

INDEX.

---

	PAGE
Testimony, .....	1
H. Lester Smith, direct, .....	1
F. Stanley Kreps, direct, .....	2
H. Lester Smith, re-direct, .....	5
F. Stanley Kreps, re-direct, .....	6
cross, .....	8
Judgment Record, .....	10
Answer, .....	11
Reply, .....	13
Judgment, .....	15
Notice of Appeal, .....	16
Grounds of Appeal, .....	17
Exhibit "A," .....	18

New Jersey State Library

**NEW JERSEY**  
**Court of Errors and Appeals**

10

H. LESTER SMITH,  
*Plaintiff-Respondent,*  
*v.*  
F. STANLEY KREPS,  
*Defendant-Appellant.* } Action at Law.

20

**State of the Case.**

The above entitled case was tried April 25, 1927,  
before Hon. William Frank Sooy, Judge, and a jury.

Appearances—

William Charlton, Esq., for Plaintiff.

Kreps & Bell, Esqs., for Defendant.  
(Clarence L. Cole, Esq., of counsel.)

30

Mr. Charlton opened the Plaintiff's case to the jury.

Mr. Cole opened the Defendant's case to the jury.

*H. Lester Smith*, the plaintiff, called as a witness in  
his own behalf, being sworn, was examined and testified  
as follows:

Mr. Charlton—I offer this agreement of commission.  
(The paper offered is received in evidence and marked  
as an exhibit for the Plaintiff P1.)

Mr. Charlton—And the agreement of sale.

(The paper offered is received in evidence and marked  
as an exhibit for the Plaintiff P2.)

Q. Did Mr. Kreps pay you any money under the  
agreement of commission?

A. He paid me one payment of five hundred dollars.

10 Q. Has he paid the balance?

A. Of fifteen hundred? No, sir.

Mr. Charlton—That is all.

Mr. Cole—No questions.

Witness excused.

Plaintiff rests.

#### DEFENDANT'S CASE.

*F. Stanley Kreps*, the defendant, called as a witness in  
his own behalf, being sworn, was examined and testified  
20 as follows:

Direct examination, by Mr. Cole.

Q. Mr. Kreps, were you prepared to make settlement  
with the buyer or purchaser named in the agreement at  
the time provided for settlement?

Mr. Charlton—I object to that as immaterial.

The Court—I sustain the objection.

Mr. Cole—Exception.

Q. Did you appear for settlement at the time and  
place named in the agreement?

30 Mr. Charlton—I object to that as immaterial.

Mr. Cole—I want to show that this purchaser  
was not a bona fide purchaser.

The Court—If it is for the purpose of substan-  
tiating the charge of fraud I will permit it.

Mr. Cole—That is exactly what it is for.

The Court—I will permit it.

Mr. Charlton—Exception.

A. I did.

Q. Did he appear?

A. He did not.

Q. Have you since tried to locate him?

A. I have.

Q. What have you done toward trying to locate him?

A. I have asked Mr. Smith on a number of occasions  
who Peter Carter was, where I could find him, who in  
Ocean City knew him, so that I could find someone to  
communicate with him that did know him. I have been  
unable to locate Mr. Peter Carter. I inquired at the 10  
office of Thomas Mole in Ocean City, whether or not he  
knew Mr. Peter Carter, and he said that he didn't  
know him.

Mr. Charlton—I object and ask that that be  
stricken.

The Court—Yes.

Mr. Cole—Allow me an exception. I am try-  
ing to show the effort he made to locate him.

The Court—I am permitting that, but not the  
conversation. 20

A. (Continuing) I inquired from Harry Headley  
and Harry Harem in an effort to find Peter Carter and  
I was unable to locate him or find out anything at all  
about him.

Q. What reply did Mr. Smith give you when you  
asked him where he might be found?

A. The first time?

Q. Yes.

A. He said that he didn't know him.

Q. Now, did any talk take place between you and Mr.  
Smith at or before the signing of this agreement upon 30  
which he brings this suit, touching Mr. Carter?

A. Yes.

Q. And where did it take place?

A. In my office.

Q. And under what circumstances?

A. Mr. Smith came to my office for the purpose of  
inducing me to sell the Sterling Hotel, which I had  
just purchased through him from his father. He told

me that he had a buyer who was willing to pay a price that would give me a small profit. I asked him who this buyer was and he told me that it was a party that was a reliable party, a Peter Carter. I asked him who Peter Carter was and he told me that he was some relation to a man by the name of O'Brien, but that he was a reliable party. I also asked him whether or not if he signed the agreement—whether he would be in position to make settlement, and Mr. Smith said he thought that  
10 Mr. Carter could make settlement and wanted to see if the sale went through, and for that reason advised me to sell the property to Mr. Peter Carter.

Mr. Charlton—If the Court please, I ask that it all be stricken. Your Honor has allowed it in on the question of fraud. I do not see that it touches it at all.

The Court—But you cannot sit still until it is all answered and move to strike it out. I will permit it to stand.

20 Q. Now, did you rely upon the faith and truth of those statements—

Mr. Charlton—I object to that. He had a right to protect himself under the contract.

The Court—Is the question completed?

Q. Did you rely upon the faith and truth of those statements made to you by Mr. Smith when you entered into the contract with Carter for the sale of the property?

Mr. Charlton—I object.

The Court—I will permit it.

Mr. Charlton—Exception.

30 A. I did.

Q. Did you inquire of Mr. Smith before the date set for settlement as to whether or not Mr. Carter would be ready to make settlement?

Mr. Charlton—I object to that as immaterial.

The Court—I will permit it.

Mr. Charlton—Exception.

A. I did.

Q. What did he tell you?

A. About a week or two weeks before the time for settlement I was in the Sterling Restaurant, had a conversation with Mr. Smith relative to this settlement. At that time I asked him whether or not Peter Carter would be ready to settle and he told me then that he didn't think that Peter Carter would settle and I asked him where I could find Peter Carter. He said that he didn't know, but that I should try to find Harry Headley and three or four other men.

Q. Did he tell you why you should find Harry Head- 10  
ley and three or four other men?

A. Because they were the parties who were actually interested in the purchase of the property.

Q. Did you have any talk with him after the time set for settlement and after the time Carter did not appear?

A. At the time of settlement I asked Smith where Carter was and he said he didn't know; that the men who were actually buying the property are someone else.

Witness excused.

20

H. Lester Smith, recalled.

By Mr. Cole.

Q. Mr. Smith, do you know Peter Carter mentioned in this agreement?

A. I do not, sir.

Q. Did you ever know him?

A. I did not.

Q. You witnessed his signature; didn't you?

A. I did not, sir.

Q. Who did witness it?

A. I couldn't tell you, sir, right off-handed. It is  
right on there, sir. You will find witness for Mr. Kreps.

30

Q. Did you see Peter Carter sign this?

A. I did not.

Q. From whose hand did you receive this agreement?

A. From Mr. Thomas W. Mold.

Q. Do you know anything at all about the responsibility of Mr. Carter?

A. I do not, sir.

Q. And never knew him?

A. No, sir.

Q. You don't know whether he is an existing person or not, do you?

A. I couldn't tell you, sir.

Q. Well, when the time came for settlement it was at the office of Thomas W. Mold, wasn't it?

A. Yes, sir; it was supposed to be.

10 Q. Were you there?

A. I was not there.

Q. Did you make any effort to locate Peter Carter?

A. I did not, sir.

Cross-examination, by Mr. Charlton.

Q. Mr. Smith, did you have any of the conversations with "Smith" just testified to?

A. No, sir.

Q. Whose check paid for this property?

20 A. There were four checks for five hundred dollars each.

Q. Were they delivered to Mr. Kreps?

A. Yes, sir; one from Harry Headley, one from Thomas W. Mold, one William J. O'Brien, and one Mr. Harry Herron.

Q. Mr. Kreps got those four checks?

A. Yes, sir.

Q. He saw those four checks and handled them?

A. Yes, sir, and endorsed them.

The Court—Was there any checks from Carter at all?

30 The Witness—No, sir.

Witness excused.

Mr. Cole—I want to recall Mr. Kreps to explain about those checks that came out.

F. Stanley Kreps, recalled.

By Mr. Cole.

Q. Mr. Kreps, were the checks received by you before or after you signed this agreement?

A. Afterwards.

Q. State the circumstances of the execution and delivery of the agreement and how the checks came in your possession?

A. As I told you before, Mr. Smith came to my office, told me that he had a buyer for the Stanley Hotel and asked me if I would sell it at a certain price, and I told him that I would, and he said he would go about and draw up the agreement. Mr. Smith went out and brought back an agreement which I supposed that he had 10 drawn, as he told me he did, and asked me to sign it: Mr. Smith and I had always been very good friends and I signed the agreement, and he said that he would bring the two thousand dollars to me that evening. About seven or seven-thirty that night—

Q. Pause there a moment. At that time had the agreement been signed by Carter?

A. No; the agreement had not been signed by Carter them but Carter's name, of course, was in it. About 20 seven or seven-thirty that night I met Mr. Smith on Seventh Street in Ocean City and he handed me four checks, as he had said, one of Harry Headley, one of Harry Herron, one of Thomas Mold, and one from a man named O'Brien, I think.

Q. At that time did he deliver the agreement?

A. At that time he delivered the agreement.

Q. Was it signed then by Carter?

A. No. That was not when he delivered the agreement. The agreement was brought back to me in my office that afternoon signed by Carter before I got the checks.

Q. So that you had the agreement executed and delivered before you got the checks? 30

A. That is correct.

Q. You kept one copy and what did you do with the other?

A. Mr. Smith took it.

Cross-examination, by Mr. Charlton.

Q. Did you keep the two thousand dollars?

A. I did.

Mr. Cole—I object.

The Court—It has already been answered.

Q. When did you pay Smith the five hundred dollars on account of the commission?

The Witness—That I don't remember.

10 The Court—Well, you remember whether you paid him before or after the time you received the four checks?

The Witness—It was after I received the money.

The Court—After you received the four checks?

The Witness—Yes.

By Mr. Charlton.

Q. You got those on the street?

20 A. I did; yes.

Q. Where did you sign the commission agreement?

A. I was in my office, I think.

Q. When?

A. As I say, I don't remember.

Q. Next day?

A. I don't remember.

Q. Wasn't it all the one transaction? It bears the same date as the agreement?

A. It was not all the one transaction.

Q. So you signed the commission agreement and gave  
30 Mr. Smith his five hundred dollars after you received the checks?

A. Yes.

By Mr. Cole.

Q. And did you at that time know that Mr. Carter was not the man that Mr. Smith had represented him to be?

A. I did not.

Mr. Charlton—I object to that and ask that it be stricken.

The Court—That does not prove anything at all. There is no evidence in the case that Mr. Carter is not a responsible man at the present time that I see.

(Witness excused.)

Plaintiff rests.

Defendant rests.

10

Mr. Charlton—I move for a direction of verdict. There is no testimony to overcome our prima facie case.

Mr. Cole—I think it is a clear case for the jury, as to whether or not we made this bargain relying upon statements that the jury have a right to infer were, some at least, untrue, and that had we known they were we would not have signed this bargain.

The Court—I will grant the motion and direct a verdict in favor of the plaintiff.

Mr. Cole—Your Honor will allow me an exception. 20

The Court—Yes.

Gentlemen of the Jury, under the circumstances of this case I direct that a verdict for the plaintiff in the sum of \$1,635 be rendered.

(The jury found as directed.)

30

CAPE MAY COUNTY CIRCUIT COURT.

H. LESTER SMITH,  
*Plaintiff.* }  
*v.* } At Law.  
F. STANLEY KREPS,  
*Defendant.* }

JUDGMENT RECORD.

(Filed May 12, 1927.)

F. Stanley Kreps, the defendant in this cause, was summoned to answer unto H. Lester Smith, the plaintiff therein, in an action at law upon the following complaint:

"Plaintiff, a resident of Ocean City, Cape May County, and State of New Jersey, says:

20

1. He is a real estate broker.
2. That on August 11, 1925, defendant executed an agreement for the payment of commission in the following way:

For services rendered in consummating the sale of the Stirling Restaurant, 828 Asbury Avenue, Ocean City, N. J., I, F. Stanley Kreps, the seller, agree to pay to H. L. Smith, party who made the sale, the sum of two thousand dollars, of which five hundred is paid upon the signing of this agreement and the balance of fifteen hundred dollars to be paid at the time settlement at the First National Bank, Ocean City, N. J., on November 11th, 1925.

30

Signed,  
F. STANLEY KREPS.

Witness, R. V. Reiley.

3. That on November 11th, 1925, the time specified for a payment in said agreement, defendant failed to pay the balance then due.

4. Plaintiff's services were fully performed and plaintiff demands as damages the sum of \$1,500, with interest from November 11th, 1925.

WILLIAM CHARLTON,  
*Attorney for Plaintiff.*

ANSWER.

The defendant answered as follows:  
"F. Stanley Kreps, of the City of Ocean City, County of Cape May and State of New Jersey, answers the complaint filed herein and says that:

1. He denies each and every allegation in said complaint.

FIRST DEFENSE.

1. That on August 11th, 1925, the said H. Lester Smith was not a real estate broker, but merely had a salesman's license, and was not at that time employed by a duly authorized real estate broker of the State of New Jersey, and therefore had no right to conduct and transact a real estate business on a commission basis.

SECOND DEFENSE.

1. That the said plaintiff at no time consummated the sale of the Sterling Restaurant, 828 Asbury Avenue, Ocean City, New Jersey, for which services the said defendant agreed to pay the sum of two thousand (\$2,000) dollars.

2. That the said plaintiff did represent to the said defendant that he had a purchaser for said property who was a good and reliable party.

3. That the said defendant entered in an agreement under date of August 11, 1925, with the said alleged

purchaser, who is known as Peter Carter, whereby the said defendant gave to the said Peter Carter an option of purchasing said property on or before November 11, 1925, which said option was not exercised by the said Peter Carter, but the sum of two thousand (\$2,000) dollars, which was paid on account of the option was forfeited. A true copy of said option agreement is in the possession of the defendant, and will be produced upon demand of the plaintiff.

10 4. That no agreement of sale was ever entered into between the defendant and a purchaser produced by the plaintiff, and the plaintiff has never performed any service for the defendant in connection with the sale of the Sterling Restaurant for which a commission should be paid.

5. The defendant further alleges that the said Peter Carter is a straw-party or a fictitious person, and that he would not have entered into the option mentioned aforesaid if he had been apprised of such fact before the time of signing said option, if it had not been for  
20 the further reason that the said H. Lester Smith advised this defendant that he knew the said Peter Carter personally, and knew that he was a financially responsible party.

#### COUNTERCLAIM.

The defendant, by way of counterclaim, says that the plaintiff has not performed the services for which he was to be paid the sum of two thousand (\$2,000) dollars, in that he did not consummate the sale of the property described in the bill of complaint, and that he did not  
30 produce a purchaser who was ready and willing and able to buy the same.

2. That the said defendant has paid to the plaintiff the sum of five hundred (\$500) dollars on account of the services which the plaintiff agreed to render, to wit, the consummation of the sale of the afore-described property, said money being advanced to the plaintiff, not because of any legal obligation on the defendant's part,

but because of the fact that the defendant was friendly with the plaintiff and advanced the money to him more in the nature of a loan than a payment on account of commission.

3. That the plaintiff has not performed the services which he agreed to perform and that he is therefore not entitled to the sum of two thousand (\$2,000) dollars or any part thereof, and the defendant demands from the plaintiff the return of the five hundred (\$500) dollars,  
10 which was paid to him on account of the services rendered and which said services he has not performed.

KREPS & BELL,  
*Attorneys for Defendant.*"

#### REPLY.

The plaintiff replied as follows:  
"Plaintiff, replying to the affirmative defenses of the  
20 answer, says:

#### FIRST DEFENSE.

1. That the plaintiff had, prior to August 11, 1925, a real estate broker's license issued to him by the New Jersey Real Estate Board, which license he is prepared to produce in Court at the time of trial.

#### SECOND DEFENSE.

1. Plaintiff denies paragraph 1. 30  
2. He denies paragraph 2.  
3. He admits that defendant entered into an agreement with said Peter Carter, etc., as in paragraph 3 set forth, but denies that he had anything to do with the execution thereof, or knew anything concerning the terms therein. He denies that said agreement is an option, and says that it is an agreement for the sale of lands.

4. He denies paragraph 4, except to reiterate that he has performed the services required of him as set forth in the agreement mentioned in paragraph 2 of the complaint.

5. He has no knowledge or information as to the truth of paragraph 5 and prays proof, but he denies that he advised the defendant that he knew Peter Carter or knew of his financial responsibility.

10

DEFENSE TO SECOND DEFENSE.

1. Plaintiff, on August 11, 1925, gave the defendant four checks for \$500 each, each of said checks being of responsible residents of Ocean City, New Jersey, and at that time informed defendant that said men were purchasers of the property.

2. That the agreement of sale was prepared by one of the purchasers and the plaintiff had no part in the preparation thereof.

20

3. That the agreement so prepared was satisfactory to the defendant and was signed by him.

4. Plaintiff became entitled to his commission upon the signing of the agreement by the defendant and satisfactory to him (the defendant).

ANSWER TO COUNTERCLAIM.

Plaintiff, answering the counterclaim of the defendant, says:

30

1. He denies the first paragraph.

2. He admits the receipt of \$500 from the defendant and says that the same was on account of the agreement set forth in paragraph 2 of the complaint. He denies the rest of the paragraph and particularly that it was a loan.

3. He denies paragraph 3.

WILLIAM CHARLTON,  
Attorney for Plaintiff."

JUDGMENT.

This action was tried before Judge W. Frank Sooy, with a jury, at the Cape May County Circuit on April, twenty-fifth, 1927.

The cause having been heard the Court directed the jury to render their verdict in favor of the plaintiff and against the defendant in the sum of one thousand six hundred thirty-five dollars; which was accordingly done. 10

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of one thousand six hundred thirty-five dollars (\$1,635), and his costs, which are taxed at the sum of sixty-eight dollars and twenty-six (\$68.26), making in the whole the sum of one thousand seven hundred three dollars and twenty-six cents (\$1,703.26).

Judgment entered April twenty-seventh, 1927.

STATE OF NEW JERSEY, }  
COUNTY OF CAPE MAY, } ss.

20

I, A. C. Hildreth, County Clerk and Clerk of the Circuit Court in and for said county, do hereby certify that the foregoing is a true and correct record of the judgment entered in the suit of H. Lester Smith v. F. Stanley Kreps, as the same remains of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Cape [SEAL] May Court House, this ninth day of May, A. D. nineteen hundred and twenty-seven. 30

A. C. HILDRETH,  
Clerk.

CAPE MAY COUNTY CIRCUIT COURT.

H. LESTER SMITH,  
*Plaintiff,* }  
*v.* } Action at Law.  
F. STANLEY KREPS,  
*Defendant.* }

10

NOTICE OF APPEAL.

(Filed May 12, 1927.)

To William Charlton, Esquire, Attorney of Plaintiff, or to Whom it May Concern:

Sir—Please take notice that the defendant in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, from the whole of the judgment entered in this cause, on the following grounds, to wit:

20 1. Because the Circuit Court erred in directing judgment for the plaintiff.

KREPS & BELL,  
Attorneys of Defendant.

STATE OF NEW JERSEY,  
COUNTY OF CAPE MAY.

30 I, A. C. Hildreth, County Clerk, and Clerk of the Courts of Oyer and Terminer, Quarter Sessions, Common Pleas, and Circuit Court, in and for the County of Cape May, do hereby certify that the foregoing is a true and correct copy of Notice of Appeal in case of H. Lester Smith, Plaintiff, v. F. Stanley Kreps, Defendant, as filed on the seventh day of May, A. D. 1927, in the Clerk's office of the County of Cape May.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Cape  
[SEAL] May Court House, this seventh day of May, A. D. nineteen hundred and twenty-seven.

A. C. HILDRETH,  
Clerk.

NEW JERSEY COURT OF ERRORS AND APPEALS.

H. LESTER SMITH,  
*Plaintiff-Respondent,* }  
*v.* } Action at Law.  
F. STANLEY KREPS,  
*Defendant-Appellant.* }

10

GROUND OF APPEAL.

(Filed June 13, 1927.)

To William Charlton, Esquire, Attorney of Plaintiff-Respondent, or to Whom it May Concern:

Sir—Please take notice that the defendant-appellant in the above-entitled cause bases his grounds of appeal on the following reasons:

1. Because the Circuit Court erred in directing judgment for the plaintiff. 20

2. Because the Circuit Court did not permit the question of fact concerning the fraud alleged to have been exercised on the part of the plaintiff-respondent to go to the jury.

3. Because the Circuit Court did not direct a verdict for the defendant-appellant.

F. STANLEY KREPS,  
Of Counsel with the Defendant-Appellant.

I consent to the within grounds of appeal being filed as within time, and hereby acknowledge due and legal 30 service of the same, this tenth day of June, 1927.

WILLIAM CHARLTON,  
Attorney for Plaintiff.

EXHIBIT "A."

THIS AGREEMENT, made the 11th day of August A. D. 1925.

Between F. Stanley Kreps, of the City of Ocean City, County of Cape May and State of New Jersey of the first part hereinafter called the "Seller," and Peter Carter, of the City and County of New York, State of New York, N. Y. of the second part, hereinafter called the "Buyer."

Witnesseth, That the "Seller" agrees to sell and convey and the "Buyer" agrees to buy all that certain lot, tract, or parcel of land and premises situate in the City of Ocean City County of Cape May and State of New Jersey, more particularly described as follows: Being lot 431, Section A, known as the Sterling Restaurant, together with furniture as is now in the property. for the price or sum of Fifty-five Thousand Dollars, under and subject to the following terms and conditions:

1. A first payment of Two Thousand Dollars, receipt of which is hereby acknowledged by the "Seller."

2. The balance of the purchase price shall be paid in the following manner:

Present first mortgage of \$5,000 to be assumed by buyer.

" second " " 5,000 "

" third " " 15,000 "

Balance to be paid in cash on day of settlement.

at the time of final settlement, which shall be made at the office of Thomas W. Mould, 411 Ninth Street, Ocean City, N. J. on or before November 11th, 1925 or the deposit of two thousand dollars made herewith, at the option of "Buyer," may be applied on account of the purchase price or be forfeited as liquidated damages to the "Seller," and not as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not the fault of the "Buyer" in the

procuring of such searches, the time for the final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear of all incumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land.....and shall be a marketable title, and the "Seller" shall tender a .....warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the "Buyer."

4. All adjustments shall be made as of.....and possession shall be given the "Buyer".....

5. The "Buyer" shall pay for searches and all other expenses, excepting the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the "Seller."

6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

7. Time is the essence of this agreement.

8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

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

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF

	F. Stanley Kregs	
	..... x Peter Carter	..... [L. S.]
G. P. Hemmerly.	.....	[L. S.]
H. Lester Smith	.....	[L. S.]
for		
Kregs.	.....	[L. S.]

10

Revised 11-1-23

Nov. 11, 1925

7-27-25-5000

AGREEMENT  
FOR SALE OF LAND

Prepared and Adopted by Camden Real Estate Board.

20

STATE OF \_\_\_\_\_ }  
COUNTY, } ss.

BE IT REMEMBERED, That on this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and \_\_\_\_\_ before me, personally appeared \_\_\_\_\_ who I am satisfied \_\_\_\_\_ the grantor mentioned in the above deed or conveyance, and I having first made known to \_\_\_\_\_ the contents thereof \_\_\_\_\_ acknowledged that signed, sealed and delivered the same as voluntary act and deed. All of which is hereby certified.

New Jersey Court of Errors and Appeals

H. LESTER SMITH,  
*Plaintiff-Respondent,*  
v.  
F. STANLEY KREPS,  
*Defendant-Appellant.*

ACTION AT LAW.

BRIEF OF PLAINTIFF-RESPONDENT.

STATEMENT OF FACT.

The only pertinent facts in this case are that on August 11, 1925, defendant gave the plaintiff a commission agreement as set forth in the complaint and offered in evidence, marked "P1." At the same time the defendant entered into an agreement for the sale of certain property owned by him in Ocean City, New Jersey, with one Peter Carter and accepted a \$2000 deposit in the form of four \$500 checks, each the check of men in Ocean City, all known to the defendant.

The plaintiff's case was admitted and does not seem to be in question on this appeal.

Plaintiff, in rebuttal of defendant's testimony, denied that he ever made any statement regarding Carter's reliability, or that he could make settlement. In fact, he never knew anything about it. He denied further that there was ever any conversation between him and the defendant whereby the defendant could be induced to enter into the agreement upon any false pretense. The plaintiff's right to recover is well established.

---

LAW.

"In the absence of a special agreement, a real estate broker, acting by virtue of a written agreement, earns his commission when he secures a buyer on the seller's terms, either as originally propounded or as settled by agreement between the seller and buyer."

*Steinberg v. Mindlin*, 96 N. J. L. 206.

"Unless a broker and his employer have stipulated to the contrary, the broker is entitled to his compensation upon the completing of the negotiations he undertook, irrespective of whether or not the contract negotiated is ever consummated, so long as the failure to carry it through to a successful completion is not due to any fault of the broker."

*Klipper v. Schlossberg*, 96 N. J. L. 397.

"In the absence of special agreement, a real estate broker, acting by virtue of a written agreement, earns his commission when he secures a ready and willing purchaser, brings the

parties together and gets them to make a binding agreement."

*Freeman v. Van Wagener*, 90 N. J. L. 358.

"A real estate broker earns his commission when he secures a buyer on the seller's terms, either as originally propounded or as settled by agreement between the seller and buyer."

*Dickinson v. Walters*, 100 N. J. L. 62.

It appeared from the reading of the testimony that Mr. Smith was entitled to recover. The defendant had only his own testimony, as the Court said, on page 9 of the State of the Case.

There is no evidence in the case that Mr. Carter is not a responsible person at the present time, as I see. The fraud claimed by the defendant was not proved. Mr. Smith exercised all the faith that was required of him. There appears nowhere in this case any evidence that Mr. Carter was not a real person and the real buyer, nor that he was unreliable and not able to settle. There was no question for the jury and the Court was right in directing a verdict for the plaintiff.

For these reasons, it is respectfully urged that the verdict be affirmed.

WILLIAM CHARLTON,  
*Attorney for Plaintiff-  
Respondent.*

33 OCT. 1. 1927

MacCrellish & Quigley Co., Printers, Trenton, N. J.

**NEW JERSEY**  
**Court of Errors and Appeals**

H. LESTER SMITH,

*Plaintiff-Respondent,*

*vs.*

F. STANLEY KREPS,

*Defendant-Appellant.*

Action at Law.

**Brief of Defendant-Appellant**

**FACTS.**

On August 11th, 1925, the defendant, F. Stanley Kreps, entered into a written agreement with one Peter Carter for the sale of certain property situate in Ocean City, New Jersey, for the price or sum of fifty-five thousand (\$55,000.00) dollars, and that there was paid on account of the purchase price a deposit of two thousand (\$2,000.00) dollars, which at the option of the *buyer* could be forfeited as liquidated damages or applied on account of the purchase price.

That one H. Lester Smith negotiated said transaction and that the said Kreps gave to Smith the following

agreement: "For services rendered in consummating the sale of the Sterling Restaurant, 828 Asbury Avenue, Ocean City, N. J., I, F. Stanley Kreps, the seller, agree to pay to H. L. Smith, party who made the sale, the sum of two thousand dollars, of which five hundred is paid upon the signing of this agreement and the balance of fifteen hundred dollars to be paid at the time of settlement at the First National Bank, Ocean City, N. J., on November 11, 1925."

(Signed) F. STANLEY KREPS.

Witness

R. V. REILEY.

That said sale was not consummated, and the said Peter Carter did not even appear for settlement, and that the said Smith did not even know Peter Carter and made no effort to find him to have him present at the settlement (State of Case, page 6, lines 2-14), and that so far as he knows there was no such person in existence as Peter Carter.

That the said Kreps testified that Smith told him that Carter was a reliable party, that he thought he could make settlement, and advised Kreps to sell the property to Carter, and that Kreps, relying on the statements made by Smith, who was a real estate broker, entered into the agreement (S. C., page 4, lines 1-30).

That the Court directed a verdict and refused to allow the case to be presented to the jury.

#### ARGUMENT.

It is a question of fact to be determined by the jury whether Kreps signed the agreement of sale and commission agreement relying on the representation made by Smith that Peter Carter was a reliable party and could settle for property, when as a matter of fact, he did not actually know whether such a person existed.

That if Smith, the agent, did not exercise good faith toward Kreps, his principal, he forfeited his right to

commission. *Leconey v. Koch*, 130 Atlantic 16; *Rogers v. Genung*, 76 N. J. Eq. 306.

The broker withheld the knowledge that Peter Carter was only a straw-party and not the real buyer until after the contract of sale had been executed and delivered, and must have had knowledge that Carter was not the real buyer at the time he made the representation that Carter was a reliable person and was able to settle.

If defendant was induced to enter into the contract through fraudulent misrepresentations made by Smith, the commission contract is void, and Kreps has the right to recover the five hundred (\$500.00) dollars paid on account of commission.

A broker must act in good faith and the interest of his principal. This requires him to give to the principal the benefit of his knowledge and advice and keep him informed of all material facts. 9 *Corpus Juris* 536.

In State of Case, page 6, line 10, Mr. Smith admitted that he was not present at the time set for settlement and that he never made any effort to locate Mr. Carter. From a fair reading of *Leconey v. Koch*, it may be concluded that this alone is sufficient to deprive the broker of his commission.

It is submitted that a broker in order to earn a commission for the sale of real estate must apprise his principal of all the facts concerning the sale, of which he has knowledge, and that he must use his best efforts to see that the sale is consummated.

It is further submitted that there was a question of fact for the jury in this case, namely, was the defendant, Kreps, induced to sign the contract of sale and commission through the fraudulent misrepresentation of the plaintiff?

Respectfully submitted,

F. STANLEY KREPS,  
Of Counsel with Defendant-Appellant.