Court for the reasons herein stated should be reversed.

Respectfully submitted,

ANDREW B. CRUMMY,
Attorney for Defendant-Appellant.

CASES CITED.

	PAGE
<i>Braclow v. Louis Schlesinger, Inc.</i> , 109 N. J. E. 472	15
<i>Ganley v. Kalikman</i> , 105 N. J. L. 311	14
<i>Hordis v. Kislak</i> , 94 Misc. R. 1030	15
<i>Klie v. Hollstein</i> , 98 N. J. L. 473	5
<i>McLaughlin v. Campbell</i> , 78 N. J. L. 541 ..	8
<i>Murray Apfelbaum, Inc. v. Bernstein</i> , 104 N. J. L. 664	10
<i>Tepperman v. Polster</i> , 113 N. J. L. 14	9
<i>Walsh v. Isgro</i> , 121 N. J. L. 165	8, 12, 13

THE

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New Jersey Court of Errors and Appeals

AARON VAN POZNAK,
Plaintiff-Respondent,

vs.

RALPH G. SCHWEBEMEYER & Co.,
Defendant-Appellant.

On Appeal from
Essex County
Circuit Court.

Sat Below:

Daniel J.
Brennan, *J.*

BRIEF FOR PLAINTIFF-RESPONDENT AARON VAN POZNAK.

This matter is before the court on the appeal of the defendant, Ralph G. Schwebemeyer & Co. from the failure of the court to nonsuit the plaintiff and to direct a verdict in favor of the defendant mentioned. No other action of the trial court is involved.

Facts.

In its Statement of the Case, and for that matter in its entire brief, the appellant, somewhat in the manner of a summation to a jury, has set forth only those facts which it apparently deems helpful to it. Since the sole question on this appeal is whether a factual question was raised for submission to a jury, the facts will be outlined here, and in our argument quotations will be given from the testimony.

The plaintiff, a lawyer having an office in National Newark and Essex Building, in Newark, approached Ralph Schwebemeyer, the president of

Ralph G. Schwebemeyer & Co., the latter being the renting agent of the National Newark and Essex Building, a large office building in Newark, N. J., with regard to presenting a prospective lessee for a long-vacant corner store in the building. This visit was made in the latter part of August, 1944. Schwebemeyer was told by Van Poznak that he had someone interested in renting a drug store, and was asked whether Van Poznak would be recognized as the broker if a lease was effected. Schwebemeyer said he would (S. C., pp. 28 and 29). Also Van Poznak told Schwebemeyer he would take him in as co-broker because he felt it would be better for the prospective lessee to have Schwebemeyer co-operate with Van Poznak in the renting of the store, and Schwebemeyer agreed to this arrangement (S. C., p. 29, l. 30) the understanding being that the commission would be split evenly between them (S. C., p. 84, l. 35). Thereafter Van Poznak produced the ultimate lessee of the store, a man named Hymen Gabriner, and there was a lengthy conference between Gabriner and Schwebemeyer (S. C., pp. 32 and 33). There was also a discussion of terms, percentages of sale, etc. (S. C., p. 33, l. 30), a checking of the financial credit of Gabriner by Schwebemeyer (S. C., p. 34, l. 20), and a detailed examination of the store and the cellar (S. C., p. 35, l. 10).

Thereafter Van Poznak did extensive work for the purpose, if possible, of obtaining a liquor license for the premises so that such a department might be added to the contemplated drug store (S. C., pp. 35, 36, 37). For this purpose, numerous contacts were made by Van Poznak with a man named Poleschuck, who had special knowledge of the availability of liquor licenses, all of which was confirmed by the testimony of Poleschuck (S. C., pp. 54-55). Moreover, there were various discussions concerning the lease between Septem-

ber, 1944, and the time the lease with Gabriner was entered into, between Van Poznak and Schwebemeyer (S. C., p. 42, l. 10).

Finally, on May 18, 1945, a lease in terms similar to those originally discussed was entered into between Newark & Essex Building Corporation and Hymen Gabriner (S. C., p. 25, l. 30, pp. 81, 82). The starting rental was the same as that originally discussed (S. C., pp. 88, 89). From the Newark & Essex Building Corporation the appellant on May 29, 1945, received as the commission on this lease \$5,427.50 (S. C., p. 25, l. 32). Appellant refused to pay any part of this amount to Van Poznak (S. C., p. 44, l. 19). Schwebemeyer told Van Poznak the latter had let the matter of the lease lapse, and that he did not consider Van Poznak had done anything in the case (S. C., p. 41, l. 32).

Schwebemeyer in his testimony admitted reluctantly on cross examination to an agreement relative to sharing these commissions with Van Poznak if the lease were effected (S. C., p. 84, l. 34).

As nearly as we can understand the theory of the appellant, it contends there was no factual question because it says the agreement was to pay a commission to Van Poznak only if there was a lease to Gabriner and somebody else, and only if it was effected on the very terms discussed at the initial meeting, and only if it was made within a very limited period of time after the initial meeting (S. C., p. 85; see also pp. 84, 85, 86). Van Poznak, the appellee, of course testified to a different arrangement and a factual question was raised. The jury merely preferred to believe Van Poznak as to the relatively few points of major importance on which the stories of the principals differed.

ARGUMENT.

If it be the contention of appellant that plaintiff cannot recover since there was an original discussion of a lease to three men, and only one of them entered into the lease, we argue in our First Point there was a factual question as to whether the discussions between the plaintiff and the defendant dealt with the proposed lease to the man who actually became the lessee, namely, Gabriner, or whether they dealt with the proposed lease only to three men.

As to our Second Point in regard to this question of whether the lease was to be with one or three men, we say as a matter of law the exact parties introduced by the plaintiff became immaterial as long as there was a lease to one of them, as admittedly there was in this case.

If the argument of the appellant is that Van Poznak is not entitled to recover on the ground there was an abandonment, then in Point III we argue there was no abandonment.

If appellant argues plaintiff is not entitled to recover because there was a difference of terms, we contend, in Point IV, that as a matter of law such differences are of no importance.

Our argument on all of these points will tend to establish that appellee raised a jury question as to whether he was the procuring cause of the lease. Nevertheless under the circumstances here existing it would make no difference whether he was the procuring cause or not, and in our Point V we establish that since there was an agreement between Schwebemeyer & Co. and the plaintiff whereby they were to share the commissions equally, Van Poznak is entitled to recover if there

was in fact a lease, regardless of whether he was the procuring cause of it.

In passing it might be well to mention, although there was no discussion of it at the trial below, that, as an attorney-at-law, Mr. Van Poznak did not require a real estate broker's license (R. S. 45:15-4), nor does R. S. 25:1-9, requiring a written agreement before a brokerage commission can be earned, apply to the leasing of property, but only to the sale of it. *Klie v. Hollstein*, 98 N. J. L. 473.

POINT I.

There was clearly a factual question as to whether the original discussions dealt with Gabriner alone as a prospective lessee or with Gabriner and associates.

The facts are clear as to what the original discussion involved in this respect. According to the appellee Gabriner was the prospective lessee. We have merely to refer to the appellee's testimony to show the raising of a factual question on this issue, if it be an issue.

We therefore quote Van Poznak as to a conversation with Schwebemeyer:

"Q. You again met with him? A. Well, I think I had a telephone conversation with him. He wanted to know who the people were who were interested, and I gave the name of Mr. Gabriner, so he could check on his credit rating."

"Did you have any discussion with him then as to who Mr. Gabriner was and about his financial background? A. I don't know whether I did then, but, subsequently, I did." (S. C., p. 32, l. 29).

* * *

“Incidentally, before we discussed price, Mr. Schwebemeyer said that he had investigated Mr. Gabriner and found that he was financially responsible and financially stable. In fact, Mr. Schwebemeyer had said he knew Mr. Gabriner because one of Mr. Gabriner’s stores was on a piece of land owned by one of his clients, and that is the store on Market Street where, I think, the First Church owns the ground and somebody owns the building, and there was a discussion about that.

“Q. Mr. Schwebemeyer, as far as you knew, had not met Mr. Gabriner before you brought him up? A. No, no.” (S. C., p. 34, l. 20).

Referring to Schwebemeyer, Van Poznak further testified:

“Q. He told about having checked upon him in this manner? A. Yes. He hadn’t met him. The whole conversation was centered around Mr. Gabriner. In fact, Mr. Gabriner told him at the time the amount of the gross income of the small store on Market Street, and Mr. Schwebemeyer seemed to be surprised that it was as much as it was.” (S. C., p. 34, l. 33).

* * *

“ (Continuing) I asked Mr. Schwebemeyer whether Mr. Gabriner had entered into a lease of the building and he said he had.

“I said to Mr. Schwebemeyer, ‘You know I was the one that brought Mr. Gabriner to you and I had asked whether you would recognize me as the broker and you said you would, and I took you in as co-broker.’ ” (S. C., p. 41, l. 30).

The most Van Poznak knew of the possibility of a partnership between Gabriner, Marks and Danzis was told by him in this language:

“Q. You knew, did you not, that Danzis, Marks, and Gabriner were contemplating the

formation of a company to lease the premises? A. There was some discussion about it.

“Q. Wasn’t that the discussion with reference to the three men? A. Not with me, no.” (S. C., p. 47, l. 10).

“Q. You knew nothing about it? A. I knew they were discussing it, but they didn’t have the discussion with me.” (S. C., p. 47, l. 22).

The whole matter of the possible participation of others is summed up in this language on Van Poznak’s cross examination:

“Q. Who was the tenant you represented at the time you spoke to Mr. Schwebemeyer, prior to August 30, 1944? A. Mr. Gabriner.

“Q. Alone? A. And possibly the group.

“Q. And possibly a group? A. Yes.” (S. C., p. 53, ll. 1 to 10).

On this testimony, how could any judge hold, as a matter of law, that the undisputed arrangement between Van Poznak and Schwebemeyer was dependent upon a lease being made not with Gabriner alone, as actually happened, but with Gabriner, Marks and Danzis? A jury question existed as to whether the admitted arrangement between the appellee and appellant was not made as to Gabriner being the proposed lessee.

POINT II.

The law applicable would not bar Van Poznak from recovery even if he had introduced three people as prospective lessees and only one of them became a lessee.

Gabriner, as appears from the quotations given in Point I, was the one around whom, the discus-

sions took place. It was his credit that was under investigation and was found satisfactory. The ultimate proof that Gabriner was the one to whom the lessor was willing to award a lease, is that the lease was in fact made with him. That anybody else tentatively involved in the proposed leasing at the outset was not necessary in the mind of the defendant to the final leasing is proved by its conduct. Van Poznak introduced Gabriner and made an arrangement to share the commission if the store was leased as a result of his introduction, and is therefore entitled to recover.

If there had been no such introduction there would have been no lease. But even if the facts could be so construed as to enable a court to find as a matter of law that Gabriner and two others were originally introduced as the prospective lessees, Van Poznak is still entitled to recover.

To deprive a broker of his earned commission merely because the formal parties differed from those originally produced is not permitted.

In *McLaughlin v. Campbell*, 78 N. J. L. 541, at page 548, this court said:

“Under the facts disclosed in the case at bar, the defendant’s liability to respond to the plaintiff for the commissions sued for was not at all dependent upon the circumstances of what parties formally entered into the written contract of sale offered to or engaged in by defendant, but wholly upon the fact as to who constituted the *real* parties to the bargain.”

A broker earns his commission when he finds a lessee able and willing to comply with the terms provided in the authority, or when he finds one who agrees to lease on terms satisfactory to the owner. *Walsh v. Isgro*, 121 N. J. L. 165 (C. E. &

A.). The latter case deals with the sale of property, and the language of the court has been paraphrased to deal with the leasing of property.

Van Poznak produced Gabriner, and the lease was made with him on terms satisfactory to the owner.

In *Tepperman v. Polster*, 113 N. J. L. 14 (C. E. & A.), the broker introduced the prospective lessee to the defendant, and after advising the latter he would expect a commission, and after discussing the value of the property, left the prospective lessee and the defendant together, whereupon they came to an agreement. The commission was refused to the plaintiff, and the court held he was entitled to it, despite the little he had done.

POINT III.

There was no abandonment of effort on the part of Van Poznak, or, for that matter, of the lessee.

Van Poznak has testified as to his continued efforts with regard to the obtaining of a license for the sale of liquor on these premises which was an important element in the ability of Gabriner to pay the rent requested (S. C., pp. 36, 37). His efforts in this direction continued over a period of months and up to the time the lease was consummated (S. C., p. 38, l. 40), and Poleschuck verifies these efforts (S. C., pp. 54, 55).

The matter of the leasing was discussed with Schwebemeyer on various occasions by Van Poznak between the time of the last conference in September, 1944, and the spring when the lease was effected (S. C., p. 42, l. 10).

“Q. Between the time of September, 1944, and the time of this meeting with Mr. Schwebemeyer in the spring of 1945, had you met with Schwebemeyer from time to time? A. I had seen him a number of times, yes.

“Q. And had you discussed this matter? A. Yes.” (S. C., p. 42, l. 10).

That there was no abandonment, or at least that a question of fact was raised as to whether there was an abandonment, is developed in this question addressed to the plaintiff and his answer: (S. C., p. 49, l. 17).

“Q. You spoke to Mr. Schwebemeyer. What did you say to him about it? A. He asked me about the drug store matter and I said it was still hanging fire. That’s all.

“Q. It was still hanging fire? A. That’s right.”

Of his conversations with Mr. Gabriner, the lessee, Van Poznak, in his cross examination says:

“Q. Did he tell you he had abandoned all hope of going into the place, after he had not the other two men to go in with him? A. No, he told me the thing was still hanging fire.

“Q. After the lease had been executed? A. He never said he had abandoned it at any time.

“Q. He never told you he had abandoned it? A. No. The fact is he entered into a lease shows he hadn’t abandoned it.” (S. C., p. 51, ll. 1 to 11).

Reliance was placed in the court below and in this court by our adversary upon the case of *Murray Apfelbaum, Inc. v. Bernstein*, 104 N. J. L., 664, an opinion of the late Judge Dungan, apparently given orally at the conclusion of the trial, and affirmed by this court on that opinion. All the facts of the case are not given in the short

remarks of Judge Dungan. The mere difference in price and terms between those discussed at the original meeting of the broker when he attempted to bring together the ultimate buyer and seller, was not the conclusive reason for the court's directing a verdict. In fact, on page 665 Judge Dungan indicates that if that was all there was in the case, it would be sufficient to go to a jury. From the other language of the Judge on page 665, it is apparent that employees of the plaintiff corporation, the broker, testified they had actually discontinued their efforts to lease. The court says:

"That the plaintiff was not the efficient and procuring cause is certainly shown by the testimony of Mr. Pikon, who says that he continued his efforts with Mr. Bernstein and with the firm of Kislak for about two weeks; to use his own words, he discontinued his efforts as to Lobel, and he talked with Mr. Bernstein about other property. Mr. Flood, who carried on the negotiations for his firm, says that he continued his efforts for about three weeks, and that he discontinued his efforts, and that he dropped the negotiations."

Such is not the situation in the case at bar. Contrast the testimony of the plaintiff's witness in the *Apfelbaum* case with that of Van Poznak quoted above. He continued his efforts to obtain a liquor license, he discussed the matter with Schwebemeyer, he flatly testifies there had been no abandonment of effort on his part, and states he was informed by Gabriner, the lessee, there was no abandonment on the latter's part. Obviously a question of fact was raised as to whether there was an abandonment.

In *Tepperman v. Polster*, *supra*, the *Apfelbaum* case is discussed and distinguished from one in which there has been no abandonment of effort,

and it becomes clear that a factual question is raised under such circumstances.

In *Walsh v. Isgro*, 121 N. J. L., 165, the court said on page 169:

“Under the terms of the contract in the case at bar, the plaintiff was entitled to commissions if he was the procuring or efficient cause of the sale to Grover. Since the evidence was conflicting so as to raise a doubt on this point it was properly submitted as a question of fact to be determined by the jury.”

It is interesting to note in the *Walsh* case the court also said on page 169:

“The plaintiff’s right of recovery is not dependent upon the knowledge of the defendant that the purchaser was procured by the activity of the plaintiff. *McLaughlin v. Campbell*, 78 N. J. L. 541. Furthermore, we think that both of these propositions were necessarily considered by the jury in their determination of the procuring or efficient cause of the sale.”

The testimony of Schwebemeyer himself, on his cross examination, establishes what is generally known, that negotiations, discussions, and delays in the leasing of a store of the size of this one may consume months. We quote this testimony:

“Q. Of course, you have had real estate deals and leasing deals of importance running into negotiations over a period of many months? It is not uncommon? A. It sometimes happens.

“Q. It sometimes runs eight, nine, or ten months? A. It could be.” (S. C., p. 86, l. 15).

POINT IV.

It is immaterial that different terms than those originally discussed were ultimately arrived at in the lease.

There is, of course, a substantial similarity between the terms originally discussed and those contained in the lease. For example, both started at \$1,000 a month, and both dealt with percentages of gross sales as additional rental, etc., see Van Poznak's story of the original negotiations (S. C., pp. 33-34) and Schwebemeyer's cross examination as to the final terms (S. C., p. 89, ll. 1-10).

Schwebemeyer admits (S. C., p. 89, l. 10) that it is not uncommon, as of course we know, for parties not to get together on the first meeting as to the final understanding of the terms of a lease. He says it is more often true than not that they do not (S. C., p. 89, l. 15), particularly in a store of this size.

If this be so, how then can the appellant argue the plaintiff fails of recovery simply because there was a different amount ultimately agreed upon than was first discussed? Whatever the appellant's arguments are in this respect, however, the law is not in its favor.

In *Walsh v. Isgro*, 121 N. J. L. 167, at 168, the court said:

"To support the defendant's contention, we would be forced to hold that where an asking price is specified in the broker's written authority, no commissions could be earned unless that price be obtained, whatever terms might later prove satisfactory to the owner in a sale to a purchaser originally procured by the broker. Such a holding would in effect overrule the principle of law stated in the case of *Ganley v. Kalikman*, *supra*, which we think is controlling here."

In *Ganley v. Kalikman*, 105 N. J. L. 311, (affd. by this court in the opinion below in 106 N. J. L. 237) the Supreme Court said in the first syllabus:

“A broker, duly employed in writing, earns his commission when he finds a purchaser able and willing to comply with the terms specified in the authority given or when he finds a purchaser who agrees to purchase on terms satisfactory to the owner.”

The terms in the case at bar were ultimately satisfactory to the lessor.

POINT V.

Since there was an agreement between Schwebemeyer & Co. whereby they were to share their commissions equally, Van Poznak is entitled to recover if there was in fact a lease, regardless of whether he was the procuring cause of it.

Up until the present time we have discussed this case as though the plaintiff were entitled to recover only if he were the procuring cause, and we submit this question was properly referred to the jury, who resolved it in favor of the plaintiff.

He would, however, under the testimony, we contend be entitled to recover even if he were not the procuring cause. Judge Brennan summed up this point very concisely (S. C., p. 37, ll. 21-22). Van Poznak testified he agreed with Schwebemeyer that the latter would take him in as a co-broker (S. C., pp. 28-29), and Schwebemeyer admits this on his cross examination, stating the commission was to be shared equally (S. C., p. 84, l. 35). There was a lease with Gabriner, and it matters not, under the law in this kind of an arrangement, whether Van Poznak was in fact the procuring cause.

In *Braclow v. Louis Schlesinger, Inc.* 109 N. J. E. 472, (affirmed by this court on the decision of the Court of Chancery in 112 N. J. E. 88) the second and third paragraphs of the syllabus as given in 109 N. J. E. 472, read as follows:

“When two men enter into a joint brokerage adventure, commissions to be divided, the efforts of one to procure a purchaser will inure to each equally.

“When an agreement is made, authorizing two brokers jointly to sell property at a price within a fixed period, and one secures a purchaser at a less sum, whom both have solicited, they will be entitled to share the commission even though one does the major share of the work.”

Thus, even if the entire work had been done by Schwebemeyer & Co., and it was not, the plaintiff would still be entitled to recover. To the same effect is *Hordis v. Kislak*, 94 Misc. R. 1030 (affirmed on the opinion below in 109 N. J. L. 413), a case rather similar in its facts to the one at bar.

Conclusion.

We respectfully submit that the ruling of the trial court was correct, and the judgment below should therefore be affirmed.

Respectfully submitted,

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To be argued orally by Charles S. Barrett, Jr.

