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SUMMONS.

CAMDEN COUNTY, }
 CITY OF CAMDEN, } ss.

The State of New Jersey, to any Constable of Camden County.

10 Summon Philip Kalikman, 126 No. King St., Gloucester, N. J., to appear before The District Court of the City of Camden, to be held in the court room, Camden County Court House, third floor, in the said city, on Wednesday, the 14th day of March, nineteen hundred and twenty-eight, at ten o'clock in the forenoon, to answer unto Teresa Walsh Ganley, trading as T. C. Walsh, in an action at law for five hundred dollars. Hereof fail not.

20 Witness FRANK F. NEUTZE, ESQUIRE, Judge of said Court, at Camden, aforesaid, the 8th day of March, in the year of our Lord, one thousand nine hundred and twenty-eight.

EDWIN HILLMAN,
Clerk.

VINCENT DE P. COSTELLO,
Attorney.

[ENDORSED]

30

Demand	\$110.00
Interest	1.14
Costs	3.60
Mileage	.32
Attorney's Com.	5.50

Returnable March 14th, 1928.

Hour 10 A. M.

STATE OF DEMAND.

CAMDEN CITY DISTRICT COURT.

TERESA WALSH GANLEY, trading as T. C. WALSH, <i>Plaintiff,</i> v. PHILIP KALIKMAN, <i>Defendant.</i>	}	Action at Law. State of Demand.	10
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The plaintiff, T. C. Walsh, of the City and County 20
of Camden and State of New Jersey, being a real
estate broker, says that:

1. On December 31st, 1927, the defendant duly au-
thorized her, by a written agreement, a copy of
which is hereto annexed, to sell for sixty-eight hun-
dred (\$6800) dollars, the premises in the City and
County of Camden, known as No. 1110 Langham
Avenue, agreeing to pay to plaintiff the usual brok-
erage of five per cent on said price, for such sale. 30

2. On January 10th, 1928, plaintiff duly sold said
premises for defendant, to one Louis Katz, for the
sum of sixty-three hundred (\$6300) dollars, and de-
fendant agreed in writing to all the terms of said

sale and accepted a payment on account of the purchase price, as appears by the copy of the agreement hereunto annexed.

3. Thereafter plaintiff demanded of defendant the agreed brokerage.

4. Plaintiff has received the sum of two hundred (\$200) dollars on account of the agreed brokerage, leaving a balance due of one hundred and ten dollars (\$110.00), on account of said agreement.

Plaintiff therefore demands as damages the amount due of \$110.00, with interest from January 10th, 1928, and costs of suit.

VINCENT DEP. COSTELLO,
Attorney for Plaintiff.

T. C. Walsh is hereby authorized by the undersigned as Sole and Exclusive Agent to sell the property described on the reverse hereof, which is made part of this agreement, and in consideration of said Agent listing said property for sale in his office, agrees to pay said Agent 5 per cent of the gross consideration when a sale or exchange is effected, either by the Agent or Owner, before the revocation of this agreement. The owner may revoke this agreement at any time, one week from date, provided that no negotiations are pending at the time for sale or exchange of the property. If the property is sold or exchanged subsequently to any party with whom the said Agent has been negotiating, the said commission is to be paid to said Agent. No

verbal notice of the termination of this agreement will be recognized.

Witness my hand and seal this 31st day of Dec. 1927.

Philip Kalikman (Seal)
126 No. King
Address Gloucester, N. J.

G. K. Baumgartner
Phone 366J

(Sale agency authority adopted by the Camden Real Estate Board on June 29, 1922) 10

In or near City of Camden, N. J.	Price \$6800.
Premises No. 1110 Langham Ave.	Terms
Building 2 story Roof	Rent
Rooms 1st floor 3 2d 3 & Bath	
Condition Good Finish Chestnut	
Lot 20 x 100 Alley Driveway Porch enclosed	
Paving yes Sidewalk yes curb and gutter yes	
Sewer yes Light in St. yes Light in house gas & Elec.	
Bath yes Closet yes Laundry yes Basement Cellar	20
Water Heat Hot water Taxes \$	
Garage yes sign water rent \$	
Mort. to suit Int %	
Insured for \$ Expires	
Remarks	

ANSWER AND COUNTER-CLAIM.
CAMDEN CITY DISTRICT COURT.

10	TERESA WALSH GANLEY, trading as T. C. WALSH, <i>Plaintiff,</i>	}	Action at Law. Answer and Counter- claim.
	v.		
	PHILIP KALIKMAN, <i>Defendant.</i>		

Defendant, of the City of Gloucester City, County
of Camden and State of New Jersey, answering the
20 state of demand of the plaintiff, says:

1. He admits the first paragraph of the state of demand.
2. He denies the second paragraph of the state of demand.
3. He denies the third paragraph of the state of demand.
- 30 4. He denies the fourth paragraph of the state of demand.

FIRST DEFENSE.

1. The alleged or pretended agreement under which the plaintiff seeks to recover in this action

was not in writing, and void under the statute of frauds.

COUNTER-CLAIM.

Defendant, by way of off-set or counter-claim exhibited against the plaintiff, says:

1. That on December 31, 1927, the defendant made a certain agreement, in writing, with plaintiff, a copy of which is annexed to the plaintiff's state of demand, reference being thereto had will more fully and at large appear. 10

2. Under the terms of the said agreement the authority of the plaintiff to sell the premises was limited to securing a buyer for the price of \$6,800.00.

3. No other written authority was given by the defendant to the plaintiff to sell the said premises mentioned in the said agreement for any other sum, and in consequence any alleged or pretended agreement under which the plaintiff asserts any rights is void under the statute of frauds. 20

4. The plaintiff received from a certain purchaser, of the defendant, of the said premises the sum of \$300.00, and paid to defendant the sum of \$100.00, claiming the balance of \$200.00 as commissions on the said sale. 30

5. The said retention by the plaintiff of the sum of \$200.00 was unlawful and unwarranted by reason of the fact that she had no valid agreement with defendant by which she was entitled to receive from him any sum unless a sale was effected for the sum

TRIAL AND JUDGMENT.

DISTRICT COURT OF THE CITY OF
CAMDEN.

TERESA WALSH GANLEY, }
 v. } On Contract. 10
PHILIP KALIKMAN. } Trial and Judgment.

VINCENT DEP. COSTELLO, Esq., attorney for plain-
tiff.
D. T. STACKHOUSE, Esq., attorney for defendant.

March 8th, 1928. Issued Summons, returnable March 21st, 10 A. M. 20
March 14th, 1928. Dennis, Sergeant at Arms, returned Summons endorsed, I served the within Summons March 14th, 1928, on the defendant by reading the same to him and giving him a copy thereof.
March 14th, 1928. State of Demand filed.
March 16th, 1928. Answer and Counter-Claim filed.
March 21st, 1928. The Court adjourned the case to 30
April 18th, 1928, at 10 A. M.
April 18th, 1928. Parties appeared ready for trial.
Mr. Leon Ackerman was appointed by the Court as Stenographer and was duly sworn.
Gertrude Baumgartner sworn on part of plaintiff.

Card offered in evidence marked P1. Teresa Walsh Ganley the plaintiff sworn. Plaintiff rests. Motion for non-suit. Motion allowed by the Court. Letter offered in evidence. Marked D1. Teresa Walsh Ganley recalled for defendant, in counter-claim.

10.

The Court gave judgment in favor of defendant on counter-claim and assessed damages at the sum of two hundred three dollars and twenty cents.

Wherefore it is adjudged that said defendant do recover of said plaintiff the said sum of Two Hundred Three Dollars and twenty cents, as heretofore assessed against her, also the sum of ten dollars and sixteen cents.

April 26th, 1928. Appeal filed.

May 1st, 1928. Bond filed.

20

I, EDWIN HILLMAN, clerk of the District Court of the City of Camden do hereby certify that the foregoing is a true and correct copy of the proceedings and determination of said Court in said cause as the same appears upon the records of this office.

In witness whereof I have hereunto set my hand and affixed the seal of said Court this thirtieth day of April, A. D. nineteen hundred and twenty-eight.

30

(Seal)

EDWIN HILLMAN,
Clerk.

TESTIMONY.

CAMDEN CITY DISTRICT COURT.

TERESA WALSH GANLEY,
 Plaintiff, }
 v. } Action at Law. 10
PHILLIP KALIKMAN,
 Defendant. }

PHILLIP KALIKMAN,
 Plaintiff, }
 v. } Counter-claim. 20
TERESA WALSH GANLEY,
 Defendant. }

Before NEUTZE, J.

April 18, 1928. 30

APPEARANCES:

VINCENT COSTELLO, Esq., appearing for plaintiff.
D. TRUEMAN STACKHOUSE, Esq., appearing for de-
fendant.

Mr. Costello: If the Court please, I would like to amend paragraph two to read as follows: On line two where it says the sum of \$6300.00 I would like to have it amended to read \$6200.00.

The Court: Is there any objection to that?

Mr. Stackhouse: No.

10

The Court: The amendment will be allowed.

Mr. Costello: If the Court please, this action is brought by T. C. Walsh on an agreement of sale, where the defendant, Phillip Kalikman, came into our office and executed an agreement of sale—not an agreement—an agreement authorizing us to sell the property located at 1110 Langham Avenue, in the City and County of Camden. And this agree-
20 ment of agency gave the plaintiff the strict and exclusive right to sell the described property at 110 Langham Avenue. And this agreement was signed by the plaintiff and witnessed by one of the employees working for the plaintiff. The plaintiff had procured a purchaser for the above property and after talking over the terms with the defendant, the defendant agreed—thereby signing an agreement of sale with one Mr. Louis Katz—whereby Phillip Kalikman and Bessie Kalikman his wife, City of
30 Gloucester—they signed this agreement with Mr. Katz; agreement to sell 1110 Langham Avenue for \$6200.00. And it was through the efforts of the plaintiff in this matter that the seller and the buyer in this particular instance were brought together. The plaintiff has received the sum of \$200.00 on account of the commission she was to receive, five per

cent from the purchase price, being \$6200.00, it would be \$310.00, and the plaintiff having received \$200.00 on account of that, we are suing for the difference of \$110.00.

Mr. Stackhouse: May it please the Court. The defense in this action is, I will say, purely a legal defense. The circumstances are, that Mr. Kalikman did give an agreement to Mrs. Ganley to sell this property for him at the stipulated price of \$6800.00, that was the price stipulated in the agreement. Afterwards she procured a purchaser for \$6300.00 and Mr. Kalikman protested at that time against paying anything like five per cent on \$6300.00 and said that he might be willing to pay \$200.00. Finally the \$6300.00 purchaser did not materialize, but a purchaser was produced who was willing to pay \$6200.00. \$300.00 was paid on account to Mrs. Ganley and she sent us a hundred dollars, retaining \$200.00 of what she claimed to be her commission. Mr. Kalikman, while not at all satisfied with the transaction, would be willing to let the matter ride along without making any further protest, but following that, this suit was brought to recover \$110.00, being based on the five per cent of \$6200.00, giving us credit for the \$200.00 which had been paid. And since Mrs. Ganley seeks to invoke by the aid of this Court that which she conceives to be her legal rights we are equally insistent upon our legal rights. We claim that not only is she not entitled to recover \$110.00 from us but we, under the counter-claim which I have filed here, are entitled to recover from her the \$200.00 which she retained without any legal warrant. So that, if this matter is presented in this shape —

The Court: Do I understand your notion, that

she isn't entitled to commission, because she didn't produce a purchaser for \$6800.00?

Mr. Stackhouse: That is exactly it. I have taken a somewhat unusual course in filing a written answer to the complainant in addition to the counter-claim in order that there might be no misunderstanding on the record as to what our position was. I have pleaded the statute of frauds as to the \$110.00
10 and also based our counter-claim upon the same statute.

GERTRUDE K. BAUMGARDNER, SWORN.

Direct examination.

By Mr. Costello:

20 Q. Miss Baumgardner, where are you employed?

A. T. C. Walsh.

Q. In the course of your employment what are your duties?

A. I am bookkeeper and general office assistant.

Q. Well, in the office there, if someone comes in to list a property for sale, have you the authority to enter into an agreement with a prospective seller?

A. If they sign a card.

30 Q. I show you a card, is that the signature of Mr. Kalikman?

A. Yes.

Mr. Stackhouse: There isn't any dispute as to the contract having been entered into by Mr. Kalikman.

The Court: It will be admitted.

(Said card received and marked Exhibit P1.)

Q. That agreement was signed by whom?

A. By Mr. Philip Kalikman.

Q. Do you know what the contents of that agreement were?

The Court: Signed by whom?

10

The Witness: Mr. Phillip Kalikman.

Cross-examination.

(None.)

TERESA WALSH GANLEY, SWORN.

20

Direct examination.

By Mr. Costello:

Q. Mrs. Ganley, you are the plaintiff in this case?

A. Yes.

Q. Will you tell the Court what transpired with regard to the sale of 1110 Langham Avenue, Camden, New Jersey.

30

A. Mr. Kalikman came to our office and said he had this property for sale, 1110 Langham Avenue. And when I found a purchaser for the property, before I took them to see it, I called Mr. Kalikman at Gloucester and told him he would have to come and sign a contract. He came on Saturday morning

when I wasn't in the office, and executed the contract that the bookkeeper had him sign. And, afterwards I took the people around to see the property and negotiated with them. We couldn't come to terms on the price. I took Mr. Kalikman with me, down to see Mr. Katz, and he also had a talk with him, and found he wasn't able to get Mr. Katz to pay any more for the property than \$6200.00. He decided he wasn't going to sell it at that time for 10 \$6200.00, that he himself had a purchaser. And then after that he was unable to sell his purchaser. He came back to me and he said he couldn't sell and I should go to Mr. Katz, if they were willing to buy the property that he could make a deal with them. I went to Mr. Katz and got a check—\$300.00 deposit. I called Mr. Kalikman and I drew an agreement, and that afternoon I took Mr. Katz's daughter and myself, and we went to Gloucester and had Mr. Kalikman and his wife to sign an agreement. And 20 I told him I had the check and I then wanted to give him my check for the portion of the deposit. He said he didn't want to talk any more about it in the store while Mrs. Kalikman was there, to take everything back to the office and he would be up there tomorrow. So when he came up the next day I offered him his check, he says, "Well, I am only going to pay you a hundred dollars commission." After the sale was made and he knew I had the check and signed the agreements. And I said to 30 him, "I wouldn't consider taking a hundred dollars" because we had worked about ten days on the proposition. He said, "Well, of course, if I did business with your office I would lose money." And I said, "Well, it was your property, if you didn't want to sell you shouldn't have signed an agreement, but you know you signed to pay us five per cent commission." So I sat there, and he said, "I

will pay you \$150.00 commission." I said, "No, we wouldn't take it." So, then he walked out of the office and he said he wasn't going to go through with the deal. And the very next day he went down to see Mr. Katz and he told Mr. Katz that he had signed a contract with me for five per cent and that Mr. Katz should come to me and get the \$300.00 back and he would sell the property to Mr. Katz less my commission and Mr. Katz told him that he wouldn't do business.

10

Q. Did this conversation take place in the presence of Mr. Kalikman?

A. Yes, Mr. Kalikman brought them back to my office. But, I told Mr. Kalikman the deal was made he would have to go through with it. He said, he wouldn't. We argued and I told him he would have to get out of the office. He walked out with the Katzes, and he wouldn't turn the search over. And I finally found out where the searches were. I located them and sent them to Mr. Lieberman. Mr. Kalikman said he wouldn't go through with the deal because he had lost no money and had signed this agreement which was false, because I didn't pay him over any money. So, I went on and sent him a check for \$100.00 and retained \$200.00, and until two days before the agreement, he had never deposited the \$100.00 check. And on the advice of Mr. Costello, I had stopped payment on the \$100.00 check. He stated he was going to hold us up for the commission. In the meantime, he cashed the check. As late as Friday of this week he goes to Mr. Katz's daughter —

20

30

Mr. Stackhouse: Just a moment, were you there?

The Witness: He was there this morning.

Mr. Stackhouse: You weren't there when he went there.

Q. In respect to that \$200.00 that you retained, was it ever agreed upon that you ever agreed that was to be your total commission or was that just on account of your commission?

Mr. Stackhouse: I object to that, the witness can
10 say what the agreement was, I don't see how she can very well say what the agreement wasn't.

Q. With respect to the \$200.00 that you retained out of the deposit—deposit of \$300.00 made by Mr. Katz, now you turned over a check for \$100.00 to Mr. Kalikman?

A. Yes.

Q. And retained \$200.00 yourself. That \$200.00 that you retained what was that?

A. That was a part of our commission.

20 Q. Did you ever agree to accept \$200.00 or anything less than five per cent?

A. I never agreed to accept that. After the day Mr. Kalikman was there and said he would pay us \$100.00, which we agreed we wouldn't accept, I have never seen Mr. Kalikman since.

30 Q. When you brought this agreement of sale between Philip Kalikman and Bessie Kalikman his wife, and Louis Katz, of Camden, brought this down to Mr. Kalikman's store in Gloucester, what was the conversation there, did he object to the \$6200.00 sale at that time?

Mr. Stackhouse: Objected to as immaterial and irrelevant.

Mr. Costello: If the Court please, I think it is very material in this case.

Mr. Stackhouse: Just a moment. This action is brought upon what proposition—to be an agreement to pay commission upon a sale of \$6800.00. Now, anything with reference to sale of anything less than that is absolutely without any materiality in this case.

The Court: Overruled, exception noted.

(Question read.)

10

The Witness: He did not.

Q. And did Mr. and Mrs. Kalikman sign that agreement in your presence?

A. In my presence.

Cross-examination.

20

By Mr. Stackhouse:

Q. Mrs. Ganley, you say that there was never any time, any agreement by you, by which you were to take \$100.00 commissions on this sale?

A. No agreement.

Q. Witness is shown letter on letter head of T. C. Walsh, dated January 12, 1928, and purporting to be signed by T. C. Walsh, and asked if you wrote that letter?

30

A. That is my letter, yes.

Q. And that letter accompanied the check for \$100.00?

A. Yes, that is right.

Q. I will ask that this be marked for identification.

The Court: It will be marked for identification at this time.

(Said letter marked D1 for identification.)

Q. Now, as a matter of fact, before this purchaser Katz who gave this agreement for \$6200.00 appeared on the scene, didn't you tell Mr. Kalikman that you had a purchaser for \$6300.00?

10 A. Did I tell Mr. Kalikman what?

Q. That you had a purchaser for \$6300.00?

A. Before I had a contract?

Q. Yes?

A. No, I didn't tell Mr. Kalikman anything about it. I didn't know what the purchaser was offering before I had the contract signed. They hadn't looked at the house.

Q. Did you ever tell Mr. Kalikman that you had a purchaser for \$6300.00?

20 A. No, I told Mr. Kalikman I had a purchaser for the house providing he would come and sign a contract. I wouldn't take the people there until he signed the contract.

Q. The contract which was signed, the one which has been offered in evidence here, this card contract?

A. Yes, that is the contract.

Q. That is the contract which you refer to? (Handing card to witness.)

30 A. That is the one I refer to.

Q. And prior to signing that contract you said you had a purchaser?

A. I had a purchaser in mind for a house who I told him I thought would buy that house, but they had never seen it until after the contract was executed.

Q. In order to protect yourself you procured this signature?

A. I had Mr. Kalikman sign the contract.

Mr. Stackhouse: I have nothing further.

Mr. Costello: That is our case.

PLAINTIFF RESTS.

10

Mr. Stackhouse: On the plaintiff's case, I move to make a motion for a non-suit. Obviously, under this contract—under the pleadings, perhaps, I move for a judgment on the pleadings. I thought I would let the plaintiff put in her case. The contract authorizes the plaintiff as sole and exclusive agent to sell the property described on the reverse hereof, which is made part of this agreement and in consideration of said agent listing said property for sale in his office, agrees to pay said agent five per cent of the gross consideration when a sale or exchange is effected, either by the agent or owner, before the revocation of this agreement. Now then, the reverse of the contract states the property being located in or near the City of Camden, County of Camden, New Jersey, premises 1110 Langham Avenue, price \$6800.00. It is quite obvious that under the laws as exist in the State of New Jersey today, the plaintiff has earned, certainly not any \$110.00 commission, balance of commission on this sale. Now, our law in that respect, and I would say that I have had occasion, not in this particular case, but in other cases in which I have been interested, to go into the matter with some degree of care. Sec-

20

30

tion of the statute of frauds respecting commissions, agreements, which is section ten, as originally drafted provided, "That no broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the sale or exchange of any real estate unless the authority for selling or exchanging such land is in writing and signed by the owner or his authorized agent, and the rate of commission on the dollar shall have been stated in such authority." 10 This section was amended in 1911 by adding the phrase, "Any Real Estate," and the concluding phrase—the use of additional matter—now reads as follows: "No broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such land is in writing, and signed by the owner or his authorized agent, 20 or the authority of the broker or real estate agent to make a sale or exchange of such land is recognized in writing or memorandum signed by the owner or his authorized agent, whether or not such writing or memorandum is signed by said owner or agent before or after such sale or exchange has been effected and the rate of commission on the dollar shall have been stated therein." Section ten is further amended in 1918 by adding certain other 30 provisions, but they are not relevant to the matter in controversy, in this matter. Now, in the case of *Henry v. Heintz*, the Supreme Court said, "To entitle a broker to commissions for his services in negotiating a sale, the services must be rendered under an employment and retainer by his principal. Services rendered as a mere volunteer, without any employment, express or implied, will give no title to commissions. If the employment be by

special agreement, the rights and the liabilities of the parties will be determined by the terms of the agreements, exclusively." Now, the rights of the parties which are to be determined by this agreement are, that Mrs. Ganley was to sell this property for \$6800.00. There was nothing elastic about the agreement at all. If she got a purchaser for \$6800.00 and procured a purchaser for that sum who was able, ready and willing to purchase upon the terms that the owner prescribed, she earned her commission, she earned \$340.00, I think, under those circumstances. If she took the alternative, brought the parties together, and got them to sign the agreement for \$6800.00, the agreement which was a binding agreement, satisfactory to the parties who signed it, then and under those circumstances she would also be entitled to five per cent. But, she did neither of those things. She claims to have brought the parties together, got them to sign the agreement, not for \$6800.00, the amount set forth in the contract, but for \$6200.00 for which she had no agreement whatever. And having no agreement in writing she wasn't entitled to any commission at all. Now, in the case of *Street v. Smith*, the Supreme Court held —

The Court: Who is that opinion by, Justice Katzenbach?

Mr. Stackhouse: It is a *per curiam* opinion.

The Court: That is not the one I had in mind.

Mr. Stackhouse: It was argued before Justice Gummere, Justice Trenchard and Justice Minturn.

The Court: When was it decided?

Mr. Stackhouse: It was decided December 15, 1926, and in that case, the Supreme Court said, "Payment by the purchaser of realty to broker held payment to vendor and broker, as agent of vendor was under duty to turn over entire payment to vendor, unless he had then earned his commissions." Now, obviously, under the circumstances, the instant case, the broker had earned no commissions at all. In the case of *Schwartz v. Weinstein*, which is a Supreme Court case reported in 5 Miscellaneous, page 708, the Court laid down this rule—that was a case where there was an agreement which was limited by its terms as to the time it should run. And there was some claim in that case that there had been an extension of the agreement by parol. A motion was made to non-suit, and the motion denied and exception was taken. The Court then went on to say, "We are of the opinion that the motion should have been granted. The agreement in writing with the plaintiff had expired by the limitation contained therein. The plaintiff, in order to come within the statute of frauds was obliged to show written authority. The statute is explicit that no broker shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such real estate is in writing and signed by the owner or his authorized agent. The plaintiff had no written authority because the agreement had expired. A contract within the statute of frauds cannot be modified by a parol agreement. Where a land contract is in writing, an agreement modifying its provisions, such as extending time for payment of the purchase price, cannot be proved by parol." In *Kerzner v. Chanin*, 98 Law 38, it was held, that "contracts coming within the express provisions of the statute of frauds are excepted from the rule allowing merely

written contracts to be varied by subsequent oral agreement between the parties." Now, under those circumstances, the only claim that Mrs. Ganley can make to commission in this matter is a claim that under a subsequent oral agreement between her and the defendant in this case, that she was to be entitled to five per cent commission on a sale of \$6200.00. Her written agreement is specific.

The Court: Well, now, what about the agree- 10
ment that was signed later, it isn't in evidence.

Mr. Costello: But it has been referred to, the agreement between Kalikman—I don't know at this time whether it has been signed by anyone else or not, but she testified she went down to Gloucester and got Kalikman to sign, he and his wife.

Mr. Stackhouse: This is an agreement of sale. 20

The Court: That is an agreement of sale. I want to hear what you have to say. You argue authority to sell is not in there it is merely an agreement of sale. I want to hear what you have to say about that.

Mr. Stackhouse: Why, that was merely procur-
ing a purchaser for \$6200.00, and no matter how
valuable the services may have been which Mrs. 30
Ganley might have rendered, she wasn't entitled to
any commission. Let us assume that there was
never any agreement in writing at all, but that Mr.

The Court: You mean forget about this?

Mr. Stackhouse: Forget about this for the instant, and that Mr. Kalikman agreed to pay five per cent commission for the procuring of a purchaser for his property 1110 Langham Avenue, and we will assume, just for the purpose of illustration, that Mrs. Ganley worked day and night in order to get a purchaser there, and she finally did, by the most arduous efforts, procure a purchaser, yet the owner is entitled to resist any attempt to collect commission under those circumstances, no matter how valuable the services which may have been rendered by the broker. And under the statute of frauds, since the agreement must be in writing, and, since, coming back to this matter, the agreement was to secure a purchaser, specifically for \$6800.00 and not for any less sum I respectfully submit that the plaintiff has made no case for the recovery of commission in this case.

20 The Court: I will hear Mr. Costello. Let me see the memoranda you had of the statute of frauds as presently written, in our statute law.

Mr. Costello: If the Court please, in the Court of Errors and Appeals, 119 Atlantic, page 98 —

The Court: What case is that?

30 Mr. Costello: That is *Reskey v. Meyer*. The Court of Errors and Appeals held the proposition of the broker, in order to be entitled to commission, he must be then the producing cause of the sale—necessarily implies that the purchaser must be produced by him. The broker must produce the purchaser. In *Steinberg v. Mindlin* —

The Court: Of course, there is no question about that. There is no question but Mrs. Ganley did produce the purchaser ready, willing and able to buy.

Mr. Costello: In 114 Atlantic, page 451, the Court of Errors and Appeals held, "That a real estate broker acting by virtue of a written agreement, earns his commission, when he secures a buyer on the seller's terms, either as originally propounded or as settled by agreement between the seller and the buyer." And so that case holds in this case, where an original agreement — 10

The Court: Give me the memoranda in that case.

Mr. Costello: 114 Atlantic, page 451, Steinberg v. Mindlin, that is the exact thing we have in this case, that where a buyer or seller comes to the broker and wants so much money for his house, then the broker, which is Mrs. Ganley in this case, procured a buyer and brought an agreement of the sale to the seller, and she told him that she could sell his property for \$6200.00, he then and there thereby agrees without any dissenting voice in the matter, signs the agreement, he and his wife signed the agreement, we have, why, a sale conforming, I think, to the terms of that case. And if it was an agreement of sale, we are entitled to commission and I think that the motion should be denied. 20

The Court: I am going to hold this until half-past one, and counsel may say anything at that time before I pass on it. I want to look into this case of Steinberg v. Mindlin, 114 Atlantic, page 451. 30

Wednesday, April 18th, 1928.
One-thirty P. M.

(Court met pursuant to recess.)

(Present same as before.)

The Court: Do you want to supplement your
10 statement made prior to the noon recess, in this
case?

Mr. Stackhouse: For me to say something or
Mr. Costello?

The Court: You will have your opportunity to
say something now.

Mr. Stackhouse: I had examined the case to
20 which Mr. Costello had reference —

The Court: Steinberg v. Mindlin?

Mr. Stackhouse: Yes. And that is based upon a
long line of old cases, the majority of which I think
I have read. When a statement was made by coun-
sel along the lines that Mr. Costello indicated before
we adjourned this noon, of course, it is something
which requires attention. That case was decided,
30 and the doctrine is by no means a new one, it is in-
herent in all decisions from early times, that a
broker earns his commission when he brings the
parties together and gets them to make an agree-
ment, either upon the terms outlined in the com-
mission contract or upon the terms which are sub-
sequently agreed upon between the owner and the

buyer. Now, the price is not a term. And those cases upon which the case in-114 Atlantic was based—is based upon some such situation as this. I remember one of these older leading cases on the subject; where a broker was authorized to procure a purchaser for a certain sum—we will say \$63,000.00, and he procured a purchaser and the owner agreed in lieu of taking cash to take a mortgage for \$30,000.00 as part of the purchase price and then resisted the payment of commission on 10 the ground that the broker had not earned it because he did not procure a purchaser for cash. The Supreme Court said he could not avoid paying commission because the owner had agreed to accept as cash the mortgage which was taken as part of the purchase price. Now, I want to call your Honor's attention to this contract which is self-interpreted, it says, price \$6800.00—terms, blank—which clearly differentiates the question of terms from question 20 of price, interpreting itself by distinguishing “price” which stands by itself and “terms” which stands by itself. The terms being left blank is to be inferred that the terms are to be cash. And if there is a modification of those terms by the owner to the extent, we will say, of taking a purchase money mortgage for a large part of the purchase price, and take that as cash in lieu of the terms imposed by the agreement, then, under the circumstances, obviously, the owner could not escape payment of the commission, because he modified the 30 terms, which by implication there would be cash, and instead of cash, a mortgage. I respectfully refer your Honor to the case of Brown against Adams, 69 Atlantic, page 601. That is not a New Jersey case, I will say, that is a Rhode Island case decided by the Rhode Island Supreme Court, which laid down the law as follows: “Where a broker for

an agreed commission was employed to sell certain real estate for a fixed price, did not procure a purchaser at that price, and the owner sold at a less price, the broker was not entitled to recover a commission even though it appears that the purchaser to whom the sale was made was procured by him." Now, that would seem, in a measure, to be the situation here, so that the cases to which my friend on the other side referred to, modification in the
10 terms of the sale, has no reference to a change in the price. Where a price is specifically set forth in the commission agreement no commission is earned until that price is obtained by the broker and Mrs. Ganley had no right, because she had earned no commission to retain any part of this down payment of \$300.00, and it was her duty to turn the entire \$300.00 over to Mr. Kalikman. She could not claim under a parol modification of the
20 agreement, which she obviously does claim under, because agreements which must be in writing under the statute of frauds cannot be modified by parol agreements made subsequently, and under the circumstances I respectfully submit I am entitled to a non-suit.

The Court: I will hear Mr. Costello.

30 Mr. Costello: If the Court agrees with Mr. Stackhouse—in that letter, we also have the letter that Mrs. Ganley had sent to Mr. Kalikman two days afterwards, and the statute also provides where there is an agreement between the broker and the seller, if the seller —

The Court: That letter is not in evidence.

Mr. Stackhouse: The letter is not in evidence. Not only that, but the complaint is not based upon any such agreement.

The Court: The only article in evidence is this agreement, that is the only exhibit.

Mr. Costello: If the Court please, I haven't anything else to say, except to repeat what was said this morning.

10

The Court: I have considered this motion during the noon recess and it will be granted and an exception noted for plaintiff. Now, do you want to go on with your counter-claim?

Mr. Stackhouse: Yes. I will offer in evidence this letter which was offered for identification, and ask that it be marked Exhibit D1.

The Court: It will be marked as an exhibit.

20

(Said letter received and marked Exhibit D1.)

Mr. Stackhouse: Under those circumstances, I don't know that I have any further testimony and ask for a judgment on the counter-claim.

The Court: Go ahead with the defense, Mr. Costello. This is Mrs. Ganley, called for the defense, you have been sworn.

30

MRS. TERESA WALSH GANLEY.

Direct examination.

By Mr. Costello:

10 Q. Mrs. Ganley, will you please explain to the Court the contents of that letter of January 12, 1928 or 1927?

Mr. Stackhouse: 1928. That is objected to, the letter speaks for itself.

The Court: Objection sustained.

20 Q. Well, in respect to the commission, that \$200.00, Mrs. Ganley, retained by you, what is the usual practice in the real estate—by real estate brokers in respect to the deposit made on a house?

Mr. Stackhouse: Objected to as incompetent, irrelevant and immaterial and has no bearing upon this case at all, what the custom is. The rights of these parties are fixed by the agreement which is the subject of the suit. There is nothing in the pleadings which shows any custom or practice.

30 Mr. Costello: If the Court please, there isn't anything in the agreement. There is nothing in the agreement in respect to the retainer.

Mr. Stackhouse: That is exactly the point I am making, the agreement speaks for itself. How can we go outside of the agreement when the agreement must be complete in itself under the statute of frauds.

The Court: Objection overruled, exception noted. You may answer the question as to what the custom is.

The Witness: To retain part of our commission out of the deposit.

Q. And you did so in this matter?

A. I did.

Q. How much did you retain in this matter? 10

A. \$200.00.

Q. How much did you turn over to Mr. Kalikman?

A. \$100.00.

Q. Was there anything said at that time with regard to the \$100.00, that check which you turned over to Mr. Kalikman?

A. I never heard from Mr. Kalikman after we sent him the check.

Q. Do you know when, exactly or approximately 20 when that check was cashed?

Mr. Stackhouse: That is objected to. There is no question but the check was cashed.

The Court: Objection sustained. It is immaterial.

Q. At the time that you brought the agreement of sale which was offered—was that offered this morning? 30

The Court: It was referred to but not offered in evidence.

Q. At the time this agreement of sale between Phillip Kalikman and Bessie Kalikman, his wife,

and Louis Katz was signed by Mr. and Mrs. Kalikman, was there anything said at that time in respect to the retention of the \$200.00 of his deposit—made by you?

A. Nothing.

Mr. Stackhouse: Objected to as immaterial and irrelevant. Under the case of Street against Smith which I referred to your Honor, this morning, the
10 right of the agent to retain a commission is dependent upon the agent having earned the commission. And since it has already been decided, I will say, *res adjudicata* in this case, upon disposition of the motion for non-suit. The agent having earned no commission had no right to retain the deposit.

Mr. Costello: If the Court please, I believe we have a right to introduce that because we have already produced there, and the case holds where the
20 producing cause—there is no question here we were the producing cause in this matter, in bringing the parties together.

The Court: Objection sustained.

Q. Did Mr. Kalikman at any time ever agree as to a commission by you in respect to this agreement of sale, on the execution of this?

A. Other than we were to retain five per cent
30 commission on the sale.

Mr. Stackhouse: Just a moment, I would like to cross-examine on that.

Cross-examination.

By Mr. Stackhouse:

Q. Was that agreement in writing?

A. No, it wasn't in writing.

Mr. Stackhouse: Then I move that the testimony be stricken out, if the Court please.

The Court: It will be stricken.

10

Mr. Costello: May it please the Court, by us putting Mr. Kalikman on the stand —

The Court: If there is any recovery here at all it must be based on written authority, upon the statute of frauds. Now, it is on that theory that the testimony is ruled out.

Mr. Costello: If the Court please, doesn't that letter cover the statute of frauds in regard to that? The statute of frauds says within five days.

20

The Court: This is a self-serving declaration.

Mr. Costello: Well, if the Court please, it is a self-serving declaration.

The Court: There isn't any memorandum sent by Mr. Kalikman, the defendant.

30

Mr. Stackhouse: If the Court please, it was introduced by the defendant.

The Court: Well, that doesn't make any difference.

By Mr. Stackhouse:

Q. Mrs. Ganley, you spoke a few minutes ago, about the custom of retaining commissions where you had made a sale, that custom of retaining is done where you have earned a commission, doesn't it?

A. Well, I presume we earned one in this case.

Q. Won't you answer the question?

10 A. Yes.

Mr. Stackhouse: All right, that is all.

By Mr. Costello:

Q. What do you understand by earning commission?

20 Mr. Stackhouse: Objected to as immaterial and irrelevant. I think that is a question for the Court to decide.

Mr. Costello: Well, if the Court please, she decided when she thought she earned a commission. Why hasn't she a right to state what her idea of the word "earn" is?

30 Mr. Stackhouse: Well, that was not in response to any question pending—not in response to my question—it wasn't responsive.

The Court: I will hear it. Objection overruled. What do you understand by the words "earn commission?"

The Witness: Where we have a property for sale—we bring the parties together—consummate

the deal—receive their check for deposit—have the agreement signed—then we have earned our commission.

Mr. Costello: That is all.

DEFENDANT RESTS.

The Court: Any more witnesses?

10

Mr. Costello: No, I haven't.

The Court: The Court will give judgment to the defendant on the counter-claim for the sum of \$200.00 and interest and costs.

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38 *Specifications of the Determinations of the
District Court With Respect to Which
Plaintiff-Appellant is Dissatisfied in
Point of Law*

10 SPECIFICATIONS OF THE DETERMINA-
TIONS OF THE DISTRICT COURT WITH
RESPECT TO WHICH PLAINTIFF-AP-
PELLANT IS DISSATISFIED IN POINT
OF LAW.

NEW JERSEY SUPREME COURT.

20	TERESA WALSH GANLEY, trading as T. C. WALSH, <i>Plaintiff-Appellant,</i> v. PHILIP KALIKMAN, <i>Defendant-Appellee.</i>	}	Action at Law. On Appeal from Camden City Dis- trict Court. Specifications of the Determinations of the District Court with Respect to which Plaintiff-App- pellant is Dissatis- fied in Point of Law.
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The following is a specification of the determina-
tions of the District Court with which appellant is
dissatisfied in point of law:

Upon the facts presented the District Court (a)
should not have granted defendant's motion for a
non-suit of the plaintiff's claim, (b) should not have

granted judgment to the defendant on his counter-claim, (c) should not have found, as a matter of law, that plaintiff was not entitled to her commissions under the evidence, (d) should not have found as a matter of law that defendant was entitled to the amount claimed in his counter-claim which had been retained by the plaintiff on account of her commission, (e) should have given judgment to the plaintiff for the sum of \$110 on her state of demand.

CARL KISSELMAN, 10
Attorney for Plaintiff-Appellant.

ALBERT S. WOODRUFF,
Of Counsel with Plaintiff-Appellant.

EXHIBIT P1.

20

T. C. Walsh is
hereby authorized by the undersigned as Sole and Exclusive Agent to sell the property described on the reverse hereof, which is made part of this agreement, and in consideration of said Agent listing said property for sale in his office, agrees to pay said Agent 5 per cent. of the gross consideration when a sale or exchange is effected, either by the Agent or Owner, before the revocation of this agreement. The Owner may revoke this agreement at any time 30
one week from date
after months, by giving 30 days written notice, provided that no negotiations are pending at the time for the sale or exchange of the property. If the property is sold or exchanged subsequently to any party with whom the said Agent has been nego-

tiating, the said commission is to be paid to said Agent. No verbal notice of the termination of this agreement will be recognized.

WITNESS my hand and seal this 31st day of Dec 1927

G. K. Baumgartner
Phone 366J
(Sale agency authority adopted by the Camden Real Estate Board on June 29, 1922)

Philip Kalikman (SEAL)

126 No. King (SEAL)

Address Gloucester N. J.

10

In or near city of Camden, N. J. | Price \$6800

Premises No. 1110 Langham Ave. | Terms

Building 2 Story Roof | Rent

Rooms, 1st Floor 3 2d 3 & Bath 3d |

Condition good Finish Chestnut

Lot 20x100 Alley diveway Porch enclosed

20

Paving yes Side Walk yes Curb and Gutter yes

Sewer yes Light in St. yes Light in House gas & Elec

Bath yes Closet yes Laundry yes Basement Cellar

Water Heat Hot water Taxes \$

Garage yes Sign Water Rent \$

Mort. \$ to suit Due Int. %

30

Insured for \$ Expires

Remarks

10

EXHIBIT D1.

January 12th. 1928

Philip Kalikman,
King Street,
Gloucester City, N. J.

Dear Sir:

Enclosed you will find copy of agreement of sale
for No. 1110 Langham Avenue, sold to Louis Katz; 20
also check for \$100.00, being the amount of deposit
paid, less my commissions of \$200.00 on the sale.

Yours very truly,

T. C. Walsh

(ENCLOSURE)
TCW/S

30

OPINION.

(Filed Mar. 11, 1929.)

NEW JERSEY SUPREME COURT.

No. 412, October Term, 1928.

10

TERESA WALSH GANLEY,
trading as T. C. WALSH,
Plaintiff-Appellant,
v.
PHILIP KALIKMAN,
Defendant-Respondent.

20

Submitted, October Term, 1928. Decided, February, 1929.
On appeal from Camden City District Court.

For appellant: CARL KISSELMAN, ALBERT S. WOODRUFF, of counsel.
For respondent, D. TRUEMAN STACKHOUSE.

30

BEFORE JUSTICES TRENCHARD, KALISCH and LLOYD.

LLOYD, J.:

This was an action instituted in the District Court of Camden by the plaintiff, a real estate broker, to recover a commission of 5% on the sale of property

in that city under a written authority given by defendant to the plaintiff. The plaintiff found a purchaser acceptable to the owner at a price of \$6,200 and collected \$300 on account of the purchase price, \$200, of which she retained on account of her commission and remitted the remaining \$100 to the owner. The sale was completed and, the commission not being paid, the present action was brought for the unpaid balance, and the defendant counter-claimed for the \$200 retained by the broker. The trial Judge dismissed the plaintiff's claim and rendered judgment for the defendant for the counter-claim. 10

The authority to the plaintiff was as follows:

"T. C. Walsh is hereby authorized by the undersigned as sole and exclusive agent to sell the property described on the reverse hereof, which is made part of this agreement, and in consideration of said agent listing said property for sale in her office, agrees to pay said agent five per cent of the gross consideration when a sale or exchange is effected, either by the agent or owner, before the revocation of this agreement. The owner may revoke this agreement at any time one week from date after * * * months by giving thirty days' written notice, provided that no negotiations are pending at the time for the sale or exchange of the property. If the property is sold or exchanged subsequently to any party with whom the said agent has been negotiating, the said commission is to be paid to said agent. No verbal notice of the termination of this agreement will be recognized. 20 30

Witness my hand and seal this 31st day of December, 1927.

PHILIP KALIKMAN (Seal)."

The reverse side of the card on which the contract was written contained a series of printed details as to the location of the property, price, type of building, rooms, additions, size of lot, &c. There was no question that the sale was effected through the agency of the plaintiff.

10 * The contention of the defendant, which was adopted by the trial Court, was that the authority was one to sell at the price of \$6,800 and that alone; that plaintiff failing to find a purchaser for that sum, earned no commission even though the sale was effected at \$6,200 through the broker's efforts, and in addition that when the broker retained the \$200 she was doing so without authority.

20 We think the contention unsound. The statute requires only that "the authority for selling or exchanging * * * land be in writing and signed by the owner or his authorized agent, and the rate of commission on the dollar shall have been stated in such authority." The authority in the present case is in writing signed by the owner and the rate of commission is specified; nothing more was required. Even though the price specified on the back of the card on which the contract was written be accepted as part of the terms of employment, unless it clearly appeared that obtaining this price was a condition of the broker's right to compensation the commission would be earned. The rule is that a broker duly employed in writing earns his commission when he finds a purchaser able and willing to comply with the terms specified in the authority thus given or when he finds a purchaser who agrees to purchase on terms satisfactory to the owner. *Crowley Co. v. Myers*, 69 N. J. L. 245; *Steinberg v. Mindlin*, 96 N. J. L. 206, *Dickinson v. Walters*, 100 N. J. L. 62. In the present case the owner accepted the pur-

30

chaser found by the plaintiff and a conveyance was made.

To defeat the plaintiff's claim it must appear that the parties intended to make the payment of the commission contingent on a price of \$6,800 being obtained. We think nothing could be further from the fact. The authority is a general one to sell the property and contemplates either a sale for cash or an exchange of properties, and stipulates for the payment of 5% of the gross consideration upon such 10 sale or exchange being effected. It is probable that the price noted on the back of the card, like the many other details, was simply one for the guidance of the broker, the contract referring to the reverse side to ascertain the property which the plaintiff was authorized to sell and that it is the description which is made a "part of the agreement." The price of \$6,800 strictly construed means actual money and not property in exchange, and would be inconsistent with the general authority given, which 20 was to sell or exchange. Whether, however, the figures were intended to be a part of the authorization further than as a guide to the broker, it is unnecessary to decide. It is sufficient to say that obtaining the price stated was not made a condition of plaintiff's right to recover the commission which she had justly earned.

The judgment is reversed.

RULE OF REVERSAL AND REMITTITUR.

(Filed April 3, 1929.)

NEW JERSEY SUPREME COURT.

No. 412, October Term, 1928.

10

TERESA WALSH GANLEY,
trading as T. C. WALSH,
Plaintiff-Appellant,
v.
PHILIP KALIKMAN,
Defendant-Appellee.

On Appeal.
Rule of Reversal and
Remittitur.

20 The Court having heard the argument of counsel, and having inspected the judgment and proceedings removed by the appeal in this cause, and having duly considered the grounds of appeal, it is on this third day of April, 1928, ordered that the said judgment of the District Court of the City of Camden, be in all things reversed, set aside, and for nothing holden, and that the said cause be remitted to the District Court of the City of Camden to be proceeded in according to law.

30 Entered: April 3rd, 1928.

On motion of,

CARL KISSELMAN,
Attorney of Plaintiff-Appellant.

A true copy,
FRED L. BLOODGOOD,
Clerk.

NOTICE OF APPEAL.

(Filed April 12, 1929.)

NEW JERSEY SUPREME COURT.

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TERESA WALSH GANLEY, trading as T. C. WALSH, <i>Plaintiff-Appellee,</i> v. PHILIP KALIKMAN, <i>Defendant-Appellant.</i>	}	On Appeal from New Jersey Supreme Court. Notice of Appeal.
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The above-named Philip Kalikman hereby ap- 20
 peals from the judgment, decision or rule entered in
 the above cause on April 3, 1928, reversing a certain
 judgment of the District Court of the City of Cam-
 den, from which the said Teresa Walsh Ganley ap-
 pealed to the New Jersey Supreme Court, to the
 Court of Errors and Appeals in the last resort in
 all cases, on the following ground:

1. That the Supreme Court should have sustained
 the judgment of the Camden City District Court in- 30
 stead of reversing the same.

D. T. STACKHOUSE,
Attorney for Philip Kalikman,
Defendant-Appellant.

[ENDORSED.]

Service of the within Notice is hereby
acknowledged this 11th day of April,
1929.

Carl Kisselman,
Attorney for Plaintiff-
Appellee.

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New Jersey Court of Errors and Appeals

TERESA WALSH GANLEY, Trading as T.
C. WALSH,
Plaintiff-Appellee,

v.

PHILIP KALICKMAN,
Defendant-Appellant.

ON APPEAL FROM SUPREME COURT.

BRIEF OF DEFENDANT-APPELLANT.

STATE OF THE CASE.

Plaintiff brought a suit in the Camden City District Court to recover commissions as real estate broker upon an agreement made with her by the defendant, by which he agreed to pay her 5% brokerage on the sale of premises 1110 Langham Avenue, Camden, New Jersey, which the defendant had authorized the plaintiff to sell for \$6800.00. The brokerage agreement was in writing and is set forth on page 4 of the State of the Case, and also as Exhibit P1 on page 39. Although the State of the Case does not make it apparent, the agreement was

drawn upon a 3" x 5" index card, part of the agreement being on one side of the card and part of it on the other. The agreement referred to "the reverse hereof, which is made part of this agreement." The face of the agreement begins on line 20, page 39, and the reverse of the agreement begins on line 10, page 40. It is thus apparent that the face of the agreement and the reverse thereof form one instrument.

The plaintiff (p. 16, line 15) received the \$300.00 which was a deposit on account of the \$6200.00 sale. Out of the \$300 which she received, she paid \$100 to the defendant, retaining \$200 which she stated to be her commissions on the sale. (Exhibit D1, p. 41.)

The state of demand is based upon the written agreement by which the plaintiff was authorized by the defendant to sell the property for \$6800, and the commission is claimed upon a sale of \$6300 (p. 3) afterwards amended to \$6200 (p. 12) and the suit is brought to recover \$110 being 5% on \$6200, less \$200 retained by the plaintiff.

The suit was resisted by the defendant, it being claimed that the agreement under which the plaintiff claimed her commission was not in writing and, therefore, void under the Statute of Frauds; and a counter-claim was also filed by the defendant seeking to recover from the plaintiff the sum of \$200 which it was claimed the plaintiff had unlawfully withheld from the defendant. Judgment was given on the counter-claim in favor of the defendant and against the plaintiff for \$203.20 and costs (p. 10).

Although the case was in the District Court, and no written pleadings in reply to the plaintiff's state of demand were required, in order that there might be no misunderstanding as to the defense, a written answer was filed (p. 6).

The plaintiff appealed from the judgment of the District Court to the Supreme Court and the Supreme Court reversed the judgment of the District Court and it is from this reversal that the appeal is taken to this Court.

GROUPS OF APPEAL.

Nominally, of course, the only ground of appeal that can be urged is the action of the Supreme Court in reversing the judgment of the District Court. The consideration of this, however, involves the real substance of the appeal, and that in turn revolves upon a question of grammatical construction as applied to the contract in suit which must first be resolved before the question of the legality or illegality of the action of the Supreme Court is reached. This will be enlarged upon under the Brief of the Argument.

BRIEF OF THE ARGUMENT.

I.

It was the contention of the plaintiff before the Supreme Court that the reference to the reverse of the agreement was made only to describe the property and the Supreme Court in its opinion apparently followed this line of reasoning. We respectfully submit that only by disregarding the most elementary rules of grammatical construction and substituting therefor, grammatical destruction, could such a result be arrived at. If the well founded principle of grammar, that a modifying clause refers

to the last preceding noun is applied to the instrument under consideration (p. 39) it is plain that it is "the reverse hereof which is made part of this agreement," and not "the property described * * * * which is made part of this agreement." We are, however, according to the opinion of the learned Supreme Court asked to disregard, eliminate and expunge the phrase, "on the reverse hereof" and to give the agreement a meaning entirely different from that which a well considered grammatical construction of it would lead to.

This, then is the first point for this Court to decide, and we are frank to say that should it, at this juncture, agree with the construction given to the contract by the Supreme Court, there is nothing further for it to decide. In order to arrive at this result, however, it is necessary that this Court should accept everything which is printed upon the reverse of the card (p. 40) and ignore the price, which is just as much a part of the reverse as any other part. The decision of the Supreme Court is based upon the erroneous conception that because the Statute of Frauds does not require that the owner and broker should state in their agreement the price at which a property was to be sold, they are precluded from making that a part of the items of the brokerage agreement. Adopting the language of the Supreme Court in its opinion, "We think nothing could be farther from the fact." The opinion goes on to say (p. 44) "Even though the price specified on the back of the card on which the contract is written be accepted as part of the terms of the employment, unless it clearly appear that obtaining this price was a condition of the broker's right to compensation, the commission would be earned." But, we venture to ask, how is it to clearly appear "that obtaining this price was a con-

dition of the broker's right to compensation?" Since the parties have put their agreement in writing, it could not appear from evidence *aliunde* and must be drawn from the terms of the agreement. This, therefore, brings us back to the question of the true construction of the brokerage contract.

The Supreme Court went on further to say that "it is probable that the price noted on the back of the card, like the many other details, was simply one for the guidance of the broker." We do not see that we can be concerned with probabilities when agreements such as this are subject to strict rule of construction. The "many other details" on the back of the card refer to various elements describing the property and the Supreme Court attempts to give effect to the one part of the reverse and to eliminate any consideration of the other.

Neither do we see that the fact that a reference is made in the agreement to "sale or exchange" embarrasses the situation in the slightest. Naturally, if the property were exchanged there would have had to be some price basis of exchange and this was inserted as \$6800. In other words, when the agent effected an exchange she must have secured to the owner, at least \$6800 in value for his property. Agreements of exchange are almost invariably drawn with one price set against another, unless, as is very unusual, there is a trade, "Even Stephen."

We repeat and again assert that only by disregarding the most elementary rules of grammatical construction, could the result arrived at by the learned Supreme Court, be obtained. Therefore, the reference on the face of the brokerage contract making the reverse thereof, part of the agreement, made both sides of the agreement, one contract.

Stoll v. Wellborn, 56 A. 894; 13 C. J. 530.

That this is the case, is quite apparent from the practical construction put upon the agreement by the plaintiff herself in her state of demand (p. 3) in which she specifically states in the first paragraph "the defendant duly authorized her by a written agreement * * * to sell for \$6800.00," and this is an element which the Supreme Court apparently overlooked, or ignored. It is quite evident that the plaintiff's own conception of the authority, was that she was to sell the property for \$6800 and that she considered that the reverse of the agreement, which is the only part of the agreement which makes reference to the price, bound her to sell for this figure. She thought that this was what it meant, because she said so in her state of demand and it is quite evident that the defendant thought that that was what it meant because he resisted payment by reason of his not getting that price. The Supreme Court possibly had the right to assume, as stated in its opinion (p. 44) that, "There was no question that the sale was effected through the agency of the plaintiff." It should be observed that the defendant was never called upon to go upon the stand, defendant's motion for non-suit having been granted at the close of plaintiff's case. Consequently, no question of fact was ever raised as to this point, as between plaintiff and defendant.

II.

If the plaintiff is entitled to recover, she can only do so under an agreement which satisfies the Statute of Frauds, as amended in 1911 (P. L. 1911, p. 703), the act reading as follows:

"That no broker or real estate agent selling or exchanging land for or on account of the

owner shall be entitled to any commission for the sale or exchange of any real estate unless the authority for selling or exchanging such land is in writing, and signed by the owner or his authorized agent, or the authority of the broker or real estate agent to make a sale or exchange of such land is recognized in a writing or memorandum signed by the owner or his authorized agent, whether or not such writing or memorandum is signed by said owner or agent before or after such sale or exchange has been effected, and the rate of commission on the dollar shall have been stated therein."

This section of the Act was further amended in 1919 (Cum. Supp. C. S. N. J., Vol. 1, p. 1452), by adding to the Act as amended in 1911 certain other provisions which, however, are not germane to the matters involved in this controversy.

Plaintiff's claim, therefore, must be under the section as amended in 1911, the additional matter contained in the amendment of 1919 having no bearing upon the present dispute.

III.

The right of the plaintiff to commissions under the contract in question is limited to a case where she secured a purchaser for \$6800. If she did not secure a purchaser for this sum she was entitled to no commission.

"To entitle a broker to commissions for his services in negotiating a sale, the services must be rendered under an employment and retained by his principal and services rendered as a mere voluntary act without any employ-

ment expressed or implied will give no title to commissions. If the employment be by special agreement, *the rights and liabilities of the parties will be determined by the terms of the agreement exclusively.*"

Hinds v. Henry, 36 L. 328.

Thus it appears that the plaintiff sought to recover, not under the agreement but upon a subsequent parol modification of it, or, in effect, *a new agreement not in writing* which was substituted for the written one.

In *Kerzner v. Chanin*, 98 L. 38, 118 A., 693, it was held that:

"The case of contracts coming within the Statute of Frauds is expressly excepted from the rule allowing merely written agreements to be varied by subsequent oral agreements."

IV.

In order for the plaintiff to have justified the retention by her of the \$200, the portion of the deposit on account of the sale, it was necessary for her to show that she was entitled to a commission on the sale.

In the case of *Street v. Smith*, 5 Misc. 5; 135 A. 352, it was held:

"Payment by the purchaser of realty to a broker was payment to the vendor and the broker as agent of the vendor was under a duty to turn over the entire payment to the vendor, *unless he had then earned his commission.*"

Thus, the plaintiff being entitled to no commission under the parol agreement which was sub-

stituted for the written agreement, was bound to turn over to the defendant the entire amount which she had received as a deposit on the sale; instead of this she retained \$200 and brought a suit to recover \$110 more. She was not entitled to any of it.

V.

We respectfully call the Court's attention to the case of *Brown v. Adams*, 69 A. 601. This was a case which was decided by the Rhode Island Supreme Court, as follows:

"Where a broker, for an agreed commission was employed to sell certain real estate for a fixed price and did not procure a purchaser at that price and the owner sold at a less price, the broker was not entitled to receive a commission, even though it appears that the purchaser to whom the sale was made, was procured by him."

VI.

Plaintiff's counsel raised the point before the trial Court that a real estate broker, acting by virtue of a written agreement, earns his commission when he secures a buyer on the seller's terms, either as originally propounded or as settled between the seller and the buyer.

There are several New Jersey cases which so hold, but the difficulty is that they do not apply to the facts in the instant case. The cases cited by the plaintiff will all be found to have this or similar elements, *viz*:

"A broker is employed, in writing, to secure

a purchaser for a certain sum upon stipulated terms of sale. He procured a purchaser at the stipulated price, but the seller instead of insisting upon cash or upon the terms of sale set forth in the brokerage agreement, sells at the price stipulated but upon different terms; or in other words, agrees to take as the equivalent of cash, certain securities by way of mortgages and otherwise."

Obviously, where a broker has procured a purchaser at the stipulated price, the owner would be estopped from setting up that he did not receive cash where he had agreed to accept something else as its equivalent.

VII.

The statement by the trial Judge (p. 29, line 1), "*Now, the price is not a term,*" is a summary of all the questions involved in the instant case; and in the contract itself the parties, by their agreement, had differentiated the price from the terms, as by reference thereto it will be found that the designation is as follows:

"Price \$6800.00.
Terms"

From this language, it would appear that the sale *price* was to be limited to \$6800.00. Neither more, nor less, and since the *terms* were left blank, the implication is that the sale was to be a cash sale. Under our decisions, however, if the broker had procured a purchaser at the price stipulated but the owner had agreed to take some securities in lieu of cash, the broker would still have been

entitled to his commission, but we reiterate, that to give the broker a commission on a price different from that stipulated in the contract would be to permit a recovery on an oral agreement, void under the statute, and in fact, to ignore the existence of the Statute of Frauds.

VIII.

There are agreements upon which the decided cases are based which either make the price elastic or name no price at all.

Obviously, if an agreement is so framed as to indicate no price, it is simply an undertaking to pay a stated commission upon whatever price the broker is able to get, in which case the broker is entitled to his commission when he had obtained a purchaser at any price.

IX.

In conclusion, the cases all distinguish the price from the terms. The case of

Johnson v. Buck, 35 L. 338.

and cases following it, all first name the price and then refer to the terms.

Also

39 *Cyc.*, 1186, 1187.

It is respectfully submitted that the judgment of the Supreme Court, should, for the reasons above stated, be reversed.

D. TRUEMAN STACKHOUSE,
Attorney for and of Counsel
with Defendant-Appellant.

entitled to his commission, but we referred that to your old federal commission of a more distant year that stipulated in the contract would be to permit a transfer, and an oral agreement void under the statute, and in fact to extend the existence of the statute of 1864.

VIII

There are numerous points upon which the double issue has been raised, and which have the same effect as to the parties to the contract, and as to the parties to the contract, it is not intended to be treated as to the double issue, but simply an agreement to pay a stated commission upon whatever price the broker is able to get, in which case the broker is entitled to his commission, which he had obtained a purchaser at any price.

The second issue is, whether the broker is entitled to his commission, and if so, whether it is to be paid in full, or whether it is to be paid in part, and if so, whether it is to be paid in full, or whether it is to be paid in part, and if so, whether it is to be paid in full, or whether it is to be paid in part.

and now I desire to say that none of the issues are referred to the jury.

THE COURT'S DECISION

The court has held that the judgment of the court is affirmed, and the reasons given are stated in the opinion of the court, and the court has held that the judgment of the court is affirmed, and the reasons given are stated in the opinion of the court.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

TERESA WALSH GANLEY, trading as T. C. WALSH,
Plaintiff-Appellee,

v.

PHILIP KALIKMAN,
Defendant-Appellant.

ON APPEAL FROM SUPREME COURT.

BRIEF OF PLAINTIFF-APPELLEE.

FACTS.

The facts involved in the present appeal, are as follows:

The plaintiff below, Teresa Walsh Ganley, a real estate broker, having offices in the City of Camden, negotiated for the defendant, who was the owner of premises #1110 Langham Avenue, Camden, N. J., a sale of the said property. This was by virtue of the authority of the plaintiff given by the listing signed by the defendant (Exhibit E1).

At the time of the sale, the plaintiff received for the defendant, the sum of \$300.00, on account of the purchase price. \$100.00 was remitted to the owner,

the plaintiff retaining \$200.00 on account of her commission. Suit was brought in the Camden City District Court for the balance of the commission of 5%. Defendant defended the suit and counter-claimed for the amount retained upon the theory that the sale made was not in accordance with the written agreement entered into between the parties. Upon these facts, the Court below rendered a nonsuit as to plaintiff's claim and found for the defendant upon his counter-claim, awarding him a verdict of \$200.00. On appeal the Supreme Court reversed the decision of the lower Court and the appellant here seeks a reversal of the Supreme Court to the end that the lower Court's decision be sustained.

LAW AND ARGUMENT.

1. The sale was made in accordance with the written agreement. It is contended by the defendant that the price of \$6800.00, indicated on the reverse side of the listing card is to be construed as the price at which a sale must be made in order that a commission might be collected. However, reference to the agreement itself will readily indicate that such is not the case. The agreement in the following language provides that reference is to be made to the information on the reverse side of the listing only for the purpose of describing the property; "T. C. Walsh is hereby authorized by the undersigned as sole and exclusive agent to sell the *property described on the reverse hereof.*"

This is further emphasized by the subsequent language in the contract in which the commission is fixed as 5% of the gross consideration when a sale

or exchange is effected. The contract itself makes no reference to the price that is to be obtained, and in the absence of such provision, the broker would be entitled to a commission when a sale is effected at any price which may be agreeable to the owner. *Johnson v. Sutton*, 94 Miss. 544.

It is not denied that the price received was acceptable to the defendant owner, and that the sale was consummated; therefore, the plaintiff having made the sale in accordance with her authority, is entitled to the commission agreed upon in writing.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

CARL KISSELMAN,
*Attorney for Plaintiff-
Appellee.*

ALBERT S. WOODRUFF,
Of Counsel.

