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SUMMONS.

STATE OF NEW JERSEY TO CHARLES F. EGGLESTON:

You are summoned to answer the annexed complaint of Charles A. Doe in an action at law in the Cape May County Court of Common Pleas. And take notice that unless you (Seal) file your answer with the Clerk of said Cape May County Court of Common Pleas at Cape May Court House, New Jersey, within twenty (20) days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in his suit and judgment be entered against you.

Witness, HONORABLE HERBERT E. BARTLETT, Judge of the said Cape May County Court of Common Pleas at Cape May Court House, New Jersey, this 30th day of July, A. D. 1926.

A. C. HILDRETH,
Clerk.

KREPS & BELL,
Attorneys for Plaintiff.

COMPLAINT.

CAPE MAY COUNTY COURT OF COMMON PLEAS.

CHARLES A. DOE, *Plaintiff*, v. CHARLES F. EGGLESTON, *Defendant*.		Action at Law. Complaint.

Charles A. Doe, of the City of Ocean City, County of Cape May and State of New Jersey, plaintiff in the above-entitled cause, says that:

1. On or about June 20th, 1925, the plaintiff was employed by the defendant to sell a piece of property in Ocean City known as Lot No. 5 in Block 1301, on the plan of the Ocean City Association.

2. The plaintiff is a duly licensed real estate broker in the State of New Jersey, with his office in the Ocean City Title & Trust Building, Ocean City, N. J.

3. On or about the 20th day of June, as aforesaid, the plaintiff procured for the defendant purchasers for the real estate which the defendant had to sell, by the name of Wagner & Hodgkins, and the said Wagner & Hodgkins entered into an agree-

ment for the purchase of the real estate in accordance with the terms set forth by the defendant. A copy of the agreement between the defendant and the purchasers is hereto attached, and by this reference thereto made a part hereof, and marked Exhibit "A."

4. At the time of the signing of this agreement for the sale of the aforementioned real estate, the defendant agreed to pay the plaintiff a commission of 5% on the gross amount of the purchase price, by means of a clause inserted in the sales agreement as follows: "Seller agrees to pay Charles A. Doe, Realtor, five per centum (5%) on the gross amount of purchase price for effecting this sale, to be paid at settlement."

5. Settlement was to be made August 20th, 1925, at which time, according to the agreement, the commission due the plaintiff was to be paid.

6. The defendant did not pay the commission of fourteen hundred ($1400.00) dollars, or 5% of twenty-eight thousand ($28,000.00) dollars, the gross purchase price, on August 20th, nor has he paid any part thereof, although frequent demands have been made.

Therefore, the plaintiff claims the sum of fourteen hundred ($1400.00) dollars together with lawful interest from August 20th, 1925, and costs of suit to be taxed.

KREPS & BELL,
Attorneys for Plaintiff.

EXHIBIT "A"

THIS AGREEMENT, Made the Twentieth (20) day of June A. D. 1925
BETWEEN Charles F. Eggleston of the first part, hereinafter called the "SELLER ," and Wagner & Hodgkins, Real Estate, 6021 Germantown Ave. Philadelphia, Pa. 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: Lot No. Five (5) Block No. 1301, with a frontage of thirty three and one third feet (33 1/3) on Ocean Avenue, and extending of that width out into the Atlantic Ocean to the outer Riparian line, together with the buildings thereon, consisting of two store rooms on the Boardwalk, and a double frame dwelling, with furniture, on Ocean Avenue, said property being situated on the east side of Ocean Avenue, three hundred and eighty three and one third (383-1/3) feet south of Thirteenth Street, for the price or sum of Twenty Eight Thousand ($28,000.00) Dollars, under and subject to the following terms and conditions:
1. A first payment of One Thousand ($1,000.00) Dollars, receipt of which is hereby acknowledged by the "SELLER ."
2. The balance of the purchase price shall be paid in the following manner: Five thousand ($5,000.00) dollars at time of settlement, and to assume an existing first mortgage now on the property of Fifteen Thousand ($15,000.00) dollars, and

the seller to take back a second mortgage in the sum of seven thousand ($7,000.00) dollars, for a period of two years: to be reduced in one year by the payment of two thousand ($2,000.00) dollars at the time of final settlement, which shall be made at Ocean City Title and Trust Co. Ocean City, N. J. on or before August 20th, 1925 or the deposit .....made herewith, at the option of the "SELLER ," 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 date of settlement and possession shall be given the "BUYER " at settlement—by assignment of leases rent for 1925 season to be retained by seller.

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:

8½. Seller agrees to pay Charles A. Doe, Realtor, five per centum (5%) on the gross amount of purchase price for effecting this sale, to be paid at settlement.

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

CHARLES F. EGGLESTON [L. S.]
Wagner & Hodgkins [L. S.]
per William A. Wagner [L. S.]
Harvey R. Hodgkins [L. S.]

SIGNED SEALED AND DELIVERED
IN THE PRESENCE OF
Charles A. Doe

AGREEMENT
FOR SALE OF LAND
Charles F. Eggleston
TO
Wagner & Hodgkins
Prepared and Adopted by Camden Real Estate Board.

ANSWER.

CAPE MAY COUNTY COURT OF COMMON PLEAS.

CHARLES A. DOE, *Plaintiff*, v. CHARLES F. EGGLESTON, *Defendant.*	Action at Law. Answer.

Charles F. Eggleston, of Philadelphia, the above-named defendant, says that:

1. He denies the allegations of paragraph 1 of the complaint.

2. He has no knowledge of the allegations of paragraph 2 of the complaint and prays proof thereof if material.

3. He denies the allegations of paragraph 3 of the complaint.

4. He admits the allegations of paragraph 4 of the complaint and alleges that the clause in the agreement recited in the complaint was his only promise of reward to the plaintiff and that it was contingent upon settlement and to be paid at settlement.

5. He admits that settlement was to be made August 20, 1925, but he denies that settlement was then made or has since been made and he denies that any commission or reward to the plaintiff was to be paid on August 20, 1925, but he alleges that in accordance with the said agreement set forth in the fourth paragraph of the complaint, the commission or reward to the plaintiff was to be paid at settlement.

6. He admits the allegations of paragraph 6 of the complaint.

Second Defense.

1. The defendant alleges that the parties, Wagner & Hodgkins, who signed the said agreement to purchase the defendant's real estate, defaulted under their agreement of purchase and did not make settlement on August 20, 1925, nor at any later date and they have been and are now decreed by the Court of Chancery of New Jersey to be in default under their agreement in proceedings instituted by them to compel specific performance of said contract and there was no settlement for the property in accordance with the terms of the agreement at any time nor can there be such settlement at any time in the future and, therefore, any commission which was to be paid to the plaintiff at settlement under the terms of the agreement set forth in paragraph 4 of the complaint, is not due and payable by the defendant to the plaintiff.

John D. McMullin,
Attorney for Defendant.

SUPPLEMENTARY ANSWER.

CAPE MAY COUNTY COURT OF COMMON PLEAS.

CHARLES A. DOE, *Plaintiff,* v. CHARLES F. EGGLESTON, *Defendant.*	Action at Law. Supplementary Answer.

And now, comes the defendant, Charles F. Eggleston and supplements his answer filed heretofore and adds to the defense already alleged the following:

THIRD DEFENSE.

1. The plaintiff by his negligence in the application for title insurance on behalf of Wagner and Hodgkins was himself responsible for there being no settlement on the agreement of sale set forth in plaintiff's complaint, and his said negligence was the sole cause of the purchaser's being in default at the time of settlement and such default resulted in the defendant herein not having any benefit whatever of his contract of sale with the said buyers referred to in the complainant's complaint and the plaintiff was himself responsible for the default at the settlement and the loss to this defendant.

2. Such negligent conduct of the plaintiff was the fact that he did not apply to any title company for title insurance until a day or two before August 20th, 1925, the date on which settlement was to be made so that there was no time for the title company to complete its search before the date specified for settlement.

FOURTH DEFENSE.

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1. The plaintiff, in so far as he acted as the agent for the defendant, was negligent in the performance of his duties and likewise in the performance of duties which he undertook to perform on behalf of the purchaser with the result that there was no settlement between this plaintiff and his purchasers on August 20th, 1925, the date specified for settlement, or at any other time and therefrom the plaintiff suffered the loss of the sale which the defendant
20 had secured for him.

As further answer, this defendant alleges as a counter-claim against the plaintiff as follows:

1. He repeats the allegations of the fourth defense above.

2. He alleges that by reason of the loss of his purchaser and of the sale of his property he has suffered damage in the amount of $3000.00 which
30 he seeks herein to recover from the plaintiff.

JOHN D. MCMULLIN,
Attorney for Defendant.

REPLY.

CAPE MAY COUNTY COURT OF COMMON PLEAS.

CHARLES A. DOE, *Plaintiff*, v. CHARLES F. EGGLESTON, *Defendant*.	Action at Law. Reply.

The plaintiff replies to the amended answer filed in the above-entitled cause, and says that:

THIRD DEFENSE.

1. The plaintiff denies the first paragraph of the third defense, and alleges that the defendant was the sole cause of the settlement not going through, for even though the application for title insurance was not placed at the time the agreement was signed, the buyers were willing to make settlement even without title insurance, and it was only because the defendant declared the buyers in default that the settlement was not made.

2. Paragraph two of the third defense is denied.

FOURTH DEFENSE.

The fourth defense is denied.

COUNTER-CLAIM

Plaintiff denies each and every paragraph in the counter-claim as set up by the defendant.

KREPS & BELL,
Attorneys of Plaintiff.

TESTIMONY.

CHARLES A. DOE,	)	Court of Common Pleas.
v.		
CHARLES F. EGGLESTON,	)	County of Cape May.

Wednesday, October 19, 1927, 10.00 A. M.

Before ELDREDGE, J., and a jury.

Cape May Court House, Cape May County, N. J.

PRESENT OF COUNSEL:

F. STANLEY KREPS, ESQ. (KREPS & BELL, ESQS.), for plaintiff.

NORMAN W. HARKER, ESQ. (MCMULLIN & HARKER, ESQS.), for defendant.

Mr. Kreps opens for plaintiff:

This is an action brought by Charles A. Doe, a real estate broker in Ocean City, against Charles F. Eggleston, Esq., to recover a commission on a written contract, the commission to be paid for the procuring of a purchaser of real estate in Ocean City, New Jersey.

The facts are these: That Mr. Doe was a licensed real estate broker in the State of New Jersey, having an office in Ocean City, and Mr. Eggleston was the owner of a beach-front property; that Mr. Eggleston listed the property for sale and Mr. Doe procured a purchaser, as the result of which parties by the name of Wagner & Hodgkins entered into a written contract with Mr. Eggleston, the owner of the property, whereby they agreed to buy this piece of ocean-front property for the sum of $28,000.

In the agreement of sale between Eggleston and Wagner & Hodgkins, there was a clause, by the terms of which Mr. Eggleston, the owner, agreed to pay to Mr. Doe a commission of 5 per cent.

Settlement for this property was to have taken place on or before August 20, 1925; first, the agreement of sale was assigned to a man by the name of Kaplan; Mr. Kaplan was not present for the purpose of making settlement on August 20, 1925, for the reason that he was of the opinion and was advised, as we will show you, that settlement was to be postponed because title searches had been procured and settlement was not made on that date.

Shortly thereafter, August 25, Mr. Kaplan received word, and Mr. Doe, for Wagner & Hodgkins, received word, that Mr. Eggleston, the owner, cancelled his contract.

That immediately the balance of the purchase price, which was $5,000, and the executed mortgages which were supposed to have been given back to the seller, were put up with the Ocean City Title & Trust Company for the purpose of making settlement; in other words, there was no intention on the part of the buyers to get out of their contract; they wanted the property but Eggleston refused to convey the property.

That the buyers then started suit in the Court of Chancery for specific performance, in order to make Eggleston go through with this contract.

That the Court in Chancery then ruled that the complainant was in default, as the title policy had not been procured immediately, and that, therefore, Mr. Eggleston did not have to convey this property to the buyers.

Mr. Doe now comes into this Court and asks this Court and jury to decide that he is entitled to his commission because of the fact that he did procure a buyer who was ready, willing and able to go through with this contract.

That the only reason there was not any settlement made was because Mr. Eggleston refused to make settlement because perhaps he thought he had made a bad bargain, for he didn't go through with it. That, however, was not our fault.

If we show you these facts and prove them to you we will ask for judgment for plaintiff.

Mr. Harker opens for defendant:

This clause in this agreement of sale between Mr. Eggleston and Wagner and Hodgkins, is the only important thing, as between Mr. Eggleston and Mr. Doe, which Mr. Doe, if the Court so directs, can rely upon in this case.

We will show you that Mr. Eggleston did not list his property with Doe; that Doe and Eggleston were unknown to each other until Doe came to Eggleston, without having such listing, and said he had a purchaser. Then when the purchaser and seller, Mr. Eggleston, got together, they signed an agreement and this clause was put in there:

> "8½. Seller agrees to pay Charles A. Doe, Realtor, five per centum (5%) on the gross amount of purchase price for effecting this sale, to be paid at settlement."

Doe put in there the condition that a commission should be paid him at settlement; and there it is, and those three lines are the foundation of Doe's claim in court here today.

So that our first defense is, there has been no settlement and that, therefore, the money is not payable. Secondly, our defense is that Mr. Doe is barred by his own carelessness and negligence in so handling the application for title insurance that there could be no settlement. Settlement was set for a certain day, August 20th, and time is made of the essence of this contract, but not until August 12th did Mr. Doe apply for title insurance and he did that himself.

We will show you the application, where he signed it, allowing but eight days for settlement, but that is no concern of ours. The getting out of the title policies was so delayed that the purchaser did not settle on August 20, 1925, as provided for in the written agreement. Mr. Eggleston was unwilling to give him any commission, and there is no reason why we should, although Mr. Kreps has gone into that at some length in his opening and it appears he is going to try it over again; but that

case he refers to has been tried in a bill for specific performance, which these purchasers brought against Eggleston. What was done and who was at fault was heard before Vice-Chancellor Ingersoll and the decree of the Court was entered in that case in which it was decreed that they, the purchasers, were in default and that Mr. Eggleston did not have to make settlement, did not have to make conveyance, because the terms of the contract were explicit and the purchaser must explicitly live up to these terms. Mr. Kreps in his opening was, to me, a little confusing as to who it was in default; he used the word "he." The purchasers are two men, Wagner & Hodgkins. Eggleston was not in default. As far as the fault lies between them, we claim it to be on the part of Doe, who made it so that there could be no settlement under the agreement. He lost his sale, there was no settlement and we should pay no commission.

Mr. Kreps: I offer in evidence agreement between Charles F. Eggleston and Wagner & Hodgkins, dated June 20, 1925, in which there is incorporated a paragraph, No. 8½, which reads as follows:

> "8½. Seller agrees to pay Charles A. Doe, Realtor, five per centum (5%) on the gross amount of purchase price for effecting this sale, to be paid at settlement."

Mr. Harker: I object to that. This is a contract between the purchaser and the seller. If it is produced at all Mr. Doe, who is a stranger as far as the contracting parties are concerned, is not competent to produce it and, being produced here by him, I submit that it is irregular and not properly proved.

The Court: I think the contract is not properly proved.

Mr. Kreps: I do not have to prove it by pleadings; he admits it in his answer.

The Court: How about that, Mr. Harker?

Mr. Kreps: Paragraph 4 of the answer admits it.

Mr. Harker: We deny the allegations of paragraph 3. We admit the allegations of paragraph 4. I believe we do admit that that clause, 8½, was inserted.

The Court: You couldn't then deny it.

Mr. Harker: I press my objection.

(Objection overruled.)

(Exception to defendant.)

(Offer admitted.)

PLAINTIFF'S EVIDENCE.

CHARLES A. DOE, sworn.

By Mr. Kreps:

Q. Where is your place of business?
A. 406 8th Avenue, Ocean City, New Jersey.
Q. What is your business?
A. Real estate broker.

Q. You are a duly licensed real estate broker, authorized to deal in real estate in the State of New Jersey?

A. I am.

Q. Do you know Charles F. Eggleston?

A. I do.

Q. Are you familiar with a piece of property situate in Ocean City, New Jersey, known as lot No. 5, block 1301, with a frontage of 33⅓ feet on Ocean Avenue and extending to the exterior riparian commissioners' line?

A. I am.

Q. Did you enter into negotiations with Mr. Eggleston concerning the sale of this property, at any time?

A. Yes, I did, about June 6, 1925.

Q. What was the first communication between you and Mr. Eggleston with reference to that property?

A. I had an inquiry from a party who wanted to buy this piece of ocean-front, so I wrote to Mr. Eggleston that I understood he was the owner, and I wrote to him for a price, and after a few days' delay—it seems Mr. Eggleston was in Ocean City and it is my recollection he came to my office and we had a conversation with regards to the property, the price, etc. After—I don't remember whether was a day or two after the communication that he accepted an offer of $28,000; and I drew up the agreement.

Q. Did he list the property with you?

A. Yes.

Q. At what price did he list it with you?

A. At $28,000.

Q. Did you procure someone who would buy that property for $28,000?

A. I did.

Q. Who was that?
A. Wagner & Hodgkins, of Philadelphia.
Q. You submitted that offer to Mr. Eggleston?
A. I did.
Q. Did he accept that offer?
A. He did.
Q. Is this the agreement of sale, do you know, of your own knowledge, that was entered into between Charles F. Eggleston and Wagner & Hodgkins?

(Paper handed witness.)

Mr. Harker: Objected to.

A. It is.
Q. Is that your signature?

(Shown witness.)

A. That is my signature.
Q. Did you witness anyone's signature to that agreement?
A. I witnessed Mr. Eggleston's signature.
Q. Where was this signed by Mr. Eggleston?
A. At the Biscayne Hotel, Ocean City.
Q. Was the clause: "8½. Seller agrees to pay Charles A. Doe, Realtor, five per centum (5%) on the gross amount of purchase price for effecting this sale, to be paid at settlement" in that agreement when it was signed?
A. It was.
Q. What was the amount of the purchase price?
A. $28,000.
Q. And you were to get 5% on $28,000?

Mr. Harker: Objected to as leading.

A. I was.

The Court: The contract speaks for itself.

Mr. Kreps: I want to get it on the record.

By Mr. Kreps:

Q. By the terms of this contract settlement was to be made at the Ocean City Title & Trust Company on or before August 20, 1925?

A. Yes.

Q. Did Mr. Eggleston, to your knowledge, appear at the Ocean City Title & Trust Company, on August 20, 1925 ——

Mr. Harker: Objected to.

Mr. Kreps: I haven't finished.

By Mr. Kreps:

Q. ——for the purpose of making settlement?

Mr. Harker: Objected to as immaterial and as being matter *res adjudicata.*

Mr. Kreps: This case hasn't been in court here before.

Mr. Harker: The purchaser must be the one ready to appear under his written agreement.

The Court: That is immaterial, in this issue, whether the purchaser is ready and willing to settle. I take the law to be that if an agent brings together a buyer and a seller who enter into a

contract satisfactory to them, then the agent is entitled to his commission unless the terms under which he is to receive that commission, provide that he is to be paid only if and when settlement is to be made. I think it is immaterial whether Mr. Eggleston was there or not, at the present state of affairs of the case.

Mr. Kreps: We want to show that, so far as the settlement is concerned, settlement couldn't be made because Eggleston wasn't there himself.

The Court: You are anticipating the defense, but I will sustain the objection, so far.

(Exception allowed to plaintiff.)

By Mr. Kreps:

Q. Has a commission ever been paid to you?
A. No, sir.
Q. What is the amount of commission to which you are entitled by the terms of this contract?
A. $1400, I think it is—5% on $28,000.

Mr. Kreps: I am going to press my motion. Mr. Harker, in his opening, said that this commission was not earned because the agreement says it was to be paid at settlement, at time of settlement, and I think we have a right to show, even now, in our case, a direct case, that settlement was not made because of Mr. Eggleston's own fault.

The Court: It seems to me that at the present time you have presented a *prima facie* case providing for payment of a commission.

Mr. Kreps: As this is a question of law I want to get it on the record. Does the Court overrule me?

The Court: I will sustain the objection so far and allow you an exception.

Cross-examination.

By Mr. Harker:

Q. In this agreement that you have produced, in which this clause is written: "8½. Seller agrees to pay Charles A. Doe, Realtor, five per centum (5%) on the gross amount of purchase price for effecting this sale, to be paid at settlement," who put in that clause?

A. I did.

Q. Who conceived those terms?

Mr. Kreps: Objected to.

(Objection overruled.)

Q. Did you put those terms in?

A. Yes.

Q. In that language?

A. Yes.

Q. At no suggestion from Mr. Eggleston about that?

A. No.

Q. Is that your signature? (Shown witness.)

A. Yes, that is my signature.

Q. Did you write that letter? (Shown witness.)

A. Yes.

Q. What is the date of it?

A. August 12, 1925.

Q. You sent it to Mr. Eggleston?
A. Yes.

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

(Marked for identification.)

Q. Is that your signature and did you send that letter?
A. Yes.
Q. To whom did you send it?
A. To Mr. Eggleston.
Q. On that date?
A. Yes.
Q. You didn't have this property listed on one of your cards the same as other properties you have listed, did you?
A. I don't remember that. I know I learned that Mr. Eggleston owned the property and I wrote to him to get a price on it.
Q. You solicited him to sell?
A. Yes.
Q. Did he ever sign any card for your office listing?
A. No.
Q. Did he ever give you any facts for your office on a listing card?
A. No, sir, not that I recollect.
Q. Or terms of settlement?
A. The terms, they were discussed between us.
Q. Aside from the discussion you had you didn't have any record of the property in your office for sale by him?
A. No.
Q. So that it was all taken up with him in the manner you have stated?

A. Yes.

Q. Who was there?

A. Mr. Eggleston and myself.

Q. Where?

A. At the Biscayne Hotel.

Q. How long did you discuss the probability of selling this property for him?

A. I don't remember just the number of meetings we had; I think one or two—something like that.

The Court: Isn't this irrelevant?

Mr. Harker: It is the subject of the offering; what led up to it.

The Court: It is the question of his listing the property and having the card. It seems to me irrelevant because here is the written contract on which your client agreed to sell.

Mr. Harker: I am going to maintain that it hasn't the full effect of a written contract.

The Court: As between the parties?

Mr. Harker: As between the parties.

The Court: All right, proceed.

By Mr. Harker:

Q. That was all that was said at this conversation, as far as you can remember?

Mr. Kreps: I think it is immaterial as to what was said. Here is the contract. It is objected to.

The Court: Objection is sustained.

By Mr. Kreps:

Q. By the terms of this agreement of sale a first payment of $1000 was paid Mr. Eggleston at the time of the signing of the agreement. Did you witness the passing of the $1000 at the time?

Mr. Harker: Objected to .

A. Yes, I did.

The Court: Objection overruled. Exception to defendant.

By Mr. Kreps:

Q. That money was paid to Mr. Eggleston as stated in this agreement?

A. Yes.

Q. Only answer of your own knowledge. Do you know, of your own knowledge, whether or not Mr. Eggleston ever returned that $1000, or whether he still retains it?

Mr. Harker: Objected to.

A. I don't know.

The Court: He says he doesn't know.

STANLEY Y. GANDY, sworn.

By Mr. Kreps:

Q. By whom are you employed?
A. Ocean City Title & Trust Company.
Q. In what capacity?
A. Settlement clerk.
Q. Are you familiar with a settlement that was to be made at the Ocean City Title & Trust Company between Charles F. Eggleston and Wagner & Hodgkins for the sale of lot No. 5, block 1301, Ocean City, New Jersey?
A. Yes.

By Mr. Harker:

Q. Answer yes or no.

Mr. Kreps: He said yes.

By Mr. Kreps:

Q. Did that settlement take place on August 20, 1925?

Mr. Harker: Objected to as immaterial.

The Court: What is your objection?

Mr. Harker: As immaterial and as anticipation of the defense.

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

(Exception to the defendant.)

A. No settlement.

By Mr. Kreps:

Q. Do you know, of your knowledge, whether or not any application for title insurance was ever made?

A. I have a record here.

Q. Will you look at that record ——

Mr. Harker: Objected to as immaterial. I think this is anticipation of the defense.

Mr. Kreps: It is not. This agreement says:

"Settlement shall be made at the Ocean City Title & Trust Company, Ocean City, N. J., on or before August 20, 1925, or the deposit made herewith, at the option of the 'Seller,' 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."

The Court: This is the Court's position in the matter with respect to that. What you are doing with this line of questioning is the anticipation of the defense in the case. I suppose Mr. Harker objects to the introduction of that testimony. At the present time I believe it is well taken. It could come in by way of rebuttal. I will sustain the ob-

jection at the present time. Exception to plaintiff is allowed.

Mr. Kreps: That is all.

Mr. Harker: No questions.

Mr. Kreps: We rest.

Mr. Harker: I move for a non-suit on the ground set forth in the reasons presented to the Court.

The Court: Do you want to argue these points in their order here?

Mr. Harker: Yes.

(Argument for defense.)

(Argument, *contra,* by plaintiff.)

The Court: I am going to overrule defendant's motion on the ground that in order to absolve a party from payment of a commission it must clearly appear by contract with the broker that payment of commission was made contingent upon actual transfer of title.

(Exception noted to defendant.)

DEFENDANT'S WRITTEN MOTION WITH REASONS.

The defendant moves the Court to enter a nonsuit against the plaintiff for the following reasons:

1. The plaintiff has failed to show that he effected a sale of the defendant's property to a purchaser able and willing to buy.

2. The plaintiff has failed to show that settlement has been made for the property and that this contingency on which the plaintiff's right to recover has in fact happened.

See Morse v. Conley, 83 N. J. L. 416; Leschizner v. Bauman, 83 N. J. L. 743; Hinks v. Henry, 36 N. J. L. 328; Lewis v. Morris Realty Co., 3 N. J. Adv. 1701.

3. The plaintiff shows no authority for selling the defendant's real estate reduced to writing and signed by the owner or any engagement, oral or otherwise, by the defendant of the plaintiff to act as his agent to sell the land in question.

4. The clause in the agreement between the defendant and the alleged purchaser has the effect only of a recognition of a former engagement or authority between the owner and the agent and cannot stand alone as primary evidence of a contract between these parties.

5. The plaintiff's proof is barren of proof of performance by the plaintiff.

6. Plaintiff has produced no sufficient evidence of a contract or agreement on the part of the defendant.

7. The agreement between seller and buyer was not an agreement to which the defendant was a party and could not be primary evidence of a contract between the parties to this suit.

JOHN D. MCMULLIN,
Attorney for Defendant.

DEFENDANT'S TESTIMONY.

CHARLES F. EGGLESTON, sworn.

By Mr. Harker:

Q. Where do you reside?
A. Glenolden, Delaware County, Pennsylvania.
Q. Your profession is what?
A. I am a lawyer.
Q. In June, 1925, were you the owner of premises in Ocean City, New Jersey?
A. I was.
Q. Where were they located? In general, what was the character of the property?
A. It was close to 14th and Boardwalk.
Q. Was it improved or unimproved?
A. Improved.
Q. Had you listed that property with Mr. Doe, for sale?
A. No, sir.
Q. What transaction or negotiation did you have with Mr. Doe? Tell the story in your own words.

A. Mr. Doe wrote me and said he understood I was the owner of this property and asked me if it was for sale. I replied in my letter that I was going to Ocean City in a few days and that he could see me there at the Hotel Biscayne. He came to see me and we had several conversations. He asked me with relation to the price I had on the property and I told him I would sell it for $35,000; and he came in the course of several days and made me an offer of $28,000. I declined the offer as presented and told him the only thing that would induce me to sell would be a quick settlement and a cash sale.

Mr. Kreps: Objected to. He entered into a contract which speaks for itself. He entered into a contract and he is bound by it.

Mr. Harker: I think Mr. Kreps raises a false issue in this case. He calls a memo a contract. The most it is, is a memo and it speaks as far as it speaks, and no farther.

The Court: The contract speaks for itself. He agreed to take $28,000; settlement was to be made under the terms of the written agreement which contained a memo, and upon which I have ruled, sufficient to entitle the agent to a 5% commission That cannot be varied by any verbal testimony.

Mr. Harker: First of all, there must be an authorization or some equivalent, between the parties, Doe and Eggleston.

The Court: Do I understand your position is that you are going to show that the broker is not entitled to his commission because the contract entered into

by him was not in accordance with the authorization to so act?

Mr. Harker: No.

The Court: Then how would your testimony be material?

Mr. Harker: If the seller apprised Doe that Doe had some obligations in this settlement and Doe didn't perform these obligations, that certainly has a bearing on the relationship between the two parties.

The Court: In other words, your testimony is directed toward the fact that the failure to make settlement was the fault of the agent—is that your position?

Mr. Harker: Exactly.

The Court: It would be material for that purpose.

Mr. Kreps: The objection was as to what Eggleston said to Doe he wanted for the sale of the property.

The Court: I will sustain the objection so far.

By Mr. Harker:

Q. Did you state to Mr. Doe any conditions that he himself must fulfill in order that this agreement would be satisfactory and acceptable to you?

Mr. Kreps: Objected to on the ground that the contract speaks for itself; and that this is a complete

contract. If they had any other agreement it should appear in writing.

Mr. Harker: The objection is not addressed to the form of the question I put.

The Court: The objection is sustained.

(Exception to defendant noted.)

By Mr. Harker:

Q. When was the agreement signed or at least where and under what circumstances?

A. It was signed at the Hotel Biscayne. Mr. Doe brought it to me there where I was stopping.

Q. Did you write it or did he write it?

A. Mr. Doe wrote it, at least he brought the contract to me. I didn't write it.

Q. Did you have anything to do with the phraseology if clause 8½?

A. I did not. I did not put it in there.

Mr. Kreps: Objected to.

Q. You did close for the sale of these premises under these precise terms?

A. I closed for the agreement, but I ——

Mr. Kreps: Objected to.

By Mr. Harker:

Q. Did these purchasers or any assignees of theirs settle in accordance with the terms of this agreement?

A. No, sir.

Q. What is this letter? (Shown witness.)

A. This is a letter from Mr. Doe, dated August 12, directed to me in reply to a letter I had sent him the day before asking him to be ready for settlement at the time specified.

Q. Will you read the letter? It has been identified.

Mr. Kreps: Wait a minute. All right.

A. (Witness reads letter from Mr. Doe to Mr. Charles F. Eggleston, as follows):

"Aug. 12, 1925.

Dear Sir:

The Trust Co. tell me that they will not reach our settlement for at least two weeks yet, as they are snowed under—I will let you know at the first moment we can get the title papers through.

Your truly,

Charles A. Doe."

Q. Would two weeks have been within the terms of this agreement?

A. No, sir.

Q. Did you receive that letter? (Shown witness.)

A. Yes, sir. (Witness reads letter as follows):

"Charles A. Doe, Realtor.

406-8th Street, Ocean City, N. J.

Mr. Charles F. Eggleston,

614 Wesley Bldg., Philadelphia.

Dear Sir:

I have arranged with the Ocean City Title and Trust Company to have the settlement on the Ocean City property I sold for you take place on Wednesday Sept. 2d, at 2 P. M. Trusting this will be convenient to you, I am

Yours sincerely,

Charles A. Doe."

Q. Was that in accordance with the language of the agreement that you signed?

A. No, sir.

Mr. Kreps: Objected to.

Q. "Trusting this will be convenient to you"—was that satisfactory to you?

A. No, sir.

Q. Had you notified the original parties to that?

A. I had.

Q. In what manner?

A. I had notified them the day before that I would cancel the agreement because of their failure to carry it out. This is a copy of the letter I sent.

Mr. Kreps: Objected to.

The Court: What is the objection?

Mr. Kreps: On the ground that it is absolutely immaterial whether it is in the contract or not.

The Court: This could not bind Mr. Eggleston.

Mr. Kreps: I further object on the ground that it could not bind this plaintiff.

By Mr. Harker:

Q. Can you say when you notified the purchasers of that?

A. August 27, 1925.

Q. Thereafter was the question of who was in default tested out in any litigation?

Mr. Kreps: Objected to.

Mr. Kreps: How can that bind this plaintiff. I object.

The Court: Now you want to introduce evidence. of this suit in chancery?

Mr. Harker: Yes, and the decree. I think it is material to show who has been decreed in default and who is free from default because these same cases you have heard read bring in the question of capriciousness on the part of the parties dealing with the real estate broker.

The Court: This suit was between the parties to the contract.

Mr. Kreps: Between the assignee of the purchaser, and the seller.

Mr. Harker: Yes. And it determines who was at fault and who was free from fault.

The Court: But that is as between the parties to that contract.

Mr. Harker: Yes.

The Court: How could that bind this plaintiff?

Mr. Harker: Only so far as the agent made this settlement part of his contract and when they come together like that there has been a test of the conduct of the agent's principal; and in some of the cases they hold he was capricious. I think the jury is entitled to know who was at fault and who is not at fault, that is, between the buyer and seller, and whether any fault might be imputed to Mr. Eggles-

ton, as between Mr. Eggleston and Mr. Doe. If there is no fault then we have the fact on that case and I think we should not be deprived of that information.

Mr. Kreps: He is now trying to get before this jury a proceeding in the Court of Chancery which was between Mr. Eggleston, the defendant in this case, the seller under this agreement of sale and, I think, a man by the name of Kaplan who, I think, was the assignee of Wagner & Hodgkins, trying to show by a ruling of the Court in Chancery, by a decision of the Vice-Chancellor who was in default. Mr. Doe is not bound by it. Kaplan is bound by it, but not Mr. Doe.

The Court: I will permit the testimony.

(Exception noted to plaintiff.)

By Mr. Harker:

Q. (Last question read to witness as follows: Q. Thereafter was the question of who was in default tested out in any litigation?)

A. It was.

Q. What litigation?

A. The assignee of the contract, I don't remember the name, of Wagner & Hodgkins. He brought suit against me for specific performance in the Court of Chancery.

Q. Did that come to final hearing?

A. Yes, before the Vice-Chancellor.

Q. Was it decided?

A. Yes.

Q. Was a final degree entered?

A. Yes.

Mr. Harker: I offer in evidence, certified copy of final decree in the case of Edward T. Jones et al., v. Charles F. Eggleston, et al.

Mr. Kreps: That is objected to, the introduction of this offer, on the ground that it is improperly certified.

Mr. Harker: It is properly certified within the limits of this State.

The Court: Objection overruled.

(Exception noted to plaintiff.)

(Offer admitted, marked D1. Copied at end hereof.)

By Mr. Harker:

Q. Has there been settlement since?
A. No, sir.

By Mr. Kreps:

Q. Has there been an offer to make settlement, since?

(Objected to.)

(Objection overruled.)

(Exception to defendant.)

The Court: I will permit the question, so far.

Q. Has there been an offer to make settlement, since?

A. I received already this offer in evidence, on the 29th. That is the only offer I received.

Q. Was there any offer made by Mr. Jones the assignee?

A. Not to my knowledge, other than this letter.

Q. He started suit for specific performance against you to make you carry it out?

A. Yes.

Q. And you refused?

A. Yes. He didn't make any offer though.

Q. He never made you any offer?

A. Not specifically. I didn't know he was in the case.

Q. Did anybody ever make an offer to you after August 20th?

A. Not after this letter, and suit brought.

Q. Did you ever go to the Ocean City Title & Trust Company for the purpose of making settlement in this matter?

A. I was there August 25 and the Title Company told me they were not ready and couldn't get ready for a month.

Q. You were not there August 20?

A. I was there August 25.

Q. I said August 20.

A. Not the 20th.

Q. That was the day for settlement?

A. Doe said he couldn't settle that day.

Q. That was the date for settlement under this contract—August 20?

A. Yes.

Q. You were not there?

(Objected to as matter res adjudicata.)

The Court: He wasn't there then. He was there he says on August 25.

By Mr. Kreps:

Q. Did you have the deed there, properly prepared and executed, ready for delivery?

Mr. Harker: Objected to.

(Sustained.)

The Court: I have ruled on this question of settlement.

Mr. Kreps: Your Honor is allowing this testimony to come on from the Court of Chancery, deciding who is in default, whose fault this was. I want to show that he couldn't have made settlement if he wanted to because he wasn't there.

The Court: There is nothing in the testimony so far as I recall which charges the plaintiff in this case with being in default.

Mr. Kreps: He is arguing that.

The Court: He has done that. But I have ruled on that.

Mr. Kreps: Your Honor overruled that?

The Court: I overruled the question.

(Exception noted to plaintiff.)

By Mr. Kreps:

Q. You received $1000 as stated in the contract?

Mr. Harker: Objected to as immaterial.

The Court: What is the purpose?

Mr. Kreps: I want to show this man has some money under this contract. He was paid $1000 and wouldn't settle with the buyers.

The Court: That is immaterial. Let me have your contract. (Paper shown Court.) Your contract acknowledges receipt of that?

Mr. Kreps: Yes.

The Court: That is in there. The contract speaks for itself. That is already in evidence.

Mr. Kreps: That is all, in view of the Court's ruling.

By Mr. Harker:

Q. Did you lose anything under this contract through its terms not being carried out?

(Objected to.)

The Court: On what ground?

Mr. Kreps: This is a question of counter-claim.

The Court: If there is a counter-claim that is another question.

By Mr. Harker:

Q. When this agreement was not carried out by the purchaser in accordance with the terms of this agreement, did you suffer any loss?

A. I did.

Mr. Kreps: Objected to.

(Objection overruled.)

Q. What loss?

(Objected to.)

The Court: The same ruling.

(Objection overruled.)

By Mr. Harker:

Q. What loss?

A. I sustained loss in more than one way. I had told Mr. Doe that the only reason for making a sale was to get ready cash.

Mr. Kreps: I object to this on another ground that there hasn't been shown that it was through the fault of Mr. Doe.

The Court: He has to follow that up.

Mr. Kreps: He ought to bring that out first.

The Court: He may prove loss and charge your client with it, if possible.

Witness: I was building some houses at that time and needed money for that purpose for completing them.

By Mr. Harker:

Q. You needed it when?

A. At the time of settlement, August 20. I was told by the title company that they could not settle for at least a month because of failure of Mr. Doe to make application for title insurance. I therefore cancelled the agreement and had to go out and borrow considerable money in order to complete my building operation, and paid a premium for it.

Q. What money did you borrow more than what you would have received under your agreement, and what premium did you pay?

A. I borrowed $5000 at that time, that is, before the end of August. I paid a premium of 3% for it.

Q. How much was that?

Mr. Kreps: I object to the question as to any premiums he may have paid for money.

The Court: On what ground?

Mr. Kreps: On the ground that it is not binding upon this plaintiff.

The Court: I am going to permit the testimony and rule it out so far as the jury is concerned, unless you can, of course, charge this plaintiff with default.

By Mr. Harker:

Q. You paid 3% on $5000?

A. Yes.
Q. That was how much?
A. $150. I paid interest for 6 months on it.
Q. Can you tell me what that was?
A. That was $150.
Q. Was there any other borrowed money?
A. Not in cash.
Q. In what way?
A. I was put to considerable inconvenience.

Mr. Kreps: Objected to.

The Court: Objection sustained.

Cross-examination.

By Mr. Kreps:

Q. Was this $5000 ever offered you?
A. What do you mean?
Q. Due under this contract?
A. I have said before, I got this letter from Mr. Doe saying he would make settlement on a certain date.
Q. When you went to the Ocean City Title & Trust Company, on August 25, did they advise you that the money was there?
A. No, sir, they advised me the money was not there and that they could not make settlement for a month.
Q. Did you ask if the money was there?
A. Yes.
Q. Whom did you ask?
A. The head of the title department.
Q. Mr. Gandy?
A. The head of the title department, Mr. Price, I think.

Q. Did you see Mr. Gandy the day you were there?

A. I don't recall. I made another settlement the same day. I don't remember.

Q. Do you remember who the settlement clerk was in the other settlement?

A. I don't remember his name.

Q. If the money had been there would you have settled so that you wouldn't have to suffer this loss you speak about?

Mr. Kreps: Objected to.

A. Yes, I would.

Mr. Kreps: Objected to.

Q. So that if you had gotten this money you wouldn't have suffered any loss?

A. If I got it at that time.

Q. Did you absolutely have to have it at that time?

A. You know what a building contract is. I had to pay the builders, sub-contractors, and I had to figure on this money coming in on the 20th. I notified Mr. Doe on the 12th, and I hadn't heard from him. I notified him on the 12th that I wanted it on the 20th. I had made my other negotiations and I wanted the money on that date and didn't get it.

STANLEY Y. GANDY, recalled.

By Mr. Harker:

Q. You have already testified that application was made at the Ocean City Title & Trust Company, where you are employed, for title insurance on the

property mentioned in this transaction. Is that correct?

A. Yes.

Mr. Kreps: That has been ruled out.

Q. (Last question read to witness.)

The Court: That question was answered before.

By the Court:

Q. You may answer it again.
A. Yes.
Q. You did so testify?
A. Yes.

By Mr. Harker:

Q. Have you produced today the written application for title insurance?
A. I have it here.
Q. By whom was this application made?

Mr. Kreps: Objected to. That can't bind this plaintiff.

Mr. Harker: We specifically plead this defense, that the plaintiff's own conduct, in this case, made it fall.

The Court: Is that set up in the defense?

Mr. Kreps: In the supplemental answer.

By Mr. Harker:

Q. Who made the application?
A. Charles A. Doe.
Q. Did he bring with it a copy of the agreement?
A. I don't know.
Q. On what date did he make that?
A. August 12, 1925.
Q. For settlement on August 20, 1925?

(No answer.)

Q. Do you know what date settlement was to be?
A. That I couldn't say.
Q. If settlement was to made on the 20th and the application was made on the 12th, would your company have been able to get out a settlement certificate and make searches and so forth ready by that date?
A. Normally at that time, no.
Q. Do you remember advising Mr. Eggleston that that was impossible on August 20th?
A. The correspondence I have here states that.
Q. By letted dated what?
A. August 20, 1925.
Q. That is the date of settlement? That is the date provided in the agreement, for settlement?
A. So you say.
Q. What did you advise Mr. Eggleston by that letter?
A. Shall I read it?
Q. Yes.
A. "On August 12, I entered under our A-1546 the application for title insurance on tract of Ocean front 83⅓ feet southwest from 13th Street. If securing of our settlement certificate on the part of the buyer is a condition of settlement, then there is no way in

which settlement can be made until we have completed our examination. You will appreciate that we are in no wise responsible for delay in placing the order and that we are doing everything in our power to overcome conditions of this search due to the great activity of real estate here." The balance of the letter pertains to another matter.

Q. What was the length of time required to get out such settlement certificate at that time, under the conditions that then prevailed?

A. That I couldn't answer.

Q. August 12, to August 20, would be eight days. Was it a greater length of time than that?

A. Considerable.

Mr. Harker: I offer in evidence—can you detach the application for title insurance for the Court's purposes today?

(Papers detached.)

I offer the application for title insurance in evidence.

(Offer admitted D2.)

By Mr. Kreps:

Q. Do you know whether or not $5000 was deposited with the Ocean City Title & Trust Company for the purpose of making settlement in this matter?

Mr. Harker: Objected to as not being cross-examination.

The Court: Are you cross-examining him or using him as your own witness?

Mr. Kreps: I am making him my own witness.

Mr. Harker: In addition to the two papers in evidence, I also offer in evidence letter dated August 12, Mr. Doe to Mr. Eggleston, identified by Mr. Doe and also letter dated August 29th, from Mr. Doe to Mr. Eggleston, both identified by defendant.

(Letter of Aug. 12, 1925, from Doe to Eggleston, read in evidence, heretofore copied page 22 this transcript.)

(Letter August 29th, 1925, from Doe to Eggleston, read in evidence, heretofore copied page 22 this transcript.)

By Mr. Kreps:

Q. Do you know whether or not $5000 was deposited with the Ocean City Title & Trust Company prior to August 20, 1925, for the purpose of making settlement in this matter?

Mr. Harker: Objected to.

(Objection overruled.)

(Exception noted to defendant.)

A. Not prior to August 20th.
Q. When was it deposited?
A. June 30, 1926.
Q. Wasn't there a deposit made there in July of 1925?
A. No record of it.
Q. Do you have a record of all the money deposited in this matter?

A. I have a memo taken from the settlement funds account ledger.

Q. You don't have that original here?

A. No, sir.

Q. Where is the original?

A. In our office, the bookkeeping office.

Mr. Kreps: I suppose I am bound by what this witness says, but he has brought only a copy here.

The Court: He is your witness.

Mr. Kreps: He is my witness. There is no question about that.

By Mr. Kreps:

Q. Is it possible that that could have been 1925?

Mr. Harker: Objected to.

The Court: The question is permitted.

Q. Is there any possibility that that could have been 1925, instead of 1926?

A. That is possible.

By Mr. Harker:

Q. But application was not made until August 12, 1925—you are clear about that?

A. Quite clear.

Q. Is there any reason for depositing the money before application?

(Objected to.)

Mr. Kreps: How does he know?

Q. Is there any reason for depositing the money before application?

A. None that I know of.

The Court: Both sides rest?

Mr. Kreps: We rest.

Mr. Harker: I move the Court for binding instructions in favor of the defendant on the reasons presented and heretofore argued.

The Court: Hold that matter until 1.30 o'clock.

Mr. Kreps: I have a motion to make.

The Court: Make it at that time.

(Recess to 1.30 P. M.)

(After recess, 1.30 o'clock.)

Mr. Harker: My motion before recess was in somewhat incomplete form, but was to the effect that I move for binding instructions.

And in further support of my request, as to reason No. 2, on the typewritten list, I wish to urge before the Court that this agreement is written by the plaintiff, Doe.

I submit with my motion that the Court should construe the language as clearly indicating a contingency and not merely a time when; that, it appearing that the settlement did not take place, instructions should be binding for the defendant.

Mr. Kreps: I wish to move for a directing of verdict on the ground that the interpretation of this contract is a matter for the Court to determine, and not for the jury;

That the Court has already ruled that the wording of the contract providing for the payment of a commission is not a contingency but that the commission was to be paid by the time of settlement.

I also wish to bring to the Court's attention the fact that on the attempted proof of the facts set forth in the counter-claim, there has been no proof to show that there was any obligation on the part of plaintiff to order title insurance; and for the further reason;

That primarily the broker is the agent of the selier.

My third reason is that there is absolutely nothing in this case by way of proof to show that the reason that the contract between Mr. Eggleston and Wagner & Hodgkins was not consummated on August 20, 1925, was in no way because of the fact that title insurance was not ordered. In other words, they have absolutely proved nothing to connect the failure of the making of settlement with any negligence on the part of Mr. Doe. Therefore their proof fails to show that settlement was not made because of the fault of plaintiff.

I therefore ask for a directed verdict.

The Court: Is there anything else?

Mr. Harker: There are several points that need reply.

It is in evidence that Eggleston informed the purchasers that he would consider the agreement forfeited because they did not settle on August 20th.

It has also appeared in evidence through the testimony of the settlement clerk at the title company

that there was no settlement on August 20th; and that there could be no settlement search or certificate required by the agreement, ready by that date; and that there was in fact none on that date.

There also appears in evidence a decree by the Court in Chancery as to where the fault lay—because on the day specified there was no settlement. I don't mean to say that that was all in the decree but it is clear from what Eggleston told his purchasers, that he wanted settlement on that date and that he would not settle because they were not ready on that date.

The Court: I am of the opinion as the case stands at this time that there is nothing that I could submit to the jury.

I take the view with respect to the clause in the agreement, providing for the payment of a commission, that the legal interpretation of it is such that it does not provide a contingency upon which payment is to be made, but comes under that class of cases where it is held that it fixes a time, merely. That being the case it is a matter of law and of course no question arises there for submission to the jury. That would leave the case dependent upon the defendant's interjection, namely, that the agent himself, the plaintiff in this case, was responsible for the delay.

There is certainly not evidence, to submit to the jury, of that fact in connection with the case because the contract is between the buyer and seller and there is no obligation on the part of the agent to secure title insurance. But the most that can be said is that he did so; as a volunteer or how we don't know. However, there is nothing in the case which charges him with the responsibility for delay on the part of the parties to the contract in postponing the

order for title insurance from June 20, to August 12, bue he did order it on August 12th.

That being my view of the matter I cannot do otherwise than to direct the jury to find a verdict for plaintiff for the amount asked.

The clerk will take the verdict.

(Verdict for plaintiff, for $1570.)

(Exceptions allowed to defendant to refusal of his motion for binding instructions and to granting of plaintiff's motion for direction of verdict.)

EXHIBIT P1.

THIS AGREEMENT, made the Twentieth (20) day of June, A. D. 1925, between Charles F. Eggleston of the first part, hereinafter called the "Seller" and Wagner & Hodgkins, Real Estate, 6021 Germantown Ave., Philadelphia, Pa. of the second part, hereinafter called the "Buyers."

WITNESSETH, that the "seller" agrees to sell and convey and the "buyers" agree 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. Lot No. Five (5) Block 1301, with a frontage of thirty-three and one-third feet (33⅓) on Ocean Avenue and extending of that width out into the Atlantic Ocean to the outer Riparian line, together with the buildings thereon, consisting of two store rooms on the boardwalk, and a double frame dwelling, with furniture, on Ocean Avenue, said property being situated on the east side of Ocean Avenue, three hundred and eighty-

three and one third (383⅓) feet south of Thirteenth Street, for the price or sum if Twenty Eight thousand ($28,000) Dollars, under and subject to the following terms and conditions:

1. A first payment of one thousand ($1000) dollars, receipt of which is hereby acknowledged by the "seller."

2. The balance of the purchase price shall be paid in the following manner: Five Thousand ($5000) Dollars at time of settlement, and to assume an existing first mortgage now on the property of Fifteen thousand ($15,000) dollars, and the seller to take back a second mortgage in the sum of seven thousand ($7000) dollars, for a period of two years; to be reduced in one year by the payment of two thousand ($2000) dollars, at the time of final payment, which shall be made at Ocean City Title and Trust Co., Ocean City, N. J. on or before August 20th, 1925, or the deposit made herewith, at the option of the "seller," 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 date of settlement and possession shall be given the "buyer" at settlement by assignment of leases, rent for 1925 season to be retained by "seller."

5. The "buyers" 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 terms:

8½. Seller agrees to pay Charles F. Doe, Realtor, five per centum (5%) on the gross amount of purchase price for effecting this sale, to be paid at settlement.

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

Charles F. Eggleston (Seal)
Wagner & Hodgkins,
per Wm. A. Wagner
Harvey R. Hodgkins

Signed sealed in presence of
Charles A. Doe.

EXHIBIT D1.

IN CHANCERY OF NEW JERSEY.

EDWARD T. JONES, *et al.*, Complainants and CHARLES F. EGGLESTON, *et al.*, *Defendants.*	On Bill for Specific Performance.

This cause coming on to be heard on final hearing before the Chancellor upon bill, answer, replication and proofs, in the presence of F. Stanley Kreps, of counsel with the complainants, and of John D. McMullin, of counsel with the defendants, and the Court having heard the testimony and arguments of the respective counsels and it appearing that complainants are not entitled to relief:

It is thereupon on this 22nd day of June A. D. 1926, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the Complainants are in default under the contract sought by them to be specifically performed, and are not entitled to any relief against the defendants arising out of the matters alleged in the bill, and it is further ordered, adjudged and decreed that complainants' bill be and

the same is hereby dismissed with costs to defendants to be taxed.

Respectfully advised,
E. R. Walker,
C.

R. H. Ingersoll,
V. C.
Ex D2 7-12-26
Edward I. Berry
Sup. Ct. Comm.

A True Copy.
Thomas Barber,
Clerk.

EXHIBIT D3.

10/19/27

CHARLES A. DOE
Realtor
406—8th Street
Ocean City, N. J.

Aug. 12th. 1925.

Mr. Charles F. Eggleston,
614 Wesley Bldg.
Philadelphia.
Dear Sir:—

The Trust Co. tell me that they will not reach our settlement for at least two weeks yet, as they are snowed under—I will let you know at the first moment we can get the title papers through.

Yours truly,
Charles A. Doe.

CHARLES A. DOE
Realtor
406—8th Street
Ocean City, N. J.

Aug. 29th. 1925.

Mr. Charles F. Eggleston,
614 Wesley Bldg.
Philadelphia.

Dear Sir:—

I have arranged with the Ocean City Title and Trust Company to have the settlement on the Ocean City property I sold for you take place on Wednesday, Sept. 2d, at 2 P. M.

Trusting this will be convenient to you, I am,

Yours sincerely,
Charles A. Doe.

Application No. 5146
Class A Ocean City, N. J. Aug. 12, 1925.

The undersigned hereby applies to
OCEAN CITY TITLE AND TRUST COMPANY
for a Guaranty in its usual form guaranteeing the title of the land hereinafter described in this application for the sum of $....., for which the undersigned agrees to pay the charges specified in this application.

The applicant hereby assents to the following provisions:

Statements made herein are correct and true to the best of the applicant's belief. Unanswered questions indicate that the applicant is without any information thereon. If the applicant before the issuing of the Guaranty shall receive any further information or intimation as to defects, objections,

liens or encumbrances affecting said premises not hereinafter mentioned, the same will be at once fully made known to the Company.

When the Company is not directed by the applicant to procure a survey, it will not guarantee against any condition that an accurate survey would show.

Liens, defects and insufficiency of records, if any, are to be reported to the applicant, and may be excepted in the Guaranty unless removed by documentary evidence furnished to the Company. All labor and expense of obtaining possession of the premises in question is assumed by the applicant.

When a definite date for closing a title is agreed upon, a postponement not requested by the Company will subject the applicant to reasonable charges for continuation of the search, unless forty-eight hours notice of the postponement be given the Company.

The charges of the Company for the examination of the title and incidental expenses shall be due at the time of making of this application and are payable whether a Guaranty can be issued or not. In case no Guaranty be issued, the applicant shall not be required to pay any premium charge. Premium $.....

1. Name and address of party to be Guaranteed. Fred. W. Kaplan.

2. Value of property.

3. Estate to be Guaranteed. (State whether a Fee, Mortgage or Assignment of Mortgage.)

4. Is there any agreement to sell? If so, between whom? Furnish copy. Owners.

5. Are there any Mortgages or other Encumbrances? If so, by whom given, the amount and address of holder. How to be disposed of?

6. Is land improved? If so, how? Are there any buildings thereon?

7. Have any buildings upon premises been erected, or repairs made within four months?

8. Have municipal improvements been made within one year?

9. Who is in possession? Under what claim?

10. Is any part of premises used by neighboring owner? If so, state particulars.

11. Are there party walls thereon?

12. Do any roads, streets, alleys, streams or drains run through premises to other lands? If so, specify.

13. Do you know of any objections to the title? If so, state them.

14. Give name, residence and occupation of Grantor or Mortgagor and husband or wife, if any. Chas. F. Eggleston.

15. Shall company procure a survey?

16. Will applicant furnish a survey which this Company may retain and upon which this Company may rely at date of guaranteeing as complete and correct?

Location and description of premises:

City....., N. J.
Plan .....
Block Dc Fr. C.
Lot .....
SE li. of Ocean Ave. 383⅓′ SW fr. 13th St. SW 33⅓′ x SE to Ext. line.

See A. 3601.

To be reported to.....
To close .....

Charles A. Doe Applicant

Received by..... Address 406 8 St.

TRANSCRIPT OF JUDGMENT.

CAPE MAY COMMON PLEAS COURT.

CHARLES A. DOE, *Plaintiff,* v. CHARLES F. EGGLESTON, *Defendant.*	In Attachment. Judgment on Verdict of Jury. Kreps & Bell, Attorneys for Plaintiff.

1081

And now, to wit, on this nineteenth day of October, nineteen hundred and twenty-seven, judgment is rendered in open court, on verdict of jury, in an action at law, in attachment, in favor of Charles A. Doe, plaintiff and against Charles F. Eggleston, defendant, in the sum of fifteen hundred seventy dollars, damages, $1570.00
and two hundred eighty-eight dollars and twenty-eight cents, costs, 288.28

Amounting in all to the sum of eighteen hundred fifty-eight dollars and twenty-eight cents $1858.28

Entered October 19, 1927, at 4 P. M.

HENRY H. ELDREDGE,
Judge.

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

I, A. C. HILDRETH, county clerk and clerk of the Court of Common Pleas in and for said county, do hereby certify that the foregoing is a true and correct copy of judgment entered in the suit of Charles A. Doe, plaintiff, against Charles F. Eggleston, defendant, as entered on the nineteenth day of October, A. D. 1927, in the office of the clerk of the Court of Common Pleas, in Book H of Common Pleas Judgments, at page 99.

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

A. C. HILDRETH,
Clerk.

(Seal)

NOTICE OF APPEAL.

CAPE MAY COUNTY COURT OF COMMON PLEAS.

CHARLES A. DOE, *Plaintiff*, v. CHARLES F. EGGLESTON, *Defendant.*	Action at Law. Notice of Appeal.

To Kreps & Bell, Attorneys for Plaintiff:

Take notice that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause.

JOHN D. McMULLIN,
Attorney for Appellant.

[ENDORSED]

Service of the within Notice of Appeal acknowledged this 22nd day of November, 1927.

Kreps & Bell,
Attys. for Charles A. Doe.

GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

CHARLES A. DOE,
Plaintiff and Respondent,
v.
CHARLES F. EGGLESTON,
Defendant and Appellant.

Action at Law.
Grounds of Appeal.

The appellant states the following grounds of appeal:

1. Because the trial Judge, upon the trial of said cause, directed a verdict in favor of the plaintiff and against the defendant, over the objection of the defendant, whereas said trial Judge should have submitted to the jury the questions involved in the issues.

2. Because the trial Judge, upon the trial of the case, denied the defendant's motion for a non-suit, whereas such motion should have been granted.

3. Because the trial Judge, upon the trial of the case, denied the defendant's motion for the direction of a verdict for defendant, whereas such motion should have been granted.

4. Because the trial Judge, upon the trial of the case, directed a verdict in favor of the plaintiff and against the defendant, over the objection of the defendant, although there was no evidence to support such a direction.

5. Because the trial Judge, upon the trial of the case, directed a verdict in favor of the plaintiff and against the defendant, over the objection of the defendant, although there was no evidence that at the time of the commencement of this suit, to wit, anything was or could be due from the defendant to the plaintiff.

6. Because the trial Judge directed a verdict for the plaintiff for $1,570.00.

7. Because the trial Judge sustained the defendant's objection to the following question addressed to the plaintiff:

> "Q. Did you state to Mr. Doe any conditions that he himself must fulfill in order that this agreement would be satisfactory and acceptable to you?"

The plaintiff being allowed an exception to the Court's ruling.

8. Because the trial Court did not admit testimony as to the duty which the defendant had undertaken in the matter of prompt application by him for title insurance, when the same was offered by the following question to the plaintiff which the trial Court did not permit:

> "Q. Did you state to Mr. Doe any conditions that he himself must fulfill in order that this agreement would be satisfactory and acceptable to you?"

The plaintiff being allowed an exception to the Court's refusal to permit the question.

9. Because the trial Court admitted in evidence over the objection of the defendant without sufficient proof an offer of the agreement between Charles F. Eggleston and Wagner & Hodgkins, who is a stranger to this suit, dated June 20th, 1925, which is Plaintiff's Exhibit 1.

JOHN D. MCMULLIN,
Attorney for Defendant-Appellant.

[ENDORSED]

Due and legal service of the within Grounds of Appeal accepted and acknowledged this 16th day of December, 1927, on behalf of the plaintiff-respondent.

Kreps & Bell,
Attys. for Charles A. Doe.

OPINION.

(Filed June 21, 1928.)

NEW JERSEY SUPREME COURT.

No. 37. January Term, 1928.

CHARLES A. DOE,
Plaintiff-Respondent,
v.
CHARLES F. EGGLESTON,
Defendant-Appellant.

On Appeal.

Submitted January Term, 1928, decided June 21st, 1928.

Before GUMMERE, Chief Justice and Justices BLACK and LLOYD.

For the respondent, MESSRS. KREPS AND BELL.
For the appellant, MR. JOHN D. MCMULLIN.

Per Curiam:

This suit was brought to recover $1,400 with interest from August 20th, 1925, a real estate broker's

commission, alleged to have been earned under a written agreement dated June 20th, 1925. The following are the pertinent clauses: "five per centum (5%) on the gross amount of the purchase price for effecting this sale, *to be paid at settlement,*" final settlement shall be made on or before August 20th, 1925. Time is of the essence of this agreement.

The trial resulted in a directed verdict in favor of the plaintiff for $1,570. The defendant filed nine grounds for a reversal of the judgment. The first six allege errors by the trial Court in refusing to non-suit the plaintiff and in directing a verdict in favor of the plaintiff. The seventh, eighth, and ninth refer to trial errors in admitting and rejecting testimony. We find no error here, but if this is not so, the rulings could not change or affect the result reached by the trial Court. The ruling of the trial Court in directing a verdict was based upon the construction of the written agreement above stated, viz., that it does not provide a contingency upon which payment is to be made, but falls under that class of cases, where it is held, that it fixes a time merely. That is a matter of law and no question arises for a submission to the jury. We think the ruling of the trial Court is supported by the reported cases from the New Jersey Courts, such as *Mahlenbrock v. Stonehell Realty Co.,* 5 N. J. Adv. R. 1464; 138 Atl. 875; *Haber v. Goldberg,* 92 N. J. L. 373; *Steinberg v. Mindlin,* 96 N. J. L. 206; *Klipper v. Schloesberg,* 96 N. J. L. 397.

A real estate broker earns his commission, when he secures a buyer on the seller's terms. *Steinberg v. Mindlin,* 96 N. J. L. 206.

Finding no error in the record the judgment of the Cape May County Court of Common Pleas is affirmed.

NOTICE OF APPEAL.

(Filed July 27, 1928.)

NEW JERSEY SUPREME COURT.

CHARLES A. DOE, *Plaintiff*, v. CHARLES F. EGGLESTON, *Defendant.*	Action at Law. Notice of Appeal.

To Kreps & Bell, Attorneys for Plaintiff:

Take notice that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause.

JOHN D. McMULLIN,
Attorney for Appellant.

[ENDORSED]

Service of the Within Notice of Appeal acknowledged this 11th day of July, 1928.

Kreps & Bell,
Attys. for Charles A. Doe.

NOTICE OF APPEAL.

(Filed September 21, 1928.)

NEW JERSEY SUPREME COURT.

CHARLES A. DOE, *Plaintiff*, v. CHARLES F. EGGLESTON, *Defendant.*	Action at Law. Notice of Appeal.

To Wilbur V. Pike, Attorney for Executrix of Respondent, Now Deceased:

Take notice that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause.

JOHN D. MCMULLIN,
Attorney for Appellant.

[ENDORSED]

Service of the within Notice of Appeal accepted and acknowledged this 11th day of August, 1928, on behalf of Blanche Susan Doe, executrix of

Charles A. Doe, the respondent, now deceased.

Wilbert V. Pike,
Atty. for Executrix of Respondent, Now deceased.

GROUNDS OF APPEAL.

(Filed August 12, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES A. DOE, *Plaintiff-Respondent,* v. CHARLES F. EGGLESTON, *Defendant-Appellant.*	Action at Law. Appeal from Supreme Court. Grounds of Appeal.

The appellant states the following grounds of appeal:

1. The Supreme Court erred in affirming the judgment in favor of the plaintiff which was entered in the Court of Common Pleas of Cape May County and in not entering its judgment for the defendant in stead and place thereof.

2. The Supreme Court erred in giving judgment for the plaintiff, Charles A. Doe, instead of for the defendant, Charles F. Eggleston.

3. The Supreme Court erred in not reversing the judgment of the Cape May County Court of Common Pleas entered by that Court in favor of the plaintiff.

4. The Supreme Court erred in not awarding to the defendant a *venire de novo* or other proper relief for the reason that the trial Judge sustained the defendant's objection to the following question addressed to the plaintiff:

> "Q. Did you state to Mr. Doe any conditions that he himself must fulfil in order that this agreement would be satisfactory and acceptable to you."

5. The Supreme Court erred in not awarding to the defendant a *venire de novo* or other proper relief for the reason that the trial Court did not admit testimony as to the duty which the plaintiff had undertaken in the matter of prompt application by him for title insurance, when the same was offered by the following question to the plaintiff which the trial Court did not permit:

> "Q. Did you state to Mr. Doe any conditions that he himself must fulfil in order that this agreement would be satisfactory and acceptable to you."

JOHN D. MCMULLIN,
Attorney for Appellant.

[ENDORSED]

Service of the within Grounds of Appeal acknowledged this 10th day of July, 1928.

Kreps & Bell,
Attys. for Charles A. Doe.

Due and legal service of the within Grounds of Appeal accepted and acknowledged this 11th day of August, 1928, on behalf of Blanche Susan Doe, Executrix of Charles A. Doe, the respondent, now deceased.

Wilbert V. Pike,
Atty. for Executrix of Respondent, Now deceased.

(Filed October 15. 1928)

NEW JERSEY COURT OF ERRORS AND APPEALS

CHARLES A. DOE, Plaintiff-Respondent, vs. CHARLES F. EGGLESTON, Defendant-Appellant.	Action at Law APPEAL FROM SUPREME COURT SUGGESTION BY APPELLANT OF DEATH OF THE RESPONDENT

AND NOW, to wit, October 11th, 1928, comes the Appellant, the Respondent nor his personal representatives not having done so, and represents and shows to this Court and hereby suggests on the record the death of the respondent, Charles A. Doe between the decision of the Supreme Court herein appealed from and this date, but on a date unknown to the Appellant, and he further suggests that Blanche Susan Doe was appointed executrix of the Estate of the said Charles A. Doe by the Surrogate of Cape May County but on a date unknown to the Appellant.

John D. McMullin,
Atty. for Charles F. Eggleston, Defendant-Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS

CHARLES A. DOE,
Plaintiff and Respondent,

v.

CHARLES F. EGGLESTON,
Defendant and Appellant.

ACTION AT LAW.

APPEAL FROM NEW JERSEY SUPREME COURT ON
APPEAL FROM CAPE MAY COUNTY
COMMON PLEAS.

BRIEF OF DEFENDANT-APPELLANT.

STATEMENT OF THE CASE.

This was an appeal from the Cape May Common Pleas of a verdict for $1,570.00 directed by the Court.

The suit was for a real estate commission which the plaintiff claimed as a real estate broker against

the defendant who was the owner of the property. The property had not been listed by the owner with the broker, but the broker sought out the owner, solicited a price and upon the signing of an agreement of sale between the owner and prospective buyer, there was inserted a clause which is the basis of this suit, and which provided in terms as follows:

> "8½. Seller agrees to pay Charles A. Doe, realtor, five per cent. (5%) on the gross amount of purchase price for effecting this sale to be paid at settlement."

Besides this clause in the agreement of sale, there was no other writing or memoranda between the parties to this suit.

It is uncontradicted in the testimony that there was no settlement.

The fault between the seller and the buyer was tried out on a bill for specific performance in Chancery in which assignees of the buyer were complainants and a copy of the Chancery decree is in evidence by which the fault was adjudged to be that of the buyer, by specific language, as follows:

> "The complainants are in default under the contract sought by them to be specifically performed and are not entitled to any relief against the defendant, arising out of the language alleged in the bill." (Exhibit D1, on page 58.)

In this suit the appellant's defenses were in brief (see answer and supplementary answer, pages 7 and 9) that settlement had not taken place and, therefore, no commission was payable, and also that the reason there was no settlement was on account of the plaintiff's own neglect.

At the trial the defendant moved for a non-suit and for a direction of a verdict.

The trial Court directed a verdict for the plaintiff and refused defendant's motions for non-suit and for direction of a verdict for defendant on the grounds (in brief) that the payment of the commissions "at settlement" was a designation of the time and not a contingency and that the jury should not be permitted to pass upon evidence of neglect of the plaintiff in bringing about the settlement.

A question was propounded to the defendant to bring out the conditions which the plaintiff himself undertook to fulfill in the matter of the transaction in order to show in what manner the plaintiff had assumed a duty to the defendant. The Court sustained the objection of the plaintiff and did not permit the defendant to answer this question.

The question was:

> "Q. Did you state to Mr. Doe any conditions which he himself must fulfill in order that this agreement would be satisfactory and acceptable to you?"

It appeared in the testimony that Mr. Doe had himself signed the application for title insurance but not until August 12, 1925, for settlement eight days later, on August 20, 1925, although the agreement was signed June 20, 1925. It is an admitted fact that the plaintiff delayed one month and twenty-two days and allowed only eight days for the Ocean City Title and Trust Company to make its search. A witness from the title company stated (page 49) that this was not sufficient time by a considerable period. Proof that Mr. Doe had undertaken with Mr. Eggleston to make a speedy application for insurance and to push the matter without delay was very pertinent in view of this testimony and was an issue in the case under the defendant's

supplementary answer (page 9) wherein the following defenses are set up by the defendant:

THIRD DEFENSE.

1. The plaintiff by his negligence in the application for title insurance on behalf of Wagner and Hodgkins was himself responsible for there being no settlement on the agreement of sale set forth in plaintiff's complaint, and his said negligence was the sole cause of the purchaser's being in default at the time of settlement and such default resulted in the defendant herein not having any benefit whatever of his contract of sale with the said buyers referred to in the complainant's complaint and the plaintiff was himself responsible for the default at the settlement and the loss to this defendant.

2. Such negligent conduct of the plaintiff was the fact that he did not apply to any title company for title insurance until a day or two before August 20th, 1925, the date on which settlement was to be made so that there was no time for the title company to complete its search before the date specified for settlement.

FOURTH DEFENSE.

1. The plaintiff, in so far as he acted as the agent for the defendant, was negligent in the performance of his duties and likewise in the performance of duties which he undertook to perform on behalf of the purchaser with the result that there was no settlement between this plaintiff and his purchasers

on August 20th, 1925, the date specified for settlement, or at any other time and therefrom the plaintiff suffered the loss of the sale which the defendant had secured for him.

GROUNDS OF APPEAL.

The grounds of appeal as filed in the Supreme Court which come before this Court as the basis of the appeal and which are urged, are as follows:

1. Because the trial Judge, upon the trial of said cause, directed a verdict in favor of the plaintiff and against the defendant, over the objection of the defendant, whereas said trial Judge should have submitted to the jury the questions involved in the issues.

2. Because the trial Judge, upon the trial of the case, denied the defendant's motion for a non-suit, whereas such motion should have been granted.

3. Because the trial Judge, upon the trial of the case, denied the defendant's motion for the direction of a verdict for defendant, whereas such motion should have been granted.

4. Because the trial Judge, upon the trial of the case, directed a verdict in favor of the plaintiff and against the defendant, over the objection of the defendant, although there was no evidence to support such a direction.

5. Because the trial Judge, upon the trial of the case, directed a verdict in favor of the plaintiff

and against the defendant, over the objection of the defendant, although there was no evidence that at the time of the commencement of this suit, to wit, anything was or could be due from the defendant to the plaintiff.

6. Because the trial Judge directed a verdict for the plaintiff for $1,570.00.

7. Because the trial Judge sustained the plaintiff's objection to the following question addressed to the defendant:

> "Q. Did you state to Mr. Doe any conditions that he himself must fulfill in order that this agreement would be satisfactory and acceptable to you?"

the defendant being allowed an exception to the Court's ruling.

8. Because the trial Court did not admit the testimony as to the duty which the plaintiff had undertaken in the matter of prompt application by him for title insurance, when the same was offered by the following question to the defendant which the trial Court did not permit:

> "Q. Did you state to Mr. Doe any conditions that he himself must fulfill in order that this agreement would be satisfactory and acceptable to you?"

the defendant being allowed an exception to the Court's refusal to permit the question.

9. Because the trial Court admitted in evidence over the objection of the defendant without sufficient proof an offer of the agreement between Charles F. Eggleston and Wagner & Hodgkins, who

is a stranger to this suit, dated June 20th, 1925, which is Plaintiff's Exhibit 1.

The Supreme Court sustained the judgment of the Court of Common Pleas of Cape May County and refused a *venire de novo* or other proper relief on account of the excluded testimony.

This appeal is taken from this action of the Supreme Court and here the grounds of appeal alleged are as follows:

1. The Supreme Court erred in affirming the judgment in favor of the plaintiff which was entered in the Court of Common Pleas of Cape May County and in not entering its judgment for the defendant instead and place thereof.

2. The Supreme Court erred in giving judgment for the plaintiff, Charles A. Doe, instead of for the defendant, Charles F. Eggleston.

3. The Supreme Court erred in not reversing the judgment of the Cape May County Court of Common Pleas entered by that Court in favor of the plaintiff.

4. The Supreme Court erred in not awarding to the defendant a *venire de novo* or other proper relief for the reason that the trial Judge sustained the defendant's objection to the following question addressed to the plaintiff:

> "Q. Did you state to Mr. Doe any conditions that he himself must fulfill in order that this agreement would be satisfactory and acceptable to you?"

5. The Supreme Court erred in not awarding to the defendant a *venire de novo* or other proper relief for the reason that the trial Court did not admit testimony as to the duty which the plaintiff had undertaken in the matter of prompt application by him for title insurance, when the same was offered by the following question to the plaintiff which the trial Court did not permit:

> "Q. Did you state to Mr. Doe any conditions that he himself must fulfill in order that this agreement would be satisfactory and acceptable to you?"

BRIEF OF ARGUMENT AND CITATIONS.

I. UNDER THE DECISIONS, THE SELLER BEING WITHOUT FAULT, THE COMMISSION STIPULATED FOR IS PAYABLE ONLY AFTER SETTLEMENT WHERE THE PARTIES HAVE AGREED THAT IT SHALL BE PAYABLE UPON THE HAPPENING OF THAT EVENT.

The Court erred in refusing to grant the defendant's motion for non-suit and his motion for binding instructions because the evidence shows that the parties contracted that the commission sued for should be payable "at settlement." It is an uncontradicted fact that settlement never took place.

It is very material and should be emphasized at the outset that the language used was not "at time of settlement," "at date of settlement," or anything else which indicated time or date, but the commission was "to be paid *at settlement.*"

The leading case of *Hinds v. Henry,* 36 N. J. L. 328, establishes fundamental law which the Courts should be reluctant to modify and from which they should not depart.

This case holds that a principal may by specific agreement with his broker so contract as to make his compensation depend on a contingency. If he does this, then the general rule that he is entitled to his commission when he has produced a purchaser able and willing to conclude the bargain is in fact limited and he cannot recover if the condition is not fulfilled.

In this case the parties agreed as to the manner of payment of an agreed commission—"the first half thereof at the time when the purchasers of the property * * * shall pay over the first half of the purchase money, and the balance at the expiration of one year from the date of the deed for said property. * * * "

The following cases support and affirm this rule and the language in the instrument of each is quoted, in order to show the distinct analogy between the cases which have been held as contingencies and the case here before the Court.

Morse v. Conley, 83 N. J. L. 416. In this case there was written into the agreement between purchaser and seller a clause as in the case at bar: "And Mrs. E. V. Conley agrees to pay to Myron W. Morse a commission of 2½% in the matter of services in the consummation of the sale at the time of the consummation of the same." Held that the agent's commission under the contract was contingent and there could be no recovery in view of the fact that the proposed purchaser did not conclude the sale and consummate the transaction in accordance with his contract.

Leschziner v. Bauman, 83 N. J. L. 743, in which the Court held that a contract for the payment of a commission for the sale of real estate to be paid on the "day of passing title or July 15th" is a contract based on the contingency of the sale of the property and the passing of title to the purchaser and that in the absence of proof in the fulfillment of that contingency, a direction of the verdict for the defendant was held proper.

This is a case by the Court of Errors and Appeals and should control the case at bar. It follows the case of *Hinds v. Henry,* commenting on which, the Court said on page 744:

> "The doctrine of that case (Hinds v. Henry) has provided the rule of conduct and adjudication in this State for nearly forty years. In varying phases of fact, it has been followed or distinguished as the reason of the rule would seem to warrant, but the underlying principle of the case is based upon the fundamental theory of contractual law, that parties may make their contracts to depend upon such conditions and contingencies as to them may seem suitable, and not violative of any legal rule, and that they are binding accordingly in a court of law."

And also on page 746:

> "When it is recalled that the rule laid down in Hinds v. Henry contains as one of its essential elements the fact of the ability of the purchaser to conclude the bargain upon the terms of the proposed contract, it becomes at once manifest that the commissions of a broker cannot be considered as earned where by reason of the inability of the proposed purchaser to con-

clude the sale by taking title to the premises, the entire transaction fails, and no sale in fact takes place. Such was the posture of affairs in the case at bar; and if the controversy here be determinable upon that ground, resulting from the inability of the proposed purchaser to fulfill his contract, it is difficult to perceive upon what legal theory of liability the plaintiffs can sustain their case.''

In the recent case of *Lewis v. Morris Realty Company,* 3 N. J. M. R. 393 (1925), the agreement read, "Said commission was to be paid upon delivery of deed.'' It is submitted that where the parties to the agreement, as in this case, have clearly shown by their agreement that delivery of the deed and settlement are synonymous in their transaction (see Argument V, post) that this case is peculiarly in point. The Court held that the contingency upon which the commission was to become payable had never arrived and refused to permit the real estate agent to retain his commission out of the first payment on a sale which he had secured for the owner.

II. THE LANGUAGE USED, TO WIT: "AT SETTLEMENT," IS CLEARLY AN EVENT AND NOT A DESIGNATION OF TIME.

This language is to be construed most strictly against the plaintiff who framed it. It is clear from the testimony of Mr. Doe on page 23, lines 10 to 30, that the language used was constructed by Mr. Doe and not by Mr. Eggleston:

> "Q. In this agreement that you have produced, in which this clause is written: '8½.

Seller agrees to pay Charles A. Doe, Realtor, five per centum (5%) on the gross amount of purchase price for effecting this sale, to be paid at settlement,' who put in that clause?

A. I did.

Q. Who conceived those terms?

Mr. Kreps: Objected to.

(Objection overruled.)

Q. Did you put those terms in?

A. Yes.

Q. In that language?

A. Yes.

Q. At no suggestion from Mr. Eggleston about that?

A. No.''

And of Mr. Eggleston, on page 34, lines 17 to 22:

''Q. Did you write it or did he write it?

A. Mr. Doe wrote it, at least he brought the contract to me. I didn't write it.

Q. Did you have anything to do with the phraseology of clause 8½?

A. I did not. I did not put it in there.''

The general principle of law should apply that these words must be construed most strictly against Mr. Doe, the plaintiff, who used them.

Stone v. U. S. Casualty Co., 34 N. J. L. 371;
American Lithographic Co v. Commercial Casualty and Insurance Co., 81 N. J. L. 271;
Newcomb v. Kloeblum, 77 N. J. L. 791;
Fletcher v. Interstate Chemical Co., 110 Atl. 709. (Not officially reported.)

If the Court does not find the words clear it must resolve any doubt against the plaintiff and in favor

of the defendant on the above established rule of construction.

Nothing more than these words are needed to show that the happening of an event was contemplated and not the mere arrival of a date. The words which appear in many of the cases such as "date of settlement," "time of settlement" are not here used. The words, "time," "date" or similar words were not adopted by these parties. The language speaks in terms of an event. It is as if the parties had said, "at birth," or "at death," or "at marriage," or "upon seisen." If these events did not happen, any contingency based upon them would clearly fail. With all words indicating time omitted from the writing in suit, we have a clear designation of a happening or an event. The evidence shows that the event did not happen. The contingency and the right to recover based thereon have both failed.

III. THE FACT THAT THERE HAS BEEN NO SETTLEMENT GROWS OUT OF NO FAULT OF THE DEFENDANT.

In *Hinds v. Henry,* 36 N. J. L. 328, 333, the leading case, it is declared that "in an action or an obligation of this kind, the pleader must aver and it must be proven at the trial that the contingency on what the debt is payable has happened, or that it was defeated through some fault of the obligor."

The agreement in *Rauchwanger v. Katzin,* 82 N. J. L. 339, provided that the commission was "to be paid on day of settlement." Although no day of settlement was ever reached or fixed, the defendant based his declination to enter into an agreement

fixing the day of settlement "upon pretexts that could have for their purpose only the defeat of the claim in suit." This fault of the defendant entitled the plaintiff to judgment.

In *Lehrhoff v. Schwartsky* (not officially reported), 125 Atl. 496, the agreement required the payment of commissions "on the date of closing title." A date was fixed but on that date the vendor capriciously refused to convey. This Court held that, in view of this fault of the vendor, the commission became due on the day set for closing title.

The case of *Taylor v. Bounincentri,* 3 N. J. Adv. R. 881, can also be distinguished because the Court found that the vendor refused to execute the conveyance to his purchaser and refused to appoint a day of settlement which was in his power and became his duty. In view of those defaults, the Court held that he could not escape payment of the commissions. The default of the defendants in suit (the seller) were the reasons for the fixing of the liability on an agreement to pay "on the day of settlement." In this case, it will also be noted that "day of" was a clear indication of time.

In the case now before the Court, there is not only no allegation nor proof that the contingency on which the debt is payable (settlement) has happened nor proof that settlement has been defeated through some fault of the defendant but there is affirmative proof that the question of fault was tried out in the Court of Chancery on bill for specific performance by assignees of the purchaser and an affirmative adjudication that the fault lay with such purchaser and NOT with the seller who is the defendant in this suit. He is free from fault. In the cases where the *Hinds v. Henry* rule was modified to permit a recovery, there was some fault shown on

the part of the owner and seller who was the defendant in the several cases.

IV. THE DEFENDANT DID NOTHING THAT WOULD OR COULD AMOUNT TO A WAIVER OF HIS RIGHT TO REQUIRE A FINAL SETTLEMENT BEFORE ANY COMMISSIONS WOULD BE DUE OR PAYABLE.

The Court of Errors and Appeals in *Dermody v. New Jersey Realties, Inc.* (101 N. J. L. 334), (128 Atl. 265), had before it a case where the commission was payable "at the time of passing title." The Court assumed that under this form of contract the passing of title would be a condition precedent to any commissions becoming due. There, however, the purchaser settled with the vendor by paying the vendor $3,000 as damages for breach of contract and mutual releases were exchanged. The Court held the commission was payable because the contract of settlement substituted payment of damages to the vendor in the place of the purchase money stipulated in the contract of sale.

In *Haber v. Goldberg*, 92 N. J. L. 367, the agreement was for a commission "to be paid on date set for the delivery of the deed." It will be noted that the "date set" and "time of" are quite different and without more would justify different rulings. There, however, the vendor also sued the purchaser for breach of contract and recovered damages. It was held that, after so doing, the vendor, as between himself and the plaintiff, was not entitled to repudiate his undertaking with the latter for compensation for negotiating the very contract which was the basis of that suit.

The rights of the plaintiff can be no greater than they were at the time of the commencement of this suit. *Titus v. Gunn*, 69 N. J. L. 410; *Felt v. Steigler*, 69 N. J. L. 92; *Holzapfel v. Hoboken Mfrs. R. Co.*, 92 N. J. L. 193. If at that time the suit was prematurely brought, it is still prematurely brought.

There is no proof that at any time any settlement (compromise or otherwise) has been made by the defendant with the purchaser, that any judgment for damages has been obtained against him or that any suit has been brought for that purpose, but on the contrary a decree in chancery is in evidence showing that the fault was with the purchaser whom the plaintiff produced.

V. THE WRITTEN MEMORANDUM IN THIS CASE UPON WHICH THE PLAINTIFF RELIES IS NOT BETWEEN HIM AND THE DEFENDANT BUT IS CONTAINED IN AN AGREEMENT BETWEEN THE PURCHASER AND SELLER AND AS SUCH MUST BE GOVERNED BY THE INTENT OF THE PARTIES WHO SIGNED THE AGREEMENT. IT STANDS ON A FOOTING DIFFERENT FROM A CONTRACT BETWEEN THE PARTIES TO THE SUIT.

There can be little doubt as to what the parties to the agreement of sale meant by the words "at settlement." Paragraph 2 of the agreement, Exhibit P1, page 55, shows that it was the occasion when $5,000.00 of the purchase price should be paid and the purchaser or his assignee should assume existing first mortgages and the owner should take back a second mortgage, all to be done at Ocean City

Title and Trust Company, Ocean City, New Jersey, and if done at all, to be done on or before August 20, 1925.

By the first clause of their agreement, the contracting parties agreed that at that time, the seller should have for conveyance a title free and clear of encumbrances, etc., and should convey the same by warranty deed and by clause 4 certain adjustments were to be made. There is no evidence that these thins which the parties to the agreement clearly contemplated as "settlement" had been done. In fact, none of them were done. The settlement called for in the agreement of sale never took place and it was *that* settlement, provided in the language of *that* agreement, as conceived by the parties thereto which was to be the event upon which a commission was to be payable to this plaintiff.

That the interpretation as evidenced by the contracting parties must govern against Charles A. Doe, the broker who was a stranger thereto, is clear from the case of *Morse v. Conley,* 83 N. J. L. 416, cited above, where the writing sued on was in the agreement of sale and as to this the Court said, on page 418, as follows:

> "The contract in question was entered into by the proposed buyer and seller, and the plaintiff was not a party to it. In construing its language, therefore, we have to apply to it a meaning such as the parties to the contract intended giving to it, and for that purpose we find it unnecessary to invoke testimony or evidence aliunde the writing. Their meaning of the period of consummation is specified and defined in the contract itself, and we are not left to conjecturing regarding it. Manifestly, as to them, the only parties to the contract, its consumma-

tion was fixed as the time when the balance of the purchase-money would be paid, a bond and mortgage delivered, and a deed of conveyance executed and delivered to the purchaser. After stating this consummation of the contract the provision regarding plaintiff's compensation concludes the agreement, and must be read and construed in the light of the entire document, and the transaction in contemplation between the parties, which was the passing of the title."

The event contemplated by the contracting parties not having taken place, the Supreme Court held that the broker could not recover.

VI. THE TRIAL JUDGE SHOULD HAVE PERMITTED THE QUESTION ADDRESSED TO THE DEFENDANT, "DID YOU STATE TO MR. DOE ANY CONDITIONS THAT HE, HIMSELF, MUST FULFILL IN ORDER THAT THIS AGREEMENT MIGHT BE SATISFACTORY AND ACCEPTABLE TO YOU?" THE COURT FELT IT MATERIAL THAT A DUTY BY THE PLAINTIFF TO THE DEFENDANT BE SHOWN IN ORDER THAT HIS NEGLECT MIGHT BE A VALID DEFENSE AND THE REFUSAL TO PERMIT THIS QUESTION DEFEATED THE DEFENDANT'S OPPORTUNITY TO PROVE SUCH DUTY.

The trial Court in directing the verdict for the plaintiff referred to the lack in the case of anything to charge the plaintiff with responsibility for delay in postponing the order for title insurance from June 20th to August 12th, which was too late to per-

mit the settlement on August 20th. It is clear from the evidence that the plaintiff did, himself, order the title insurance and he signed the application therefor.

An undertaking on the part of the plaintiff and a duty which he assumed to the defendant, would have been present in the case if the Court had permitted the defendant to answer the above question. If Mr. Doe undertook to fulfill any conditions or assumed any duty to the defendant, they become material under the defenses third and fourth in the supplementary answer and they should have been narrated as a part of the material and competent testimony in the defendant's case.

This was an issue affirmatively raised. It was an issue to which the plaintiff had filed a reply and it was therefore framed by the pleadings and provable by testimony, of which the excluded question would have been direct evidence.

Wallace v. Kennelly, 47 N. J. L. 242. Held that facts necessary to be known, to explain or introduce a fact in issue or relevant, may be admitted in evidence. This suit was for rent under a written lease, but an issue was framed and joined by the defendant that the ale furnished by the plaintiff was not good ale. There was a clause in the lease to the effect that no ale should be sold by the tenant on the premises except that manufactured and bought from the landlord, Wallace. The Court said that furnishing bad ale would not defeat the lease, but the dispute about the quality of the ale was in issue and the Court held that this evidence was properly admitted. Quoting Stevens' Digest of the Law of Evidence, Part 1, ch. 2, art. 8, as follows:

> "Facts necessary to be known to explain or introduce a fact in issue or relevant facts, or

> which support or rebut an inference suggested by a fact in issue or relevant fact are relevant in so far as they are necessary for these purposes, respectively."

Potts v. Clark, 20 N. J. L. 536, held that a Judge at the Circuit cannot exclude the evidence of injury although not actionable if the parties have taken issue upon it.

Evidence is material which touches upon the issues the parties had made by their pleadings. This is elementary.

In the case before the Court the trial Court and the Supreme Court overlooked *an issue framed by the pleadings, as to whether if the plaintiff had earned his commission he had not thereafter lost it by his own negligence and failure to carry out conditions which he undertook with the defendant to fulfill in the matter of a speedy application for title insurance.* Evidence is admitted in the case (page 48, line 7, to page 49, line 25) and Exhibit D2 (pages 60-62) to the effect that the plaintiff himself made the application for the title insurance but not until August 12th. The purchasers of the property did not make application. He had from June 20th and such application allowed but eight days to the title company. The evidence shows that it was impossible to get out a search in that limited period of time. See also testimony of the defendant (page 32, lines 10-13), in which he told the plaintiff, Mr. Doe: "I declined the offer as presented and told him that the only thing that would induce me to sell would be a quick settlement at a cash sale."

Immediately after this testimony after a discussion and a statement by the trial Court (page 23, line 22) that such testimony would be material if

the purpose of the defendant was "directed toward the fact that the failure to make settlement was the fault of the agent," the question was propounded and the purpose of it under the defendant's third and fourth defense was made clear.

An answer to the question might well be in effect, that he, Doe, had undertaken to make an early application for title insurance and would push along rapidly such application to a prompt settlement. This would have established the duty which the trial Court searched for in the evidence but which it in effect prevented by overruling this material question.

The trial Court indicated that it considered this question as material in view of the defendant's third and fourth defenses after some argument, as appears from the State of the Case on page 33, where the following colloquy took place surrounding the question in issue:

> "Mr. Harker: If the seller apprised Doe that Doe had some obligation in this settlement and Doe didn't perform these obligations, that certainly has a bearing on the relationship between the two parties.
>
> The Court: In other words, your testimony is directed toward the fact that the failure to make settlement was the fault of the agent—is that your position?
>
> Mr. Harker: Exactly.
>
> The Court: It would be material for that purpose.
>
> Mr. Kreps: The objection was as to what Eggleston said to Doe he wanted for the sale of the property.
>
> The Court: I will sustain the objection so far.

By Mr. Harker:

Q. Did you state to Mr. Doe any conditions that he himself must fulfill in order that this agreement would be satisfactory and acceptable to you?

Mr. Kreps: Objected to on the ground that the contract speaks for itself; and that this is a complete contract. If they had any other agreement it should appear in writing.

Mr. Harker: The objection is not addressed to the form of the question I put.

The Court: The objection is sustained.

(Exception to defendant noted.)''

After such expression the Court sustained the plaintiff's objection. The purpose of the question was made clear, there was no objection to it in form, the trial Court intimated its materiality and yet it was not permitted and the result was a lack of testimony as to duty, for which lack the Court refused to leave to the jury the defense of neglect by the plaintiff in the application for title insurance and the question of whether this was not the reason for the failure of settlement. That this did material harm to the defendant need hardly be argued. It resulted in the collapse of the secondary defense.

The evidence offered and excluded in no way came under the oral evidence rule because there was no written contract between the parties to this suit. There was a memorandum written into the contract between the defendant, Eggleston, and his purchasers. That clause in the contract of sale, to which plaintiff Doe was not a party, cannot rise to the dignity of a complete agreement and is but a memorandum inserted by a stranger, Mr. Doe, in a contract to which he is not a party, for the purposes

of bringing any transaction regarding his commission out of the provisions of the Statute of Frauds. The most that it is, is a memorandum, and it does not pretend to be an agreement. The plaintiff confuses the contract between the defendant and his purchaser and the memorandum between the defendant and the plaintiff. Being only a memorandum, it is not conclusive as the whole of the understanding and agreement between parties to this suit and it also comes under the limitations of construction suggested in argument V. ante and under the case of *Morse v. Connolly*, 86 N. J. L. 416.

See *Cohen v. Cohen*, 5 N. J. Adv. Rep. 1313, where it was shown by oral testimony that an agreement for the sale of a piece of land was not to go into effect if there should be a reconciliation between the defendant and his children.

Vice-Chancellor Lewis said on page 1315:

> "The evidence satisfies me that no deed was to be given in case the defendant did become reconciled with his children before the date set for the delivery of the deed, and I allowed parol testimony to be put in evidence to establish that fact.
>
> There is no doubt that parol evidence is admissible to show the existence of some contingency or condition affecting the operation and effect of a written contract. 22 Corp. Jur. 1148, Section 1540; O'Brien v. Paterson Brewing and Malting Co., 69 N. J. Eq. 131; Oak Ridge Co. v. John Toole, 82 N. J. Eq. 541."

See also *American Photoplayers Co. v. Harriet Amusement Co.*, 3 N. J. Mis. R. 558.

In our case the contingency was the fulfillment by Doe of a duty he had assumed to Eggleston and the full extent of that duty should have been heard.

VII. THE NEGLIGENCE OF THE PLAINTIFF, AS BROKER, LOST FOR HIM A RECOVERY OF THE COMMISSION WHICH HE MIGHT HAVE EARNED AND ENTITLED THE DEFENDANT TO BINDING INSTRUCTIONS OR RAISED A QUESTION FOR THE JURY.

That the broker by his own fault may lose the right to recover a commission which he has completely earned is clear from the principal of law stated in 4 Ruling Case Law, section 50, page 310, where the general right of the broker is placed under the limitation which is quoted in italics for the purpose of emphasis.

4 R. C. L. 310:

> "The authorities are practically unanimous in holding that unless the broker and his employee have expressly stipulated to the contrary, the broker is entitled to his compensation upon the completion of the negotiations he undertook irrespective of whether or not the contract negotiated is ever actually consummated, *so long as the failure to carry it through to a successful completion is not due to any fault of the broker.*" 44 L. R. A. 606 and notes.

This exact language with the significant limitation is quoted in the case of *Klipper v. Schlossberg*, 96 N. J. L. 397, by Justice Minturn, on page 401.

The failure to consummate a sale must not be due to any fault of the broker, and fault of the broker will lose for him his commission.

Gibson v. Gray (Tex. Civ. App.), 43 S. W. 922;
Conkling v. Krakauer, 70 Tex. 735;
Vauthier v. West, 45 Minn. 192;
Vinton v. Baldwin, 88 Ind. 104;
Yoder v. White, 75 Mo. App. 155.

The evidence in the case is ample to show negligence of the plaintiff. It is fully reviewed on page 20 of this argument and is on pages 48, lines 7 to 49, line 25—Exhibit D2 (pages 60-62), and throughout the testimony of the witness from the title company. This was an issue which should have been left to the jury, since it was raised by the pleadings or should have been reason for the Court granting defendant's motion for non-suit or for binding instructions. It should here result in a reversal or a *venire de novo* if the prior reasons are not sufficient.

If this Court does not consider the language of the writing as dispository of the controversy and the defendant entitled to his motion for a non-suit or to judgment in his favor on these and the further ground of the proven negligence of the plaintiff, so that a reversal be made by this Court, then on the error set forth in grounds for appeal to the Supreme Court 7 and 8, and to this Court 4 and 5, the defendant asks for a *venire de novo* or other appropriate relief.

CONCLUSIONS.

It is submitted that the language used in the writing, to wit, "at settlement," is sufficient to clearly show the adoption of an event and a contingency upon which payment to plaintiff was made to depend, so that this plaintiff was not entitled to recover, such contingency not having happened. Therefore the Court erred in not entering a nonsuit against the plaintiff or directing a verdict for the defendant, and the judgment of the Court below

should be reversed. In any event a *venire de novo* should be awarded because of the exclusion of material evidence.

Respectfully submitted,
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NEW JERSEY
Court of Errors and Appeals

CHARLES A. DOE,
Plaintiff-Respondent,
vs.
CHARLES F. EGGLESTON,
Defendant-Appellant.

Action at Law.

BRIEF OF PLAINTIFF-RESPONDENT.

APPEAL FROM NEW JERSEY SUPREME COURT.

This action was brought in the Cape May County Court of Common Pleas by Charles A. Doe, a real estate broker, of Ocean City, New Jersey, to recover a commission from the defendant, Charles F. Eggleston, for services in selling a certain piece of real estate, as is set forth in the State of Case.

We think that the facts have been correctly stated in the appellant's brief.

1. The broker's commission was not made contingent upon the actual transfer of title.

It is admitted that final settlement for the sale of the real estate in this action was never consummated, but we argue that there was nothing in the agreement that made the payment of the commission contingent upon the transfer of title or the complete consummation of the sale of said property. The agreement or memorandum on which the plaintiff brought his suit reads as follows: "8½. Seller agrees to pay Charles A. Doe, Realtor, five per cent. (5%) on the gross amount of purchase

price for effecting this sale to be paid at settlement." It is admitted that the clause was incorporated in an agreement of sale between the appellant, Charles F. Eggleston, and Wagner & Hodgkins, who were the purchasers named in said agreement, and that the said agreement was properly signed by the appellant.

It is our opinion that the stated case comes clearly within the facts of those in *Mahlenbrock* v. *Stonehall Realty Co.,* decided by the Court of Errors and Appeals on October 17th, 1927, and recorded in Volume 5, at page 1464 of the New Jersey Advance Reports. In that case the broker's commission was provided for in the contract of sale. The clause in the contract was "Harry Mahlenbrock (the plaintiff) was the agent who consummated this sale and that there is due him a commission of $1,750, payable at the conveyance of the premises." The Court there held that the broker's commission was not made contingent on the actual transfer of title, and cited *Haver* v. *Goldberg,* 92 New Jersey Law 368; *Dickinson* v. *Walters,* 100 New Jersey Law 62, and other cases.

It will be noted that the contract on which suit was brought in the Mahlenbrock case was a clause incorporated in the agreement of sale between the defendant and the purchaser procured by the plaintiff. It will further be noted that the contract did not state that the commission was payable at the time of conveyance of the premises, but at the conveyance.

We submit that there is no difference in meaning between "at the conveyance of the premises," and "at settlement."

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

We think that the above statement of law is well established in this State and has been many times thus quoted, *Dickinson* v. *Walters,* 100 New Jersey Law 62; *Clark* v. *Griffin,* 95 New Jersey Law 508; *Steinberg* v.

Mindlin, 96 New Jersey Law 206; *Klipper* v. *Schlossberg,* 96 New Jersey Law 397.

In the case of *Feist* v. *Jerolamon,* 81 New Jersey Law 437, the Court held "there was nothing further for the plaintiff to do after having brought the parties together."

3. In order to absolve a party from the payment of a commission, it must correctly appear by the contract with his broker that the payment of commissions was made contingent upon the actual transfer of title.

Dickinson v. *Walters,* 100 New Jersey Law 62.

Mahlenbrock v. *Stonehall Realty Co.,* 5 N. J. Adv. R. 1464.

4. There was no duty on the part of the broker to do anything further than bring the parties together, and have a proper agreement of sale duly executed, and when he had done this, his commission was earned.

Any conditions that the broker should have fulfilled in order to have earned his commission, other than the bringing of the parties together (if any such conditions existed), should have been set out in the written agreement signed by the defendant, in which he agreed to pay the commission, and having reduced the terms of the commission agreement to writing, any oral testimony as to other conditions which may have existed, was properly excluded by the trial Judge.

CONCLUSION.

In view of the fact that there is nothing in the stated cause to show that the settlement between Eggleston and Wagner & Hodgkins was not consummated because of the fault of the broker, and the further consideration of the cases above cited, we submit that the ruling of the trial Court was correct and that this appeal should be dismissed.

Respectfully submitted,

KREPS & BELL,

Solicitors of Plaintiff-Respondent.

F. STANLEY KREPS,

Of Counsel.