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ADDITIONAL PAPERS TO COURT OF ERRORS AND APPEALS:

ESSEX COUNTY CIRCUIT COURT.

Action at Law.

MORRIS S. ALEXANDER,
Plaintiff,

vs.

SIMON MILLER et al.,
Defendants.

Notice of Appeal.

To:

MILTON M. UNGER, ESQ.,
Attorney for Defendants.

PLEASE TAKE NOTICE, that the plaintiff, Morris S. Alexander, hereby appeals to the New Jersey Supreme Court, from the judgment of the Essex County Circuit Court, rendered in the above stated action, on March 26, 1929.

HARRY LEVIN,
Attorney for Plaintiff.

Dated, July 26, 1929.

Specifications of Grounds On Appeal.

NEW JERSEY SUPREME COURT.

Action at Law.

MORRIS S. ALEXANDER,
Plaintiff-Appellant,

vs.

SAMUEL MILLER,
Defendant-Appellee.

To MILTON M. UNGER, ESQ.,
Attorney of Defendant-Appellee, Samuel Miller.

Sir:

TAKE NOTICE that the plaintiff-appellant writes down the following grounds of appeal, upon which grounds the said plaintiff-appellant appeals from the whole of the judgment entered in the Essex County Circuit Court in this cause, to the New Jersey Supreme Court, to wit:

1. Because the Court erroneously directed a verdict in favor of the defendant, over objection of the plaintiff and exception thereto was noted as ground of appeal.

2. Because the Court erroneously, over objection and exception duly taken thereto, refused to admit in evidence, letter sent by the plaintiff-appellant to one Aaron Levin, dated August 8, 1925.

Specifications of Grounds On Appeal.

3. Because the Court erroneously, over objection and exception duly taken thereto, refused to admit in evidence, letter sent by the plaintiff-appellant to one Aaron Levin, dated December 24, 1925, and marked Exhibit P4 for Identification.

4. Because the Court erroneously overruled and refused to allow to be answered each of the following questions asked by Saul Perlmutter:

1. "Did he talk to you about Bohrer's Garage?"

2. "And aren't you now both members of the same organization?"

5. Because the Court erroneously overruled and refused to allow the following question to be answered by Simon Miller:

1. "He went out of the business shortly after that, didn't he?"

6. Because the Court erroneously overruled and refused to allow the following question to be answered by Aaron Levin:

2. "Did you see Mr. Perlmutter this morning and did you hear him testify?"

7. Because the Court erroneously, over objection and exception duly taken, granted a non-suit as to the defendant, Simon Miller.

8. Because the Court erroneously, over objection and exception duly taken thereto, refused to admit in evidence letter dated August 5, 1925, and marked Exhibit P4 for Identification.

HARRY LEVIN,
Attorney for Plaintiff-Appellant.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

Action at Law.

MORRIS S. ALEXANDER,
Plaintiff,

vs.

SIMON MILLER and PAULINE MILLER, his wife,
Defendants.

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

FIRST COUNT.

1. On or about October 7, 1925, the above named defendants engaged, hired and authorized the said plaintiff, to procure a purchaser for premises #552-4-6 South Orange Ave., Newark, N. J., and agreed to pay him therefor, 3½% commissions on the first $20,000 of the purchase price, and 2½% above that amount.

2. On or about December 23, 1925, in accordance with said authority, request and engagement, the plaintiff did procure for the defendants, a purchaser for the said premises, and the defendants did accept such purchaser and did sell to the said purchaser, the said premises for the sum of $27,000.

3. Plaintiff has demanded his commissions as

aforementioned, but the defendants have neglected and refused to pay the same.

JUDGMENT will be claimed in the sum of $875.00 together with interest thereon, and costs of suit to be taxed.

SECOND COUNT.

1. On or about October 7, 1925, the above named defendants engaged, hired and authorized the said plaintiff, to procure purchaser for premises #552-4-6 South Orange Ave., Newark, N. J., and agreed to pay him therefor, 3½% commissions on the first $20,000 of the purchase price, and 2½% above that amount.

2. On or about the said date, the said plaintiff, in accordance with the act in such cases made and provided, served upon the said defendants, a notice in writing setting forth the terms of such oral agreement and stating therein the rate and amount of commissions to be paid thereon.

3. On or about December 23, 1925, in accordance with said authority, request and engagement, the plaintiff did procure for the defendants, a purchaser for the said premises, and the defendants did accept such purchaser and did sell to the said purchaser, the said premises for the sum of $27,000.

4. Plaintiff has demanded his commissions as aforementioned, but the defendants have neglected and refused to pay the same.

JUDGMENT will be claimed in the sum of $875 together with interest thereon, and costs of suit to be taxed.

THIRD COUNT.

1. On or about December 23, 1925, the above named defendants engaged, hired and authorized the said plaintiff to procure a purchaser for premises #552-4-6 South Orange Ave., Newark, N. J., and agreed to pay him therefor, 3½% commissions on the first $20,000 of the purchase price, and 2½% above that amount.

2. On or about December 23, 1925, in accordance with said authority, request and engagement, the plaintiff did procure for the defendants, a purchaser for the said premises, and the defendants did accept such purchaser and did sell to the said purchaser, the said premises for $27,000.

3. Plaintiff has demanded his commissions as aforementioned, but the defendants have neglected and refused to pay the same.

JUDGMENT will be claimed in the sum of $875.00 together with interest thereon, and costs of suit to be taxed.

FOURTH COUNT.

1. On or about December 23, 1925, the above named defendants engaged, hired and authorized the said plaintiff to procure purchaser for premises, #552-4-6 South Orange Ave., Newark, N. J.,

and agreed to pay him therefor, 3½% commissions on the first $20,000 of the purchase price, and 2½% above that amount.

1. On or about the said date, the said plaintiff, in accordance with the act in such cases made and provided, served upon the said defendants, a notice in writing setting forth the terms of such oral agreement and stating therein the rate and amount of commissions to be paid thereon.

3. On or about December 23, 1925, in accordance with said authority, request and engagement, the plaintiff did procure for the defendants, a purchaser for the said premises, and the defendants did accept such purchaser and did sell to the said purchaser, the said premises for $27,000.

4. Plaintiff has demanded his commissions as aforementioned, but the defendants have neglected and refused to pay the same.

JUDGMENT will be claimed in the sum of $875.00 together with interest thereon, and costs of suit to be taxed.

HARRY LEVIN,
Attorney for Plaintiff.

Answer.

ESSEX COUNTY CIRCUIT COURT.

Action at Law.

MORRIS S. ALEXANDER,
Plaintiff,

vs.

SIMON MILLER and PAULINE MILLER, his wife,
Defendants.

The defendants, answering the Bill of Complaint filed herein, say that:

They deny the allegations contained in all the counts of the Complaint.

MILTON M. UNGER,
Attorney of Defendants.

Judgment.

ESSEX COUNTY CIRCUIT COURT.

Action at Law on Non-Suit.

Judgment Entered March 26, 1929.

Costs $71.60.

MILTON M. UNGER, Atty. for Defts.

MORRIS S. ALEXANDER,

Plaintiff,

vs.

SIMON MILLER and PAULINE MILLER, his wife,

Defendants.

Action at Law After Verdict.

By Order of the Court Judgment Entered March 26, 1929.

Costs $76.30.

MILTON M. UNGER, Atty. for Defts.

MORRIS S. ALEXANDER,

Plaintiff,

vs.

SIMON MILLER and PAULINE MILLER, his wife,

Defendants.

Judgment on non-suit in the above entitled action was rendered on the twenty-sixth day of March, A. D. Nineteen hundred and twenty-nine in favor of the defendant, Simon Miller.

Judgment.

Judgment after verdict, by order in the above entitled action was rendered on the twenty-sixth day of March, A. D. Nineteen hundred and twenty-nine in favor of the defendant, Pauline Miller and against the plaintiff, Morris S. Alexander for the sum of Seventy-six Dollars and thirty cents costs of suit.

Judgment entered and signed March 26, 1929.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

Recorded in Book 107 Circuit Court Judgments, page 145.

Testimony.

ESSEX CIRCUIT COURT.

Action at Law.

MORRIS S. ALEXANDER

vs.

SIMON MILLER et al.

Tuesday, March 26, 1929.

Before—HON. WILLIAM A. SMITH, *J.*, and a jury.

HARRY LEVIN appeared for plaintiff.

MILTON M. UNGER appeared for defendants (by Leonard Emmerglick).

(A jury is called and sworn.)

Mr. Levin opens in behalf of plaintiff.

Mr. Emmerglick opens in behalf of defendants.

MORRIS S. ALEXANDER, the plaintiff, sworn in his own behalf.

Direct examination by Mr. Levin:

Q. Mr. Alexander, you live in Newark? A. East Orange at the present time.

Q. How long have you lived there? A. About a year.

Q. What is your business? A. Real estate and insurance.

Q. Were you in 1925 a real estate broker? A. I was.

Q. A licensed broker? A. Yes, sir.

Q. Do you know a man by the name of Aaron Levin? A. Yes, sir.

Q. What is his business? A. Builder and real estate operator.

Q. Did he own a garage? A. He did.

Q. Where? A. At Orchard Street.

Q. What number? A. 80 Orchard Street.

Q. In the course of your employment did you try to sell that garage for Mr. Levin? A. I did.

Q. Will you tell us to whom it was that you submitted this garage?

Mr. Emmerglick: May I ask that the witness fix the date?

Q. Fix the date as to when you submitted the garage and the people you submitted it to. A. You want the time that I first assumed the agency of the garage?

Q. Yes. A. I met Mr. Levin—he was building——

By the Court:

Q. You are asked for the time. A. It was about August 6th.

By Mr. Levin:

Q. Of what year? A. Of 1925.

Q. Tell us now to whom you submitted this garage. A. I submitted it to various people.

Q. Give us the names? A. In particular I sub-

mitted it to a Mr. Saul Perlmutter and the Millers.

Q. To whom did you submit it first? A. To Mr. Perlmutter.

Q. Where does he live and what does he do? A. I used to park my car in his garage at that time.

Q. Where is his garage? A. At the Crawford garage, Washington and Crawford Streets.

Q. You submitted it to Perlmutter first, you say. A. First.

Q. What became of that? A. Mr. Perlmutter would not give the price that Mr. Levin wanted on a cash basis.

Q. Do you recall the price? A. Yes, the first was fifty-five——

Q. Give us the price. A. $58,000 is the offer he gave and Mr. Levin would not accept less than $60,000.

Q. Following that what took place in regard to the garage? A. Since the deal didn't go through at that time I was also trying to sell the Millers a garage.

Q. How did you happen to meet the Millers? A. I met her in Mr. Penn's office at that time.

Q. Which Penn? A. Mr. Percy Penn.

Q. Which Miller did you meet? A. Mrs. Miller.

Q. Fix the time as well as you can. A. That was in the latter part of September, 1925.

Q. What did you do, or what was your transaction or negotiation with the Millers? A. Mrs. Miller was asking my advice. She had put down a deposit on a garage on Hayes Street, and I advised her not to buy it, not because I wanted business, but because I didn't think she could carry it on successfully.

Q. What was Mr. Miller's business? A. He did a block business throughout the State. He did a business in blocks for butchers.

Q. Tell us what negotiations you had with the Millers. A. When Mrs. Miller asked my advice about it I told her not to take it. She asked if I had anything on hand which I could offer which I could advise. I told her I advised her to buy the Bohrer garage on South Orange Avenue. I took her up with Mr. Miller the day after we met her, and we looked the place over and we found it was not a bad proposition and they asked me the terms, which I told them I could give them, and then got in touch with Mr. Bohrer and I told Mr. Bohrer that if he would be satisfied to work a trade—as the Millers had a piece of property on South Orange Avenue at the time——

Q. Do you know the price of that property? A. Yes, it——

Mr. Emmerglick: May I ask which one of the Millers he refers to?

Q. Suppose you tell us so as to clear up that point as to whom you dealt with when you were dealing with the Millers. A. Most of the conversation was with Mrs. Miller, but off and on we would speak to Mr. Miller as well. With Mr. Miller I had, as a rule, to make a definite appointment to go and see the property.

Q. Did you meet them mostly together or separately? A. Mostly separate, but I had to make an appointment to see Mr. Miller and then we were together. After I spoke to Mr. Bohrer to ask him if he would take a trade, and he asked me the terms and the conditions and I told him

the property on South Orange Avenue and he said it was favorable to him. Mrs. Miller at that time said she wanted $25,000 as a trade proposition; Mr. Bohrer said he would be willing, provided that he got his price for his garage, which was $55,000. I went back to the Millers, to their home in East Orange and told them the proposition. We finally made an appointment with Mr. and Mrs. Miller and Mr. Bohrer at their home and they agreed to terms.

Q. Who agreed to terms? A. Mr. and Mrs. Miller and Mr. Bohrer, and the terms were to be $25,000 for the Miller property, and $55,000 for Mr. Bohrer's garage, and the money was supposed to be paid, $100 a month——

By the Court:

Q. $100 a month on what? A. To pay off the purchase price mortgage which Mr. Bohrer was to take back on the difference between the two.

By Mr. Levin:

Q. Go on. A. After we agreed on those terms we separated and the next day we got together again with Miller. We were supposed to go to the lawyer's office; Mrs. Miller changed her mind. She thought $100 a month was too much to pay. In the meanwhile she asked me if I didn't think some other proposition could be offered and that probably they would consider it more favorable. She said she wanted to settle the thing by the first of October.

Q. Were you talking to her or to him? A. To her.

Q. Go ahead. A. She said she wanted her husband to quit the road and he would have to go on the road shortly and he wanted to waste as little time as possible, so I told him about the Mosque garage. It was not an established place; it was a newly built place and I tried to advise him, he being a mechanic in the automobile line I felt he could easily work up the place.

Q. You talked to them in regard to the Mosque garage and told them it was a good place for them. Who was it that you talked to, Mr. Miller, Mrs. Miller, or both? A. Mrs. Miller first.

Q. And then after that? A. Then we made an appointment with Mr. and Mrs. Miller and I drove them around to the vicinity of the Mosque garage, explaining to them what I thought of it and why it would be advisable for them to buy it. She said all right. She said, "Go ahead and see what terms you can get." I got in touch with Mr. Levin. Do you want the date of that?

Q. Approximately. A. That would be somewhere in the latter part of September; the last week in September, I might say; probably around the 26th.

Q. What negotiations did you have with him in regard to this? A. I told Mr. Levin that I had a client, Mr. Miller and Mrs. Miller, who had some property on South Orange avenue—I had previously talked to Mr. Levin on a cash basis and no trade.

Q. That was when you had the Perlmutter case? A. Yes, and he said he would consider the trade provided we could get together on it. I told him the property was on South Orange avenue and he said he was familiar with it.

Q. What kind of property was it? A. It is

three stores with four rooms in back of each store. Do you want the dimensions?

Q. No. Go on. A. He said, "That's all right. What do they want to give?" I said, "I don't know. First I want to know what would you do on a trade proposition."

Objected to.

Mr. Levin: That is part of the res gestae.

Q. What did you do to consummate this deal?

The Court: I don't think conversations are permissible.

Q. Tell us what you actually did. A. Then I went back to Mrs. Miller's home and told her that Mr. Levin would want to consider the trade. They wanted $25,000 for their place and they would be wiling to give Mr. Levin $60,000 for his, so I told them I doubted whether I could succeed in doing that since he wanted $60,000 on a cash basis. She said, "Go ahead and take it back to him." And I did that.

Q. Go on. A. Mr. Levin said he would not consider that. He said that he knew that I knew that I offered him $58,000 on a cash basis, and he said I would have to do better than that.

By the Court:

Q. He did not accept the proposition. A. He did not accept the proposition.

By Mr. Levin:

Q. Go on. A. I then went back to the Millers

and told them that. They said they could not handle it and they then went back to the Bohrer proposition. We went up to Mr. Bohrer and while we were there we argued with him to better the terms; that is, from the $100 to $50 a month.

By the Court:

Q. Who went there? A. Mr. and Mrs. Miller and I.

By Mr. Levin:

Q. Go on. A. We argued with him to reduce it to $50 a month.

Q. When you went back to Mr. Bohrer did both of them talk to you about going back to Bohrer or was it one or the other?

Mr. Emmerglick: The testimony as it has developed thus far shows that he is claiming commissions on the Mosque garage. I don't think anything about the Bohrer garage has anything to do with the case.

The Court: I don't think we need to go into the details of what he did on the Bohrer garage; they didn't go through with it, did they?

Mr. Levin: No, sir.

The Court: Then get back to the other.

Q. After you took them back to Bohrer did you close that deal? A. They agreed——

By the Court:

Q. Did you close it? A. No.

By Mr. Levin:

Q. To what point did that deal go? Was an agreement drawn? A. An agreement was drawn.

Q. For the Bohrer garage? A. Yes, and Miller backed out at the last minute. We were up in the lawyer's office. Mr. Bohrer was not to come until later and they requested that we go back to the Bohrer garage for a last look.

By the Court:

Q. It didn't go through, did it? A. No, sir.

The Court: That's enough of that.

By Mr. Levin:

Q. What took place with regard to the Mosque garage? A. She said she would rather buy it on a cash basis because she would probably get it cheaper, which she could, and she said she could probably interest her brother-in-law, so she made an appointment—that was the latter part of the week—she made an appointment for me to meet her brother-in-law on the following Monday, I think, and see if she could not interest him, with my assistance, in investing in the Mosque garage.

Q. What was the brother-in-law's name? A. Hyman Ganzel.

Q. Did you meet him? A. Yes.

Q. Who was present? A. Mr. Miller, Mrs. Miller and Mr. Ganzel.

Q. Where? A. At the Miller home on Grand Avenue, East Orange.

Q. What took place that day? A. I tried to

explain to Mr. Ganzel the advisability of his investing in the garage and he couldn't see his way clear on it and he refused, so Mrs. Miller then said she was sorry he couldn't see his way clear into going into it and to see if I couldn't do something and get Mr. Levin to accept the offer of $60,000; instead of $3,000 they would make it $4,000 and their property taken in at $25,000. Mr. Levin said, "I can't see that." I tried to fish out of him a definite price, which he wouldn't give me, but he said somewhere between $60,000 and $65,000. I went back to the Millers and told them that, that he wanted too much on a cash basis and they wouldn't go through with the deal.

Q. What happened after that? A. They told me if I could offer some other proposition she would be glad to consider it, and I looked around in the meantime.

Q. What was the next step? A. The next I heard of it Mrs. Miller or Mr. Miller or both of them had gone back and bought the Hayes Street garage.

By the Court:

Q. Is that the Mosque garage? A. No, that's on Hayes Street.

Mr. Levin: The Mosque garage is the one we claim we sold. The Bohrer garage fell through and the Hayes Street garage was the one they actually bought.

The Witness: I had nothing to do with that.

By Mr. Levin:

Q. After you met the brother-in-law at the

house and they refused to go through, and they couldn't buy the garage themselves, what happened to the South Orange Avenue property? A. She said to me, "See if you can sell it. Get a cash customer for my property on South Orange Avenue." They wanted only $23,000 on a cash basis.

Q. What did you do? A. I said, "Mrs. Miller, it seems that it is hard for you to make up your mind definitely." I said, "Do you want me to go ahead and sell, and will you pay the broker's commission of 3½ per cent on $20,000 and 2½ per cent above that?" She said, "I certainly will."

Q. Whom did you say that to? A. Mrs. Miller.

Q. Then what did you do? A. I went out immediately to see whether I could procure a cash customer for the stores. Of course, as I formally do, I mailed Mr. and Mrs. Miller a letter that I accepted the agency, which I do when I work on a piece of property. I formally sent them a letter to that effect.

Mr. Levin: I call upon you for the letter of October 7th.

Mr. Emmerglick: I don't think I had a notice to produce.

Mr. Levin: Yes, it was served with a formal notice to produce. Here is your acknowledgment.

Mr. Emmerglick: No objection to the use of the copy.

Q. Is this the letter that you sent to the Millers dated Oct. 7th, 1925? A. Yes.

Q. Did you mail it yourself? A. I personally mailed it.

Mr. Levin: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-1.)

(Mr. Levin reads Exhibit P-1.)

Q. After you sent that letter when was the next time you saw Mrs. Miller or Mr. Miller? A. Within a couple of days, and I proposed a garage on the other side of——

Q. When did you see Mr. or Mrs. Miller after you sent the letter? A. About three or four days after I went up purposely to propose another garage.

Q. Did you have a conversation with either of the Millers? A. Yes.

Q. Which one did you talk to? A. I spoke to both, and Mrs. Miller asked me what was the idea of the letter and I told her I always formally send the letter after I have investigated and I am willing to work on it.

Q. Did she ask you about this particular letter? A. Yes, sir.

Q. After that you say you submitted to them this other garage. Did it go through or did it fall through? A. No, I showed them two on the south side of South Orange Avenue, but they were not interested.

Q. After that what took place with regard to the Mosque garage? A. Why, nothing that I can recall. We always spoke on and off about it because I always felt that they should have bought it.

Q. Did you obtain anybody that wanted to buy their property? A. Yes.

Q. Who? A. Dr. Reiss.

Q. A physician? A. No, a dentist.

Q. Does he live in the city? A. Yes.

Q. Where does he live? A. He lives on Clinton Place and his office is on South Orange Avenue and Tenth Street.

Q. On a trade or purchase outright? A. Purchase outright.

Q. Did you tell Mr. or Mrs. Miller about this prospective purchaser? A. Yes.

Q. What was his offer? A. $20,000.

Q. Whom did you tell about it? A. Mr. and Mrs. Miller.

Q. Did they consider the offer? A. No, they would not.

Q. Subsequent to that did you offer any propositions to them? A. Why, no, I didn't think I could offer them any proposition because they had bought the Hayes Street garage.

Q. Did you see Mr. and Mrs. Miller after that? A. When they bought the Hayes Street garage I merely verified it by calling them on the phone.

Q. Whom did you talk to? A. If I recall, it was Mrs. Miller.

Q. What was the conversation? A. I said, "I thought you wouldn't buy that place." She said, "We thought it over and it's the best thing we can do. We feel we can work it up." I didn't think they would, which resulted that they didn't.

Q. Subsequent to that time did you see either one of the Millers? A. Yes.

Q. After that? A. Yes, after that time I heard in the latter part of December that the Millers had sold the Hayes Street garage and I was going to call up Mrs. Miller, but I happened to meet her on Market Street.

Q. Market Street and what? A. Right opposite

Washington at Grant's store, which was previous to Christmas.

Q. What happened there? A. I greeted her and I waited to see what she would say, so I said nothing. Then I said, "I understand you sold the Hayes Street garage." She said, "Yes, and we made $1,000 profit." I said, "You were fortunate in that." I said, "You found it wasn't advisable to have that place." She said, "We didn't lose anything." I said, "Now that you made a mistake will you buy the Mosque garage?" She said, "We are not going to buy any garages." I said, "Why?" She said, "We are sick and tired. You have to slave day and night and we don't like that slaving business? I am satisfied for him to go back to his old line. He makes a dollar easily. He goes away once in a while, but he can make a dollar easily." I said, "What about your property on South Orange Avenue? Do you still want me to go ahead with it?" She said, "Yes, if you can get a cash customer for it." At that time I was negotiating with the doctor to buy the property.

Q. Did you talk to her at that time about your commission? A. I said, "Now being that we are here, if I get a cash customer will you pay the rate of commission you agreed upon previously?" I knew she was of an uncertain type and I wanted to pin her down definitely.

Q. What was the rate? A. Three and a half and two and a half.

Q. Did she agree to that? A. Yes.

Q. Did you tell her anything further about the commission? A. I wrote her a registered letter.

Q. Is this the letter you then sent her (handing

paper to witness)? A. That's the letter.

Q. How many days was it after you saw her that you wrote her that letter? A. That was about four days later.

Q. That went by registered mail? A. Yes.

Mr. Levin: I offer in evidence letter dated December 24, 1925.

(Same is received in evidence and marked Exhibit P-2.)

(Mr. Levin reads Exhibit P-2.)

Q. So apparently by this time you had been advised of the sale of the Mosque garage. A. The day previously I was advised of the sale.

Q. Who advised you of the sale? A. Mr. Perlmutter.

Q. When you heard of the sale, outside of writing that letter to the Millers, what did you do with regard to getting in touch with them? A. Immediately as soon as I got home that afternoon I called up on the telephone to verify it.

Q. You called up whom? A. Mrs. Miller.

Q. Did you recognize her voice over the telephone? A. Absolutely.

Q. Did you talk to her personally? A. Yes, and I called my wife to the phone so that she could listen in on it.

Q. How could she listen in? A. I had it close by. She doesn't speak in a subdued voice.

Q. Who? Mrs. Miller? A. Yes.

Q. She is not a loud speaker, is she? A. No, but not subdued.

Q. What was the conversation? A. I called her

up. I said, "Are you still of the frame of mind that you don't want the garage?" She said, "Yes, we will not consider the garage any further. I still feel that way about it." I said, "Isn't it true that you bought a garage?" She said, "We did not." I said, "Are you sure?" She said, "Certainly." I said, "Isn't it true you bought the Mosque garage?" She said, "What of it?" I said, "After working all this time and working for your interests do you think that's a fair thing to do?"

Objected to.
Objection overruled.

Q. What did she say to that? A. She said, "You mean to say I need a broker if I want to buy a place?" I said, "No." She said, "I didn't have to call on you. I went direct to the owner and bought it." I said, "I know you did, but you know I tried to interest you to buy it." She said, "You showed me the garage once." I said, "Are you going to do anything about it?" She said, "No, nothing." I said, "Then you want to force me to go to court?" She then hung up on me.

Q. And that was the last you talked to her about the case? A. That was the last I talked to her.

Q. In your dealings with Mr. Levin, did you write him any letters? A. I did.

Q. In regard to the Mosque garage? A. I did.

Q. When was the first letter you wrote him in regard to the Mosque garage? A. August 8th.

Q. Did you mail that letter personally to him? A. I mailed the letter personally.

Q. I show you a copy of a letter and ask you

if you mailed that letter to him on August 8th, or whatever the date may be. A. That's the letter.

Q. Was that prior to your talking to the Millers about the garage? A. Prior thereto.

Mr. Levin: I offer the letter in evidence.

Objected to on the ground that the letter is self-serving and that it is a letter to Mr. Levin.

Mr. Levin: It is a letter sent to the owner of the other property prior to this deal and it is only to show the connection this man had with it. It shows his agency.

Objection sustained.

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

Exception noted as ground of appeal.

Cross examination by Mr. Emmerglick:

Q. Mr. Alexander, how long have you been a real estate broker? A. Sixteen years.

Q. Have you been licensed all the time? A. Absolutely.

Q. And what did you do before you were a real estate broker? A. I did insurance work for the Prudential Insurance Company.

Q. You studied law at one time, did you not? A. I did.

Q. For how many years? A. That was about 1915, 1916 and 1917.

Q. For how many years did you study? A. For three years.

Objected to.

Objection sustained.

Q. This letter that you mailed in October, you mailed in the regular manner, not registered? A. Not registered.

Q. You mailed this one registered (indicating)? A. I did.

Q. Why didn't you mail this one registered (indicating)? A. Because when I accept property for sale formally I send them a notification to the effect, because I don't anticipate any legal action.

Q. Why did you send a registered letter? A. I anticipated legal action.

Q. And you didn't on this one (indicating)? A. I did not.

Q. Isn't it a fact that you did not regard yourself as an agent when you wrote that letter? A. I regarded it legal sufficiency.

Q. You did? A. I did.

Q. And some time in September you suggested the Bohrer garage to Mrs. Miller? A. I did.

Q. Why didn't you suggest the Mosque garage to them at that time? A. Because they wanted an established place that had already been worked in.

Q. And that was the only reason? A. That was the main reason.

Q. You say that was the main reason. What other reasons were there? A. Probably the terms could be more easily arranged.

Q. How could you tell before the terms had been presented? A. I said that was the main reason.

Q. Levin wanted $60,000 when Perlmutter was considering the property? A. Absolutely.

Q. Yet that offer was turned down later on? A. Because it was not a cash proposition.

Q. What was the proposititon put up to Perlmutter? A. It was $15,000 cash and $60,000 for the price.

Q. The first you talked to any of the Millers was when? A. The last part of September.

Q. And that was to whom? A. First to Mrs. Miller.

Q. Do you know who owned the Miller property? A. Do I know?

Q. Yes. A. I assumed that Mr. and Mrs. Miller owned it; they told me so.

Q. Did you take the trouble to find out who owned it? A. I didn't search it.

Q. They wanted how much for their property? A. On a cash basis?

Q. On the trade end. A. $25,000.

Q. Isn't it a fact that they wanted $27,000? A. Not at this particular time; not through me.

Q. You were friendly with the Millers? A. Yes.

Q. You had arranged with them for the purchase and sale of other properties? A. Yes.

Q. You were quite friendly with them weren't you? A. With both of them; that's why I never anticipated this.

Q. Did they tell you why the deal with the Bohrer garage did not go through? A. No, they said it was toppling down.

Q. Didn't they say you had been misleading them and misrepresenting it? A. No, they saw it.

Q. Wasn't the deal practically concluded without their having seen it? A. No, they saw it first.

Q. Wasn't the deal practically concluded before you went up there with them? A. No, they saw it first before we ever started to negotiate.

Q. Didn't you call the Bohrer garage to their attention? A. Sure.

Q. Did they know about it before that? A. No.

Q. Didn't you make some arrangements with them before they saw it? A. To see it, yes.

Q. What arrangements did you make with them about price before they say it? A. None.

Q. You didn't tell them how much the garage would cost. A. Yes.

Q. How much did you tell them? A. $55,000.

Q. How much cash did you say they needed? A. I said probably $5000 or $3000.

Q. How many cars did you tell them it would hold?

Objected to on the ground that counsel wanted to limit the testimony on this point.

The Court: I don't see what difference it makes whether he misrepresented any other proposition or not.

Q. You were not instrumental in getting the Hayes Street garage for them? A. No.

Q. Why didn't you try to sell them that garage?

Objected to.

Objection sustained.

Q. When did you know they bought it? A. I heard about it.

Q. They didn't tell you about it? A. No, Mr. Perlmutter told me.

Q. And then you confirmed it with Mrs. Miller on the telephone? A. Yes.

Q. You couldn't get together on the terms with respect to the Mosque garage? A. No.

Q. And then they tried to get you to arrange for an all cash proposition? A. Yes.

Q. And you couldn't agree on that? A. Not that we couldn't agree; she couldn't get her brother-in-law to invest. She couldn't get enough cash.

Q. And you still made an attempt to sell them the Mosque garage? A. Yes.

Q. And that fell through? A. That fell through.

Q. Can you fix the date when you met Mrs. Miller in the street in December? A. December 19th; the Saturday before Christmas.

Q. And you mailed this letter apparently on December 24th? A. I did.

Q. On what day did you learn that they had bought the Mosque garage? A. On the 23rd; I mailed that letter in the morning and in the afternoon I found that out.

Q. Why did you wait with the sending of the registered letter until December 23rd if you had spoken to them about this Mosque garage back in September? A. Simply because I felt—or rather that I knew—I anticipated and know that they were going to go behind my back and that I would have to fight for my commission.

Q. You knew that all the time, didn't you? A. No, I never anticipated that.

Q. But you knew you had to send them a registered letter some time to get your commission? A. Oh, no, you do not.

Q. That is your understanding? A. That's my knowledge of that.

Q. Did you have a written contract with them for the payment of that commission? A. Unfortunately, not.

Q. I didn't ask you fortunately or unfortunately. Did you or did you not? A. I did not.

Q. Where did you find out about the sale of the Mosque garage from Mr. Perlmutter? A. In the garage where I parked my own car.

Q. What was the date? A. On the 23rd of December, 1926.

Q. And that was the date on which you sent the letter? A. I sent it the day following.

Q. Now, go back just a moment. When you presented to Mr. Levin the offer of $60,000 made by the Millers and $3,000 cash payment, did Mr. Levin propose any counter terms? A. The last proposal was $4,000 cash.

Q. I am talking about the earlier one. A. No, he simply said that being—rather, they would have to go and give a bigger price for his garage.

Q. Isn't it a fact that he said he would take $10,000 in cash? A. Yes, he did.

Q. And then sell it at $60,000? A. No, he wanted $10,000 cash; he wouldn't take less than $10,000 in cash and he wanted more than $60,000 for the place.

Q. Do you remember making an affidavit in this matter? A. To what extent?

Q. Your affidavit dated September 17, 1928, says: "An offer was then made by the Millers to me of $60,000 in exchange, trading in their property for $25,000, and $3,000 in cash. I submitted this offer to Mr. Levin and his counter proposition was that there should be $10,000 in cash." A. That's right.

Q. He didn't raise the price? A. No.

Q. Why didn't you say it in the affidavit? A. I answered it the way I wanted to.

Q. The way somebody wanted you to answer it?

A. Yes, the way it was suggested to me to answer.

Q. You know, though, that at that time he didn't want any additional price? A. He wanted a bigger price; he didn't specify because I knew he wanted $60,000.

Q. You are sure about that? A. I am sure about that, but they wouldn't give it to him.

Q. You don't know today who owns the Miller property, do you? A. Mr. Levin does, or the Victory Realty Company. I don't know about today, but at the time the deal took place.

Q. At the time of the deal, who owned it? A. At the time of the deal, Mr. and Mrs. Miller owned it.

PAULINE MILLER, one of the defendants, sworn in behalf of plaintiff:

Direct examination by Mr. Levin:

Q. Mrs. Miller, you are one of the defendants in this case, are you not? A. Yes, I am.

Q. And you are the Mrs. Miller we have heard so much about from Mr. Alexander; is that correct? A. Too much.

Q. Have you the contract with you with the Victory Realty Company? A. No, I guess my lawyer will have that.

Mr. Levin Have you it, Mr. Emmerglick?

Mr. Emmerglick: I have. Have you served a subpoena for it?

The Court: I will require you to produce it.

Mr. Levin: I have served a subpoena for it.

Q. Is this your signature? A. Yes.

Mr. Levin: I offer the contract in evidence.

Mr. Emmerglick: No objection.

(The same is received in evidence and marked Exhibit P-3.)

(Mr. Levin reads Exhibit P-3.)

Q. Did the deal actually go through? A. Which deal?

Q. Which deal are we talking about?

By the Court:

Q. Under this contract. A. Yes.

By Mr. Levin:

Q. And you actually transferred to Mr. Levin's company, the Victory Realty Company, the South Orange Avenue property? A. Yes.

Q. And received their property on Orchard Street, is that right? A. Yes.

Q. Did you know Mr. Alexander? A. Oh, yes, I knew him for about ten years.

Q. Did he ever show you the Mosque garage? A. Never.

Q. He never showed you the Mosque garage? A. Never.

Cross examination by Mr. Emmerglick:

Q. Who owned the property on South Orange Avenue, you or your husband? A. Myself.

WILLIAM BOHRER, sworn in behalf of plaintiff.

Direct examination by Mr. Levin:

Q. Mr. Bohrer, you owned a garage on South Eleventh Street in 1925, did you not? A. Yes, sir.

Q. And you knew Mr. Alexander, did you not? A. Yes.

Q. And Mr. Alexander acted as agent in trying to carry through a deal between you and Mrs. Miller? A. Yes.

Q. And that deal was pending for some time and did not go through, is that correct? A. Yes.

Q. At that time when they were talking with Mr. and Mrs. Miller in regard to your property, was anything said by the Millers with regard to the Mosque garage? A. No, sir.

Q. Didn't you tell me in my office that something had been said— A. They tried to——

Mr. Emmerglick: I object to all this. He is trying to impeach his own witness.

Mr. Levin: If your Honor please, this witness is apparently turning out hostile.

The Court: You have to tell me about your surprise. I could see it on your face, but it is not on the record.

Mr. Levin: At this time, your Honor, I allege surprise.

The Court: Go ahead.

Q. Didn't we talk this over at my office? A. And I told you I wouldn't tell any lies.

Q. And I told you not to tell any lies, didn't I? A. Yes.

Q. And didn't you tell me in my office that you heard Alexander and Miller talk about the Mosque

garage in comparison with your garage when the deal fell through? A. They were talking about a garage, but I never heard of the Mosque garage before.

Q. Did they talk about a garage on Orchard Street? A. No, sir.

Q. Did they talk about any garage? A. They talked about a garage, but about a week after the deal went through Mr. Alexander stopped at my place and I asked him what's the trouble and he said they bought the Hayes Street garage.

Q. But when they were talking about your property, didn't they talk about the Mosque garage and compare the conditions with yours? A. No, sir.

Q. And you are sure you didn't mention that in my office? A. No, I told you that they were talking about a garage and you tried to insist on me that I should say the Mosque garage and I said I can't tell no lies.

(Cross examination waived.)

SAUL PERLMUTTER, sworn in behalf of plaintiff.

Direct examination by Mr. Levin:

Q. Mr. Perlmutter, you are the owner of the garage at Washington and Crawford Streets, are you not? A. Yes, sir.

Q. And that was the place that Mr. Alexander was parking his car at at the time? A. Yes, sir.

Q. Mr. Alexander in 1925 tried to interest you in the Mosque garage, did he not? A. Yes, sir.

Q. At that time or around that time you knew the Millers? A. Yes, sir.

Q. They are some relation of yours, are they? A. Offhand, I wouldn't say relations of mine; they are relations of my stepmother.

Q. And they were inquiring from you in regard to what garages they should or should not buy? A. That was previous to September; that was around June or July. Mr. Miller asked me to go out and look at a couple of places he had in view of purchasing.

Q. And it was at the same time you were talking to Alexander about the Mosque garage? A. At the time I went out with Mr. Miller?

Q. Yes. A. No, sir.

Q. At what time was it you talked to Alexander about the Mosque garage? A. In September.

Q. And you mean to tell me it was prior to that you talked to Alexander about the Mosque garage? A. Mr. Miller came to me and said something about a garage on Warren Place. It was a two-story affair, and I told him not to buy it. After that he didn't talk to me about any garages.

Q. Didn't he talk to you about any garages? A. No, sir.

Q. Never? A. No, sir.

Q. So you say the last time he talked to you about garages was June or July, 1925? A. Correct.

Q. And never talked to you after that about garages? A. Yes.

Q. You and he had an argument of some sort, didn't you?

Objected to.

Objection sustained.

Q. Do you know why he never talked to you about garages after that?

Objected to.
Objection sustained.

Q. You told him finally that you did not want to bother with him about garages, didn't you?

Objected to.
Objection sustained.

Q. Did he ever say to you or talk to you about the Hayes Street garage? A. No.

Q. Isn't it a fact that he talked to you about the Hayes Street garage and you told him not to buy it? A. No.

Objected to.
Objection sustained.

Q. Did he talk to you about Bohrer's garage?

Objected to.
Objection sustained.
Plaintiff's counsel prays an exception to the ruling of the Court.
Exception noted as ground of appeal.

Q. Didn't he come down and talk to you about Bohrer's garage while Alexander and he were dealing with the Bohrer garage proposition? A. No, sir.

Objected to.
Objection sustained.
Plaintiff's counsel prays an exception to this ruling of the Court.
Exception noted as ground of appeal.

Q. Did you talk to Alexander about the Miller deal at all? A. No, Mr. Alexander spoke to me.

Q. And when he spoke to you, you, I suppose, answered him? A. In regard to what?

Q. Whatever you talked to him about.

Objected to.

Mr. Levin: I am entitled to fix the time. The materiality is as to what the transaction was and what did he do about it.

Mr. Emmerglick: The witness has disclaimed all knowledge of the Mosque deal.

The Court: That's what I understood.

Mr. Levin: He has disclaimed all knowledge.

The Court: Then why do we want to go over this? He is your witness.

Mr. Levin: Again I must state on the record that he has apparently turned out to be a hostile witness.

The Court: I will sustain the objection.

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

Exception noted as ground of appeal.

Q. Isn't it a fact that you told Mr. Alexander when the Millers purchased the Mosque garage? A. Yes, sir.

Q. That is true, isn't it? A. Yes, sir.

Q. And isn't it a fact that you told Alexander before that that you had advised the Millers to buy Bohrer's garage and not the Hayes Street garage?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Subsequent to that, isn't it a fact that Mr. Miller joined your Automobile Owners' Association?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. And aren't you now both members of the same organization?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Cross examination by Mr. Emmerglick:

Q. When did you first learn that Miller purchased the Mosque garage? A. I believe it was the day following the purchase.

LOUIS REISS, sworn in behalf of plaintiff.

Direct examination by Mr. Levin:

Q. Doctor, you are a dentist in this State? A. Yes.

Q. In practice? A. Yes.

Q. For how many years? A. About 15.

Q. Do you know Mr. Alexander? A. Yes, sir.

Q. Did he ever submit to you a proposition for purchasing a property on South Orange Avenue? A. Yes.

Q. What property was it, do you recall? A. He submitted to me, in fact, several properties; I don't know which ones you allude to.

Q. Did he ever submit 552-4-6 South Orange Avenue? A. I can't remember the number.

Q. Did he submit a number of stores on South Orange Avenue? A. Yes.

Q. Do you recall the offer you made on that property? A. I can't.

Q. Do you recall making an offer on it? A. I can't recollect that.

Q. Do you recall making an offer on that property? A. I can't possibly recollect; I might have done it.

Q. Do you recall going up to look at the property at Mr. Alexander's suggestion? A. That I do recollect.

(Cross examination waived.)

Plaintiff rests.

Counsel for defendants moves that plaintiff be non-suited as to both defendants on the following grounds:

1. That Mr. Alexander stated that he regarded himself employed in October and he admitted that the letter he mailed in October was not sent by registered mail;

2. That an examination of the letter

also indicates that it does not conform to Section 10 of the Statute of Fraud in that it does not refer to the property that they were going to trade it in for and refers to a price of $23,000, whereas the testimony on the part of the plaintiff shows that the deal was consummated at $25,000;

3. That no registered mail notice was sent until December, whereas his employment was in the latter part of October or September;

4. That the property referred to in the examination of Dr. Reiss is 550-2-4, or 552-4-6 South Orange Avenue, and the property mentioned in the registered mail notice is 540-2-4.

Counsel for defendants further moves that plaintiff be non-suited as to the defendant Mrs. Miller on the ground that it has been made clear that the property is the property of Mrs. Miller alone and that there is no indication that Mr. Miller in any way bound himself to pay this commission.

The Court [After argument]: I will grant the motion as to Mr. Miller because the plaintiff says that all the negotiations were with Mrs. Miller and that she was the one he talked with. Mr. Miller was there some of the times, but the plaintiff has proven on his case that Mrs. Miller was the owner. Was the receipt of the letter admitted?

Mr. Emmerglick: I don't know.

Mr. Levin: It appears in the record that they received it.

The Court: Yes, there was the testimony that she asked him about the letter. What about the last grounds; the description of the property?

Mr. Levin: In the agreement the street numbers are 540-2, in the complaint we allege it is 552-4-6; in the registered letter it is 540-2-4. She had only one piece of property in that section.

The Court: I suppose it is admitted she had only one piece of property on South Orange Avenue.

Mr. Emmerglick: Yes, sir.

The Court: I will deny the motion as to both defendants and grant the motion as to Mr. Miller.

Exception prayed by plaintiff's attorney.

SIMON MILLER, sworn in behalf of the defendant.

Direct examination by Mr. Emmerglick:

Q. Mr. Miller, did you ever talk to Mr. Alexander or did he ever talk to you about the Mosque garage? A. No, sir.

Q. How did you first learn about the Mosque garage? A. Sometime in June, 1925, I took my wife downtown to the show to the Mosque Theatre to the movie and I looked around for a place to park and I couldn't find any on Broad Street and I pulled in back of the theatre one block and this garage was under construction and Mrs. Miller said, "This is a good location". I said, "Try to

find out about it". There was a sign who the owner was and I told her to telephone him. The following day she called up Aaron Levin. He had an office on Plane Street because he had a sign on the building. It was under construction yet. She inquired about the property and the price, and it was an exorbitant price. He wanted $75,000 for it, and we forgot about it. It was too much.

Q. Did you ever buy a garage on Hayes Street? A. I leased it; I never bought it.

Q. How long did you have that lease? A. I paid the rent to the month of September and it extended to the latter part of October—I only had it about six weeks.

Q. Did you continue negotiations with Mr. Levin for the Mosque garage? A. No, I never knew him.

Q. When did you meet him? A. In the latter part of December I went over to his house one Sunday morning when I inquired all about it. He said he wouldn't like to take any exchange property because I didn't have any cash, but he will consider it if it is in a good location, and I told him where it was and he promised he would look at it. I didn't hear from him for about a week and I went to him the following week. I used to go away every week, but the end of the week he had time and I went over there and he said the best he will do will be $65,000.

Q. Did you come to an agreement with him? A. I made an appointment with him and finally I had Mrs. Miller with me. Twice I was there myself in his house and in a short time we made an appointment to meet downtown and in the end of September, I think around the 22nd, we left a deposit.

Q. Did you then tell Mr. Perlmutter? A. Yes. I knew him for some time and I stopped off and I told him I had left a deposit for the Mosque garage and he asked me how much I paid and I said I paid $65,000 and he said, "You could get it for $58,000," and I said I couldn't, and he said you could get it. That's all I told him.

Q. Did you ever speak to him about it before then? A. I never spoke to him whatsoever about the Mosque garage and nobody else.

Cross examination by Mr. Levin:

Q. What business are you in? A. By trade I am a machinist.

Q. And in September and October of 1925 you were looking for a garage, were you not? A. In September I had a garage, the Eagle garage on Hayes Street.

Q. You knew Mr. Alexander at that time, did you not? A. I knew him for the last ten years; I considered him a personal friend of the family.

Q. At that time you talked to Alexander about getting some other garage, didn't you? A. No, sir; he came over when I got the Hayes Street garage and he said, "Will you still be interested in the Bohrer proposal?" I said, "That was misrepresented". He said, "Why?" I said, "You said it had 65 cars capacity and it was only 38 and you said he had $5,000 worth of stock in the office and it was only fit to throw away for junk". When I leased the Hayes Street garage he said he will work it down so I can get it for $50,000.

Q. Which one? A. The Bohrer garage. I said, "That shows you are cheating me. You are down to $50,000 now." It was falling down, that garage.

Q. You made an arrangement at that time to go down to Penn's office to close that, didn't you? A. With him at night.

Q. Mr. Penn was your lawyer, was he not? A. Yes, sir.

Q. When you went down to Penn's office, not only was the capacity of the garage discussed, but the question of payment.

Objected to.

Mr. Levin: I can't let it stand before the jury uncontradicted that it was all caused by misrepresentation. I want to offset that impression.

Objection sustained.

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

Exception noted as ground of appeal.

Q. After you had first decided that you didn't want to go through with the Bohrer deal and the deal broke up, then Alexander came around again and again and you were going to go down to the lawyer's office to close the deal, weren't you?

Objected to.

Objection sustained.

Mr. Levin: We claim it was in between the two separate attempts to close the deal on the Bohrer garage that the Mosque deal arose and I think therefore it is material in cross examination to find out whether the Bohrer deal was in two parts.

The Court: You are going about it in the wrong way.

Mr. Levin: I don't want to lead him.
The Court: Go ahead and lead him.

Q. Is it true that there were two separate attempts to close the Bohrer deal? A. I had in mind the Eagle garage already.

Q. First there was a first attempt to close the Bohrer deal and then giving it up and going back? A. There was a question of leasing it or buying it.

Q. Won't you answer the question? A. Yes.

Q. First you dropped the Bohrer deal and then you went back to it? A. No, sir.

Q. There wasn't a lapse of two weeks? A. When I got through I got through for good and I went and leased the Hayes Street garage, but Mr. Alexander was over to my place and said he wanted $5,000 less and I told him we had lost confidence in him and that he cheated me of $5,000.

Q. Didn't Alexander take you around to see the Mosque garage? A. No, sir, he never mentioned it to me.

Q. Didn't he take you down in his car to the Mosque garage on a Sunday afternoon? A. No, sir, he never took nobody down; not me and nobody.

Q. Do you recall whether or not you and Mr. Alexander and your brother-in-law, Mr. Ganzel, had an appointment in your house arranging for the purchase of the Mosque garage? A. As far as my brother-in-law had to do with it—I had no partners in any case at all.

Q. Do you recall Mr. Alexander being at your house when your brother-in-law was there? A. I don't remember such a thing whether my brother-in-law was there or not; I can't tell you.

Q. Don't you remember Alexander talking to you about a garage, whatever garage it may be, when your brother-in-law was there? A. No, sir, I don't remember.

Q. Your brother-in-law was in what business? A. He was in the milk business.

Q. He went out of business shortly after that, didn't he?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. And your brother-in-law at that time wanted to invest money with you in some real estate proposition, did he not? A. No, sir.

Q. Did you receive any letters from Alexander? A. A registered letter after I closed the deal.

Q. Did you answer it? A. I turned it over to my attorney.

By the Court:

Q. Did you receive the first letter of October? A. No, sir.

By Mr. Levin:

Q. You didn't receive the first letter at all? A. No, sir.

Q. Did you sell your Hayes Street lease? A. Yes, sir.

Q. Did you receive $1,000 or about that profit? A. If I received $1,000?

Q. Or about that profit? A. I think I was lucky to get out in the same way.

Q. And you disposed of the Hayes Street lease just before you bought this Mosque garage? A. Naturally; I couldn't have two.

PAULINE MILLER, the defendant, recalled in her own behalf.

Direct examination by Mr. Emmerglick:

Q. Mrs. Miller, prior to the time that you bought the Mosque garage did you ever talk to Mr. Alexander about it? A. Never.

Q. Did he ever talk to you about it? A. Never.

Q. How did you learn about it? A. At one time we were going to the movies and we happened to park there and it was just under construction and it said, "Buy of Aaron, Levin & Gross," and as we always had intention of buying a garage we were interested. I called them up and they asked $75,000, and I asked the dimensions and I thought it was extremely exaggerated. I had a fair idea of real estate and I just dropped it, and occasionally when we would be downtown we would stop purposely to see it for curiosity whether it was sold for such a price, and that's all there was to it. When I first thought of buying it was when real estate was booming on South Broad Street.

Q. When was that? A. Around the latter part of September or October.

Q. When did you first get in touch with Mr. Levin the first time? A. That was sometime the latter part of June. I know it was very hot.

Q. And you thought it was too much at that time? A. Absolutely.

Q. Did you personally speak to Mr. Levin? A. Over the telephone.

Q. Tell us what led up to the purchase of it. A. We were just closing the deal of the Eagle garage on Hayes Street and we were coming to Mr. Penn's office. Do you want to know about it?

Q. No, I want to know when you bought this garage in September how you came to buy it. A. Mr. Miller went to Mr. Levin one Sunday morning and they couldn't come to terms. I said, "Take me along and maybe we can come to an understanding". We had an appointment at the office on Monday and I went over to Mr. Penn and consulted him about the proposition and we bought it.

Q. Did you ever receive this letter marked Exhibit P-1? A. Never in God's world.

Cross examination by Mr. Levin:

Q. Did you ever agree to pay Alexander any commissions?

Objected to.
Objection overruled.

A. Never.

Q. Did you ever agree to pay Mr. Alexander any commissions for anything? A. On the Bohrer transaction we understood he would have to get a commission.

Q. So you were not at all surprised when Alexander wrote you that first letter in which he said that it was three and a half and two and a half per cent. A. He never wrote me a letter.

Q. Did he ever call you on the telephone about commissions? A. About two days after I placed the deposit on the Mosque garage he told me, "I have a good garage for you for sale." I said, "Yes? I am sorry; we have just bought one." He said, "The garage I am talking about is right in the rear of the Mosque Theatre; it's downtown property." I said, "That's the garage we just bought." I never expected a telephone call from him. He said, "What did you pay for it?" I said, "$65,000." He said, "Why didn't you tell me? I could have gotten it for $58,000." I said, "Why didn't you come around and say so?" He got kind of sassy and it got me provoked. He said we had no right to buy from anybody else as though he had a mortgage on us, so I got angry and I called him names. I said, "I can buy just as I please; you have no mortgage on me; we can buy as we please." Then two days later I got the registered letter.

Q. That was the first time that you heard that Alexander claimed to be interested in the commissions on the Mosque garage, is that right? A. That's the first time.

Q. So you never went down with Alexander to see the Mosque garage at all? A. Never.

Q. And he never took you and your husband down on a Saturday afternoon? A. Never. Our transactions with him were through as soon as the Bohrer garage was finished. We were through then. I never seen him after that except once on Market Street and he didn't want to notice me, and I wanted to restore our old friendship——

Q. When was this conversation on Market Street? A. It was only talking. He was no more

than three minutes. I told him we were quite fortunate in not getting the Bohrer garage.

Q. What date was it? A. It was after Mr. Miller had sold the Eagle garage.

Q. Before you had purchased the Mosque garage? A. Yes.

Q. When did you see the Mosque garage? A. Several times.

Q. While you were dealing with Alexander for the other garages—for the Bohrer garage and for the Eagle garage—did you see the Mosque garage at that time? A. No, not just then. I don't think it was just then; I don't remember, but at certain intervals for curiosity's sake we went down to see whether the Mosque garage was sold or not.

Q. How long did it take for you to go down between the first time you saw it and— A. That was the latter part of June and then probably some time, we will say—I think it was some time in the latter part of August or September, or something like that.

Q. Well, getting down to the point where you met Alexander on Market Street, you had an argument with him there, didn't you? A. Not an argument. He didn't seem to want to notice me at all. I told him we were quite fortunate that we didn't have the Bohrer garage because we couldn't meet obligations and Mr. Miller isn't so much in the garage business and he doesn't really care to get one.

Q. You told him at that time you saw him on Market Street that Mr. Miller did not care to get any garage? A. Yes.

Q. And at that time you had sold the Hayes Street lease? A. Yes.

Q. When did you sell the Hayes Street lease? A. I don't remember the dates.

Q. About when? A. It must have been some time early in November.

Q. So you met Alexander after the early part of November? A. Yes.

Q. Because you had already sold the Hayes Street garage? A. Yes.

Q. How long did it take you from the second time you went down to Mr. Levin until you drew the contract? Was it a week or two weeks or three weeks or was it longer? A. I think it was about two weeks.

Q. So that if you drew your contract on December 22nd that would mean that the early part of December was the time you started to talk to Mr. Levin about the Mosque garage? A. Yes.

Q. When you met Mr. Alexander on Market Street and you talked to him did you tell him anything at that time about the Mosque garage? A. No, not a word was mentioned.

Q. Not a word was said about the Mosque garage? A. No.

Q. But you did tell him that you didn't want to buy any garage? A. I said Mr. Miller was not interested in the garage business.

Q. You told him, did you not, that you were not interested in garages because you had to slave too hard? A. No.

Q. And yet, only two or three weeks after that you started to dicker for the Mosque garage, is that your story? A. Yes, it was just because property was going up on Broad Street and the papers were full of it that property was worth $6,000 a foot and we considered in the rear it was worth considerably more and that's what made me buy it.

At one o'clock P. M., the Court takes a recess until two o'clock P. M.

AFTER RECESS.

PAULINE MILLER resumes the stand.

Cross examination by Mr. Levin (continued):

Q. You say that when Alexander called you up he told you he had a good garage for you in the Mosque garage. A. He said he had a good garage downtown in the rear of the Mosque theatre and I said, "That's just"——

The Court: Just answer the questions.

Q. And it was then for the first time, as far as you know, that you told Alexander that that was the place you already bought, is that right? A. Yes.

Q. How long before that had you signed the contract, do you know?

The Court: The contract is in evidence.

Mr. Levin: We haven't the date of the conversation.

A. I don't get you.

Q. How long before that conversation had you signed your contract? Just a day or two or longer? A. A couple of days.

Q. Was that before you got the registered letter or after? A. We signed the contract before we got the registered letter.

Q. Was the conversation held before you got the registered letter or after? A. Two days after the conversation we got the registered letter.

Q. The other letter was before? A. I don't know of the other letter; I never heard of it.

The Court: You mean the letter of October 7th?

Mr. Levin: Yes, sir.

Q. You then say that when you told Alexander that you bought the place he wanted to know why you didn't tell him about it so that he could have sold it to you? A. He said, "Why didn't you tell me you wanted to buy the place so I could have got it for you for $58,000?"

Q. Your husband says Perlmutter says that. A. I don't know about his conversations with Perlmutter.

Q. But you are sure it was Alexander who said it was $58,000? A. Yes, he said this to me over the 'phone.

Q. Did you tell Perlmutter that you bought this garage? A. I never seen him.

Q. You never saw Perlmutter? A. I have seen him, but not to speak about garages.

Q. At that time you were seeing him almost every day, weren't you? A. No, never.

Q. Did you go around with Perlmutter looking at garages? A. Never.

Q. Did your husband go around with Perlmutter looking for garages? A. So my husband says.

Q. Yet it was your property and not your husband's, isn't that right? A. Of course it was.

Q. When Alexander talked to you on the wire you say Alexander said that Perlmutter told him about that? A. I don't know.

Q. You said that you told him. A. I was wondering how he ever knew; I don't know how he found out.

Q. You told us before that he called you up

and told you that he wanted to sell you a garage and you, for the first time, told him that you had purchased it. A. Yes.

Q. Now, you say you don't know who told him you had purchased the garage. What do you mean by that? A. Of course, it's self-understood that somebody told him.

Q. Didn't you say before that you were the one that told him? A. I said, "This is just the garage we bought." That's what I told him.

Q. Isn't it a fact that when he called you up he asked you why you had gone behind his back and purchased it direct? A. He never said anything about that.

Q. And didn't you say to him that you could purchase whatever you wanted without bothering about his commission? A. No, I said we had a right to do as we pleased and I was under no obligation to him.

Q. So he told you that you would have to buy it through him? A. That's about the way he expressed himself; that we were his customers and we had no right to buy it in any other way.

AARON LEVIN, sworn in behalf of defendant.

Direct examination by Mr. Emmerglick:

Q. Mr. Levin, did you own this Mosque garage that we have been talking about? A. Yes, sir, I was one of the owners.

Q. When for the first time did Mrs. Miller talk to you about this garage? A. Sometime in June.

Q. June of what year? A. 1925.

Q. Did Mr. Alexander at any time introduce Mrs. Miller as a purchaser of this garage? A. No, sir.

Q. Are you sure about that? A. Yes, sir.

Q. Was he instrumental at any time in consummating the sale of this garage? A. No, sir.

Q. Did he take care of the arranging of any of the terms? A. No, he never introduced me to Mr. or Mrs. Miller and he never mentioned to me anything about it.

Q. Were you present at the closing of this transaction? A. Yes, sir.

Q. Was he there? A. No, sir.

Cross examination by Mr. Levin:

Q. You are now being sued by Mr. Alexander for commissions in the very same deal, aren't you? A. Yes, sir.

Q. And he is suing you because he claims——

Objected to.

The Court: I will sustain the objection. It is all right to say he is being sued, but not for commissions.

Q. And you are being sued for the sale of the Mosque garage to Mrs. Miller? A. Yes, sir.

Q. In this very same deal, is that correct? A. Yes, sir.

Q. Was Mr. Alexander trying to sell the Mosque garage for you? A. Not to my knowledge.

Q. Never? A. No, sir.

Q. He produced no purchaser at all? A. No, sir.

Q. Do you know Mr. Perlmutter? A. I do.

Q. Did Mr. Alexander introduce Mr. Perlmutter? A. No, sir.

Q. Didn't he talk to Mr. Perlmutter and you with regard to the sale of the Mosque garage? A. No, sir, Mr. Perlmutter was in to see me several times and he made me a ridiculous offer and I wasn't interested in what Mr. Perlmutter wanted to give.

Q. Did you see Mr. Perlmutter this morning and did you hear him testify?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Did you hear Mr. Perlmutter say that Mr. Alexander tried to sell him the Mosque garage? A. I don't know whether I heard it or not.

Q. Is it a fact, or isn't it? A. No, it is not.

Q. You said that Mr. Alexander was not trying to sell your garage at all, is that correct? A. Yes, sir.

Q. Have you the letters that I asked you to produce? A. I couldn't produce anything that I haven't got.

Q. So you haven't got any letters?

Objected to on the ground that the line of questioning is immaterial and on the further ground that this man is a witness in this cause and letters mailed to him by anybody would be self-serving and not germane to the issue.

The Court: Have you subpoenaed him to produce some document?

Mr. Levin: Yes, sir.

The Court: Call upon him to produce.

The Witness: I took the summons to my lawyer this morning and he couldn't understand what you wanted.

By the Court:

Q. Have you any letters in response to that subpoena? A. No, sir.

By Mr. Levin:

Q. I ask you to look at this and tell me whether you received the original of that letter?

The Court: Answer yes or no.

A. No, sir.

Mr. Levin: I ask that it be marked for identification.

(The same is marked Exhibit P-4 for Identification.)

Q. I ask you to look at this letter and tell me whether you received the original of it? A. Yes, sir.

By the Court:

Q. What is the date of that? A. December 24, 1925.

Mr. Levin: I offer it in evidence.

Objected to.

The Court: I suppose that is a letter of the same purport?

Mr. Levin: Yes, sir.

Objection sustained.

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

Exception noted as ground of appeal.

Q. When was it that the Millers first saw you about this? In June? A. They didn't see me; they called me up in June.

Q. Where did they call you? A. At the office.

Q. Whose office? A. My office.

Q. Where is that? A. 326 Plane Street.

Q. This property was owned by whom? By you or by the Victory Realty Company? A. Which one?

Q. This Mosque garage. A. It was owned by the Victory Realty Company.

Q. You were in the market at that time to sell it, were you not? A. Well, I built it to sell.

Q. Did it have a sign on it? A. Yes, sir.

Q. What sort of a sign? A. It had a "For sale" sign giving my office address and my home.

Q. When did you put that sign up? A. Well, in the course of construction.

Q. In the course of construction? A. Yes, sir.

Q. When was your garage finished? A. It was finished some time in the early part of August.

Q. When was it started? A. It was started in the beginning of May; probably April.

Q. So that in June it was not fully completed? A. No, sir, not fully; the entire structure.

Q. The entire structure had not been raised yet, had it? A. Yes.

Q. And you had at that time a sign for sale

outside before you completed your garage? A. Yes, sir, before the finishing touches were completed.

Q. You say at that time the Millers got in touch with you? A. Yes, sir.

Q. Who called you up at that time? A. Mrs. Miller.

Q. What made you so sure it was Mrs. Miller? A. It sounded like a lady's voice.

Q. And you couldn't mistake Mr. Miller's voice for Mrs. Miller's voice, could you? A. I don't think I could.

Q. Did you give them a price at that time? A. Over the telephone I did, yes.

Q. How much? A. $75,000.

Q. Did they talk about a swap? A. No, sir.

Q. At that time they didn't talk about a swap? A. No, sir.

Q. And you still wanted $75,000? A. That was my asking price.

Q. Subsequent to that, how long after that was it that they got in touch with you again or that you got in touch with them? A. I didn't get in touch with them, because they always made me a ridiculous offer and I took their name.

Q. When did they make this ridiculous offer? A. Over the telephone.

Q. When you wanted $75,000? A. Yes, they said they could get it for $50,000 or something like that.

Q. You say they said it. Did they both talk to you? A. The party that called up, Mrs. Miller.

Q. When did you see them again? A. The latter part of November.

Q. And who came to see you then? A. Mr. Miller came to see me at my house.

Q. Between June and November did you have any other prospective purchasers for that Mosque garage besides Perlmutter? A. Yes, lots of people called me up and came over to see me, but nothing materialized.

Q. Did you at that time give any brokers authorization to proceed to sell this property for you? A. No, sir.

Q. You did not? A. No, sir, at no time.

Q. You deal through brokers in your business, don't you?

Objected to.

The Court: What has that to do with this case?

Mr. Levin: The question is whether he dealt with this particular broker.

The Court: Ask him that.

Mr. Levin: He said he dealt with no brokers and I asked him whether he dealt with no brokers in his business; in other words, checking up whether his story is credible or not.

The Court: Ask him whether he dealt with this broker.

Mr. Levin: He has already said he did not.

The Court: That ought to answer your question. I will sustain the objection.

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

Exception noted as ground of appeal.

Q. When they came back to you in November what was the first offer they made to you then? A. They made a better offer than they did when

they spoke to me on the phone, and that wasn't satisfactory and I turned that down, too.

Q. Do you recall that when you wanted to sell this property to Perlmutter the offer was $58,000 by Perlmutter to you? A. Perlmutter made me several offers and they were also ridiculous and I didn't accept them.

Q. Do you recall the offer of $58,000 in cash? A. He started at $50,000 and probably went up to $60,000; I don't recall exactly.

Q. Did you at that time know that Perlmutter was some relation of the Millers? A. I did not.

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. When they came back to you in November what was the first offer that the Millers made? A. The first offer through the telephone or at my office?

The Court: You are addressing yourself to the first offer leading up to the closing, I suppose.

Mr. Levin: Yes, sir.

Witness: At that time they offered $61,000, the first time they were over to my house and that we couldn't agree on. Then they came together and I cut them down to $70,000 and we were about $8,000 to $10,000 apart and we came together and closed it on the basis of $65,000.

Q. Did you ask them whether there was a broker in the deal? A. No, sir, I did not.

Q. Weren't you interested? A. They came to my house direct; I didn't ask them and they didn't tell me.

Q. And because no broker was paid any commissions in this deal the price went lower, is that it? A. No, sir.

Objected to.
Objection overruled.

PERCY H. PENN sworn in behalf of defendant.

Direct examination by Mr. Emmerglick:

Q. Mr. Penn, you are an attorney and counsellor at law of this State? A. I am.

Q. How long have you been practicing? A. Seven and a half years.

Q. Do you know Mr. Alexander, the plaintiff? A. Yes, sir, I know him.

Q. How long have you known him? A. About that many years—seven years.

Q. Was his office connected with yours in any way or was there any business relationship existing between you? A. He clerked with me off and on on several occasions.

Q. Did he have desk space in your office? A. No, he didn't have definite desk space; just as a law clerk.

Q. About in the year 1925 was he frequently in your office? A. Yes, he was in my office a great deal then.

Percy H. Penn—for Defendant—Cross.

Q. Did you draw the agreement of sale for the Mosque garage? A. Together with Mr. Cohen at his office.

Q. Were you present at the closing of the title? A. I was.

Q. Was Mr. Alexander present either at the closing of the title or at the making of the contract?

Objected to.
Objection overruled.

A. He was not present at the making of the contract or at the closing of the deal.

Q. And any time when you and Mr. Alexander and Mrs. Miller were present did you hear mention made of the Mosque garage? A. At no time.

Q. Having reference to your notes made at the closing of title, will you tell us how much was allowed for the property of Mrs. Miller on South Orange Avenue?

Objected to on the ground that the contract speaks for itself.
Objection sustained.

Q. At any time did Mrs. Miller tell you that Mr. Alexander was the broker in this deal?

Objected to.
Objection sustained.

Cross examination by Mr. Levin:

Q. Did you tell Alexander about the closing of the Mosque deal? A. No, I did not. He told me about it considerably after the closing of the deal.

Q. Did you take care of the legal arrangements with respect to this Bohrer transaction? A. I did.

Q. Did you take care of the legal arrangement with respect to the Eagle garage transaction? A. I did.

Q. Did you take care of the legal arrangement with respect to the Mosque garage transaction? A. I did.

Q. In the Bohrer garage transaction did you prepare any writing having reference to commissions to be paid to Mr. Alexander?

Objected to.

The Court: Answer yes or no.

A. I did.

Q. In fact, was he included as the recognized broker in that writing? A. He was.

Objected to.

Objection sustained.

Mr. Emmerglick: I asked the question for this reason: I am going to show that Mr. Penn included his name in that, but did not include his name in the agreement for the Mosque garage and that that was done as a result of the close relationship which existed between them and the knowledge of Mr. Penn as to the transactions.

Mr. Levin: I object to the statement being made before the jury and I ask that the Court instruct the jury that it be disregarded.

The Court: You may put that into a request.

Q. You know better than to volunteer, Mr. Penn. I asked you whether you told Alexander about the Mosque deal. A. I did not, sir.

Q. You say that Alexander at that time was frequently in your office and I assume he was a fairly good friend of yours? A. He was and is at this very minute.

Q. And that is why you are volunteering answers.

Objected to.

The Court: I will sustain the objection. It is improper. I will strike out the answers that are volunteered if you want me to.

Q. You say that you were a friend of Alexander and yet you mentioned nothing about the deal to him at all as to the Mosque garage being closed, did you? A. I did not.

Q. Did Mr. Alexander come around to your office after that? A. He certainly did.

Q. And yet you made no mention of it at all? Why? A. Because I had no occasion to say anything to him about it. He didn't figure in it.

Q. You are sure it wasn't that you had occasion to withhold the information and didn't say anything about it to him? A. I had no occasion to say anything about it.

Q. Yet when he instituted this suit he asked you to testify for him? A. If my recollection serves me right he asked me to represent him and I wouldn't.

Q. That isn't the question. The question is: He asked you to testify for him. A. I have no recollection of it; he may have.

Q. And you said you would rather not be a witness and to let you out. A. That is not my recollection.

Q. Yet you are not positive about it. A. I am reasonably certain that I didn't say that.

SIMON MILLER recalled in behalf of defendant.

Direct examination by Mr. Emmerglick:

Q. Mr. Miller, shortly after you signed the contract for the Mosque garage did Mr. Alexander speak to you? A . I believe a deposit——

Q. Answer yes or no. A. Yes, he did.

Q. Was it personal or over the telephone? A. Personally.

Q. What was said to you respecting the purchase of the Mosque garage? A. He came over the following morning and said, "Why, you bought the garage." I said, "Yes, sir, who told you?" He said, "Mr. Perlmutter." He said, "By the way, how much did you pay for it?" I said, "$65,000." He tried to act like an old friend, and he said, "Did you turn in the South Orange Avenue property?" I said, "Yes." He said, "How much did you get for it?" I said, "$27,000." He said, "You weren't interested in the Mosque garage because it was not an old established place. Why didn't you tell me you wanted it?" He said, "The garage I tried to tell you was in a better location and better established." I said, "You misrepresented yourself. You came over with another offer of $5,000 less and that's why I lost confidence in you."

Simon Miller—for Defendant—Recalled—Cross.

Cross examination by Mr. Levin:

Q. You say he came around to see you the following morning? A. Yes, sir.

Q. Following what? A. After I placed the deposit.

Q. The very next day? A. The next day, yes, sir.

Q. Alexander came around to see you? A. Yes, sir, he is a neighbor; he lives on Orchard Street, two blocks away from there.

Q. Where were you when he saw you? A. In the garage.

Q. Which garage? A. The Mosque garage.

Q. You were there the morning after? A. Yes, sir, I had to go and check different things up to see what was there. I was there continually after.

Q. And he met you in the Mosque garage the following morning? A. Yes, sir.

Q. And he told you that he had heard you had bought the garage? A. He told me that Mr. Perlmutter that I placed a deposit on the garage and is it true and I told him yes.

Q. At that time did he tell you he had been agent for the Mosque garage? A. No; in fact, he was arguing with me why I didn't purchase the Bohrer garage; he said it is an old established place and that I will starve here.

Q. On the morning following the giving of the deposit was your wife there? A. No, sir.

Q. Did you talk to your wife that night and did she tell you about a telephone call that she received from Mr. Alexander?

Objected to.

Objection overruled.

A. There was no telephone then because that was the following morning.

Q. Did you talk to your wife about what Alexander said to you that day? A. Well, I wouldn't say yes or no; I don't remember.

Q. Wasn't your wife down at the Mosque garage that following morning with you? A. No, sir, she never mixes in business at all.

Q. Was that your business or her business? A. The property is in her name; I have a right to trust my wife.

Q. What did she tell you about this telephone conversation with Alexander?

Objected to.

The Court: I will sustain the objection. This is not cross examination; he has only brought back the conversation he had in the garage.

Mr. Levin: I am now trying to locate it for the purpose of allocating the time.

The Court: I have sustained the objection.

Q. You know that Alexander talked to your wife on the telephone about the purchase of the Mosque garage, don't you?

Objected to.

Objection overruled.

A. Yes.

Q. When was that, after or before Alexander saw you? A. I think it was the day after; not the same day.

DEFENDANT RESTS.

LUCILLE HEMBER, sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Levin:

Q. Miss Hember, do you know Mrs. Miller? A. No.

Q. Do you know her when you see her? A. I know her now, yes, but I never knew her before.

Q. Do you recall the first time that you ever saw her? A. Yes.

Q. When was that? A. Why, four years ago.

Q. What was the occasion on which you saw her? A. It was the Saturday before Christmas and she was standing on Market Street with Mr. Alexander.

Q. Did you overhear a conversation between them? A. Part of it.

Q. What did you hear? A. I heard her say she was not interested in the Mosque or any other garage.

Q. You are sure she said the Mosque garage? A. Yes, that's what attracted my attention because it sounded like the Mosque theatre.

Cross examination by Mr. Emmerglick:

Q. Did you know Mr. Alexander? A. Yes, sir.

Q. Had you been with him before he met Mrs. Miller? A. No, I was just passing.

Q. And you were just passing at the time he met Mrs. Miller? A. No, he was standing talking to her as I passed.

Q. How long did you stand there? A. About five minutes.

Q. What did you hear in the five minutes? A. That's all I remember.

Q. What were the words? A. That she was not interested in the Mosque or any other garage.

Q. That's all you remember? A. Yes.

Q. And the whole conversation was pretty loud? A. Yes, naturally, but I was looking in the window at the time.

Q. And in the five minutes you heard only that? A. Yes.

Q. And the whole conversation was in a loud tone? A. Yes.

Re-direct examination by Mr. Levin:

Q. Was it said once or was it repeated? A. I don't remember it being repeated.

Q. What recalls it particularly to your mind at this time? A. Why, I met Mr. Alexander on the street after—at the time I asked him after she left what she meant by the Mosque garage because I live almost opposite there and I was interested and I didn't know there was any garage connected with it.

Q. And that is what holds it in your mind? A. Yes.

Re-cross examination by Mr. Emmerglick:

Q. And you heard her say she was not interested in the Mosque garage or any other garage? A. Yes.

Q. You told us on direct examination you heard the word Mosque mentioned. A. I asked what the Mosque garage was because I didn't know there was any garage conected with it.

Q. This was right after she left? A. Exactly.

MATILDA T. ALEXANDER, sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Levin:

Q. Mrs. Alexander, you are the wife of Morris Alexander, the plaintiff in this case? A. Yes.

Q. Do you know Mrs. Miller? A. I don't know her.

Q. Did you ever converse with her at all? A. Not at all.

Q. Do you recall a telephone conversation that your husband made to the Millers? A. I only recall it because he came in and said——

Q. Don't tell us what he said. Do you recall a telephone conversation? A. Yes.

Q. Do you recall any conversation over the telephone in particular with the Millers that he had had? A. Yes.

Q. Do you recall when that was? A. I can't remember the dates.

Q. Did you hear the voice on the other end of the wire? A. Yes.

Q. How could you hear that when he was talking on the telephone? A. Because he called me over and told me to listen.

Q. He put the receiver to your ear? A. To both of us at the same time.

Q. Did you hear the conversation? A. Yes.

Q. Can you tell us what it was? A. I can't remember the exact words.

Q. Give us the substance of the conversation. A. "Mrs. Miller, do you want to—" I am too nervous to talk.

Q. Tell us what he said and what she said. A. He came in and said, "What do you think of that? Mrs. Miller went ahead and bought the garage behind my back."

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

Mr. Levin: I consent that it be stricken out.

The Court: Strike it out.

Q. Just what your husband said to Mrs. Miller over the 'phone and what she said to him over the 'phone. A. (No response.)

Q. Do you understand what I mean? A. I do—I think I do.

Q. Won't you answer it, please? A. He asked her, "Why did you go behind my back?" She said, "Well, I don't have to have you; I can do it myself."

By the Court:

Q. Is that all you can recall? A. No, but I am too nervous and I have to get myself together. If you will give me a few minutes time, please. He said, "Mrs. Miller, you want to buy a garage?" She said, "No, I told you I am not interested in the Mosque garage." He said to her, "Are you sure you don't want to buy any garage?" She said, "No, I don't want to buy any garage at all." He said, "Are you sure you haven't bought any?" She said, "No, I haven't bought any." He said, "Are you sure you didn't buy the Mosque garage?" She said, "Who told you? And if I did, what about it?" He said, "Do you think it is fair to do that; to go behind my back?" She said, "What about it?" He said, "I am your agent. What about the commissions?" So she hung up.

Cross examination by Mr. Emmerglick:

Q. This is the first day you have been in court in this case? A. Yes.

Q. You knew that it was coming up any day for some time, did you not? A. Yes.

Q. Mr. Alexander told you that, did he not? A. He told me to be ready to come here.

Q. You have been ready for several days, have you? A. Well, yes.

Q. And haven't you been thinking over the conversation that you had? A. No, I have not.

Q. You haven't given it any thought? A. No.

Q. You haven't given it any thought until you got on the witness stand? A. I don't know what you mean by that.

Q. Do you recollect at any time before you got on the witness stand what the conversation was and recalled it to your mind yesterday, before, or any day? A. Yes.

Q. Did you go over it in your mind thoroughly? A. I am not so sure. I don't have to go over it in my mind.

Q. You can remember it without doing so? A. Well, I don't know whether I can express it; I am nervous on the stand.

Q. The way you have expressed it is the best way you can express it? A. Yes.

Q. You can't possibly recall the date? A. No.

Q. And your hesitation on direct examination was due entirely to nervousness? A. Absolutely.

Q. You are not nervous now, are you? A. I am.

Q. You are sure that you have recalled this story in your mind before you came on the witness stand? A. What do you mean? I can't help it because I know it.

Q. You knew it all the time? A. Well, I don't know that I expressed myself correctly.

MORRIS ALEXANDER, the plaintiff, recalled in his own behalf in rebuttal.

Direct examination by Mr. Levin:

Q. Mr. Alexander, I show you a letter dated August 5, 1925, marked Exhibit P-4 for Identification. Did you send the original of that letter to the addressee, Mr. Levin? A. I did.

Mr. Levin: I offer it in evidence.

Objected to.

Objection sustained.

Mr. Levin: The witness for the defense on cross examination denied ever receiving this letter and it is therefore very material in this particular part of the case.

The Court: I believe it is immaterial.

Mr. Levin: I say it is material in this respect: That this witness is the one that sold the property and the agent is the intermediary, or claims to have been, between the vendor and the vendee, and any correspondence had at that time would be very material. You can't say it is self-serving because it was sent at that time to one of the principals in this matter.

The Court: I have sustained the objection.

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

(Exception noted as ground of appeal.)

Q. Do you know the brother-in-law of the Millers to whom you referred before? A. I do.

Q. What is his name? A. Mr. Ganzel.

Q. That is the man you say was up to their house on the day of this talk? A. Yes.

Q. Is he in court? A. Yes, sir.

Q. Under subpoena by you? A. By me.

(Cross examination waived.)

PLAINTIFF RESTS IN REBUTTAL.

Defendant's counsel moves for a direction of a verdict on the following grounds:

1. That both defendants denied the receipt of Exhibit P-1, the mailing of which, at most, is presumption of receipt. On denial of that it is incumbent upon the sender to introduce evidence of its receipt;

2. That this letter, as expressed in the motion for nonsuit, was not a registered letter and that the statute requires a registered letter;

3. That the pleadings and the proof are not in accord, the complaint stating that it was $25,000 for the houses and the proof showing it was $27,000.

The Court: (After argument.) The plaintiff testified that the defendant did admit it; that is, admitted the receipt of Exhibit P-1, and that furnishes a jury question. The plaintiff testified that the defendant said to him, "Why did you send me that letter?" And he explained to her why he did. As to the other grounds, there are several modifications of the statute, and in order to recover on all agreements you have to have all

those things present that the statute requires, and one of them is that they must actually effect the sale pursuant to such agreement. That was not done in this case. I will grant the motion for the direction of a verdict.

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

(Exception noted as ground of appeal.)

The Court: Gentlemen, by direction of the Court you will return a verdict in favor of the defendant and against the plaintiff.

(The jury returns a verdict accordingly.)

Exhibit P-1.

Newark, N. J., October 7, 1925.

Mr. & Mrs. Miller,
39 Grand Ave.,
East Orange, N. J.

Dear Sir & Madam:

It is unfortunate that your brother did not want to invest any money in the Mosque Garage.

I will bend every effort to sell your property located at 552-4-6 South Orange Ave., Newark, N. J., so that you can purchase the Mosque Garage.

The following are the terms:

Lot 50 X 111
3 stores and 4 rooms to each store.
Private Mortgage $14,000.00
Price $23,000.00
Balance cash.

It is agreed that I shall receive Three and one half percent commission for the first $20,000.00 and two and one half percent for all above that amount upon my procuring a purchaser directly or indirectly for the above price or any agreed price.

Anxiously yours,

MORRIS ALEXANDER.

Exhibit P-2.

M. S. ALEXANDER,
128 Market St.,
Newark, N. J.

December 24th, 1925.

Mr. & Mrs. Simon Miller,
39 Grand Avenue,
East Orange, New Jersey.

Dear Sir and Madam:

As you no doubt know, I have spoken to Mr. Aaron Levine, owner of the Mosque Garage, 80 Orchard Street, Newark, New Jersey, regarding your property, #540-42-44 South Orange Avenue, Newark, New Jersey, in the exchange of which you wanted to purchase the above mentioned Mosque Garage.

I understand that you are the purchasers of the above property, and being the broker in the case, I will expect to receive a regular rate of commission of three and one-half per cent of the first $20,000.00, and two and one-half per cent for any amount above, at the time of the consummation of the sale.

Hoping that you will inform me as to the time of the settlement, I am

Very truly yours,

MORRIS ALEXANDER.

MSA

Exhibit P-3.

Law Offices
SAUL AND JOSEPH E. COHN
Chamber of Commerce
Building
Newark, N. J.

ARTICLES OF AGREEMENT

MADE the Twenty-second day of December, 1925, BETWEEN VICTORY REALTY COMPANY, a corporation of the State of New Jersey, having principal offices in the City of Newark in the County of Essex and State of New Jersey, party of the first part, hereinafter known as VENDOR; AND PAULINE MILLER and SIMON MILLER, her husband, of the City of Newark in the County of Essex and State of New Jersey, party of the second part, hereinafter known as VENDEE.

WITNESSETH, Said vendor for and in consideration of the sum of Sixty Five Thousand ($65,000.00) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said vendee, doth agree with the said vendee, well and sufficiently to convey to the said vendee, their heirs, executors, administrators and assigns, by Deed of Warranty free from all encumbrances, except as hereinafter stated, and free from all municipal, county or state taxes or assessments for improvements already made or in progress at the date hereof, whether such assessments are confirmed or prospective, subject, however, to restrictions of record, if any, and to Zoning Ordinances of the municipality in which the premises hereinafter men-

tioned are located, which restrictions and Zoning Ordinance are not violated by the erection or maintenance of the present buildings thereon, on or before the Second day of January next ensuing the date hereof, all that certain lot, tract, or parcel of land and premises, commonly known and designated as No. 78-80 Orchard Street, in the City of Newark, County of Essex and State of New Jersey, together with all appurtenances connected therewith, said land being more particularly described as follows:

BEGINNING in the easterly line of Orchard Street at a point therein distant 100 feet northerly from the northeast corner of the same and Chestnut Street; thence running along Orchard Street north 28 deg. 15 minutes east 54 feet; thence in an easterly direction and parallel with Chestnut Street 154 feet more or less to the easterly face of the brick building standing on the premises herein described; thence south 28 deg. west and along said brick building 54 feet to a corner of same; and thence westerly parallel with Chestnut Street and along the southerly wall of said Brick Building and in continuation thereof 154 feet 3 inches more or less to Orchard Street and the place of BEGINNING. The above description is made in accordance with survey made by Borrie & Kreiner, surveyors, May 16, 1910.

The vendees agree to accept title to the premises agreed to be conveyed by the vendor herein with the understanding that there is no sprinkler system installed therein.

The vendors agree to convey the said Orchard

Exhibit P-3.

Street premises together with the good will of the garage business conducted on the premises.

Included in the sale of the Orchard Street premises hereinabove described is all personal property with exception of all pumps and oil tanks.

AND the said vendee for themselves, their heirs, executors, administrators, assigns, doth agree with the said vendor, its successors and assigns, that the said vendee will pay and satisfy, or cause to be paid and satisfied unto the said vendor the said sum of Sixty Five Thousand ($65,000.00) Dollars as and for the purchase money of the foregoing described lands and premises, in the following manner, that is to say:

On execution of this agreement for which this is also a receipt, $1,000.00.

On delivery of deed, cash $1,000.00.

By taking premises subject to a bond and mortgage held by American Building and Loan Association, in connection with which all premiums and expenses have been paid, said mortgage being in the nominal sum of $35,000.00.

In connection with said Building and Loan association mortgage the party of the first part hereto agree, to assign all their right, title and interest in and to the shares given as collateral security in connection with said mortgage, the party of the second part agreeing to pay the same at their withdrawal value by adding the same to the purchase money mortgage hereinafter mentioned.

By conveying by Deed of Warranty premises hereinafter mentioned, $11,000.00.

Balance of purchase price, by executing a pur-

chase money bond and mortgage embracing the premises agreed to be conveyed; said bond and mortgage to contain a thirty days interest clause, 90 days tax clause, assessment, insurance and thirty days default clause, and an agreement not to claim credit on the interest payable on the bond and mortgage by reason of any tax assessed or to be assessed against the premises, $17,000.00.

Said bond and mortgage to be for a period of four years, with interest at six % payable semi-annually and to be in the form employed by Saul and Joseph E. Cohn and to be drawn by the attorneys of the mortgagee at the expense of the mortgagor who shall also pay the cost of recording said mortgage and revenue stamps on bond accompanying the same, which mortgage shall provide for payments as follows: $1,000.00 at the end of one year from the date thereof; $1,000.00 at the end of eighteen months from the date thereof and the sum of $1,000.00 semi-annually thereafter, and the balance, at maturity, to wit, within four years from the date thereof. Said purchase money mortgage to contain a clause giving the mortgagor the privilege of prepaying the principal sum at any time before maturity with interest to date of payment.

By conveying by Deed of Warranty, free from all encumbrances except as hereinafter stated and free from all municipal, county or state taxes or assessments for improvements already made or in progress, at the date hereof, whether such assessments are confirmed or prospective, subject, however, to restrictions of record, if any, and to Zoning Ordinances of the municipality in which the premises hereinafter mentioned are located,

which restrictions and Zoning Ordinance are not violated by the erection or maintenance of the present building thereon, premises commonly known and designated as 540-542 So. Orange Ave., Newark, N. J., more particularly described as follows: $11,000.00

BEGINNING at a pt. in the Sly li of So. Orange Avenue therein dist 50 ft. Ely fr the cor formed by the intersection of the Sly li of So. Orange Avenue and the Ely li of So. 21st St.; thence running South 62 deg. 6 min. East alg So. Orange Ave. 50.12 feet and thence N 30 deg. 47 min. W 100 feet; thence rung N 62 deg. 47 min E par with 1st course 50.12 feet; thence N 30 deg. 47 min E parallel with So. 21st St. 100 feet to So. Orange Avenue and p of b which premises for the purposes of this agreement are taken at a valuation of $25,000.00 and are to be conveyed subject to a mortgage in the sum of $14,000.00.

AND IT IS FURTHER AGREED by the parties to these presents that the said vendee, their heirs, executors, administrators and assigns, may enter into and upon the said respective lands and premises on the day of settlement and from thence take the rents, issues and profits to and their use.

Rents of said respective premises, all insurance premiums, water rents, taxes and interest on mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said Deed and shall be added to or subtracted from the purchase money mortgage hereinabove mentioned.

Gas fixtures, including gas ranges and gas water heaters, electric fixtures and chandeliers, window

shades, screens, awnings, floor covering in halls, ash cans and heating apparatus, if any, and any other personal property attached and appurtenant to and used in connection with the premises are included in this sale.

In case the respective premises shall through or by any of the elements suffer injury beyond ordinary wear and tear, the vendor shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

IT IS EXPRESSLY UNDERSTOOD AND AGREED that the buildings upon the said respective premises are all within the boundary lines of the property as described in the deed therefor herein, and that there are no encroachments thereon except as hereinbefore stated.

IT IS EXPRESSLY UNDERSTOOD AND AGREED that the respective buildings comply with municipal ordinances and regulations and the statutes of the State of New Jersey referring to Tenement Houses as said statutes are supervised and enforced by the New Jersey State Board of Tenement House Supervision.

IT IS EXPRESSLY UNDERSTOOD AND AGREED that the title to the respective land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for non-payment of taxes or assessments, or adverse possession.

THE VENDOR AGREES to carry valid fire insurance for the full insurable value of said building and

Exhibit P-3.

in the event of a destruction by fire, constituting less than a twenty-five per cent loss as determined by the insurers, the vendor shall, with all reasonable dispatch, restore and rebuild the same in substantially the same condition as at the date hereof. In the event that the destruction by fire shall constitute more than a twenty-five per cent loss as estimated by the insurers, this agreement shall, at the election of the vendee and upon five days' written notice to the vendor, be at an end and the deposit returned upon the execution of mutual general releases.

AND IT IS FURTHER AGREED by the parties hereto, that the said Deed, purchase money hereinabove mentioned and all instruments necessary to carry out the true intention of this agreement, shall be received and delivered at the office of Saul and Joseph E. Cohn, 20 Branford Place, Chamber of Commerce Building, Newark, New Jersey, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon on said day of settlement.

Conveyance of the So. Orange Avenue premises shall be made subject to the following tenancies:

1. National Grocery Company, expiring March 1st, 1927, rental $80.00 per month.

2. Accessory store, expiring June 1st, 1927, rental $75.00 per month.

3. Tailor shop, expiring May 1st, 1930, rental $70.00 per month to May 1st, 1926, thereafter $75.00 per month.

Exhibit P-3.

IN WITNESS WHEREOF the party of the first part has caused these presents to be signed by its duly authorized officers and its corporate seal to be hereunto affixed and the party of the first part have hereunto set their hand and seal the day and year first above written.

VICTORY REALTY COMPANY,
By AARON LEVIN,
Pres.

Attest: JACOB GROSS,
Sec.
(Seal)

PAULINE MILLER,
SIMON MILLER.

Signed, sealed and delivered
in the presence of

JOSEPH E. COHN.

Exhibit P-3.

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

BE IT REMEMBERED, That on this 22nd day of December, in the year of our Lord One Thousand, Nine Hundred and twenty-five before me, the subscribed, an attorney at law of New Jersey, personally appeared Jacob Gross known to me to be the Secretary of the Victory Realty Company, a Corporation, the party of the first part within named, who, being by me duly sworn on his oath, said and made proof to my satisfaction that he is such Secretary, and that he well knows the Common Seal of said Corporation, and that the Seal affixed to the within instrument is such Common Seal and was hereto affixed by Aaron Levin, the President of said Corporation, and that the said instrument was by the said President also signed and delivered as and for the voluntary act and deed of said Corporation in the presence of said Deponent, who thereupon subscribed his name thereto as attesting witness.

JACOB GROSS.

Sworn and subscribed before me at Newark, N. J., the day and year first above mentioned.

JOSEPH E. COHN,
An Attorney at Law of New Jersey.

Exhibit P-4 for Identification.

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

BE IT REMEMBERED, That on this 22nd day of December, in the year of our Lord One Thousand, Nine Hundred and twenty-five before me, an attorney at law of N. J., personally appeared Pauline Miller and Simon Miller, her husband, who, I am satisfied, are the vendees mentioned in the within instrument and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

JOSEPH E. COHN,
An Attorney at Law of N. J.
(Seal)

Exhibit P-4 for Identification.

Newark, N. J., August 5, 1925.

Mr. Aaron Levin,
326 Plane St.,
Newark, N. J.

Dear Sir:

Per our conversation yesterday I will propose your property located at 80 Orchard St., Newark, N. J., on the following terms and conditions:

Lot 54 X 150,
Brick construction,
Capacity of 80 cars.
B. L. Mortgage $35,000.00

Exhibit P-4 for Identification.

Asking Price $75,000.00
Cash $15,000.00
Balance on terms, open to an offer or will trade.

If directly or indirectly I procure a purchaser for the above property on the above terms or any other terms agreed upon I shall receive (5%) Five percent commission.

Yours for success,

M. S. ALEXANDER,
128 Market St.,
Newark, New Jersey.

December 24th, 1925.

Mr. Aaron Levine,
36 Schuyler Avenue,
Newark, New Jersey.

Dear Sir:

You will please take notice, that I have procured as purchasers for your garage, known as the Mosque Garage, #80 Orchard Street, Newark, New Jersey, Mr. and Mrs. Simon Miller, of 39 Grand Avenue, East Orange, New Jersey; that said purchasers were procured in pursuance of an authorization given me by you in which you agreed to pay me the regular broker's commission of three and one-half per cent on the first $20,000.00, and two and one-half per cent on any amount above that sum.

Accordingly, I shall claim said commission from you in the event that the sale of the premises to the said Mr. and Mrs. Simon Miller is consummated.

Very truly yours,

MSA

Opinion of the Supreme Court.

NEW JERSEY SUPREME COURT.

No. 70—October Term, 1929.

Morris S. Alexander,
Plaintiff-Appellant,

vs.

Simon Miller et al.,
Defendants-Appellees.

Argued October 2, 1929; decided May 6, 1930.

Before Chief Justice Gummere, and Justices Kalisch and Campbell.

Appeal from Essex County Circuit Court.

For Appellant, Harry Levin.

For Appellee, Milton M. Unger.

Per Curiam:

Appellant sued to recover the sum of $875 for brokerage commissions for the sale of premises 522-524 South Orange Avenue, Newark. There was no brokerage agreement in writing but the plaintiff-appellant relies upon Section 10 of the Statute of Frauds (1 Comp. Stats. 1453) as a basis for his right to recover. A judgment of non-suit was directed in favor of the defendant, Simon Miller, and at the close of the entire case a verdict was directed in favor of the remaining defendant, Pauline Miller, and a judgment against the plaintiff below entered thereon.

For reversal of such judgments various grounds are urged.

1. Error in rulings excluding evidence.

We find no error in such action.

2 and 3. Error in non-suiting as to Simon Miller and directing a verdict in favor of Pauline Miller.

We are unable, from the proofs, to find any merit in either of these grounds.

The judgments under review will be affirmed, with costs.

Judgment of Affirmance.

NEW JERSEY SUPREME COURT.

On Appeal.

MORRIS S. ALEXANDER,
Plaintiff-Appellant,

vs.

SIMON MILLER et al.,
Defendants-Appellees.

This appeal having been heard by the Court, and the Court having considered the matter, it is, on this day of , 1930, Ordered that the judgment of the Essex County Circuit Court be affirmed and appeal dismissed.

WILLIAM S. GUMMERE,
Chief Justice.

Notice of Appeal.

NEW JERSEY SUPREME COURT.

Action at Law.

MORRIS S. ALEXANDER,

Plaintiff,

vs.

SIMON MILLER et al.,

Defendants.

To: MILTON M. UNGER, ESQ.,
Attorney for Defendants:

PLEASE TAKE NOTICE, that the plaintiff, Morris S. Alexander, hereby appeals to the Court of Errors and Appeals in the Last Resort in all causes, from the decision of the New Jersey Supreme Court, rendered in the above action, on May 6, 1930.

Dated, June 9, 1930.

HARRY LEVIN,
Attorney for Plaintiff.

Grounds of Appeal.

NEW JERSEY SUPREME COURT.

On Appeal.

MORRIS S. ALEXANDER,
Plaintiff-Appellant,

vs.

SIMON MILLER et al.,
Defendants-Appellees.

The plaintiff appeals from the judgment of the New Jersey Supreme Court, on the following grounds:

1. The Supreme Court erred in affirming instead of reversing the judgment entered in the Essex County Circuit Court, and the said affirmance of the judgment by the New Jersey Supreme Court was in error.

HARRY LEVIN,
Attorney for Plaintiff-Appellant.

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New Jersey Court of Errors and Appeals.

On Appeal From

NEW JERSEY SUPREME COURT.

Action at Law on Appeal.

MORRIS ALEXANDER,
Plaintiff-Appellant,

—against—

SIMON MILLER *et al.,*
Defendants-Appellees.

BRIEF FOR APPELLANT.

Facts.

The plaintiff, a real estate broker, seeks to recover commissions from the defendants, basing his claim on the 1918 Brokers' Act, because he has no written authority. (Letters conforming agency, etc.)

The defendants deny that the plaintiff had anything to do with the sale of the property at any time, although they admit that the plaintiff tried to interest them in other properties some time before this transaction.

The purchaser (also the seller, because the deal was an exchange) also denies that the agent had anything to do with the transaction.

The issue therefore became as to which side was

telling the truth, each side categorically denying the testimony of the other.

Plaintiff testified that on August, 1925, he was trying to sell the Mosque Garage, for one Aaron Levine, and submitted it at that time, among others, to a Saul Perlmutter. Offers were exchanged, but they were unacceptable.

It was about that time the plaintiff was trying to obtain for the defendants, at their request, a garage and either sell or exchange their property on South Orange Avenue in Newark, and after proposing a number of other garages, he proposed this Mosque Garage. He testifies that offers were exchanged (he acting as intermediary) between the parties; that he took the defendants down to see the garage and discussed the proposition with them, and the principal difficulty seemed to be over the question of the amount of cash, and they therefore said they would rather take up another deal, the Bohrer deal, so that the plaintiff again started to work upon this other Bohrer deal. Within the next few weeks, the Bohrer deal fell thru, and again Alexander, the plaintiff, began negotiations with the defendants (according to his testimony) for the Mosque Garage, and this time, an appointment and interview were made with the defendant's brother-in-law, who they thought might be willing to invest the necessary cash required to consummate the deal as he was shortly to sell out his business.

The plaintiff testified that at this meeting with the brother-in-law, the defendants and the broker, the brother-in-law refused to go into the deal. At the defendants' suggestion however, the plaintiff continued to try to sell the So. Orange Avenue property for them (it is on this deal for which commissions are sought), so that cash arrange-

ments might be made for the Mosque Garage (see letter Exhibit P-1, "I will make every effort to sell your property located at #542-4-6 So. Orange Ave. Newark, so that you can purchase the Mosque Garage"). And in his continued brokership, he offered the property to and the property was inspected by a Dr. Reiss (S. of C. 40). It was shortly after this that he met Mrs. Miller on the street. He had heard that she had sold some other place and therefore might have further cash to go into the Mosque deal. In his conversation with her, she said she would have nothing further to do with the Mosque Garage because she did not want her husband to go into the garage business again.

It was shortly after this that admittedly, the defendants exchanged their So. Orange Avenue property for the Mosque Garage, at terms approximately the terms related by the plaintiff.

The plaintiff is corroborated by his wife as to a telephone conversation with Mrs. Miller and by one Lucille Hember, who overheard the street conversation with Mrs. Miller, and also by Saul Perlmutter, who testified to the effect that Alexander had proposed to him, the Mosque Garage, and that offers had been exchanged with the owner, thru Alexander.

The defendants, as stated before, categorically deny the plaintiff's allegation and testimony. They admit that he tried to sell their property and purchase for them, by purchase or exchange, a garage, but say that he never at all suggested the Mosque Garage; that they never exchanged offers thru him, and that he never took them down to see the place, or showed them the place.

Mrs. Miller admits that she talked to Alexander on Market Street about the garages, but denies

that she talked to him about the Mosque Garage, although this is what Miss Hember (Alexander's witness) testifies as having heard.

The former owner, of the Mosque Garage (Levine) also testifies for the defendant (S. of C. 57) that the plaintiff never tried to sell the Mosque Garage for him, never exchanged any offers with him, even denying that the broker had ever been in touch with him regarding the same or that he had ever negotiated thru him with Mr. Perlmutter. (Perlmutter testifies for the plaintiff as to negotiations and offers exchanged, see S. of C. 36.)

The exchange of the premises So. Orange Avenue for the Mosque Garage is admitted, the contract being in evidence (Exhibit P-3).

Diagnosing the details of the testimony, it is therefore apparent that admittedly the plaintiff-broker was engaged to sell the premises of the defendants and that the premises were sold, leaving the sole controverted issues to be determined by the trial only as follows:

1. Did the broker *start or have anything to do* with the negotiations with the customer to whom the premises were unquestionably sold?

2. Was he the procuring cause of the sale?

3. Can he under the statute of fraud as amended in 1918 recover his commissions?

4. Are both or only one of the defendants liable?

POINT ONE.

Rulings on Evidence.

(a) The Court erroneously refused to admit in evidence letter written by the plaintiff-appellant to one Aaron Levine (Exhibit P-4).

(b) The Court erroneously overruled and refused to allow the following question to be answered by Simon Miller: "You went out of business shortly after that, didn't you?"

(a) *The Court erroneously refused to admit in evidence letter written by the plaintiff-appellant to one Aaron Levine (Exhibit P-4).*

The letter involved in this point is a letter written by the broker to Aaron Levine, the owner of the Mosque Garage, in which he confirms the listing with him of the Mosque Garage, located as shown in the letter, at #80 Orchard St., Newark, N. J. The letter was excluded at two points of the trial.

First, upon the direct testimony of Morris Alexander while he was recounting what steps he had taken toward effecting the exchange of the properties as finally consummated (S. of C. 26). It was then objected to on the ground that the letter was a self-serving one and was a letter to one other than the defendant (S. of C. 27—15) and the Court apparently excluded the letter upon the grounds urged.

This was clearly error. The issues as set forth before were, first, whether the broker had anything to do with the Mosque Garage, and second, whether he was the procuring cause. On either one of these issues, it was material as it tended

to show that the agent had something to do with the property in question, showing his starting point and then going on with the balance of his performance. The Court seemed to think however, that it was hearsay and a self-serving declaration because a letter sent to one other than the defendant.

But this is clearly not so, because it was testimony showing the actions and conversations of the agent in the consummation of his agency. In other words, it was just as admissible as the testimony of the agent would have been to the effect that he had gone to New York, East Orange or other points, for the purpose of procuring a customer. This would have been testimony of what he did outside of the presence of the defendants, but it would have been still admissible as part of the performance of the agency. So also it was just as admissible as if the agent had testified that when he had gone to these customers, he told them what the terms of the sale were or had made them the offer on behalf of his clients. What he would thus say, would not be hearsay at all, but would be a statement of facts showing in what manner, and the details of how he had performed his duty as agent, and if the conversations were admissible in this way, a letter embodying the conversation is surely admissible in the same way, not to prove the truth of its contents (that would be hearsay) but to prove that the letter was sent in the course of his employment and tending to show performance by the agent.

Peck v. *Foote,* 7 Misc. Rep. 672, seems to be directly in point. The Court said:

"The first point raised by the appellant is

> that the Court should not have received in evidence all conversations had between the broker's agent and the purchaser of the property. An examination of the record shows that this conversation related merely to the circumstances, incident to showing the prospective purchaser the property which he afterwards purchased. It tended to prove performance, and, hence, there was no error in its receipt."

The text books and the cases in other jurisdictions seem also clear upon this subject.

Wigmore on Evidence, Section 1772, Verbal Acts (*Res Gesta*)—Utterances constitute a verbal part of an act.

> "The use of the words is wholly subsidiary and appurtenant to the use of the conduct. The former without the latter have no place in the case, and could only serve as a hearsay assertion in direct violation of the rule."
>
> "Where the utterance of specific words is itself a part of the details of the issue under the substantive law and pleadings, their utterances may be proved without violation of the hearsay rule, because they are not offered to evidence the truth of the matters that may be asserted therein."
>
> Subdivision D. "The performance of a contract may involve an utterance, written or oral, which therefore becomes receivable under the present principle. *Ellis* v. *Thompson,* 1 Appellate Division 606, 37 N. Y. Supplement 468. (Breach of contract to produce a play and 'to play it continu-

ously if there was a reasonable success attending its production'.) (Allowance of form of treatment by the public, such as audience, applause, etc.)"

"The fact of sending a notice is often essential as part of the issue. In such cases, the terms of the notice are receivable under the present principle without regard to the truth of any assertion that may be contained in it."

Jaffe v. *Nagle,* 114 N. Y. Supplement 905;
Thomas v. *Janeki,* 191 N. W. 69.

Conversations held out of the presence of the party against whom they are offered, are competent if they form a part of the *res gesta,* and tend to prove the issues of fact for the jury, as verbal statements accompanying evidential facts are competent evidence.

Benedict v. *Dakin,* 148 Ill. Appeal 301;
Mesmer v. *Henry W. Boettger,* 145 N. Y. Supplement 560, 160 App. Div. 519.

Where a contract of employment was conditioned on the work being satisfactory to customers, evidence was admissible as to statements, by the customers as to the reasons for their dissatisfaction, where that was the ground of plaintiff's discharge.

Bausbach v. *Ruff,* 91 Atl. Rep. 224, 244 Pa. 559, L. R. A. 1915, 785.

Declarations or acts which accompany a fact in controversy and tend to illustrate

or explain it, are admissible as part of the *res gesta.*

Jaffe v. *Nagel,* 114 N. Y. Supplement 905.

"In an action for commissions for procuring a purchaser for property, conversations between the plaintiff and the intended purchaser were admissible as part of the *res gesta* to show what plaintiff did toward procuring a purchaser," citing *Carroll* v. *Pettit,* 67 Hun 418, and *Doran* v. *Bussard,* 18 App. Div. 36.

It is apparent that the case last above cited is directly in point with the case *sub judice.*

My adversary's argument in the Supreme Court on this point seems to concede the point that the letter would have been perfectly proper in evidence, except for the fact that it was sent prior to the time "when negotiations were opened with the Millers", and he attempts to distinguish the case and authorities cited, only upon that ground.

It is apparent that this is erroneous reasoning when we stop to consider that the issue in this case is, *"did the broker have anything to do with the Mosque Garage?"* and that all of the defendants and their witnesses deny emphatically that he *at any time* had anything to do with the Mosque Garage; as shown hereafter, the purchaser, Aaron Levine, denies "everything" and does not limit his denial at all to the point "after negotiations started with Miller".

A parallel case will also clearly bring to view the erroneous reasoning that the evidence is inadmissible because "prior to the negotiations with the purchaser". For example, the agent had been approached by some one desirous of buying a

house. The broker shows this purchaser a large number of different properties and the purchaser is still not satisfied. There then appears at the broker's office an owner of the identical kind of property that the purchaser wants. The owner agrees to pay the broker commissions for procuring a purchaser and the broker takes the customer he had previously attempted to satisfy with other properties, to the house of his present principle, the new owner, and the deal is consummated. Could there be any question that the work done prior to the contract of employment by the owner would be admissible in evidence to show just what the broker had accomplished in procuring the purchaser?

So also if a broker lists in his office letters sent by owners and purchasers asking to buy or sell property, and he then matches up his listings so that a deal is consummated, could a question at all arise as to whether one or the other listing was prior to the other or "prior to the negotiations with the one being held for commissions"?

It is therefore apparent that this so-called defense made by my adversary has no bearing upon the question at all, and that the evidence was not hearsay, but material upon the issue in the cause under the questions quoted above, and therefore should have been allowed, and not having been allowed, a new trial must of course be allowed.

The letter is next offered in evidence and rejected on the rebuttal testimony of the plaintiff (S. of C. 76).

Aaron Levine had testified as before set forth that the broker had never *in any wise* been in the negotiations between the parties. He had denied that he heard anything at all from the broker regarding sale and denied that he had ever received any letters from the broker. It was there-

fore directly competent rebuttal testimony upon one of the material issues of the case, to have Alexander testify that he had sent the letter.

It was as if Levine, the purchaser, had stated, "I never saw the man before", and had denied that he had conversed with him shortly before the sale, and there was then offered in evidence the testimony of an eye-witness who had seen the parties together.

Of course, the contents of the letter showing that Alexander was attempting to procure a purchaser for the Mosque Garage, was directly on the issue of the case, and it seems to follow without the necessity for argument that the letter should have been admitted in evidence.

The case of *Queens* v. *Jennings,* 93 Law 353, also seems to be directly in point. There an agent's services were mainly composed of letters and telegrams that were allowed in evidence to show what work he did do.

(b) *The Court erroneously overruled and refused to allow the following question to be answered by Simon Miller:*

"He went out of business shortly after that, didn't he?"

This question was asked of Simon Miller upon cross examination. It had been brought out previously by the plaintiff on his direct case that the brother-in-law had been called by the defendants to a conference for them to ask him to join in the purchase of the garage, so that they could in this way, raise the necessary cash. The defendants deny this throughout the case, and the witness, one of the defendants, had denied upon cross examination that the plaintiff-broker had

ever in any wise been interested in the negotiations of the sale of the Mosque Garage, and that the plaintiff's testimony as to the brother-in-law having been called by the defendants to a conference, was absolutely untrue.

The question asked was therefore part of the cross examination to show the fact leading up to the arranging of the conference. The fact that the brother-in-law had gone out of business shortly before that would make very probable the situation as recounted by the plaintiff. (If he had shortly before gone out of business, he was in a position to join in the garage business.)

It was therefore proper cross examination upon a material issue in the case and should have been allowed.

POINT TWO.

The Court erroneously granted a non-suit as to the defendant, Simon Miller.

The Court in granting this motion, said (S. of C. 42): "I will grant the motion as to Mr. Miller because the plaintiff says that all of the negotiations were with Mrs. Miller and that she was the one he talked with. Mr. Miller was there some of the times, but the plaintiff has proven in his case that Mrs. Miller was the owner".

Of course, it is fundamental that the motion for non-suit should not have been granted if there was testimony in the case at all, which viewed in its best light for the plaintiff, would make a jury question.

The testimony of the plaintiff was that both Mr. and Mrs. Miller engaged him to sell their property:

S. of C. 14, line 14: "I took her up with Mr. Miller".

S. of C. 14, line 32: "Most of the conversation was with Mrs. Miller, but off and on we would speak to Mr. Miller as well. With Mr. Miller, I had, as a rule, to make a definite appointment to see the property."

S. of C. 14, line 36: "Q. Did you meet them mostly together or separately (referring to the Millers)? A. Mostly separate, but I had to see Mr. Miller and then we were together.

S. of C. 19, line 34: "Q. Who was present? A. Mr. and Mrs. Miller and Mr. Ganzel."

S. of C. 20, line 16: "I went back to the Millers and told them that he wanted too much on a cash basis and they wouldn't go thru with the deal."

S. of C. 21, line 21: "I mailed Mr. and Mrs. Miller a letter that I accepted the agency."

S. of C. 22, line 15: "About three or four days after I went up purposely to propose another garage. Q. Did you have a conversation with either of the Millers? A. Yes. Q. Which one did you talk to? A. I spoke to both, and Mrs. Miller asked me what was the idea of the letter, and I told her, etc."

S. of C. 23, line 11: "Did you tell Mr. and Mrs. Miller about this prospective purchaser? A. Yes. Q. Whom did you tell about it? A. Mr. and Mrs. Miller."

There was also placed in evidence during the testimony of the plaintiff, two letters, Exhibits P-1 and P-2, the first of which was dated October 7, 1925. The letters are addressed to both Mr. and Mrs. Miller and recites the contract to pay commissions.

This taken in conjunction with the testimony before stated, clearly made a question for the jury and a non-suit should not have been granted.

My adversary in his argument upon this point, quotes the case of *Hand* v. *Howell*, 61 N. J. L. 142, and refers to the statement therein made by Justice Collins, that the recipient of the letter is not called upon to reply. An examination of the case, however, discloses that there, the letter sent, was a letter of notice of claim for rent to the Sheriff, and the Court said:

> "Failure to reply to a letter not sent *in the course of a correspondence*, is not to be taken as an admission of the truth of its contents."

Clearly, the Court's decision shows that a letter sent *in the course* of an agency and negotiations such as here, without a repudiation and in a continued employment of the agent after the letter had been received as in this case, would surely raise the question to be submitted to the jury. In other words, the letter in this case, because of the conduct of the parties after its receipt, is on the same plane as oral declarations received in silence and a continued employment after that, and this is pointed out by Justice Collins in his decision.

And then, there was one further bit of testimony which clearly made the question a question for the jury, and that is, the testimony of Saul Perlmutter (S. of C. 37) in which he states while testifying for the plaintiff, "*Mr.* Miller asked me to come out and look at a couple of places he had in view of purchasing".

After the motion for non-suit had been granted, the defendants took the stand on the remaining case against Mrs. Miller, and it is startling to note that the defendants, both Mr. and Mrs. Miller, in their testimony, admit that the employ-

ment of Alexander was by both of them, that they apparently acting indiscriminately as to their property. *Mr. Miller* (S. of C. 44, l. 12), "he (Levine) wanted $75,000 for it, and *we* forgot about it." "Q. Did *you* buy a garage on Hayes Street? A. I leased it."

S. of C. 44, line 39: "Twice I was there myself in his house (Levine's house) and in a short time *we* made an appointment to meet downtown and in the end of September, I think about the 22nd, *we* left a deposit."

(This is the very Mosque garage deal in which the broker says the authority was of both Mr. and Mrs. Miller.)

S. of C. 47, line 18: "When I got through, I got through for good and I went and leased the Hayes Street garage, but Mr. Alexander was over to my place and said he wanted $5,000 less and I told him *we* had lost confidence in him etc."

Mrs. Miller's testimony is to the same effect.

S. of C. 50, line 10: "*We* were just closing the deal of the Eagle Garage on Hayes St. etc."

S. of C. 50, line 32: "Did you ever agree to pay Mr. Alexander any commissions for anything? A. On the Bohrer transaction, *we* understood he would have to get a commission."

S. of C. 52, line 32: "I told him we were quite fortunate that we didn't have the Bohrer garage because we couldn't meet obligations and Mr. Miller isn't so much in the garage business and *he doesn't really care to get one.*"

So also on the plaintiff's main case, his testimony was that in his conversation with Mrs. Miller, she said, S. of C. 24, line 18, "*We* are not going to buy any garages; *we* are sick and tired. You have to slave day and night and we don't like that slaving business. I am satisfied for him

to go back to his old line. He makes a dollar easily. He goes away once in a while, but he can make a dollar easily."

And so also, throughout the plaintiff's testimony, he testifies conversations were had with *both* Mr. and Mrs. Miller, in the presence of each other in regard to the workings of the garage primarily by Mr. Miller.

There was sufficient evidence to be spelled out with the conversations, actions, circumstances and letters, to go to the jury on the question of whether Mr. Miller and Mrs. Miller together hired the agent and as pointed out before, this in truth is actually the fact, as disclosed by the defendants.

The Court apparently merely non-suited because of the testimony given by Mrs. Miller when she was put on the stand by the plaintiff, that she alone was the owner of title of the So. Orange Avenue property, the Court's theory being that unless the party was the owner, there was no liability upon that party to pay commissions. This is obviously contrary to the well-settled law in this State.

Sadler v. *Young,* 75 Atl. 840, 78 Law 594;
Bloom v. *Kumerle Corp.,* 141 Atl. 766;
Jaffe v. *Cohen,* 141 Atl. 14;
Cruse v. *Ferber,* 91 Law 470;
Taub v. *Shambanier,* 95 Law 349;
Kislak, Inc., v. *Jude,* 102 Law 506.

The last case cited, decided by Justice Parker, points out, that where the person who contracted a debt or liability for commissions is not the owner, the Statute of Frauds does not apply, and

there need be neither a written agreement for the commissions, nor the letters in accordance with the statute.

POINT THREE.

The Court erroneously directed a verdict in favor of the defendants.

At the end of the case, defendants' counsel moved for a direction of verdict on the ground that the authorization was not within the statute, not having been personally served or registered, etc. The Court then directed a verdict for the defendant as follows:

S. of C. 77, line 31: "By the Court: The plaintiff testified that the defendants did admit it; that is, admitted the receipt of Exhibit P-1, and that furnishes a jury question. The plaintiff testified that the defendant said to him, 'why did you send me that letter?' and he explained to her why he did. As to the other grounds, there are several modifications of the statute, and in order to recover on all agreements you have to have all those things present that the statute requires, and *one of them is that they must actually effect the sale pursuant to such agreement.* That was not done in this case. I will grant the motion for the direction of a verdict."

In discussing this point, at the risk of being tiresome, let me repeat that diagnosing the details of the testimony, it is aparent that the plaintiff-broker was engaged to sell (whether also to exchange will be discussed later) the premises of

the defendants and that the premises were sold leaving the sole controverted issues as follows:

1. Did the broker *start or having anything* to do with the negotiations with the customer to whom the premises were unquestionably sold.

2. Was he the procuring cause of the sale?

3. Can he under the Statute of Frauds as amended in 1918 recover his commissions?

The Court properly determined as can be seen from its opinion, that the question was for the jury as to whether or not the agent had been hired, together with the question as to whether or not the plaintiff had given proper notice under the statute, and there being testimony that receipt of the first letter had been admitted by the defendants, he properly refused to direct upon that ground (*Alexander* v. *Rexoon,* 6 Adv. Rep. 195; 139 Atl. 796).

Clearly therefore the Court directed the above verdict in accordance with what it thought was the law as laid down in the case of *Noonan* v. *Henry,* 97 Law 447, *Barron* v. *Winowsky,* 102 Law 46.

Starting with fundamentals, it is well-established law in this State "that a broker earns his commissions when he produces a customer, ready, able and willing to buy, and that unless his commission agreement expressly provides for that contingency, it is of no concern to him whether the sale actually closes or not, the sale as far as the broker is concerned in all of these cases, being considered the bringing together of the parties, the acceptance of the purchaser by the

vendor, by the entering into of the contract and *not* the ultimate consummation of the deal by deed, etc."

Hinds v. *Henry,* 36 Law 328 (the first leading case on this subject); *Resky* v. *Myers,* 98 Law 168 (perhaps the last leading case upon the subject).

The 1918 amendment of the Statute of Fraud allowed an agent to recover commissions even though he did not have written authorization, providing he gave notice, etc., under the statute. The provisions of that statute so far as they are pertinent to the issue now before the Court are as follows:

> "* * * provided, however, that any broker or real estate agent who may here-after be employed by any owner of real estate by oral agreement, to sell or exchange any real estate belonging to such owner, and who shall actually effect the sale or exchange of such real estate pursuant to such oral agreement, before the same shall have been terminated by such owner, in writing, as hereinafter provided, may recover from such owner the amount of commissions upon such sale or exchange, provided such broker or agent shall, within five days after the making of such oral agreement, serve upon such owner a notice in writing, setting the terms of such agreement forth, and stating the rate or amount of such commission to be paid thereunder, and provided said owner shall not have repudiated or terminated such agreement prior to an actual sale or exchange of said real estate; said owner

shall have the right, at any time after receiving such notice, to repudiate or terminate such oral agreement by serving upon such broker or agent a notice in writing to that effect, and upon the repudiation or termination of such agreement by, the serving of such notices upon such agent or broker, prior to the actual sale or exchange of said property by said agent, such agreement shall be null and void and no recovery of any commission shall be had thereunder; provided, however, that if any broker or agent shall have entered into negotiations with a prospective customer, in good faith, under such agreement, for the sale or exchange of such property, and such negotiations shall be pending at the time of the repudiation or termination of such agreement by such owner, and such sale or exchange is subsequently consummated between such owner and such customer, such agent or broker shall be entitled to recover the commissions on such sale or exchange, notwithstanding the repudiation or termination of such agreement. The notice provided for herein shall be served either personally or by forwarding the same to the person to be served, by registered mail, to the last known post office address of such person."

The cases of *Noonan* v. *Henry,* 97 Law 447, and *Barron* v. *Wisnowsky,* 102 Law 46, for the purpose of giving effect to all of the provisions of this statute, point out that under this statute, the broker must go further than merely procuring the customer, but the deal must actually be

closed and consummated. In *Noonan* v. *Henry*, 97 Law 447, Justice Katzenbach, said:

> "This section, as amended, is not free from ambiguity. It is, however, a cardinal rule of construction that every portion of a statute must be given effect, if possible. The difficulty presented is as to what effect shall be given the words 'provided said owner shall not have repudiated or terminated such agreement prior to the actual sale or exchange of said real estate.' The appellant contends that where an oral agreement for commission has been made it may be made effectual by service by the broker of the notice in writing provided by the statute, and that such notice can only be repudiated by a notice in writing to that effect given by the owner to the agent at any time before the actual sale by the agent. This construction of the statute applied to the present case would result in holding that, as the owner gave no written notice of repudiation, the broker is entitled to recover his commission. Such a construction gives no effect to the words, 'and provided said owner shall not have repudiated such agreement prior to the actual sale or exchange of said real estate'. In this clause it is difficult from the context to determine whether the words 'such agreement' refer to the agreement for commission or for the sale or exchange of the land, but in this case it makes no difference because Henry, the landowner, repudiated both the oral agreement to sell made by Noonan with Pank as well as the oral agreement made with Noonan to pay him com-

missions for effecting the sale. It seems to us that this clause was inserted in this section of the statute when amended in 1918 to provide for such a contingency as arose in the present case. Henry had authorized Noonan orally to sell his property. No agreement binding upon Henry had been executed with Pank the purchaser. No agreement binding in law had been made by Henry with Noonan for his commissions. Before any notice relating to his commissions was served by Noonan upon Henry, Henry repudiates and terminates the negotiation for the sale of his property, and his oral agreement with Noonan for commissions. This, we believe, Henry had the legal right to do, and that this right was reserved to him under the clause, 'and provided said owner shall not have repudiated or terminated such agreement prior to the actual sale or exchange of said real estate'. To hold otherwise would be to ignore this portion of the statute."

While in *Baron* v. *Wisnowski,* 102 N. J. L. 46, the Court also stated:

"* * * We consider that by this repeated use of the word 'actual' as applied to 'sale' the legislature intended to limit the right of recovery on an oral agreement to cases where the vendor either conveyed to the broker's client, or at most to cases in which a valid and binding contract of sale was entered into between vendor and the purchaser brought in by the broker. This construction, while not specifically enunciated

> in *Noonan* v. *Henry,* 97 Law 447, was necessary to that decision, because in that case the broker, if he had been employed under written authority, would have earned his commission. Our view is fortified, we think by the second proviso, which, as we have said, is in effect, an exception to the first, and protects the broker even after repudiation or termination, in a case where negotiations are pending between vendor and his client, and the 'sale or exchange is subsequently consummated between such owner and such customer.'
>
> In the present case the broker did not become entitled to commission under either of the two provisos as we understand their meaning. He did not 'actually effect a sale' before repudiation, which, in this case, was a sale to another; nor did the owner after repudiation, sell to his client."

Obviously the only difference between the original statute and the 1918 amendment is the one clearly pointed out by the foregoing case, and that is, in the first, the commissions were earned when the broker produced a satisfactory customer, and in the second instance (the amendment) that the broker only earned his commissions when the deal actually was consummated.

And in this case, as it has been repeatedly pointed out before, as there was an actual consummation of the deal between the vendor and purchaser, the difference in the statute is for the purpose of the case under consideration, entirely immaterial. Under both statutes, the purchaser would have to be the procuring cause of the sale.

The point that the Court therefore made in directing a verdict for the defendant must there-

fore have been (and actually was by reason of the argument between the Court and counsel at the trial—not set forth in the state of case) that as the amended statute requires under the interpretation given by the preceding cases "an actual effecting of the sale", that it meant that if the broker was not present at the sale, but the owner closed, that this would defeat the broker's commissions under the amended act, regardless of the fact that the broker was the efficient cause of the sale.

This is of course stretching the *Noonan* v. *Henry and Baron* v. *Wisnowksi* cases to a preposterous and apparently illogical conclusion. If the broker were the procuring cause of the sale, the owner of course by accepting the broker's labor, cannot defeat the broker's compensation, and the act was never intended to bring this result.

Justice Parker himself (and Justice Parker wrote the decision in the *Baron* v. *Wisnowski* case) points this out in the case of *Rooney* v. *Grinner,* 3 Mis. 996, 130 Atl. 456. In that case, the point on appeal was "there is no evidence that the plaintiff 'actually effected the sale'," the very point in case. The Court said:

> "The evidence is that plaintiff produced and introduced a prospective purchaser named Doryea, who liked the house, but would not take it at the asking price of $12,000, but entered into negotiations with the defendants and ultimately became the purchaser at $10,500. This seems to bring the case directly within the manifest intent of the Statute of 1918, that the broker who served notice as therein contemplated, shall be entitled to commissions, when he had 'actually effected the sale', before termi-

> nation of his employment by the owner, and even in case of such termination, and the sale to the client introduced by the broker, and with whom negotiations are pending subsequently consummated between such owner and such customer."

As stated here, this seems to be the clear wording of the act itself (if we must go into the 1918 act at all), which states:

> "* * * And such sale or exchange is subsequently consummated between such owner and such customer, the said agent or broker shall be entitled to recover his commissions on such sale or exchange, notwithstanding the reputation or termination of such agreement."

So also in the very case of *Baron* v. *Wisnowski,* where the Court said:

> "Our view is fortified, we think, by the second proviso, which, as we have said, is in effect, an exception to the first, and protects the broker even after repudiation or termination, in a case where negotiations are pending between the vendor and his client, and the 'sale or exchange is subsequently consummated between such owner and such customer'.
>
> In the present case, the broker did not become entitled to commissions under either of the two provisos as we understand their meaning. He did not 'actually effect the sale', before repudiation, which, in this case, *was a sale to another; nor did the owner after repudiation sell to his client.*
>
> It is suggested that there was 'actual

> sale', to plaintiff's client because the latter took over the contract made by defendant with the other party, though he did not carry it out and abandoned it. But the owner was not responsible for anything that this other purchaser may have done by way of selling or assigning his contract. *Resky* v. *Myers, supra.*"

Plainly the quotation above shows that if the owner himself, not through another broker, subsequently or ultimately closes with the purchaser produced by the broker, that the broker is entitled to his commission, if the efficient cause of the sale.

The authorities are also well established on this point. In *Hanscon* v. *Blanchard,* 3 A. L. R. 544, the Court said:

> "A real estate broker is entitled to his commissions if the owner makes a sale to a customer introduced by him, although on different terms specified in his employment contract."

In 43 A. L. R., page 1103, note upon broker's right to commission where owner sells property to customer of broker at less than stipulated price.

> "The general proposition is well established that if properties placed in the hands of brokers for sale at a certain price, and a sale is brought about through the broker as a procuring cause, he is entitled to commissions on the sale even though the final negotiations are conducted through the owner, who in order to make a sale accepts a price less than that stipulated to the

> broker. The law will not allow the owner of property sold to reap the fruits of the broker's labor and then deny him his just reward. Citing as the New Jersey authorities, *Weeks* v. *Theo. Smith & Co.,* 79 Law 388, 75 Atl. 773."

In *Weeks* v. *Theo. Smith & Co.,* 79 Law 388, 75 Atl. 773, the Court stated:

> "An agent employed to sell real estate, who first brings it to the notice of the person, who ultimately becomes its purchaser, is entitled to his commissions on its sale, nor can the owner avoid the liability by the selling of the property when a reduction is made through another broker.
>
> Where the principal sells at a less sum than that for which the broker was authorized to sell, the latter is entitled to a commission on the amount realized."

The only question which therefore remains is the question as to whether or not the broker in this case was the efficient cause of the sale, and this question resolves itself into a jury question regardless of who, subsequently or ultimately, actually and physically closed the deal. As stated in *Lepore* v. *Kooligan,* 6 Misc. 1041:

> "From the conflicting evidence before me, the plaintiff and his witnesses, claiming that he had produced the buyer, and the defendant claiming that he had himself brought the property to the attention of the buyer whom he had known for many years, I drew the conclusion of fact that the plaintiff had not actually effected the sale of the property, etc." (Here the Judge sat apparently as jury.)

See also *Clark* v. *Griffin,* 113 Atl. 234; *Queens* v. *Jennings,* 93 Law 353; *Hudson Real Estate* v. *Bower,* 74 Law 90; *Longstreth* v. *Korp,* 64 Law 112, in which the Court said:

> "It is clear that the question, which was one entirely of fact, whether the plaintiff negotiated the sale or exchange was properly submitted to the jury. The court could not, upon the evidence, direct a verdict for the defendant. Besides the evidence of the plaintiff and the evidence of the purchaser, other corroborating facts and circumstances exist from which the jury could very reasonably conclude that the plaintiff was the sole cause of the sale or exchange, and, under all the facts of the case, it was for the jury to determine whether the plaintiff had established, by a preponderance of evidence, that he made the sale and exchange. The jury was told by the Court that this must be established by a preponderance of proof, and the jury so found, and there appears no reason why this verdict should be disturbed on this ground."

My adversary, however, attempts to make much of the words "pursuant to the agreement", and attempts to justify the direction of the verdict by the arguments that the sale was not effected pursuant to the agreement, because, 1, the owner claims to have terminated the agreement to pay commissions, and 2, the agreement to pay commissions was for a sale and not for an exchange.

On the first point, it is first of all, obvious that if the owner had repudiated the agreement and then under the statute, carried out the deal,

that the broker would still be entitled to his commissions.

The broker's testimony is that he had worked a long time upon the Mosque deal. In October, he wrote a letter which shows in its contents, that the Mosque deal was not abandoned (P-1), and while the Mosque garage deal seemed to have been put aside for the time being, the broker sent a customer, Dr. Reiss (S. of C. 40), in regard to the purchase of the So. Orange Ave. property. (The commission agreement is for the sale of the So. Orange Ave. property and the suit is brought for commissions upon that sale.)

Subsequently, on December 18, 1925, he met Mrs. Miller on the street, and talked to her about the sale of her property and about the Mosque garage. On December 22, 1925, the contract for the Mosque garage was signed by the parties.

Under this testimony there can be no question that there was no "abandonment" by the agent or owner of the agreement to pay commissions or of the Mosque deal when we bring the employment of the agent up to a few days before the sale, and when an inspection of the contract discloses that the terms of the sale were the terms worked on by the agent. The agent testified that in his negotiations (17 S. of C. 20) the Millers offered $60,000 for the Mosque garage if they could get $25,000 for the So. Orange Ave. property. The deal as closed was $65,000 for the Mosque garage and $25,000 for their property (Exhibit P. 3), showing conclusively that the deal was closed upon the foundation of the broker's work. In any event, there being evidence by the broker which tended to show that the deal had not been abandoned and that it was finally closed while he was still endeavoring to bring the parties together, the question became a jury question

and there should not have been a direction of a verdict.

The cases holding the owners liable to the broker for a transaction efficiently procured by the broker and then ultimately closed by the owner, have been cited on the foregoing page of this brief. Other cases in point are:

State v. *Wescot,* 66 Law 551, 49 Atl. Rep. 426:

> "The facts returned in this case which are undisputed show that the plaintiff first brought the purchaser to the attention of the defendant, and carried from the purchaser to the defendant, two written propositions, both of which were declined, and that then, soon after, the plaintiff and defendant coming together, a sale was consummated on substantially the same terms as the proposition carried thru the agent. There is no statement in the opinion of the trial judge, or in the facts returned by him, wherein it is alleged or claimed that any other person or agent ever spoke to the defendant of the purchaser, or in any way introduced her to the defendant."

The Court then found that the agent was therefore entitled to his commissions.

Hudson Real Estate Co. v. *Bauer,* 74 Law 90:

> "Where the broker employed to sell real property brings about an introduction of a buyer, and a negotiation resulting in the purchase ensues on that foundation, the owner and buyer cannot by any arrange-

> ment disappoint the claim of the agent for remuneration. And 'in this class of cases' as was stated by Chief Justice Beasley, in *Vreeland* v. *Vetterlin,* 33 Law 237: '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.' "

On the second point raised by my adversary, that the sale was not "in pursuance to an agreement", because the deal as closed was an exchange and not a sale, the law in this State is too well settled to leave any room for argument.

In *Steinberg* v. *Mindlin,* 114 Atl. 451, the Court of Errors and Appeals, said, through Justice Trenchard:

> "In the absence of a special agreement, a real estate broker acting by virtue of a written agreement, earns his commissions when he secures a buyer on the seller's terms, either as originally propounded *or as stated by agreement between the seller and buyer. Freeman* v. *Wagenen,* 90 Law 358, 101 Atl. Rep. 55; *Homan* v. *Griffin,* 110 Atl. 825; *Clark* v. *Griffin,* 113 Atl. 234."

See also 3 A. L. R. 544:

> "A real estate broker is entitled to his commissions if the owner makes a sale to a customer introduced by him, altho on different terms specified in his employment contract."

See also 4 Ruling Case Law, page 313, Sec. 52:

"Where a broker instead of procuring a customer who is ready, able and willing to accept the terms his principal authorized him to offer at the time of his employment, procures one who makes a counter offer more or less at variance with that of his employer, the latter is at perfect liberty, either to accept the proposed party upon the altered terms, or to decline to do so. If he accepts, he is legally obligated to compensate the broker for the services rendered.

In *Weeks* v. *Theodore Smith & Co.*, 79 Law 388, 75 Atl. 773, the Court charged:

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

Where the principal sells at a less sum than that for which the broker was authorized to sell, the latter is entitled to a commission on the amount realized."

Crowley v. *Meyers*, 69 Law 245, 55 Atl. 305: Court of Errors & Appeals, by Chancellor Magie.

(This case is almost directly in point with the case under discussion.)

"The contract of a real estate agent is a contract of the owner to procure a pur-

chaser for the property upon the terms fixed by the owner. If he procures a satisfactory purchaser upon such terms, he earns his commissions. *Hedden* v. *Shephard,* 29 Law 324; *Vreeland* v. *Vetterlein,* 33 Law 247; *Hinds* v. *Henry,* 36 Law 328; *Runyon* v. *Wilkinson,* 57 Law 420, 31 Atl. 39. When a consideration is fixed by the owner and authority to the agent at a certain price in dollars, the owner may reject a purchaser procured by the agent who offers to pay the price, not in dollars, but in other property. But if the owner, having the option to reject such an offer, accepts it, and takes other property as equivalent for so much of the selling price fixed by his authority, I have no doubt that the agent becomes thereby entitled to his commissions."

It is obvious, therefore, that as the difference in the statute is of no importance in this case, and that as the question of "in pursuance to such agreement", is also of no importance in this case, that the only issue remaining was the issue as to whether the plaintiff had *in any way* been in the negotiations between the parties as to the terms of the sale.

On this question alone and the question as to whether the broker was the procuring cause of the sale, the testimony unquestionably raised a question of fact to be decided by the jury. The testimony was full upon both sides, although contradictory of each other. The plaintiff recounts the procuring of the purchaser by him, the exchange of the offers, the various intermediate deals, the letters sent, the talks and conferences

with the purchaser and with the defendants at their home and on the street (which is corroborated by his witnesses) and the closing of the transaction approximately on the foundation of his terms, only four days after his last conversation. The defendants and the purchaser deny any of these transactions and deny having discussed the matter at any time with the broker as to the sale of the Mosque Garage.

Under the case and the facts, the question is of course one to be left to the jury, and the Court committed error in taking it from the jury's consideration and directing a verdict.

CONCLUSION.

It is respectfully submitted that for the reasons above stated, the judgment rendered should be reversed both as to Simon and Pauline Miller, and the case remitted for a new trial.

HARRY LEVIN,
Attorney for and of Counsel with Plaintiff-Appellant.

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New Jersey Court of Errors and Appeals

MORRIS S. ALEXANDER, *Plaintiff-Appellant,* *vs.* SIMON MILLER, *et al.,* *Defendants-Respondents.*	*Action at Law.* *On Appeal from Supreme Court.* *Sat Below: Gummere, C. J. and Kalisch and Campbell, J. J.*

BRIEF OF DEFENDANTS-RESPONDENTS.

History of the Cause.

This appeal presents for review a judgment of the Essex County Circuit Court. The action was brought agains two defendants. The plaintiff-appellant was non-suited by the Court as to the defendant-respondent Simon Miller, and a verdict was directed by the Court in favor of the defendant-respondent Pauline Miller. Judgments were entered accordingly, and affirmed in the Supreme Court, upon appeal.

Statement of Facts.

The plaintiff below sued for commissions alleged to have been earned as a real estate broker in effecting a sale of property owned by the defendant Pauline Miller. The plaintiff's authorization was not in writing. He rested his case upon a written notice alleged to have been mailed to the defendants in order to show compliance with Section 10 of the Statute of Frauds.

The provisions of that Statute, so far as they are pertinent to the issue now before the Court are as follows:

> "* * * provided, however, that any broker or real estate agent who may hereafter be employed by any owner of real estate by oral agreemnt, to sell or exchange any real estate belonging to such owner, and who shall actually effect the sale or exchange of such real estate pursuant to such oral agreement, before the same shall have been terminated by such owner, in writing, as hereinafter provided, may recover from such owner the amount of commission upon such sale or exchange, provided such broker or agent shall, within five days after the making of such oral agreement, serve upon such owner a notice in writing, setting the terms of such agreement forth, and stating the rate or amount of commission to be paid thereunder, and provided said owner shall not have repudiated or terminated such agreement prior to an actual sale or exchange of said real estate; said owner shall have the right, at any time after receiving such notice, to repudiate or terminate such oral agreement by serving upon such broker or agent a notice, in writing, to that effect, and upon the repudiation or termination of such agreement by, the serving of such notices upon such agent or broker, prior to the actual sale or exchange of said property by said agent, such agreement shall be null and void and no recovery of any commission shall be had thereunder; provided, however, that if any broker or agent shall have entered into negotiations with a prospective customer, in good faith, under such agreement, for the sale or exchange of such property, and such negotiations shall be pending at the time of the repudiation or termination of such agreement by such owner, and such sale or exchange is subsequently consummated between such owner and such customer, such agent or broker shall be entitled to recover his com-

missions on such sale or exchange, notwithstanding the repudiation or termination of such agreement. The notice provided for herein shall be served either personally or by forwarding the same to the person to be served, by registered mail, to the last known post office address of such person." (1. C. S. 1453.)

The propriety of the judgment rendered below is attacked upon the grounds that the Court committed error

(A) In directing a verdict,

(B) In granting a non-suit,

(C) In excluding certain testimony.

The respondent therefore, will make three points on this brief:

1. **The Court below properly directed a verdict in favor of the defendant Pauline Miller.**
2. **The Court below properly non-suited the plaintiff as to the defendant Simon Miller.**
3. **The Court below committed no error in the admission or rejection of evidence.**

POINT ONE.

The Court below properly directed a verdict in favor of the defendant Pauline Miller.

The trial court directed a verdict, as is manifested by the observations of the trial judge (page 77 of the State of the Case), upon the ground that the evidence clearly indicated that the plaintiff below did not actually effect the sale of the property in question. Although the property in question was sold the Court found that the evidence and all proper inferences which could be drawn from it disclosed, without contra-

diction, that the broker did not actually effect the sale.

By judicial deliverance it has been established that in cases coming under the first proviso in Section 10 of the Statute of Frauds—and this is such a case—the broker, before he is entitled to commissions, must be the instrumentality effecting a conveyance or a binding contract of sale.

Thus, in *Baron* v. *Wisnowski,* 102 N. J. L. 46, a decision of the Supreme Court, affirmed in this court in 103 N. J. L. 171, it appeared that a broker who had no previous written authority, sued for commissions. He relied upon a notice served, as he claimed, in conformity with the statute. The Court below refused to grant a non-suit, or to direct a verdict. The Supreme Court found this to be error, and in the course of its opinion said:

> "The first provision is that any broker (a) employed by oral agreement to sell or exchange (b) and who shall *actually effect* the sale or exchange pursuant to such agreement (c) as later provided, (d) and shall have served on the owner within five days after the oral agreement a written notice stating its terms and the rate of commission—shall be entitled to recover if the owner has not repudiated or terminated the agreement prior to the *actual sale or exchange* of the real estate. Then follow provisions about repudiation or termination by the owner, not material here.
>
> The second provision is that if, pursuant to an oral agreement, the broker has, in good faith, entered into negotiations with a prospective purchaser, and such negotiations shall be pending at the time of repudiation or termination by the owner, and such sale or exchange is 'subsequently *consummated* between such owner *and such customer'* the broker shall be entitled to recover notwith-

> standing the repudiation of the agreement. This is, in effect, an exception to the 'terminating' right of the owner established by No. 3."

The lower court refused to grant a non-suit or a direction of a verdict, notwithstanding the fact that the evidence indicated the owner sold the property in question to a purchaser other than the one the broker desired to introduce to him. The observations of the Court are pertinent to the point here mooted.

In *Noonan* v. *Henry,* 97 N. J. L. 447, it appeared that a broker who had an oral authority merely, secured a purchaser and received a deposit which he turned over to the owner, and was later informed by the owner that the latter did not desire to sell. The deposit was returned and thereafter the broker served a notice on the owner under the provisions of Section 10 supra.

The trial court held that the owner had a right to repudiate the oral contract in the manner in which he did make such repudiation. In affirming the judgment for the defendant, the Supreme Court, by Justice Katzenbach, said:

> "This section, as amended, is not free from ambiguity. It is, however, a cardinal rule of construction that every portion of a statute must be given effect, if possible. The difficulty presented is as to what effect shall be given the words, 'provided said owner shall not have repudiated or terminated such agreement prior to the actual sale or exchange of said real estate.' The appellant contends that where an oral agreement for commission has been made it may be made effectual by service by the broker of the notice in writing provided by the statute, and that such notice can only be repudiated by a notice in writing to that effect given by the owner to the agent at any time before the

actual sale by the agent. This construction of the statute applied to the present case would result in holding that, as the owner gave no written notice of repudiation, the broker is entitled to recover his commission. Such a construction gives no effect to the words, 'and provided said owner shall not have repudiated such agreement prior to the actual sale or exchange of said real estate.' In this clause it is difficult from the context to determine whether the words 'such agreement refer to the agreement for commission or for the sale or exchange of the land, but in this case it makes no difference because Henry, the landowner, repudiated both the oral agreement to sell made by Noonan with Pank as well as the oral agreement made with Noonan to pay him commissions for effecting the sale. It seems to us that this clause was inserted in this section of the statute when amended in 1918 to provide for such a contingency as arose in the present case. Henry had authorized Noonan orally to sell his property. No agreement binding upon Henry had been executed with Pank the purchaser. No agreement binding in law had been made by Henry with Noonan for his commission. Before any notice relating to his commissions was served by Noonan upon Henry, Henry repudiates and terminates the negotiation for the sale of his property, and his oral agreement with Noonan for commissions. This, we believe, Henry had the legal right to do, and that this right was reserved to him under the clause, 'and provided said owner shall not have repudiated or terminated such agreement prior to the actual sale or exchange of said real estate.' To hold otherwise would be to ignore this portion of the statute.''

In *Baron* v. *Wisnowski, supra,* the Court said:

''* * * We consider that by this repeated use of the word 'actual' as applied to 'sale' the legislature intended to limit the right of recovery on an oral contract to cases

where the vendor either conveyed to the broker's client, or at most to cases in which a valid and binding contract of sale was entered into between vendor and the purchaser brought in by the broker. This construction, while not specifically enunciated in Noonan *v.* Henry, 97 N. J. L. 447, was necessary to that decision, because in that case the broker, if he had been employed under written authority, would have earned his commission. Our view is fortified, we think, by the second proviso, which, as we have said, is in effect, an exception to the first, and protects the broker even after repudiation or termination, in a case where negotiations are pending between vendor and his client, and the 'sale or exchange is subsequently consummated between such owner and such customer.'

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

The principle stated above is directly applicable to the present issue. No negotiations were pending for a long time in the past respecting the Mosque Garage when whatever authority the appellant had was revoked. They had been brought to an end, according to the statement of the latter.

In *Sattler* v. *Gott,* 102 N. J. L. 515, a decision of the Supreme Court, Justice Parker applied the doctrine of *Baron* v. *Wisnowski* and said:

''This is a broker's suit for commissions against the owners employing him. The contract of employment is not in writing and the broker resorted to the alternative provisions of the tenth section of the statute of frauds as amended in 1918. Pamph. L. p. 1020. This statute as abstracted in *Baron* v. *Wisnowski,* ante, p. 46. As in that case,

there was here no 'actual sale.' The owners refused to convey. The court below gave plaintiff a judgment.

We consider that this case is controlled by *Baron* v. *Wisnowski.* It is speciously argued that the evidence shows that the broker was not employed to effect a sale, but to 'procure a purchaser' able, ready and willing to purchase the property at the price fixed, and that such an employment is not within the statute. But it has been many times held that the word 'sale,' under the tenth section in its original form, means nothing more than the mere bringing together of seller and purchaser, on price, terms and ability to perform. Resky *v.* Meyer, 98 N. J. L. 168, 171 *et seq.,* and cases cited.

In the Baron case we differentiated between 'sale' in the first part of the amended act, and 'actual sale' in the provisos. The broker in the present case effected a 'sale' by procuring his purchaser as claimed, and it is idle to argue that his accomplishment was anything else. The case was clearly within the first clause of the statute, and it was error to award judgment in favor of the broker. Let the judgment be reversed and judgment for defendant entered in this court, with costs.''

It makes little difference whether the absence of an actual sale is brought about by a refusal by the owner of the property to convey, or by a termination of the broker's authority in good faith and a subsequent sale entirely disconnected with the previous employment. The principal fact is present in both cases namely, that no actual sale was affected *by* the broker.

The evidence discloses that the appellant tried from time to time, to interest the respondents in the purchase of various garages and in the disposal of certain property owned by Mrs. Miller

in connection with such a purchase. The testimony indicates that the appellant became acquainted with a garage referred to as the Mosque Garage, and at that time was informed by Mrs. Miller that she had placed a deposit on a garage on Hayes street, Newark, New Jersey (S. C., pp. 12 and 13). Upon Mrs. Miller's asking him if he had anything to offer, he advised her to buy the garage known as the Bohrer Garage (S. C., p. 14). Negotiations were carried on respecting the Bohrer Garage, which were not consummated.

Thereafter, the plaintiff testified, he spoke to Mrs. Miller about the Mosque Garage, and took both respondents to see it, in the latter part of September, 1925 (S. C., p. 16). The parties could not come to terms. The appellant then testified (S. C., p. 17):

"*By Mr. Levin.*

Q Go on. A I then went back to the Millers and told them that. They said they could not handle it and they then went back to the Bohrer proposition. We went up to Mr. Bohrer and while we were there we argued with him to better the terms; that is, from the $100 to $50 a month."

The Bohrer deal also failed of consummation. Thus the appellant testified (S. C., p. 18):

"Q After you took them back to Bohrer did you close that deal? A They agreed—

By the Court.

Q Did you close it? A No.

By Mr. Levin.

Q To what point did that deal go? Was an agreement drawn? A An agreement was drawn.

Q For the Bohrer Garage? A Yes, and Miller backed out at the last minute. We were up in the lawyer's office. Mr. Bohrer

was not to come until later and they requested that we go back to the Bohrer Garage for a last look.

By the Court.

Q It didn't go through, did it? A No, sir.

The Court: That's enough of that."

Negotiations were again re-opened, according to the testimony, in connection with the Mosque Garage (S. C., p. 19). These, too, proved to be abortive. Referring to these last efforts the appellant said (S. C., p. 20):

"Q What happened after that? A They told me if I could offer some other proposition she would be glad to consider it, and I looked around in the meantime.

Q What was the next step? A The next I heard of it Mrs. Miller or Mr. Miller or both of them had gone back and bought the Hayes Street Garage.

By the Court.

Q Is that the Mosque Garage? A No, that's on Hayes street."

Thereafter, according to the statement of the appellant, Mrs. Miller orally authorized him to secure a cash purchaser for the property she owned, and agreed to pay the appellant a commission definitely ascertainable. The appellant then went out to procure a cash customer. His testimony (S. C., p. 21) is as follows:

"Q Then what did you do? A I went out immediately to see whether I could procure a cash customer for the stores. Of course, as I formally do, I mailed Mr. and Mrs. Miller a letter that I accepted the agency, which I do when I work on a piece of property. I formally sent them a letter to that effect."

The letter referred to is printed as Exhibit P. 1 on page 79 of the State of the Case. An examination of it will indicate that the appellant con-

templated a cash sale, and not an exchange for the Mosque Garage. No success was met with in disposing of the property of Mrs. Miller in this fashion. The appellant, from his own testimony, did not believe that he could offer any garage to Mrs. Miller because of the fact that the Millers were in possession of the Hayes Street Garage. Thus he said (S. C., p. 23):

> "Q Subsequent to that did you offer any propositions to them? A Why no, I didn't think I could offer them any proposition because they had bought the Hayes Street Garage."

It is interesting to note that the appellant definitely understood that the negotiations respecting the Mosque Garage, after they were revived, were definitely abandoned and at an end. Thus, on cross examination, he said (S. C., p. 30):

> "Q You couldn't get together on the terms with respect to the Mosque Garage? A No.
>
> Q And then they tried to get you to arrange for an all cash proposition? A Yes.
>
> Q And you couldn't agree on that? A Not that we couldn't agree; she couldn't get her brother-in-law to invest. She couldn't get enough cash.
>
> Q And you still made an attempt to sell them the Mosque Garage? A Yes.
>
> Q And that fell through? A That fell through."

It was not until December 19, 1925, that the matter was again discussed with Mrs. Miller. The conversation, as related by the appellant, was as follows (S. C., p. 24):

> "Q What happened there? A I greeted her and I waited to see what she would say, so I said nothing. Then I said, 'I understand you sold the Hayes Street Garage.'

She said, 'Yes, and we made $1,000 profit.' I said 'You were fortunate in that.' I said 'You found it wasn't advisable to have that place.' She said 'We didn't lose anything.' I said, 'Now that you made a mistake will you buy the Mosque Garage?' She said 'We are not going to buy any garages.' I said 'Why?' She said 'We are sick and tired. You have to slave day and night and we don't like that slaving business? I am satisfied for him to go back to his old line. He makes a dollar easily. He goes away once in a while, but he can make a dollar easily.' I said, 'What about your property on South Orange avenue? Do you still want to go ahead with it?' She said 'Yes, if you can get a cash customer for it.' At that time I was negotiating with the doctor to buy the property.

Q Did you talk to her at that time about your commission? A I said, 'Now being that we are here, if I get a cash customer will you pay the rate of commission you agreed upon previously?' I knew she was of an uncertain type and I wanted to pin her down definitely.

Q What was the rate? A Three and a half and two and a half.

Q Did she agree to that? A Yes."

The appellant learned, on December 23, 1925, that Mrs. Miller had contracted for an exchange of her property for the Mosque Garage, and on the following day mailed a registered letter, which is printed as Exhibit P. 2 in the State of the Case, page 80. That letter, it will be noted, is not in conformity with the conversation detailed hereinabove, which is alleged to have taken place on December 19, 1925. That conversation refers to an authorization to secure a cash purchaser for the Miller property. The letter, it is quite evident, was an attempt on the part of the appellant to create a colorable right to commissions in connection with the exchange.

That the matter of the Mosque Garage, so far as the appellant was concerned, was at an end, is evident from his own testimony that he could not bring the parties together, and is further evidenced by his making a new agreement on December 19, 1925, with Mrs. Miller, entirely inconsistent with the continued existence of any prior agreement for the exchange of the Miller property for the Mosque Garage. Under these circumstances it is plain that the appellant did not actually effect the sale of the property, pursuant to his authority.

At the time of the exchange agreement between the Millers and the owners of the Mosque Garage, which was entered into on December 22, 1925, the appellant had at most, an oral authorization to effect a cash sale of the Miller property, and not an authorization to effect an exchange for a garage.

And such authority as the appellant did in fact have, according to his own statement, was repudiated, within the meaning of the decisions hereinabove cited, by the act of Mrs. Miller in contracting for the exchange of her property prior to the receipt of any legally sufficient notice in writing, required by the Statute to be served by the broker. The notice which the broker did in fact later serve, does not meet the requirements of the Statute, because it does not conform with what the broker himself testified was the oral arrangement, nor was it served in due time.

The appellant in his argument respecting this point, refers to *Sattler* v. *Gott, supra.* The Court in that case expressly stated that the decision was controlled by *Baron* v. *Wisnowski, supra.* Reference is also made in that brief to the decision of *Rooney* v. *Greiner,* 3 Misc. 996.

There it appeared that the broker served upon the owner of the property in question, a notice sufficiently setting forth the terms required by the statute. The principal objection, upon appeal, was that there was no evidence that the plaintiff actually effected the sale. Upon this point the Court said:

> "The evidence is that plaintiff produced and introduced a prospective purchaser named Duryea, who liked the house but would not take it at the asking price of $12,000, but entered into negotiations with the defendants and ultimately became the purchaser at $10,500. This seems to bring the case directly within the manifest intent of the statute of 1918, that the broker who serves notice as therein contemplated shall be entitled to commission when he shall 'actually effect the sale' before termination of his employment by the owner, and even in case of such termination of the sale to the client introduced by the broker, and with whom negotiations are pending is subsequently consummated between such owner and such customer. The memorandum of the trial judge, while not expressly so stating, carries the clear implication that the plaintiff effected the sale."

It is clear that the case is readily distinguishable from the one at bar. The kind of sale embraced within the authorization of the broker, was the kind of sale actually effected. In the instant case the broker was authorized for a time to effect a cash sale of the Miller property. By his suit he endeavored to recover commissions for an exchange of the property after his agency was ended. He had no authority to exchange the property, nor did the notice he served contemplate commissions upon an exchange of the property.

In the Rooney case there is nothing to indicate that negotiations were at any time called off and dropped, as was the fact in this case, and for that reason it was competent for the Court to find that the broker was the efficient cause of the sale.

The appellant cites generally, in support of his contentions on this point, the following cases:

Clark v. *Griffin,* 113 Atl. 234;
Vreeland v. *Vetterlin,* 33 N. J. L. 249;
Queen v. *Jennings,* 93 N. J. L. 353;
Hudson Real Estate Co. v. *Bower,* 74 N. J. L. 90;
Longstreph v. *Korb,* 64 N. J. L. 112; 44 Atl. Rep. 934, (dispute as to letter being mailed, etc.);
Lepore v. *Kooligan,* 6 Misc. 1041.

Clark v. *Griffin, supra,* the case first cited, proceeds on the theory that there was doubt upon the record as to whether or not the plaintiff was the procuring or efficient cause of the sale. The trial court non-suited the plaintiff upon the ground that the writing served upon the defendant did not comply with the Statute of Frauds. The decision indicates only some of the testimony adduced at the trial. Justice Black, in writing the opinion, said (p. 510):

> "* * * The testimony, in brief, shows the plaintiff, after receiving the writing, went to see a Mr. Abrams, who is a real estate dealer. They then went to see Mr. Hersch, the purchaser of the property. He told them to go and see his lawyer, Mr. Koestler, which they did. The plaintiff then showed Mr. Koestler the above writing, and they then made an appointment to meet Mrs. Griffin in Mr. Wilson's office. The plaintiff then told her that Mr. Abrams had a buyer, a Mr. Hersch, for $90,000. Mrs. Griffin said she would not accept that amount, she

wanted $95,000 in cash. There is more testimony in detail, but, subsequently to these negotiations, on September 10, 1919, the property was conveyed by Mrs. Griffin to Louis F. Hersch and Herman Hersch, partners, for $93,000. The question, then, who was the procuring or efficient cause of the sale was a jury question."

The case is far different from the one now presented for consideration. There is nothing to indicate a calling off of negotiations. Two brokers apparently, were instrumental in bringing the parties together.

In *Vreeland* v. *Vetterlin, supra,* it appeared that the plaintiff was a real estate agent, and defendant applied to him to find a customer for six acres of land. Defendant informed plaintiff that other agents had the same property for sale. Plaintiff undertook to sell the property, and secured an offer of $18,000 from a Mr. Henderson. The defendant declined to accept and later had an interview with Mr. Henderson and authorized plaintiff to sell to Mr. Henderson for $20,500. He refused it at that figure, and then determined to give the price asked, because he casually learned that a public sewer was to be constructed. Being fearful that he might encounter competition from a customer of another agent, he called upon that agent and effected the purchase through the latter. Chief Justice Beasley, in writing the opinion of the Supreme Court, said:

"* * * In the absence of all collusion on the part of the vendor, the agent, through whose instrumentality the sale is carried to completion, is entitled to the commissions. This rule, I think, will be found to be in accord with the cases heretofore decided.

"Applying this test to the facts of the case before us, it is clear that the non-suit

was right. The plaintiff did not earn the commissions, because he did not produce a purchaser. He may have come near doing so, but he did not do it. In his hands, Mr. Henderson flatly refused to take the property at the designated price. Nothing that the plaintiff did induced him to alter his mind. That was the result of a casual conversation with a third party. With this altered view, of his own volition he sought out the other agent, Garrabrants. He says he purposely avoided acting through the instrumentality of the plaintiff. Mr. Henderson was free to choose. There was nothing illegal in his conduct. Nor was there anything illegal in Garrabrants' acting as a middle-man. The defendant had nothing to do with this; but when Garrabrants presented him Mr. Henderson as a purchaser, he had no choice but to receive him as such. Is it not clear that if he had refused to make the conveyance to Mr. Henderson, that Garrabrants could have recovered his commissions by suit? I do not see how such a claim could have been resisted for a moment. Under these circumstances, then, it is clear that the plaintiff has not been wronged —he is only unfortunate."

The case is an authority in support of the ruling of the trial court in this controversy and serves to justify rather than to impeach the granting of a directed verdict.

In *Queen* v. *Jennings, supra,* the Court said:

"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 into an agreement. The agent must be the procuring or efficient cause of the sale. Vreeland *v.* Vetterlein, 33 N. J. L. 247; Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378; 19 Cyc. 257; 9 C. J. 613; 4 R. C. L. 298, p. 42."

The Court went on to say that where there is a real doubt upon the question whether the agent was the efficient or procuring cause of the sale, such doubt must be solved by the jury.

In the instant case, however, there can be no doubt. The testimony of the plaintiff at best, permits of the drawing of but a single inference, namely, that negotiations for the exchange of Mrs. Miller's property for the Mosque Garage were terminated, and this condition continued without change, until December 19, 1925, when the appellant procured an authorization to secure a cash purchaser for the Miller property. That was the limit of his authority. The notice he served in October cannot have the effect of making a binding obligation out of this authorization, nor can the notice he served in December have that effect, and the latter notice does not state accurately the contract to which the appellant testified, and was not served until the authorization was repudiated by Mrs. Miller, by her having, on December 22, 1925, engaged to exchange the property.

In *Hudson Real Estate Company* v. *Bauer, supra,* it appeared that the plaintiff had a written authorization from the defendant to rent and sell certain premises. The Court went on to state the facts as follows:

> "* * * The property was sold in July, 1905, with other property, for the aggregate price of $4,000 the sum of $2,800 thereof being the consideration price of the property referred to in the authorization. The purchaser was one Tafero, who became a tenant in February, 1905, under an oral agreement to hire until May 1, 1905, entered into at the plaintiff's office. There was a 'For Sale' bill upon the property. About a month after Tafero rented the property he learned, upon inquiry from the plaintiff, that

> the purchase-price of the property was $3,000. Some time in April, 1905, the wife of Tafero went to Mrs. Linder, wife of one of the defendants, who in April superseded the plaintiff as agent and took charge of the collection of rents, and asked that certain repairs be made, which were refused by Mrs. Linder on the ground that the property was for sale. She then suggested to Mrs. Tafero that she should buy the property. The latter's reply was that she had not the money. About two weeks later Mrs. Linder again saw Mrs. Tafero and offered her the property for $2,800. Later Mrs. Linder had her husband see the Taferos. Mr. Tafero negotiated with Mr. Linder for the purchase of this, with other adjoining property, which was effected, as before stated. The trial was had without a jury and the judge gave judgment for the defendants."

The Court found that the question whether the plaintiff was the efficient cause of the sale, was a question of fact, and came to this conclusion quite properly in view of the state of facts which existed. Thus, Justice Hendrickson in the course of the opinion, said:

> "The circumstances of the case recited above are, we think, consistent with the theory that the plaintiff's efforts to sell the property had ceased in April, 1905, plaintiff having failed to negotiate a sale to Tafero at the price of $3,000, and that subsequently Mrs. Linder, who had superseded the plaintiff as agent in charge, managed to negotiate a sale at $2,800. We think there was evidence in this case which would support the finding of the trial judge, a feature that was absent in Somers *v.* Wescoat, supra."

The decision in *Longstreph* v. *Korb, supra,* related to the establishment of the existence of a lost instrument. Incidentally the question arose whether the agent was instrumental in making the sale and exchange. We do not have the bene-

fit of what the evidence was, the Court merely making the following statement in its opinion:

> "Upon an examination of the evidence, it is clear that the question, which was one entirely of fact, whether the plaintiff negotiated the sale or exchange was properly submitted to the jury. The court could not, upon the evidence, direct a verdict for the defendant. Besides the evidence of the plaintiff and the evidence of the purchaser, other corroborating facts and circumstances exist from which the jury could very reasonably conclude that the plaintiff was the sole cause of the sale or exchange, and, under all the facts of the case, it was for the jury to determine whether the plaintiff had established, by a preponderance of the evidence, that he made the sale and exchange. The jury was told by the court that this must be established by a preponderance of proof, and the jury so found, and there appears no reason why this verdict should be disturbed on this ground."

The appellant has also cited *Lepore* v. *Kooligan, supra.* This case is readily distinguishable from the one now presented for review, upon a reading of the following excerpt from the opinion of the Court:

> "The difficulty with this contention is that thereafter a question of fact was raised as to the service rendered by the appellant. In the case as settled by the judgment it is stated that the defendant put in his testimony and the plaintiff offered evidence in rebuttal, whereupon the trial judge, sitting without a jury, makes this finding: 'From the conflicting evidence before me, the plaintiff and his witnesses claiming that he had produced the buyer, and the defendant claiming that he had himself brought the property to the attention of the buyer whom he had known for many years, I drew the conclusion of fact that the plaintiff had not actually effected the sale of the property in question, but that the defendant had himself, by his

own efforts, made the sale. I, therefore, gave judgment in favor of the defendant and against the plaintiff."

It is respectfully submitted that the direction of a verdict was entirely proper in the instant case. The evidence adduced renders inapplicable the supposedly controlling precedents cited by the appellant.

POINT TWO.

The Court below properly non-suited the plaintiff as to the defendant Simon Miller.

The burden of the contention of the appellant respecting the motion for non-suit seems to be that both Mr. and Mrs. Miller indiscriminately engaged him to sell their property and purchase a garage. His testimony indicates a contrary situation.

Upon every occasion throughout the length of his testimony at which the appellant testified to conversations with the Millers, he stated in effect, that any agreement which was the result of those conversations, was with Mrs. Miller. Mr. Miller either was present, or went to examine the proposed garages, but nowhere in his testimony, does the appellant refer to any words of employment used by Mr. Miller. The case is entirely devoid of any statement that Mr. Miller engaged the plaintiff, or by his conduct led him to believe that he was engaged to sell the property of Mrs. Miller on behalf of Mr. Miller. Thus, in his direct testimony, plaintiff said (S. C., p. 14):

"Q Do you know the price of that property? A Yes, it—

Mr. Emmerglick: May I ask which one of the Millers he refers to?

Q Suppose you tell us so as to clear up that point as to whom you dealt with when you were dealing with the Millers. A Most of the conversation was with Mrs. Miller, but off and on we would speak to Mr. Miller as well. With Mr. Miller I had, as a rule, to make a definite appointment to go and see the property."

Similarly, the testimony of the plaintiff, appearing on page 15 of the State of the Case, is in the same vein. He said:

"Q Go on. A After we agreed on those terms we separated and the next day we got together again with Miller. We were supposed to go to the lawyer's office. Mrs. Miller changed her mind. She thought $100 a month was too much to pay. In the meanwhile she asked me if I didn't think some other proposition could be offered and that probably they would consider it more favorable. She said she wanted to settle the thing by the first of October.

Q Were you talking to her or to him? A To her."

The foregoing conversations related to the purposed purchases of property other than the Mosque Garage. Coming down to the testimony respecting that property, it is interesting to note the following testimony of the appellant (S. C., p. 16):

"Q You talked to them in regard to the Mosque Garage and told them it was a good place for them. Who was it that you talked to, Mr. Miller, Mrs. Miller, or both? A Mrs. Miller first.

Q And then after that? A Then we made an appointment with Mr. and Mrs. Miller and I drove them around to the vicinity of the Mosque Garage, explaining to them what I thought of it and why it would be advisable for them to buy it. She said all right. She said, 'Go ahead and see what terms you can get.' I got in touch with Mr. Levin. Do you want the date of that?

Q Approximately. A That would be somewhere in the latter part of September; the last week in September, I might say; probably around the 26th."

It is to be noted that this testimony clearly establishes that the appellant was dealing with Mrs. Miller. She advised him to proceed and find out what terms could be made. There was nothing to connect Mr. Miller with this phase of the relationship between the parties. In making a report of his endeavors he went to Mrs. Miller, and it was she again, who advised him to go back to the owner. Thus the appellant said:

"Q Tell us what you actually did. A Then I went back to Mrs. Miller's home and told her that Mr. Levin would want to consider the trade. They wanted $25,000 for their place and they would be willing to give Mr. Levin $60,000 for his, so I told them I doubted whether I could succeed in doing that since he wanted $60,000 on a cash basis. She said, 'Go ahead and take it back to him.' And I did that."

Upon the failure of these negotiations, the appellant testified, Mrs. Miller stated that she would rather buy the property on a cash basis, and that she would endeavor to interest her brother-in-law in the proposition. The testimony on this score is as follows (S. C., p. 19):

"Q What took place with regard to the Mosque Garage? A She said she would rather buy it on a cash basis, because she would probably get it cheaper, which she could, and she said she could probably interest her brother-in-law, so she made an appointment—that was the latter part of the week—she made an appointment for me to meet her brother-in-law on the following Monday, I think, and see if she could not interest him, with my assistance, in investing in the Mosque Garage.

Q What was the brother-in-law's name? A Hyman Ganzel.

Q Did you meet him? A Yes.

Q Who was present? A Mr. Miller, Mrs. Miller and Mr. Ganzel.

Q Where? A At the Miller home on Grand avenue, East Orange.

Q What took place that day? A I tried to explain to Mr. Ganzel the advisability of his investing in the garage and he couldn't see his way clear on it and he refused, so Mrs. Miller then said she was sorry he couldn't see his way clear into going into it and to see if I couldn't do something and get Mr. Levin to accept the offer of $60,000; instead of $3,000 they would make it $4,000 and their property taken in at $25,000. Mr. Levin said, 'I can't see that.' I tried to fish out of him a definite price, which he wouldn't give me, but he said somewhere between $60,000 and $65,000. I went back to the Millers and told them that, that he wanted too much on a cash basis and they wouldn't go through with the deal.

Q What happened after that? A They told me if I could offer some other proposition she would be glad to consider it, and I looked around in the meantime."

Here, again, there is nothing with which to charge Mr. Miller. The utmost that the appellant has said is that he, after being employed by Mrs. Miller to undertake a proposed real estate transaction, reported back to her and her husband. It is significant to note particularly the wording in the last preceding question and answer. Although the appellant used the word "they" referring to both the Millers, he went on to say that "she," referring, of course to Mrs. Miller, would be glad to consider some other proposition. Such language, on direct examination, certainly does not admit of any other interpretation than that the appellant, at all times, contemplated that he was dealing with Mrs. Miller alone.

Coming now to that part of his testimony at which the appellant for the first time, spoke about an authorization to produce a cash purchaser for the Miller property, we find that words of employment were used by Mrs. Miller alone (S. C., p. 20).

Up to this point Mr. Miller was entirely out of the picture. Thereupon, the appellant proceeded to mail a notice, alleged by him to be identical with Exhibit P. 1, directed to both Mr. and Mrs. Miller. From his own statement it is evident that he knew he was employed by Mrs. Miller alone, for he had immediately before said that it was she who employed him.

The fact that Mr. Miller made no reply to this letter does not militate against the propriety of the judgment of non-suit entered in his favor.

In *Hand* v. *Howell,* 61 N. J. L. 142, the Supreme Court, in an opinion by Justice Collins, said:

> "Oral declarations made to one sought to be charged thereby may in some cases be considered as admitted by silence, but the rule is otherwise as to letters. The recipient is not called on to reply or to be considered as admittent what is written. * * * An unanswered letter, not received in the course of a correspondence, is not evidence at all against the recipient, except to prove notice or demand."

The Supreme Court was affirmed in this court, in an opinion reported in 61 N. J. L. 694.

A reading of the remainder of the testimony of the plaintiff will indicate that all of his conversations were with Mrs. Miller. Mr. Miller, according to his statement, was present on some of these occasions, but the appellant did not

state that Mr. Miller said or did anything respecting appellant's employment.

The final statement by the appellant of an agreement respecting commissions, has been quoted above. It was the conversation alleged to have taken place on December 19, 1925. It was Mrs. Miller alone who, according to this narration, authorized him to proceed to procure a cash purchaser for her property.

Finally, after learning of the purchase by the respondent of the Mosque Garage, the appellant called on the telephone—not Mr. Miller, but Mrs. Miller. Thus he said (S. C., p. 25):

> "Q When you heard of the sale, outside of writing that letter to the Millers, what did you do with regard to getting in touch with them? A Immediately as soon as I got home that afternoon I called up on the telephone to verify it.
>
> Q You called up whom? A Mrs. Miller.
>
> Q Did you recognize her voice over the telephone? A Absolutely.
>
> Q Did you talk to her personally? A Yes, and I called my wife to the phone so that she could listen in on it."

The appellant's brief contends that a person other than the owner may obligate himself to pay commissions for the sale of property, and in such case the Statute of Frauds does not apply. The defendants have no quarrel with this statement as an abstract proposition of law. There is no testimony in this case, however, to indicate that Mr. Miller at any time employed the appellant, or promised to pay him commissions, or authorized his wife to act as his agent in that behalf.

It is significant to note the testimony produced on behalf of the appellant respecting the owner-

ship of the Miller property. On cross examination he said (S. C., p 29):

"Q Do you know who owned the Miller property? A Do I know?

Q Yes. A I assumed that Mr. and Mrs. Miller owned it; they told me so.

Q Did you take the trouble to find out who owned it? A I didn't search it."

The appellant called on his main case, Mrs. Miller.

Respecting the ownership of the property in question she said (S. C., p. 34):

"Q Who owned the property on South Orange avenue, you or your husband? A Myself."

It is thus manifest that on the appellant's case proof was offered by his own witness, that Mrs. Miller was the sole owner of the property. This proof, together with the statement of the appellant hereinabove last set forth, and the entire absence of any testimony of a nature to charge Mr. Miller as an employer of the appellant, entirely warranted the trial court in non-suiting the latter as to his claim against Mr. Miller.

POINT THREE.

The Court below comimtted no error in the admission or rejection of evidence.

In his brief, the appellant treats Points Two and Eight as embracing a single letter, marked as Exhibit P. 4, which appears on page 9 of the State of the Case. A reading of the letter will indicate that it is nothing more than a statement that the writer intends to make efforts to procure a purchaser for property alleged to be owned by the addressee, and a statement of his expectation to secure commissions if a sale is effected. The letter bears date August 5, 1925. The testimony

was to the effect that the first conversations with Mrs. Miller respecting the Mosque Garage were had some time in September of that year.

It was conceded by counsel, when he offered the letter, that it was sent to the addressee prior to the "deal" now in question, to use the language of counsel (S. C., p. 27). Its reception in evidence was objected to because it was self-serving, and because it was a letter to someone not a party to the suit. It was offered later on, on the rebuttal examination of Mr. Alexander, and there excluded again, the Court stating that it was immaterial. The letter was offered ostensibly to establish the facts contained in it, and not merely to show that a letter was mailed to Mr. Levin. The appellant in his brief, contends that it is admissible as part of the *res gestae.* It was offered at the trial, however, for another purpose. Even if it were offered upon that theory, it could serve no good in a controversy between the agent and the owner of the Miller property, where the issue related solely to the rights of the agent to secure commissions for a sale of the Miller property. The suit did not at all involve the rights of the agent to secure commissions on the sale of the Mosque Garage.

Reliance is placed by the appellent upon the decision in *Jaffe* v. *Nagel,* 114 N. Y. Supp. 905. That case presented a situation where a broker produced a buyer to whom the owner refused to sell. It became incumbent upon the plaintiff to prove that he produced a purchaser. The Court admitted in evidence conversations between the broker and the intended purchaser as part of the *res gestae,* to show what the broker did under his employment toward procuring a purchaser.

The letter offered in evidence however, is dated in advance of the time when negotiations

were opened with Mr. Miller. It cannot, under any theory, be admissible—either as part of the *res gestae,* or otherwise.

The letter in question was not marked for identification when it was offered (S. C., p. 27). It was first so marked on the cross examination of Aaron Levin, the respondent's witness. Mr. Levin denied the receipt of the letter and the appellant contends that it was admissible thereafter as rebuttal testimony. An examination of the grounds stated when it was offered, however (S. C., p. 76) will indicate that it was not sought to be introduced in evidence with this purpose in mind, but rather, because it was correspondence between the agent and the vendee. Furthermore, upon denial by Mr. Levin that he received the letter, it is manifest that the offer of the alleged letter in evidence would not have the effect of discrediting in any way, this witness. It is not counter-proof of receipt.

The appellant next discusses as error a portion of the record (S. C., p. 40):

> "Q And aren't you now both members of the same organization?
>
> Objected to.
>
> Objection sustained.
>
> Plaintiff's counsel prays an exception to this ruling of the Court.
>
> Exception noted as ground of appeal."

It was proposed, by this questioning, to establish that the witness and Mr. Miller were members of the same automobile owners' association. The purpose for which the appellant sought to show this is not evident from the record. Having in mind the issue which was being tried, it is plain that the testimony could have no bearing upon the controversy and would serve no good

purpose in aiding the jury to come to a verdict. It is within the discretion of the Court to deny the appellant the right to ask such a question, even if it be regarded as an attempt to show the relationship or association between Mr. Miller and the witness.

The appellant next turns to the action of the Court in sustaining an objection to the following question (S. C., p. 48):

"Q He went out of business shortly after that, didn't he?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal."

The question referred to Mr. Miller's brother-in-law, who, Mr. Miller previously stated was in the milk business. It is alleged that this question was admissible to show that this brother-in-law who, it was mentioned, might possibly be interested in investing money in a garage, was selling his business. This line of testimony is so remote, and so unrelated to the real issue, that no further comment is necessary to point out its impropriety.

Finally, the appellant contends that there was error in the refusal of the Court to permit the following question to be answered by Mr. Aaron Levin (S. C., p. 58):

"Q Did you see Mr. Perlmutter this morning and did you hear him testify?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal."

It is alleged in the appellant's brief that this question was permissible because Mr. Perlmutter testified that the appellant had interested him in the purchase of *a* garage, and that Mr. Levin testified previously that Mr. Alexander never talked to Mr. Perlmutter respecting the sale of the *Mosque* Garage. It is difficult to see any logical connection between these matters. The question asked could serve no good to clarify any of these collateral questions, because it merely sought to learn whether the witness saw Mr. Perlmutter and heard him testify. It did not endeavor to discover whether or not the witness conversed with Mr. Perlmutter.

There appears upon page 91 of the State of the Case, a letter, not marked, apparently, as an exhibit, which has no right to appear in the State of the Case. It was apparently referred to at the bottom of page 59 of the State of the Case, and thereupon its reception in evidence was refused.

It is respectfully submitted that upon an entire consideration of the record, that the Court below committed no error in any of its rulings, and the judgments below should be affirmed.

Respectfully submitted,

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LEONARD J. EMMERGLICK,
On the Brief.