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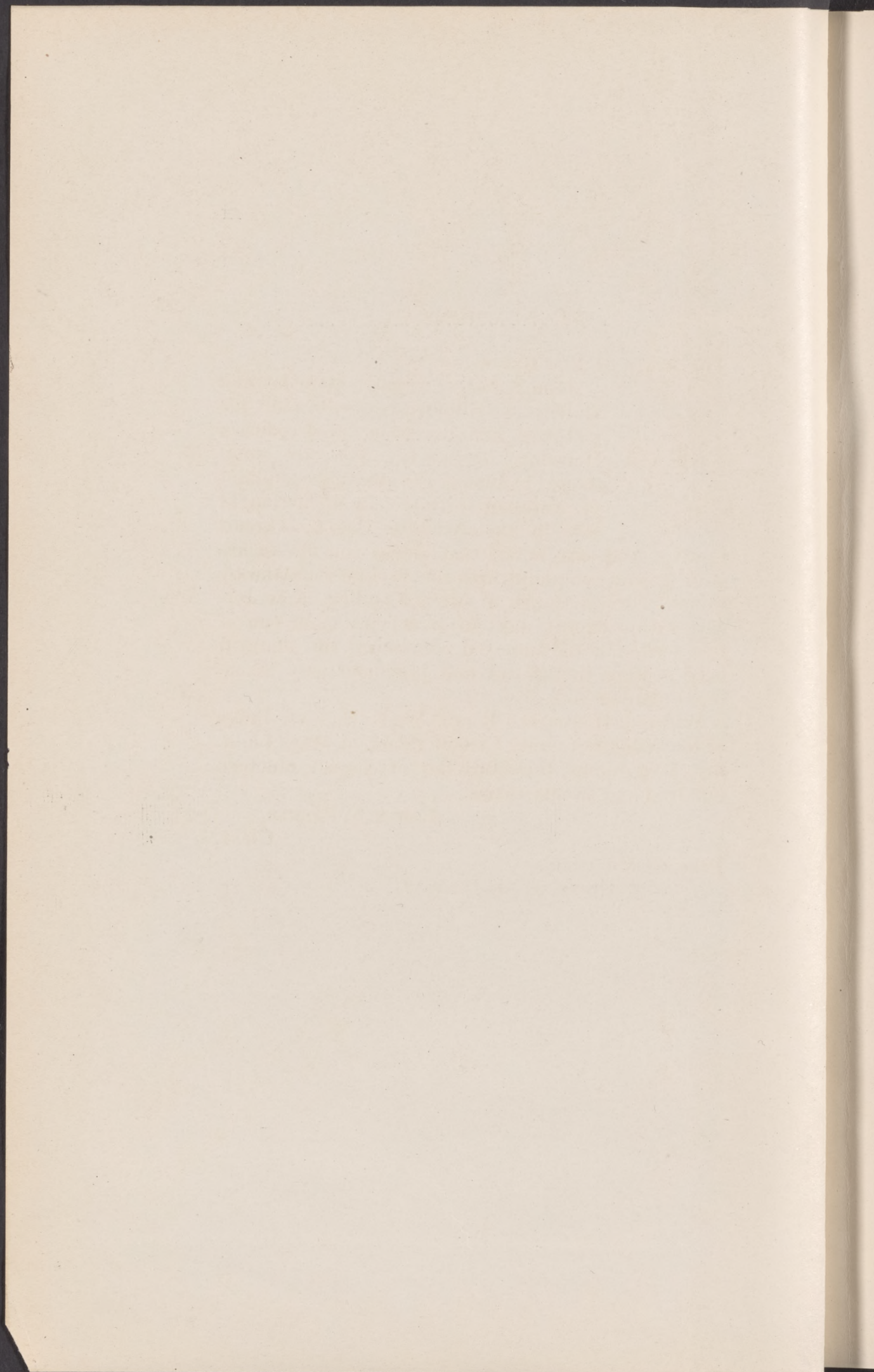
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SUMMONS.

THE STATE OF NEW JERSEY, to

John B. Slack, Anna H. Hemsley and
Quincy A. Gilmore, executors of the
last will and testament of Frederick

(SEAL) Hemsley, deceased: You are sum- 10

moned to answer the annexed complaint
of Abraham Littman, in an action at
law in the Atlantic County Circuit

Court. And take notice that unless you file an an-
swer to said complaint with the clerk of the Atlantic
County Circuit Court, at Mays Landing, New Jer-
sey, within twenty days after service upon you of
this writ and the annexed complaint, the plaintiff
may proceed in the suit and judgment may be en-
tered against you. 20

Witness, HONORABLE RALPH W. E. DONGES, Judge
of the Atlantic County Circuit Court, at Mays Land-
ing, New Jersey, this ninth day of August, nineteen
hundred and twenty-three.

EDWIN A. PARKER,
Clerk.

PARSONS & PARSONS,
Attorneys for Plaintiff.

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

10 ABRAHAM LITTMAN,
Plaintiff,

v.

JOHN B. SLACK, ANNA H.
 HEMSLEY, and QUINCY A.
 GILMORE, Executors of
 the last Will and Testa-
 ment of FREDERICK HEMS-
 LEY, deceased.
Defendants.

Action at Law.
 Complaint.

20

The plaintiff, Abraham Littman, residing in the City of Atlantic City, County of Atlantic and State of New Jersey, complaining, says:

1. That he is a real estate broker, with offices at No. 8 and No. 10 Seaside Block, in said city, and conducts a general real estate business.

30 2. That at the time of the grievances hereafter alleged the plaintiff was in partnership with one Wilkins, and traded under the firm name of "Wilkins and Littman;" that the said Wilkins and the plaintiff have dissolved their co-partnership and all the claims due to the partnership have been assigned to the plaintiff.

3. That on or about the first day of July, nineteen hundred and twenty-two, Quincy A. Gilmore, one of the executors aforesaid, brought to plaintiff's office the plans of a number of stores situate on the Boardwalk in said city, for which he engaged the plaintiff to secure tenants for the estate of Frederick Hemsley, deceased; that at the time he delivered the plans to the plaintiff, the said Gilmore agreed to pay a commission of five per cent on all the stores that plaintiff might be successful in renting.

10

4. That in pursuance of said agreement, the plaintiff began at once to secure tenants for said stores, and through his efforts, the defendants leased one of the stores, situate at 1723 Boardwalk, city aforesaid, to the Huyler Company for a term of five years, at a yearly rental of twelve thousand dollars, said Huyler Company being now in possession of said store, and that there is due to the said plaintiff a commission of three thousand five hundred dollars for the renting of said store.

20

5. That through plaintiff's efforts, the defendants leased one of the stores, situate at 1725 Boardwalk, city aforesaid to the Hanan Shoe Store, for a term of five years at a yearly rental of eight thousand dollars, said Hanan Shoe Store being now in possession of said store, and that there is due to the said plaintiff a commission of two thousand dollars for the renting of said store.

30

6. That through plaintiff's efforts, the defendants leased one of the stores, situate at 1727 Boardwalk, city aforesaid to the Bacheller Jewelry Store, for a term of five years at a yearly rental of eight thousand dollars, said Bacheller Jewelry Store being now in possession of said store, and that there is due to

the said plaintiff a commission of two thousand dollars for the renting of said store.

7. That for the services rendered to the said John B. Slack, Anna H. Hemsley and Quincy A. Gilmore, executors of the last will and testament of Frederick Hemsley, deceased, a cause of action has accrued and the plaintiff is entitled to judgment in the sum of six thousand five hundred dollars, with interest from the first day of January, nineteen hundred and
10 twenty-three.

PARSONS & PARSONS,
Attorneys for Plaintiff.

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

20

ABRAHAM LITTMAN,
Plaintiff,

v.

JOHN B. SLACK, ANNA H.
HEMSLEY, and QUINCY A.
GILMORE, Executors of
the last Will and Testa-
ment of FREDERICK HEMS-
LEY, deceased,
Defendants.

Action at Law.
Answer.

30

John B. Slack, Anna H. Hemsley and Quincy A. Gilmore, executors of the last will and testament of Frederick Hemsley, deceased, all of Atlantic City, New Jersey, answering the complaint, say:

1. They admit paragraph 1 of the bill of complaint.

2. They are without information as to paragraph 2 and therefore, neither admit nor deny, and they pray proof.

3. They deny paragraph 3 of the complaint.

4. They deny paragraph 4 of the complaint.

5. They deny paragraph 5 of the complaint.

6. They deny paragraph 6 of the complaint.

COLE & COLE, 10
Attorneys of Defendants.

ORDER OF SUBSTITUTION.
ATLANTIC COUNTY CIRCUIT COURT.

ABRAHAM LITTMAN,
Plaintiff,

v.

JOHN B. SLACK, ANNA H.
HEMSLEY, and QUINCY A.
GILMORE, Executors of
the last Will and Testa-
ment of FREDERICK HEMS-
LEY, deceased,
Defendants.

Action at Law.
Order of Substitution.

20

Ordered that Bourgeois & Coulomb be substituted 30
as attorneys for plaintiff in the above stated cause.

PARSONS & PARSONS,
Attorneys.

We consent to the making of the above order.

BOURGOIS & COULOMB,
Attorneys.

MEMORANDUM OF OPINION.

ATLANTIC COUNTY CIRCUIT COURT.

ABRAHAM LITTMAN, Plaintiff,	}	On Motion for a New Trial.	10
v. JOHN B. SLACK, Defendant.			

Memorandum of
Opinion. 10

SCHIMPF, J.:

I have read the transcript of testimony in this case with a good deal of care, and I have concluded that the plaintiff, Abraham Littman, was not the procuring or efficient cause of the renting of the property by the tenants involved in this suit. Neither did he bring the parties in interest to any agreement. 20

“The duty an agent undertakes, the obligations he assumes as a condition of his right to demand commissions, is to bring the buyer and seller to an agreement. The agent, to earn commissions on the sale of property, must be the efficient or procuring cause of the sale.”

Queen v. Jennings, 93 N. J. Law, p. 353.

The jury was so charged. The testimony in the case does not justify the jury in finding either of the propositions in favor of the plaintiff. 30

The rule to show cause will be made absolute, and a new trial granted.

THEO. W. SCHIMPF,
Circuit Court Judge.

July 27, 1925.

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

January Term, 1926.

10	ABRAHAM LITTMAN, <i>Plaintiff,</i>	}	Action at Law.
	v.		On Verdict.
	JOHN B. SLACK, ANNA H.		Cole & Cole, Attys.
	HEMSLEY, and QUINCY A.		
	GILMORE, EXRS. of FRED- ERICK HEMSLEY, deceased, <i>Defendants.</i>		

20 Judgment entered Feb. 17, 1926, at 9 A. M.
 Costs of defendants, \$42.76.

This action was tried before Judge Theo. W. Schimpf, with a jury on February 15th, A. D. 1926.

The cause having been heard, the Judge directed the jury to find a verdict in favor of the defendants, and against the plaintiff for costs.

Whereupon it is ordered that the defendants, John B. Slack, Anna H. Hemsley and Quincy A. Gilmore, executors of Frederick Hemsley, deceased, recover of the plaintiff, Abraham Littman, the sum of forty-

30 two dollars and seventy-six cents, costs of suit.

WM. A. BLAIR,
Clerk.

County Circuit Judgment Book 14, page 380.
 Notice of Appeal filed April 9, 1926.

WM. A. BLAIR,
Clerk.

NOTICE OF APPEAL.

ATLANTIC COUNTY CIRCUIT COURT.

ABRAHAM LITTMAN,
Plaintiff,

v.

JOHN B. SLACK, ANNA H.
HEMSLEY, and QUINCY A.
GILMORE, Executors of
the last Will and Testa-
ment of FREDERICK HEMS-
LEY, deceased,
Defendants.

Action at Law.
Notice of Appeal.

10

20

Take notice that plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. Because the Court erred in permitting Coulter D. Huyler, over plaintiff's objection, to testify to the following question:

"Will you state, please, with whom this corporation negotiated for the rental of the property?" 30

2. Because the Court erred in permitting Coulter D. Huyler, over plaintiff's objections, to answer the question:

"Q. Tell me about it?"

3. Because the Court erred in overruling the question put to Mr. Littman:

“Q. Mr. Littman, you testified this morning about having called upon Mr. Bacheller. Mr. Bacheller came on the stand and testified that he never had seen you regarding the lease. Have you any explanation to make or do you still stand by your previous testimony?”

10 4. Because the Court erred in directing a verdict in favor of the defendants, as there was evidence in the case making it a jury question, and not a court question.

Dated April 7th, 1926.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

To

COLE & COLE, ESQS.,
Attorneys for Defendants.

20

30

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

ABRAHAM LITTMAN,
 Plaintiff, }
 v. } Action at Law. 10
 JOHN B. SLACK,
 Defendant. }

Mays Landing, N. J., March 16, 1925.

APPEARANCES:

MESSRS. BOURGEOIS AND COULOMB, for plaintiff.
MESSRS. COLE AND COLE, for defendant.

The above entitled cause was tried at Mays Landing, New Jersey, on March 16, 1925, before HONORABLE THEODORE W. SCHIMPF, Judge.

Mr. Bourgeois: If the Court please, I ask leave to amend the fourth paragraph of the complaint, making the rentals \$12,000 instead of \$10,000 per year, and then at the end of it claiming \$3,000 instead of \$2500.

The Court: Is there any objection to the amendment?

Mr. Cole: No.

The Court: It may be made.

(Mr. Bourgeois opened the plaintiff's case to the jury.)

10 (Mr. Cole opened the defendant's case to the jury.)

Mr. Bourgeois: I want to offer in evidence, if your Honor please, some interrogatories directed to the executors and answered by Mr. Gilmore.

(The interrogatories referred to are received in evidence and marked as exhibits for the plaintiff, P1 and 2, and are read to the jury by Mr. Bourgeois.)

20

ABRAHAM LITTMAN, the plaintiff, sworn as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bourgeois:

30 Q. Where do you live?

A. At the Alamac Hotel, Atlantic City.

Q. What is your business?

A. Real estate.

Q. How long have you been in the real estate business?

A. About five years.

Q. Did you have any business relations with the Helmsley estate or with Mr. Gilmore, the executor of it, during 1922?

A. I did.

Q. Where did those negotiations first begin?

A. At the hotel.

Q. When?

A. At the hotel.

Q. I say when?

A. That was in 1921, prior——

10

Q. When?

A. In 1921.

Q. How did they come about?

A. How did it come about? Why, they were building, changing the front, the casino front into stores, and that was my business. Knowing that, I called to see Mr. Gilmore.

Q. And what conversation took place between him and you?

A. He was not ready at the time to talk leasing, but he told me to keep in touch with him; when he would be here he would either call to see me or have me summoned to come to see him at the hotel. 20

Q. Did you keep in touch with him?

A. I surely did.

Q. Did he call to see you?

A. Oh, yes, numerously.

Q. Did he ever bring anything with him when he called to see you?

A. He did; those plans.

30

(Witness is shown a set of plans and is asked, what are those plans?)

A. The plans represent the changing of the casino front into stores, showing the elevation——

Q. I don't care what they show. They speak for themselves. They show the stores, anyway?

A. Yes.

Mr. Cole: Did you get all that from Mr. Gilmore?

Q. Did they all come from Mr. Gilmore?

A. Yes.

Q. These sheets also?

10 A. They are little plans that he had drawn in my office for the purpose of showing the second floor, into brokers' offices.

Mr. Bourgeois: I will offer the plans.

(The papers referred to are received in evidence and marked as an exhibit for the plaintiff P3).

20 Q. I show you two sheets of paper, loose—and ask you what they are.

A. These pieces of paper—these are for the purpose of changing the second floor of the casino into stores; so that it was rather a novel idea to have the second floor rented for brokerage purposes. I had several inquiries for brokerage concerns wishing to locate on that boardwalk front, and they would most likely locate there provided there was place. Submitting that to Mr. Gilmore—

30 Q. Well, who made those drawings?

A. Mr. Gilmore. He suggested a new way for a tenant there.

Q. Did he also make the drawing on that short paper?

A. Yes; he made that drawing, made the corrections there and I made these—

Mr. Bourgeois: I ask that it be marked as Exhibit 4.

(The paper referred to is received in evidence and marked as an exhibit for the plaintiff P4.)

Q. When Mr. Gilmore brought these plans to your office, did you have some conversation about the securing of tenants for these stores?

A. Yes, sir.

10

Q. What was the conversation? What took place there that day?

A. That I get tenants that would be subject to their refusal, and that I lift up the space there at the rental that he furnished me with.

Mr. Cole: A little louder.

The Witness: That I secure a tenant for the—tenants that I would interest to secure for the space, 20 would be subject to his refusal. Of course, they would have to be tenants that would be responsible, men—concerns that could pay the rent.

Q. Now, what was said, if anything, about the compensation?

A. Why, we had that understood about the compensation.

Q. I don't care what was understood. What was said?

30

A. My compensation was five per cent on the leases that I would secure for the locations.

Q. And for how long a period were you going to get that five per cent?

A. Five years.

Q. What did he say about that?

A. Perfectly agreeable, and said it was satisfactory.

Q. Did he say anything about whether you should go on and secure the tenants or not?

A. Oh, yes; oh, yes. He told me to make my report to him in each instance, which I did.

Q. Who was to draw the leases?

A. So I—I—I did ask Mr. Gilmore at the time. He told me his attorney would attend to that.

10 Q. You were not?

A. Oh, no.

Q. Who had the determination as to the amount of rental that they would rent them for?

A. Why, his end of it.

Q. Beg pardon?

A. His end of it; either the hotel or the attorney.

Q. Well, you were to do nothing except get these people who were willing to rent?

A. Just get the tenants.

20 Q. Providing they were satisfactory to them?

A. Providing they were satisfactory to them.

Q. Now, what did you do? What did you do after that?

A. Why, I simply went out and got busy securing tenants for the location, tenant that I thought would be acceptable and financially responsible.

Q. And whom did you communicate with or deal with?

30 A. Why, I communicated with Huyler's, and I called on Mr. Marx who is——

Q. Take one at a time. What was the effect or the result of your communication with Huyler's?

Mr. Cole: I ask that that be stated now. I don't want this witness' conclusion.

Mr. Bourgeois: I want him to state facts, too.

Q. You dealt with Huyler's?

A. Yes, sir.

Q. Now, did you get any reply from Huyler's?

A. Yes, sir.

Q. What did you do then so far as the estate was concerned?

A. I made my report to Mr. Gilmore.

Q. What did you tell Mr. Gilmore?

A. I told him what I was doing and he told me to get busy, keep after them. 10

Q. Did you tell him who it was?

A. Oh, yes; oh, yes.

Q. And did you continue to keep after them?

A. I did.

Q. Did you have any more than one conversation with Mr. Gilmore about them?

A. Why, I did, continuous.

Q. And what was the final result of that, do you know? 20

Mr. Cole: I object.

Mr. Bourgeois: If he knows.

Mr. Cole: I object to it even if he knows. "Result" is a conclusion.

The Court: Objection sustained.

Q. Do you know who occupied the store? 30

A. The store has been occupied by Huyler's.

Q. Who is occupying it now?

A. Huyler's.

Q. Now, you say that you went and saw Mr. Marx. Who is Mr. Marx?

A. He runs the Hanan Shoe store.

Q. What conversation did you have with Mr. Marx?

A. Why, my conversation with Mr. Marx was his lease—knowing that he was going to make a change I thought it would be best for him to locate in the new location of the stores. He was interested, but not at the rental that I had offered to him.

Q. What rental did you state to him?

A. \$12,000, and he told me to offer a proposition
10 of \$8500, which I did.

Q. To whom did you make that offer?

A. Mr. Gilmore. That was rather early in the building. He told me—so he said: "It is rather early in the construction. Let us wait a while and see if we can't get a little more." "Well," I said, "I thought I would report to you," and I returned with the report to Mr. Marx that he couldn't rent it at \$8500, but the chances are if he would go up a little he could get it. I kept calling on Mr. Marx
20 continuously. He in turn—one day that I reported to him going away to New York on a business trip for the interest of the hotel, and on that day he had called at the hotel—

Mr. Cole: I object to this.

The Witness: He leased the place.

Mr. Cole: I object to this.

30

The Court: Strike it out.

Q. Don't tell what you don't know. But, at any rate, you were away on business for the hotel?

A. For the hotel's interest.

Q. Then did you afterwards learn that they had been leased?

A. Yes, I did, and I returned, made my report to Mr. Gilmore as to the nature of the business I had gone away on, and after that he told me, he said, "Well, we succeeded in leasing to Marx, the shoe man."

Q. Did he tell you at what rental?

A. I don't recall whether he did at the time, but he did say he leased to Mr. Marx, the shoe man. I said: "I am very happy to hear that, knowing that something is going to bring me a little reward." 10

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

The Court: Strike it out.

Q. Who is occupying that store at the present time, do you know?

A. Marx, the Hanan Shoe people.

Q. How long have they been occupying it, do you know? 20

A. Well, since that time. They have been there ever since. They were the first tenants in the new store and they have been there since.

Q. Now, tell us about Mr. Bacheller. Did you have any conversation with Bacheller?

A. I called on Mr. Bacheller one day. I have a memorandum there that will make him recall it that I did call on him and asked him would he become interested in locating at the Brighton.

Q. Now, maybe you better get this memorandum 30 that you can look at and tell me what it is—well, I don't know. Can you tell me what time it was?

A. It was in the daytime.

Q. Well, I mean, what time of year?

A. I can't recall the correct date, the correct time; but, nevertheless, he told me that he really was not interested at that time, but I learned that—but I

learned through a certain channel that his store he would soon give up. That is really why I called him; not realizing that I knew why he was giving it up; but I told him I thought that would be a good location for him. He told me he really was not interested at that time and later on I was told at the hotel——

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

10 Q. Well, don't tell what you were told. Did you go back any more?

A. I did. I called back again to see him because Mr. Gilmore had told me in my office that I ought to look up his responsibility, his financial responsibility. Not realizing that probably he didn't know—that we had a nice store up there on the boardwalk, I told him it would be an asset to his business.

Q. Did you find out he was financially responsible?

A. I did.

20 Q. Did you report that to Mr. Gilmore?

A. I did. When I called the second time Mr. Bacheller wasn't there, and I left my card with his young lady, telling of the purpose of my calling. I had not heard from him. Since that time I found he located in the new store.

Q. Were the stores completed at that time?

A. Yes; they were completed at that time.

Q. Were they completed the first time that you went and saw him?

30 A. The first time, no; they were not.

Q. Who is in the store, if you know, now?

A. Mr. Bacheller.

Q. How long has he been occupying it?

A. Why, he has been there going on a couple of years, I guess.

Q. With his jewelry business?

A. In the jewelry business; same business.

Q. Now, after the renting of those stores, did you have negotiations with Mr. Bacheller about the payment of the moneys?

A. No; never did.

Q. I mean with Mr. Gilmore?

A. Oh, yes.

Q. About payment of your commission?

A. Oh, yes.

Q. When?

A. Well, that was the time of my returning from 10
New York on business relating to the interest of the
hotel—for the hotel. I told Mr. Gilmore, I says,
“I think I am entitled to my commission——”

Mr. Cole: Won't you please speak a little louder?

The Witness: I told Mr. Gilmore I thought I was
entitled to my commission and he told me he thought
so, too, hardly realizing that a man working on the
job not to receive any pay for it. Well, he told me 20
he would talk it over with his attorney. I asked him
why—I asked him why he would talk it over with
his attorney, knowing that he was the head and he
engaged me and he knowing directly what I was
doing, and how hard we worked together. “Well,”
he said, “I will talk it over, anyway.” At that he
said he can't understand why I should get any com-
mission, because his attorneys had prepared papers
for these men to sign, whereby there is no risk that
any real estate man has anything to do with the 30
leasing of these stores to them. Well, if I did, I
didn't see why there should be any such paper exe-
cuted.

Mr. Cole: Are you telling the conversation?

The Witness: The conversation which I had with
Mr. Gilmore.

Mr. Cole: Are you telling what you told him?

The Witness: And what Mr. Gilmore had told me. He told me Mr. Black had Mr. Marx sign a paper whereby there was no real estate man had anything to do with the leasing—

Mr. Cole: I ask that be stricken out.

10 Mr. Bourgeois: He is repeating what Mr. Gilmore said to him.

The Court: I will have to let it stand if he says it was in connection with the claim for commission.

The Witness: He, Mr. Gilmore said—

20 The Court: Gilmore is telling why he should not have the commission. That is what I gathered. I cannot understand it very well.

Q. Now, Mr. Littman, speak a little louder. You say Mr. Gilmore wanted you to go and see whom?

A. He told me to go and see Mr. Marx. I asked him why should I call to see Mr. Marx, what would that have anything to do with it? "Well," he said, "you can see him, anyway. He signed this paper." I said: "Well, of course, I will do so if you want
30 me to see him." I called to see Mr. Marx and Mr. Marx said—

Mr. Cole: I object to what Mr. Marx told him.

Mr. Bourgeois: I think it is relevant, but I will not press it at this time.

Q. You called to see him?

A. I did.

Q. Now, have you ever been paid your commission?

A. No, sir.

Q. Have you been paid anything at all?

A. No, sir.

Q. Ever any reason assigned to you why you were not entitled to your commission on the Huyler lease?

10

A. No reason at all.

Q. Just won't pay you?

A. Just won't pay me, that is all.

Cross-examination.

By Mr. Cole:

Q. Are you sure they never assigned any reason?

A. Never assigned any reason.

20

Q. Did you ever get any letters?

A. I can't recall. If I did, they are in the papers there.

Q. Well, suppose you produce a letter under date of September twenty-eighth, 1922, to you, won't you, about the Huyler—

Mr. Bourgeois: What is the date of that?

Mr. Cole: September twenty-eighth, 1922.

30

Mr. Bourgeois: Addressed to him?

Mr. Cole: Addressed to him.

Mr. Bourgeois: I do not seem to find it, Judge; no, I do not find it.

Q. Well, you wrote that letter, didn't you, under date of September twenty-sixth? (Paper shown to and examined by the witness).

A. That is my handwriting.

Mr. Cole: Mark that for identification.

10 (The paper referred to is marked for identification as an exhibit for the defendant, D1).

Q. Did you receive a reply to this letter, dated September twenty-sixth—that is, to your letter?

A. I don't know, sir. I will see.

Q. Look at this copy and see whether that is not a true copy of the reply you received? (Paper shown to and examined by the witness).

20 Mr. Bourgeois: Did you say September twenty-eighth, by a man named Lehman? (Producing a paper).

Q. You received that letter in reply to yours of September twenty-sixth?

A. Yes, sir.

(The paper referred to is marked as an exhibit for the defendant for identification, D2).

30 Q. Suppose you read that and see if you still insist no reason was assigned why you were not paid. (Handing paper to the witness.) Answer "yes" or "no." Do you still insist there was no reason assigned?

A. Why, this has no reason at all.

Mr. Cole: I ask that that answer be stricken out.

The Court: It will be stricken.

Q. I ask you whether, having read that letter, you still insist that no reason was assigned why you were not paid a commission?

A. No, sir, there was no reason.

Q. I show you a letter from yourself, of the firm Wilkins and Littman, to Hotel Brighton. You sent that letter, didn't you, dated February 22?

A. That is my bill to the hotel. 10

Q. Well, is it your bill or is it a letter?

A. Well, it is a bill referring to the account.

Q. Is it a letter?

A. No; it is a bill.

(The paper referred to is marked as an exhibit for the defendant for identification, D3).

Mr. Cole: Let me have letter of February 23, 1922, plus one of the executors to Messrs. Wilkins and Littman. 20

Q. By the way, there was a firm at that time, wasn't there?

A. Yes, sir.

Q. I show you a copy and ask you if that is a copy of the letter you received in reply to the one of February 22?

A. I can't acknowledge this because—unless I see my papers there, whether I had written a letter.

Mr. Bourgeois: February 22, did you say, Judge? 30

Mr. Cole: His letter was the twenty-second and our reply to him was February 23rd.

Q. Is this the reply you received to your letter of February 22?

A. Yes, sir; I received that.

(The paper referred to is marked as an exhibit for the defendant for identification, D4).

Q. Read that and say whether you still insist that no reasons were assigned why you were not paid a commission—"yes" or "no."

A. No, sir.

Q. No reason at all?

A. No reason at all.

10 Q. Well, this says: "I acknowledge receipt of your letter of February 22, 1923, with enclosures and beg to advise you that we rented the store to Mr. Marx without the intervention of any real estate agent and, therefore, do not owe any commission on this rental." You don't think that was a reason why you were not paid your bill, is that right?

A. There is no reason for not paying the bill.

20 Q. All right; that is all I want to know. You don't think that is a reason. Did you ever have any dealings with Mr. Slack, one of the executors in connection with this matter?

A. I did.

Q. What?

A. With reference to the Marx offer.

Q. What?

A. In reference to the Marx offer, Mr. Marx's offer, the Hanan Shoe people.

Q. Before or after the lease was made?

30 A. Prior to the lease being made.

Q. What connection did you have with Mr. Slack?

A. I got in touch with the office of the hotel. Mr. Lehman, who was the manager—

Q. I asked you about Mr. Slack.

A. I was trying to explain how I got in touch with him.

The Court: Actually that is not the question he asked. He asked what connection he had with Mr. Slack.

Q. (Repeated by the stenographer). What connection did you have with Mr. Slack?

The Court: Why can't you tell us what connection you had with Mr. Slack instead of going down to the hotel and what you said to Mr. Lehman, etc.? 10

The Witness: I got in touch with Mr. Slack's office and Mr. Slack answered me. I told him, Mr. Slack, I was offered \$8500 for the store and would he draw a lease or shall I draw a lease. I thought he should be considered; that while he has a nice store there, etc.—and he told me: "Now, Mr. Littman, you better wait until Gilmore gets back. Take that up with Mr. Gilmore." He didn't want me to talk with him on the leasing of any part of the hotel. 20

Q. Now, is that all the connection you had with him?

A. That is all.

Q. Sure about that?

(No answer).

Q. Now, did you ever go with Mr. Huyler to Mr. Gilmore and say to Mr. Gilmore that Mr. Huyler was a tenant that you had procured for him? 30

A. Never did.

Q. Did you ever go with Mr. Marx to Mr. Gilmore and say to him that Mr. Marx was a tenant you had procured for him?

A. Well, I never—

Q. Now, did you?

A. I never did.

Q. Did you ever with respect to Mr. Bacheller?

A. We never accompanied each other.

Q. Did you ever talk to Mr. Gilmore in the presence of anyone of these people whom you say you procured as tenants?

A. We never did.

Q. You had nothing to do with the fixing of the rentals as you already testified?

10 A. Only——

Q. When did you—what?

A. Only to offer to the schedule rates that were given to me.

Q. Have you told us all that you had to do with procuring these tenants for this estate?

A. So far.

Q. What do you mean by “so far?”

A. Well, of course, there is considerable to do. If that is all that I had to do with the leasing of
20 those stores, why I would say——

Q. You started to say about some correspondence you had with Huyler. Won't you please produce that?

A. We have the correspondence there.

Q. Produce that, and particularly let us have Huyler's correspondence to you.

Mr. Bourgeois: You called for the correspondence?

30

Mr. Cole: He said he had correspondence with Mr. Huyler. I would like to see it.

Mr. Bourgeois: I haven't read it over.

Q. Now, here is what purports to be a copy of a letter dated November 21, 1921, to Mr. Jenkins of

Huyler's, signed "Wilkins and Littman;" letter from Huyler's signed by Jenkins under date of November 30, 1921, to "Wilkins and Littman," and what purports to be a copy of a letter dated December 21, 1921, from Littman and Wilkins to Jenkins. I ask you if that is all the correspondence you had with Huyler?

A. At that time it was; yes, sir.

Q. What do you mean by "At that time?" Have you any other correspondence but this? 10

A. That is the only correspondence.

Q. Well, that is all, isn't it?

A. That is all.

Q. Let us be sure about it. Is that all the correspondence you had with Huyler's in connection with the rental of the store?

A. That is all.

Q. By the way, you went over to New York, didn't you?

A. I was to New York. 20

Q. Whom did you see in connection with this matter?

A. I was employed——

Q. Whom did you see in connection with this matter?

A. Well, it was relative to the hotel's interest. Unless Mr. Gilmore wants me to make that public I would be very glad to do so, Mr. Cole.

Q. I am asking you whom did you see in New York of the Huyler concern in connection with renting the store that you claim to have rented? 30

Mr. Bourgeois: He has not testified he went over there to see Huyler's.

Q. Well, did you see Huyler's?

A. I didn't call on Huyler's, I had other duties.

Q. Won't you please answer?

A. I didn't call on Huyler's.

Q. Did you see Mr. Huyler?

A. No; I didn't see Mr. Huyler.

Q. Then you didn't have any conversation, did you, with anyone in connection with Huyler's, touching the rental of this store?

A. Conversation, I didn't.

Q. What?

10 A. It was all correspondence.

Q. And this represents all your efforts, does it?

A. That is the correspondence.

Mr. Cole: I want to mark these three letters for identification.

Mr. Bourgeois: They might as well be offered, so long as you called for them.

20 Mr. Cole: All right. Plaintiff offers them in evidence.

(The papers referred to are received in evidence and marked as exhibits for the plaintiff, P5, 6 and 7).

Q. Will you fix the date, please, when you first saw Mr. Bacheller or someone in connection with that?

A. I can't recall the date, Judge.

30 Q. Have you any idea?

A. I have no idea at present. I might have some records.

Q. When was it that you first saw Mr. Marx?

A. That was during the early part of the construction.

Q. Well, when was it?

A. That I can't answer off-hand.

Q. Was it in 1921?

A. It was in 1921.

Q. Was it 1921 that you saw Mr. Bacheller?

A. No, I saw Mr. Bacheller later. I think that was in 1922.

Q. What time in 1922?

A. The latter part.

Q. What?

A. The latter part.

10

Q. In 1922?

A. Yes; very late in the year.

Mr. Cole: That is all.

Re-direct examination.

By Mr. Bourgeois:

Q. Now, Mr. Littman, just a few questions:

20

Mr. Bourgeois: First, if your Honor please, I want to read this correspondence. You need not take it, Mr. Victory.

(Mr. Bourgeois reads Exhibits P5, 6 and 7 to the jury).

Q. Did they ever deal with you any further after that?

A. Never did.

30

Q. Dealt with Mr. Gilmore?

A. They did.

Mr. Cole: I object. How does he know they dealt with Mr. Gilmore?

The Court: Well, that part of his answer will be stricken.

Q. Now, Mr. Littman, I show you a letter marked Helmsley Estate, signed by John B. Slack. That letter, I understand, came to you in response—how did you get that letter? Was it in response to a letter from you?

A. Yes.

10

Mr. Bourgeois: I will offer those letters that are marked for identification in evidence.

(The papers referred to, heretofore marked as exhibits for identification, D1 and 2 are received in evidence and marked as exhibits for the plaintiff, P8 and 9).

Mr. Bourgeois: The first is a letter from Mr.
20 Littman to Mr. Slack, I assume.

Q. To whom was that sent, September 26, 1922? It says The Brighton Hotel, attention of Gilmore.

A. This was sent to Colonel Gilmore.

(Mr. Bourgeois reads to the jury Exhibits P8 and 9).

Q. Who was Lehman?

30 A. He was the manager of the hotel.

Q. How did he get in this?

Mr. Cole: Now, do you know?

The Witness: I really don't know.

Q. All that you know is that he wrote you?

A. He wrote me that letter.

Q. These prior letters you had taken up with Huyler's, November 21, 1921?

A. Yes, sir.

Q. And this letter you got from Lehman in September, 1922, telling you they are doing it?

A. Yes, sir.

Mr. Bourgeois: Now I also offer in evidence a letter from Littman to the Hotel Brighton, February 22, 1922, and the answer of February 23, 1922, which the defendant called for. 10

(The papers referred to are received in evidence and marked as exhibits for the plaintiff, P10 and 11).

(Mr. Bourgeois reads them to the jury).

Q. Mr. Littman, were you to rent the stores or only find the tenant?

A. Find the tenant.

20

Mr. Cole: I object. That is a very leading question.

The Court: Yes, it is very leading and also calls for a conclusion. The contract is made up of the conversations. The question is overruled.

Mr. Bourgeois: Now, Judge, will you produce a letter written to Mr. Gilmore under date of September 28th? 30

Mr. Cole: September 28?

Mr. Bourgeois: Yes.

Mr. Slack: What year, Mr. Bourgeois?

Mr. Bourgeois: 1922. (Paper produced). I offer that in evidence.

Mr. Cole: I object to this. It is self-serving wholly.

Mr. Bourgeois: If your Honor please, he calls
10 for the correspondence relating to Huyler's and when he called for it he didn't put it all in. Now, this is a letter, the copy of which he did not put in.

Mr. Cole: I wonder if that is so?

Mr. Bourgeois: Yes, it is so; because you took this right off of there.

Mr. Cole: There was a letter of this plaintiff to
20 Colonel Gilmore in which he is making some information for himself. He has testified that that was all the correspondence he had.

Mr. Bourgeois: With Huyler's. This is not with Huyler's. This is with Colonel Gilmore about Huyler's.

Mr. Cole: It is a voluntary letter undertaking to make a case for himself.

30 Mr. Bourgeois: Now, if your Honor please—I don't want to have to disclose it yet. Correspondence between parties is just exactly the same as conversations. If Mr. Littman had gone to Colonel Gilmore and stated that to him, wouldn't it be relevant? Couldn't he testify to it? What is the difference? He got it. It is his statement to them.

Why can't he testify what he said to them? Why isn't it the best evidence of it? I have never known, if your Honor pleases, any correspondence between parties to be excluded. It all goes as part of the same dealings and it is exactly the same as if they had a verbal conversation about it.

The Court: I think perhaps it is admissible.

Mr. Bourgeois: I want to offer it but I will re- 10
serve it until, maybe, the rebuttal, because I assume
they are going to have Huyler on and Mr. Gilmore
on, and this will answer later. Now, Judge, we
called on you to produce the leases.

Mr. Cole: They are here. (Producing papers).

Mr. Bourgeois: I offer in evidence a least made
between Anna E. Helmsley, Quincy A. Gilmore and
John B. Slack, executors of the estate of Frederick 20
Helmsley, and Huyler's, bearing date the fifteenth
day of September, 1922.

(The paper referred to is received in evidence and
marked as an exhibit for the plaintiff, P12).

Q. 1729—is that the store leased to Huylers?
A. 1729.

Mr. Bourgeois: I offer in evidence the lease be- 30
tween the executors and Meyer Marx, bearing date
the third day of February, 1922.

(The paper referred to is received in evidence and
marked as an exhibit for the plaintiff, P13).

Q. 1725—is that the store let to Marx?

A. 1725.

Mr. Bourgeois: Have you the renewal lease of that, Judge?

Mr. Cole: There is no renewal lease.

Mr. Bourgeois: I also offer in evidence lease
10 dated the thirteenth day of September, 1922, for premises known as 1727 Boardwalk.

(The paper referred to is received in evidence and marked as an exhibit for the plaintiff, P14).

Q. During the time when you were having these conferences with Mr. Gilmore—Colonel Gilmore, about Huyler's, did he ever say anything to you that you were not interested in that; that he had secured the tenant?

20 A. No; he never has disclaimed my having to do with renting of Huyler's.

Mr. Cole: Pardon me, Mr. Littman. You have answered the question.

Q. Did he ever say anything to you that you had nothing to do with securing Hanan's?

A. No.

Q. He told you to go and see Slack?

30 A. Yes, sir.

Q. Did he ever claim to you that you didn't have anything to do with the renting of Bacheller?

A. No; he never did.

Mr. Bourgeois: That is all.

(Witness excused.)

PLAINTIFF RESTS.

DEFENDANT'S MOTION FOR NON-SUIT.

Mr. Cole: We ask for a non-suit in this case upon the ground that there is not sufficient evidence to go to this jury upon which they could find that the plaintiff has established his complaint. All we have is a statement according to the complaint as follows: that at the time he delivered the plans to the plaintiff the said Gilmore agreed to pay a commission of five per cent. on all the stores that the plaintiff might be successful in renting. Of course, his proof is that these tenants were to be satisfactory to this estate. I submit there is no proof here that he procured any tenant. You have the fact that he did talk with certain people, Mr. Marx in one case, and Bacheller in the other, and you have the further fact that later these executors leased the store. But where is there any evidence that they were leased as a result of what this plaintiff did? I submit there is none. When you come to Huyler all you have is this correspondence. You have nobody who had to do with Huyler. Huyler simply said: "Give us the facts and we will let you know whether we are interested," and there the correspondence ended. Now, can this jury from that testimony be permitted to find that this plaintiff was the procuring cause; that he brought the tenant and the landlord together? Why, they never met at any time according to his testimony. He simply was trying to get them to rent and there his work ceased. The only thing you have is that later these people rented; so the jury have to guess, as it seems to me, that it was as a result of this talk that he had that these properties were rented through his efforts. I submit the proof here does not warrant the jury having that question for determination.

The Court: The rule expressed by a good many cases is to the effect that if the real estate agent brings the landlord and tenant together, and as a result of his efforts the tenant rents, he is entitled to his commission—isn't that the rule?

Mr. Bourgeois: That is the rule.

Mr. Cole: Now, when did he ever bring them together? In other words, the jury in this case could just as well find (and if they can that ends the plaintiff's case) that this renting was done wholly independently of anything this man did. It may have been in the hands of half a dozen agents. But did the landlord and the tenant get together, and was the rental the result of what this plaintiff did? The proof is silent. It is speculation. Certainly it is at the command of this plaintiff to bring the people here and have them say whether or not they rented as a result of what he said and did. It is not a defense. Why, may it please your Honor, it was a year after the three letters had passed between Huyler's and this man before this estate made a lease to Huyler, and there is not a suggestion in the Huyler correspondence that they are looking to this man at all, and he says he never met anybody; he never even talked with Huyler or their representative. When you come to Bacheller, he doesn't even fix the date when he first talked to Bacheller. He only talked with him twice, and that was not rented until 1922, and the same is true with respect to Marx.

I call your Honor's attention to another thing; in the letters that they have put in evidence it is distinctly repudiated that he ever produced these people as tenants to them. They said "Our relations were with them directly." And that is their

own evidence. Now, we are not here to defend until they have proof of the fact that they have performed their contract. If the contract was that we were to pay this man five per cent. commission if he went and talked with somebody about renting, that is another thing; but that is not this complaint, and that is what they are seeking to recover on. Certainly they have got to bring somebody together. We have to get some benefit from this man's work and where is there any evidence that we have any benefit from this man's work? 10

Mr. Bourgeois: It is for the jury to say.

The Court: I think there is enough dispute to let it go to the jury.

Mr. Cole: Allow me an exception.

The Court: Yes.

20

DEFENDANT'S CASE.

COULTER D. HUYLER, called as a witness on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct examination.

30

By Mr. Cole:

Q. Mr. Huyler, what is your connection with Huyler's, the corporation?

A. Treasurer and general manager.

Q. Where is your office?

A. 136 East 18th Street, New York.

Q. Did you ever meet Mr. Littman, the plaintiff in this case, in connection with the rental of the store on the boardwalk in Atlantic City, from the Helm-sley estate?

A. I never did.

Q. There is some correspondence here, two letters from Mr. Littman and replies. I will ask you to look at those and tell me whether you personally ever saw
10 the correspondence?

A. I never did.

Q. And who, in that corporation, takes care of the matter of rental of stores?

A. I do.

Mr. Bourgeois: That is objected to as irrelevant and immaterial.

20 The Court: I am inclined to think it is relevant and material. It is a corporation and if in the corporation they have someone who takes charge of those matters exclusive of any authority to anyone else, to do it, it seems to me that it is perfectly proper that he should testify to it.

Mr. Bourgeois: Allow me an exception.

The Court: Yes.

30 Q. (Repeated by the stenographer). Who in that corporation takes care of the rental of stores?

A. I do.

Q. Do you know how the corporation came to rent the store from these executors?

Mr. Bourgeois: I object. That calls for a conclusion. It may be hearsay also, but it certainly calls for a conclusion.

Mr. Bourgeois: It calls for "yes" or "no." Does he know?

Mr. Bourgeois: Well, if you want to put it that way I am satisfied to have the answer "yes" or "no," and I will object to the next question.

A. Yes.

Q. Will you state please with whom this corporation negotiated for the rental of the property? 10

Mr. Bourgeois: I object. That is hearsay.

The Court: It may or may not be hearsay. He says he knows. Let us hear what his answer is.

Mr. Bourgeois: Allow me an exception, if your Honor overrules it.

The Court: Yes. 20

The Witness: Let me hear that question again.

Q. (Repeated by the stenographer). Will you state please with whom this corporation negotiated for the rental of the property?

A. Mr. Clifford Bangs.

Q. Who?

A. Mr. Clifford Bangs.

Q. What is his business?

A. Real estate broker. 30

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

The Court: No; I will let it stand.

Mr. Bourgeois: Allow me an exception. He has not said at all that he knows anything about it ex-

cept that they negotiated with him. It may be all hearsay, so far as he knows.

The Court: Well, if it is hearsay I will strike it out.

Q. Did you have something to do with the negotiations?

A. I did all there was to do about it.

10 Q. Tell about it.

A. Mr. Bangs submitted the location——

Mr. Bourgeois: I object.

The Court: He says he had all to do about it.

Mr. Bourgeois: But he cannot testify what he did with somebody else.

20 The Court: Well, Mr. Bourgeois, you want to show that your client was the efficient, procuring cause of the rental of this store. Now, here is the tenant who rented the store and he certainly has a right to say how and under what circumstances he rented the store. I will take his testimony and allow you an exception.

Mr. Bourgeois: Allow me an exception.

30 Q. Now, proceed and tell us, please.

A. Mr. Bangs submitted this location to us and I, in turn, submitted it to our board of directors. I, in turn, submitted it to our board of directors with our recommendations. They passed favorably upon it and the lease was closed.

Q. Do you recall about when it was that Mr. Bangs presented the matter to you?

A. Why, it was submitted to us I think twice by Mr. Bangs; early in the spring some time first, then again perhaps a month or six weeks before final action was taken on it.

Q. And then was this lease made between the Huyler's Corporation and the executors as a result of the action of the board of directors on your recommendation?

Mr. Bourgeois: Repeat that.

10

Q. (Repeated by the stenographer). And then was this lease made between the Huyler's Corporation and the executors as a result of the action of the board of directors on your recommendation?

Mr. Bourgeois: I object. It asks for a conclusion. He can state the facts.

The Court: I will permit the question.

20

Mr. Bourgeois: Allow me an exception.

A. Yes, it was.

Q. Did you meet or have any conversation or correspondence with any other person than Mr. Bangs?

Mr. Bourgeois: I object to that as irrelevant and immaterial, whether he did or not.

Q. In connection with this lease?

30

Mr. Bourgeois: I object to that for the same reason, as irrelevant and immaterial, whether he did or not.

The Court: Objection overruled.

Mr. Bourgeois: Allow me an exception.

Q. Did you meet or have any conversation or correspondence with any other person than Mr. Bangs in connection with this leasing?

A. No.

Q. Mr. Huyler, can you say whether the stores owned by the Helmsley estate had been brought to your attention or the attention of the Huyler Company before the Littman correspondence?

Mr. Bourgeois: I object. First, whether it was brought to his attention or not may be all right, but the other part calls for a conclusion; that is whether it was brought to the attention of the Huyler Company. There are two questions in one and one of them is wrong.

Mr. Cole: I will withdraw it.

Q. Can you say whether the Brighton stores owned by the Helmsley estate were brought to your attention before the date of these letters, from Mr. Littman?

A. Not to my knowledge.

Q. Is Mr. Jenkins alive or dead?

A. He is dead.

Q. When did he die?

A. Early in January of this year.

Mr. Cole: Cross-examine.

Cross-examination.

By Mr. Bourgeois:

Q. Who is Mr. Bangs?

A. Mr. Bangs is a real estate agent.

Q. Where? Where is he in business?

A. His main office is in Washington.

Q. And did he have an office in New York

A. No.

10

Q. Is he the gentleman who transacts the real estate business of Huyler's?

A. A great portion of it, yes.

Q. Then he is your agent?

A. Not our agent, but he submits a great many locations to us.

Q. Now, when was it that he spoke to you about this location?

A. Some time early in the spring before we made the lease.

20

Q. Spring of 1922?

A. Spring of 1922.

Q. Mr. Jenkins was assistant treasurer, was he not, in his lifetime?

A. He was.

Q. Under you?

A. Yes.

Q. And, of course, his correspondence was your correspondence; that is, he was your agent in that correspondence, wasn't he, your assistant?

30

A. I would not have felt that so, no.

Q. Well, didn't he take care of the treasurer's business in your absence?

A. I suppose he would have. I don't know that he ever had occasion to.

Q. Well, I show you Exhibit P6. That letter is on the letterhead of Huyler's, isn't it?

A. Yes.

Q. And that is Mr. Jenkins' signature or his clerk's?

A. It is not his, no.

Q. It is his clerk's signature?

A. I don't know whose signature that is.

Q. Don't you know what that letter stands for?

A. No.

Q. Isn't it the stenographer's signature, where it
10 has "M" in there?

A. No; I think it may be another man in the office.

Q. Who?

A. Mr. Miller.

Q. What does Mr. Miller do?

A. He is one of the store supervisors.

Q. Supervisor of what?

A. Store routine, inspection, and so forth.

Q. Does he have an office there in the same office
20 with you?

A. He does.

Q. What part of the duties devolve upon him?

Mr. Cole: All this is objected to as not being proper cross-examination and it is not relevant. The correspondence speaks for itself. The plaintiff himself says he met nobody in connection with it.

Mr. Bourgeois: I will withdraw it.

30 (Witness excused.)

H. CLIFFORD BANGS, called as a witness on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

Q. Mr. Bangs, where do you live?

A. Washington, D. C.

10

Q. What is your business?

A. Real estate.

Q. How long have you been in the real estate business?

A. For twenty-eight years.

Q. Do you know Mr. Huyler?

A. Very well.

Q. Have you done any renting for them?

A. At various times, yes.

Q. What is your exact relations with that corporation?

20

A. I haven't any.

Q. You are not employed by them?

A. No.

Q. Never have been?

A. Never have been.

Q. Just what do you do for them? Well, do you try to get stores for them?

A. I try to get stores for them when I run across them. I handle other accounts similar to theirs—

30

Q. Did you have anything to do—

A. Act as broker.

Q. Did you have anything to do with the Huyler Company renting the Brighton store?

A. I did.

Q. Did you introduce the matter to Mr. Huyler, who was just on the stand?

A. I did.

Q. When was that for the first time?

A. I should say about the early summer.

Q. Of what year?

A. 1922.

Q. And again after that, was it?

A. Yes.

10 Q. When?

A. I should say about a month later.

Q. How did you come to do that?

A. I was in Atlantic City and saw a sign in the window—in that window and one adjacent to it in the Traymore, in which it was stated the stores were for rent, and applied for the name of the landlord, the executor.

Q. And did you see someone?

A. I did.

20 Q. Whom did you see?

A. I saw Mr. Lehman.

Q. Whose signs were they in the windows?

A. "For rent. Apply to Brighton Hotel," my recollection; I will have to qualify this—it was "For rent. Apply to Brighton Hotel or your own broker."

Q. Did you meet Colonel Gilmore, one of the executors, in connection with that?

A. Not the first time.

30 Q. Well, at any time?

A. Yes, shortly after.

Q. Before the leases were signed, I mean?

A. Oh, four or five times, in discussing the negotiations as to the various things that developed and had to be gotten out of the way before the lease could be entered into.

Q. How long was it after you began your talks of negotiations before the lease was made?

A. It took two months to negotiate that lease.

Q. Where was the lease signed, do you know, on the part of the Huyler Company?

A. I didn't witness the signing of the lease.

Q. Did you see the lease after it was drawn?

A. Yes, sir.

Q. Before execution?

A. Yes, sir. The lease was submitted to me and I 10 presented it to the Huyler Company. It was sent to me as agent.

Q. And who presented the terms of the lease to the executors for the Huyler Corporation?

A. Eventually I had a written statement from them agreeing——

Mr. Bourgeois: Now——

Mr. Cole: Well, you had a written statement from 20 them as to what, terms of the lease?

Mr. Bourgeois: The question was by whom?

Q. Who was it gave you the written statement?

A. Mr. Huyler.

Q. The one who was just on the stand?

A. Mr. Coulter Huyler, yes.

Q. And did that give the provisions of the lease

30

Mr. Bourgeois: I object to the part that is leading.

Mr. Cole: All right; cross-examine.

Cross-examination.

By Mr. Bourgeois:

Q. You do all of Huyler's real estate business, do you?

A. Not to my knowledge; no, sir. In fact, I can answer that no.

10 Q. You don't do it all, but you do it practically all, don't you?

A. Not to my knowledge.

Q. Where have you rented for them—

A. May I ask just one question? I might qualify that, too, by saying at that time or now? There is a difference.

Q. At that time.

A. At that time very little.

Q. And now you don't know whether you do it all, or do you do it all now?

20 A. I don't do it all, but I do more now than I did at that time.

Q. Now, where was it—why was it that it took two months to negotiate that lease? What were you figuring over?

A. The sewer was above the level of the cellar. Glasses had to be washed downstairs, dirty ice cream containers, and there had to be some way to get the water up to the sewer to carry off dirty—

30 Q. What did they have to do?

Mr. Cole: Let him finish.

Mr. Bourgeois: I do not have to listen to something that does not have to do with the question.

The Court: I should think it would be a very important thing to adjust the matter of the business

to be conducted there to the conditions in the place before he signed the lease, and that is what you are asking him.

The Witness: There were half a dozen questions in that memorandum of agreement before the signing of the lease that I will have to answer just that way—that had to be overcome.

The Court: If counsel wants to know what took 10
you so long you are entitled to tell him. If he withdraws his desire to know that, of course, that is another matter.

Q. What caused the negotiations to extend over two months?

A. The fact that the building was a frame building; there had to be—there was to be cooking in the building. We had to see the local authorities here to have them inspect the property, as to whether 20
or not Huyler's were permitted to cook there. Their recommendations had to come in as to fireproofing, asbestos covering for certain portions of it; the same sewer condition that I have just mentioned; the fact that the Brighton would not permit garbage, trash, merchandise such as ice and the various things that Huyler's need in the conduct of their business, to pass over the entrance, to cross the entrance and exit to the bath house. We had to find a way in which to get that stuff in and out; other than that 30
all the leases fell to the ground. Do you want me to tell you how these things were accomplished, too?

Mr. Cole: Yes, go ahead. That is just what we do want now.

Q. Go ahead, as far as you like. I will have some

questions to ask you when you are finished. Go ahead, take your time, be perfectly at ease.

A. There was conference after conference.

Q. What?

A. Conference after conference over a fire clause in this lease that I imagine is different, after reading one of the leases—it is different from the fire clauses in the other leases that tenants of that property hold.

10 Q. Go on.

A. In case of partial destruction and the landlord were to rebuild, Huyler was to have as near as possible the identical same place in the new—

Q. That is one of the negotiations?

A. That is one of the conditions that I negotiated.

Q. Go ahead.

A. They were to be replaced in as near the same condition in the new improvement as before the building was destroyed or partially destroyed. If
20 you have read the lease you can see several others of a similar nature that it was necessary to thoroughly discuss and negotiate before those leases were eventually signed. Another reason for delay in the signing of the lease was that Colonel Gilmore was not always available in Atlantic City. I was told—withdraw that—I am not always in one spot. I negotiate all over the country for various corporations, submitting them property and carrying through the thing. The Huyler people were a corporation.
30 Their board does not always sit to consider such things as leases. Those things must be presented in the ordinary course as they see fit to take them up.

Q. Is that all? If it is not, finish the rest.

A. Well, I will stop at that.

Q. I do not want to hurry you. I just want to ask you about the fire clause a minute. It says: "It

is understood and agreed that the said lessee will not make or suffer to be made any alteration in said building without the written consent of the lessors and all such improvements made to the building proper with the consent aforesaid shall, upon the expiration of the lease, become the property of the lessors; that no electric signs are to be allowed on the store, and all advertising signs, lettering and other display of signs shall have the written approval of said lessors; no auction sale to be conducted in the premises; and the said lessee agrees to keep the said store open throughout the year, and also agrees at the expiration of said term to deliver up and surrender possession of said demised premises with the appurtenances in such good condition as the same now are or may be put into by the said lessors, reasonable wear and tear and accidents happening from fire or other casualties excepted." Now, did it take you very long to put that clause in? 10

A. No. 20

Q. That is just the ordinary clause?

A. No; it is not the ordinary clause.

Q. Isn't that the ordinary clause?

A. There isn't any two fire clauses, unless it is a standard clause put out by the cigar companies and three or four of the large chain stores that are exactly alike.

Q. You didn't bother to get the ordinary form of New Jersey lease, did you?

A. No, no. 30

Q. Have you seen one since?

A. New Jersey form of lease?

Q. Yes.

A. No.

Q. Don't you know that there is a regular clause in every New Jersey lease?

A. No. Do you?

Q. Yes.

A. I will say to you that I imagine—I cannot say, either; because it is not within my knowledge; but from all inferences I should say that the portion you have read was crossed and blue pencilled and t's crossed and i's dotted many times over before it was eventually signed.

Q. Was the ordinary form of—

A. I don't know the ordinary form of New Jersey
10 lease.

Q. How long did it take you to put that in? Not long? Did it take you twenty minutes?

A. I didn't write that lease.

The Court: The testimony is that Mr. Slack wrote that lease.

Mr. Bourgeois: But he says with all that in is what caused the delay.

20

The Court: In negotiating the terms of the lease.

Q. Now, what was there about the clause to take any time in negotiation? It is an ordinary clause in the ordinary printed leases of New Jersey. It doesn't take that much time to negotiate that phase of it, and it didn't take you any longer than that, did it?

A. Are you trying to put words in my mouth?

30 Q. I am trying to find out. You say the fire clause caused the delay.

Mr. Cole: I object to it as not being proper cross-examination and wholly irrelevant to the issue we are trying.

The Court: Objection sustained.

Mr. Bourgeois: I ask an exception.

The Court: You may have it.

Q. Now we will take up the next clause about the fire: "It is further understood and agreed that if the said demised premises or the building of which the demised premises are a part, should be partially destroyed or damaged by fire or other elements, that the same shall be repaired as speedily as possible by the lessors; or in the event of the said lessors deciding not to rebuild such partially destroyed premises and giving written notice thereof to the lessee, or in case the said demised premises or the building of which the demised premises are a part, should be totally destroyed by fire or other elements, then this lease shall cease and become null and void, and any advance payments in rent that may have been made shall be returned to the said lessee. It is understood and agreed that in case of partial destruction of said demised premises or the building of which the demised premises are a part, as set out in this paragraph, and the determination of the lessors to rebuild or repair the same as above set forth, that then and in that event the rent under the terms of this lease shall be justly and proportionately reduced until such time as such repairs are completed." Now, is that the clause?

A. Read the balance of it.

Mr. Cole: I object on the ground it is not cross-examination and is irrelevant.

Mr. Bourgeois: Why, if your Honor please, he says this was the reason why it took so long.

Mr. Cole: The reason why it took so long has nothing to do with the case.

Mr. Bourgeois: I certainly have a right to cross-examine him on what he says. I do not suppose I have to take what he says as the truth without any cross-examination.

The Court: No; I do not suppose you have; but
10 at the same time there is such a thing as conserving the valuable time of——

Mr. Bourgeois: Well, that is all.

The Court:—Of all the persons who are interested in the case, including the Court and jury, and it seems to me that the questions that you are asking now are all totally irrelevant.

20 Mr. Bourgeois: Well, if the Court's time is more valuable than justice I won't ask another question.

The Court: If you think that justice demands that you should ask these questions, you go ahead and ask them and I will permit them. I will allow the question.

Q. (Repeated by the stenographer.)

A. (Repeated by the stenographer.) Read the
30 balance of it.

Q. Then that was not the clause—not all of it?

A. That is not all the fire clause.

Q. I will read the next clause: "It is understood and agreed that in the event of the partial destruction of the demised premises or building of which the said demised premises are a part and notice given as set out in paragraph ten of this lease, that

the said lessors do not intend to repair either said demised premises or the building of which said demised premises are a part, then in the event of said lessors rebuilding further stores, it is agreed that they will give said lessee a lease for the balance of the term of the lease approximately similar to the presently demised premises in size and location, but which new lease for the balance of the term shall contain all the terms and conditions of this lease with the rent at the rate of \$12,000 per year, payable quarterly in advance and subject to the four months' cancellation clause in the case of sale of the property as fully set out in this lease." 10

Q. Now, are the leases or clauses that took the time for you to negotiate—are they the clauses?

Mr. Cole: Objected to on the ground that it is not proper cross-examination and wholly irrelevant to the issue. 20

The Court: I will permit the question.

Mr. Cole: Exception.

A. The entirety took considerable time.

Q. I didn't ask you that. You told me before that it was the fire clauses. Now I want to know——

Mr. Cole: He did not say that. He said there were a number of things; among them was this fire clause. 30

Q. Now, I say is that the clause? Are they the paragraphs that took the time to negotiate?

A. You say is that the paragraph or are they the clauses? The three distinct items that you read as

a whole were the subject of a considerable delay in closing that lease.

Q. Now, how much delay do you think? How much delay in time do you think that was?

A. Well, now, please, I was not in the lawyer's office who drew it. I was not present in the other lawyer's office who went over it, only part of the time. It would be impossible to——

10 Q. I understood you to say the delay came in the negotiations, not in the drawing. Didn't you say the delay came through the negotiation of it?

A. Well, yes, but——

Q. I want to know how much time was occupied in the negotiations, not in the drawing.

A. I am trying to tell you.

Q. Well, now, how much?

20 A. In the negotiation of a lease each and every clause is gone over by the attorneys for both sides. There are certain conditions set out, certain things objected to. That lease, to my knowledge, was drawn at least twice, blue-pencilled and additions set out in the margin or typewritten on another sheet. That had to pass back and forth from Atlantic City to Washington sometimes, and to New York. The lawyers for each of the parties in interest—after the basis of it was practically finished had to approve the thing.

Q. Where did it come to when it came to Washington?

30 A. To my office.

Q. Then I ask you again how much time was consumed in the negotiation of that fire clause for this lease?

A. Again, I cannot tell you; because part of it was done in Atlantic City and part of it was done in New York.

Q. Who was Samuel Lehman?

A. Samuel Lehman was the manager of the Brighton Hotel in Atlantic City.

Mr. Bourgeois: That is all.

Mr. Cole: That is all, sir.

(Witness excused.)

10

MEYER MARX, called as a witness on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

Q. Mr. Marx, are you the Meyer Marx named in the lease of February 3, 1922, from the Hemsley 20 executors?

A. Yes, sir.

Q. Will you tell the jury how you came to rent the store and execute this lease?

A. I had a store at the time at 1409 Boardwalk, which is in the Alamac block. I knew at that time I couldn't stay very long on account of the building being sold, and at that time they tore down the Brighton block, made improvements, and when they tore down the building I went down there to see the 30 manager of it, to ask him what time or when, about, the building will be finished. They said about in March.

Q. Now, proceed. Tell us how you came to make the lease.

A. Well, then I went down there several times after that again and asked the rent. My intention

was to rent the corner store. They asked \$12,000 for the corner store, and I made them an offer for the corner store and negotiated for that corner store, I should judge about four, probably five weeks. I made them first an offer of \$10,000 for the corner store. They would not accept it. Then I made them an offer of \$11,000 for the corner store. They didn't accept it. Then finally I had to fall back on a smaller store because the rent—the business I
10 do wouldn't allow over about eight or ten thousand dollars; eleven thousand dollars I would have stretched it a little by putting in another department, but finally I rented that store for eight thousand dollars.

Q. Now, with whom did you negotiate?

A. With Mr. Slack—first with Mr. Lehman, then with Mr. Slack and Mr. Gilmore.

Q. Who drew the leases for you?

A. Mr. Slack.

20 Q. Did Mr. Littman ever produce you to either Mr. Slack or Mr. Gilmore as the prospective tenant?

A. No, sir.

Q. Did he have anything to do with your renting that store?

A. No, sir.

Q. Was there a sign in the stores, in the window?

A. Yes, sir.

Q. What was on the sign?

30 A. I was not interested in the sign because I knew the owners.

Q. How long had you been on the Boardwalk before that?

A. Twenty-five years.

Q. So that you knew who owned the property?

A. Yes, sir.

Mr. Cole: Cross-examine.

Cross-examination.

By Mr. Bourgeois:

Q. You remember Mr. Littman coming to you and talking to you about the store?

A. Yes, sir.

Q. And you remember that he told you he thought the rent would be \$12,000 a year?

A. He didn't say anything to —

10

Q. He didn't say?

A. No.

Mr. Cole: Wait a moment. Did you finish your answer?

The Witness: No, sir.

Mr. Cole: Finish it, please.

The Witness: He simply asked me if I was interested in one of the stores in the Brighton block. I said, "I know all about it." That is just the words I used.

20

Q. You authorized him to go and make an offer of \$8500?

A. No, sir.

Q. You went down and looked at the store?

A. Yes, sir.

Q. Then after that was done Mr. Littman came to you and asked you what you had told Slack; that he had nothing to do with it, for?

30

A. No, sir.

Q. Didn't he come to you at all?

A. Mr. Littman?

Q. Yes, sir.

A. No, sir.

Q. Didn't he come to you and ask you why you had said that, and didn't you tell him that "What had you to do? It was nothing to you?"

A. Now, let me understand your question, Mr. Bourgeois. Just repeat that question.

Q. After you had leased the store Littman came to you?

A. Yes, sir.

10 Q. And said to you that they had told him that you had said you had signed a paper that he had nothing to do with the renting of that store, and he asked you why you told him that, didn't he?

A. Do you want my question?

Q. I want you to answer me whether he did or didn't.

A. Mr. Littman never came to the store after I rented it. I never seen him after that on that question.

20 Q. Another question: Now, didn't you say to him at that time: "Well, what difference does it make to me? I have the store for less rent and you can go and sue them?"

A. No, sir.

Q. You didn't say that?

A. No, sir.

Q. You went in the store in February, 1922, didn't you?

A. About that time; yes, sir.

30 Q. And Mr. Littman had come to you prior to that time, sometime in the fall of 1921, hadn't he?

A. No, sir.

Q. What time did he come to you?

A. Oh, I should judge about in January.

Q. In January?

A. I believe so. I couldn't say just exactly, but around that time.

Q. All right; that is all.

A. January or February.

Re-direct examination.

By Mr. Cole:

Q. How many times did he talk to you about this property?

A. Well, if I wanted—I never did want to talk to him about the property because he wanted to rent me the smallest store. He talked about the smallest store and I didn't want to talk about stores because I had my eye on the larger store, on the corner store, when they were building. I didn't want to rent the small store first off. 10

Mr. Cole: That is all.

Re-cross examination.

20

By Mr. Bourgeois:

Q. But you finally rented the smallest store?

A. Yes, sir.

Q. You rented the very store he talked to you about?

A. No, no; he didn't talk to me about any store.

Q. No particular one?

A. No.

Q. He just talked to you about the smaller store? 30

A. About the smaller store.

(Witness excused.)

MARTIN BACHELLER, called as a witness on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

Q. Are you Martin A. Bacheller named in this
10 lease from the Helmsley estate?

A. I am.

Q. Will you tell the jury how you came to rent?

A. I went and rented myself.

Q. Whom did you see?

A. I went to see, first Colonel Gilmore, and met
Mr. Slack that evening.

Q. What had Mr. Littman to do with renting?

A. I don't know Mr. Littman; never met him.

Q. Never saw him?

20 A. Never saw him; never had anything to do with
the renting of the store; don't know Littman; never
was in my store; never was in my establishment
to see me, even.

Q. Were all the negotiations between you and Gil-
more?

A. Yes; all done in an hour or so. I met Mr. Gil-
more in one afternoon and he said, "Come up to
the hotel" that evening. I went up to the hotel and
we settled it, and the next day I got my lease.

30 Q. Mr. Littman said that he called on you one
day.

A. Mr. Littman never came to see me. I didn't
ever even know him except —

Q. That is not true, then, what he testified?

A. No, sir.

Mr. Cole: Cross-examine.

Cross-examination.

By Mr. Bourgeois:

Q. This is Mr. Littman sitting by my right.

A. Yes, sir.

Q. You say you never saw him before?

A. Not in regard to any renting or anything of that kind. I have seen him in Atlantic City if that is what you mean.

10

Q. Now, Mr. Bacheller, do you remember, for the purpose of refreshing your recollection—do you remember a day in 1922 or the early part of 1922 when a Mr. Eckstein representing Mr. Mocker came to your store to see you?

A. No, sir; I do not.

Q. What?

A. No, sir; I do not. In the first place, I had no need of a store. I had still three years' lease on my own store. I wasn't even thinking of renting.

20

Q. You know Mr. J. Mocker, don't you?

A. I don't know him; that is —

Q. Don't know the firm?

A. I do not.

Q. And don't know Mr. Eckstein?

A. Not to my knowledge.

Q. I show you a card of Mr. Mocker and ask you if that will refresh your memory, not the pencil marking on it—I ask if you remember a day when Mr. Eckstein representing Mr. Mocker came to see you about some business transaction?

30

A. Who was this Mocker?

Q. Mocker is a wholesale jeweler, from whom, I think, you bought jewelry and Mr. Eckstein was his representative.

A. What did he have to do with renting stores?

Q. That is just to fix time, not a thing to do with renting stores.

A. I had no real estate deals with these people.

Q. I say, do you remember a time when Mr. Eckstein representing Mr. Mocker —

A. Eckstein I don't know. Mocker, now it comes to me—It seems to me I do know the name; that I did buy some jewelry from this concern, not very much; I never had very much to do with them.

10 Q. Do you remember a time when his representative called to see you about it?

A. About what?

Q. About the purchase that you had made, about the bill of it, about jewelry?

A. I cannot remember that.

Q. You don't remember. But you say that Mr. Littman never, at any time, called to see you?

A. Not in regard to renting the store, no; I had no idea of renting the store; never thought of it.
20 I had still three years to go in my own store.

Q. Did you ever get from your clerk a card—Mr. Littman's card?

A. No. You see, on the Boardwalk there are people continually coming in the shop from morning to night, we never see and never hear of.

Q. Do you remember Mr. Littman saying to you when he came in to see you and talked to you at the store—that you said you were not interested in any store at that time; that you had a lease where
30 you were?

A. No; I do not. The fact of the matter is I did have a lease and absolutely wasn't thinking of a store. I don't even remember Littman being ever in to see me.

Q. Let me see if I can refresh your memory. Don't you remember Mr. Littman coming in there and you speaking to him about the Brighton store and you telling him that you had a lease where you were

and he said, "That is a good location down there and consider it?"

A. The only incident I have in mind—no, it is not the same; the incident came to my mind was in the Ambassador Hotel; no, I don't remember Mr. Littman coming to see me.

Q. I don't mean that.

A. No; I don't remember him at all.

Q. And that sometime you went down yourself?

A. No, sir.

10

Q. And looked at the store?

A. No, sir.

Q. Didn't you go and look at the stores?

A. I think the—I will tell you; that year I was a little disgusted with the business up at our location. Now, I didn't go down to see—my wife and I had been by there several times looking at that store and they had a sign in it "For rent;" that store was for rent, and the one next to it, and where Huyler's afterward went; there were three stores, 20 and I think my wife and I looked in the window there two or three nights and I said, "I think I will go and see what it is." So I went in and saw Colonel Gilmore.

Now, I had no idea of Mr. Littman coming in. I was not even thinking of any other store; I had no idea because I had three years to go on that store where I was.

Q. Now, do you mean to say that Mr. Littman never did come in to see you about it or you don't 30 remember?

A. To my knowledge I don't remember Mr. Littman ever coming in and making any proposition to me or in the store. That is my knowledge as I know it today.

Mr. Bourgeois: That is all.

(Witness excused.)

JOHN B. SLACK, the defendant, being called as a witness in his own behalf, was examined and testified as follows:

Direct examination.

By Mr. Cole:

- 10 Q. Are you one of the executors of the Helmsley estate?
A. Yes.
Q. Did you draw the leases?
A. Yes, I drew them.
Q. Will you state what connection you had with Mr. Littman with relation to the leasing of these properties, if any?
A. None.
Q. Did you ever meet him and talk to him about
20 renting them?
A. My recollection is that I met Mr. Littman once, but I think it was after they were rented, the stores were rented. I think he was in my office once.
Q. What was the occasion of his coming then?
A. I think he was in there on the theory that he was entitled to commission for these stores.
Q. Will you state the conversation you had with him as well as you can recall it?
A. I can't state it except in a general way.
30 Q. Well, the substance?
A. My recollection is, I told him then that we didn't consider he was entitled to any commission.
Q. Were you ever advised that he was the procuring cause of any one of these tenants before the leases were made?
A. Possibly, yes; before the leases were made I

think were certain letters there in which he claimed it.

Q. Those were his letters?

A. Yes.

Q. But anything outside of himself, I mean, were you ever advised?

A. No.

Q. Any of these tenants ever advise you that they were renting through him?

A. No.

10

Mr. Cole: Cross-examine.

Cross-examination.

By Mr. Bourgeois:

Q. Did you ask the tenants anything about him?

A. Surely.

Q. About Littman?

20

A. What?

Q. Did you ask them anything about Littman?

A. Surely.

Q. Before he came in there?

A. Before he came in to see me?

Q. Yes.

A. I don't know; it was about that time; it might have been after for all I know; I am not sure.

Q. Do you know whether it was before or after?

A. I am not sure.

30

Q. Did you know that he had been engaged to secure tenants or try to secure them?

A. Colonel Gilmore told me that he had stopped in there, yes.

Q. Then you knew that he was making some effort. Now, when it came to drawing these leases, did you

get in touch with Mr. Littman to find out what he claimed his rights were?

A. No; because I never understood that Mr. Littman had brought the tenants to us.

Q. But you knew that he was engaged to do it; you knew that he had the authority?

A. Not these particular tenants. He was engaged to bring in tenants.

Q. You knew that he was engaged to get tenants
10 for those stores?

A. Yes.

Q. And you went on without asking him anything about whether he had been successful or not?

A. Yes; we presume he would report if he had been successful.

Q. He would not have reported to you, would he?

A. Possibly.

Q. Why would he report to you if he made the contract with Mr. Gilmore?

20 A. I suppose he knew I was one of the executors of the estate.

Q. Did you ask Colonel Gilmore before the leases were made whether or not Littman made any claim of having rented them?

A. I don't recall whether I did or not.

Re-direct examination.

By Mr. Cole:

30 Q. There were signs in the windows of these stores?

A. Yes.

Q. What did they read?

A. "For rent. Apply to Hotel Brighton."

Q. Mr. Littman's signs were not there, were they?

A. No.

Q. Or any other real estate man's?

A. No.

Q. When these stores—could these stores be rented by any real estate man?

A. Oh, yes; we had them in five or six agents' hands for rent.

Mr. Cole: That is all.

(Witness excused.)

10

QUINCY A. GILMORE, called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

20

Q. You are one of the executors of the Helmsley estate; are you not?

A. I am.

Q. And you joined in these three leases that have been offered in evidence, I suppose?

A. I did.

Q. Had you been notified by anyone of these three tenants before you signed the lease that Mr. Littman had been the one who had produced them to you as a tenant?

30

A. No.

Q. Did he ever come with any one of them and tell you that he had secured them as tenants?

A. He did not.

Q. When were you first informed that he was

claiming that he had been the cause of the rental of these stores?

A. To the best of my recollection after the leases were signed.

Q. With whom did you negotiate for the rental of the Huyler store?

A. Through Mr. Bangs.

Q. The witness who was here this morning?

A. Yes, sir.

10 Q. With whom did you negotiate for the renting of the store to Marx?

A. Directly with Mr. Marx.

Q. With whom did you negotiate for the renting of the store to Mr. Bacheller?

A. Directly with Mr. Bacheller.

Q. Did you ever have any talk whatsoever with Mr. Littman concerning the terms for the rental of the property to any one of these three tenants?

A. May I ask a question?

20 Q. Yes.

A. Do you mean with regards specifically to these specific tenants, or in general terms?

Q. No, these tenants?

A. No, sir, to the best of my recollection.

Q. Now, he testified that he called on you at one time and wanted to know about being paid and that you said to him that you thought he ought to be paid. Did you ever have any such conversation as that?

30 A. I don't think that my words could have been interpreted that way. As I remember it, I told him that if he had done any work that merited compensation, he should receive it. I think I went further even than that, and told him I would take it up with the tenant and find out definitely whether the tenant had been secured through his services.

Q. When you told him that, that if he had done any service that merited compensation, that you might pay him, did you, at that time, know he had done anything to bring these tenants to you?

A. No, sir.

Q. And did you afterwards inquire whether he had?

A. I did.

Q. And what was the information you received?

A. I only called Mr. Marx and Mr. Bacheller because I personally knew about Huyler's, because I definitely knew about Huyler's. 10

Q. What did they tell you?

A. They both told me he had never—they both told me he had nothing at all to do with the renting of their stores.

Q. What was your arrangement with him in case he did find tenants?

A. I gave Mr. Littman the plans and specifications of the stores when they were being built, and also our asking prices for rentals. I gave these to Mr. Littman as well as to half a dozen other brokers with the idea that if they procured tenants for us we would pay the agreed-on commission. 20

Q. What was that?

A. Five per cent for the first year and two and a half per cent for the additional years up to a total of five years.

Mr. Cole: Cross-examine.

30

Cross-examination.

By Mr. Bourgeois:

Q. Wasn't Mr. Littman to represent you exclusively?

A. Not at all, sir.

Q. You took the plans up to his office?

A. Yes, sir.

Q. Did you take them to any other real estate agent's office?

A. Yes, sir.

Q. Which one?

A. Harris and Company; Adams—C. J. Adams and Company. I am sure half a dozen agents had
10 plans, even agents out of town, I sent plans to.

Q. Did Mr. Littman report to you what he was doing with relation to those stores?

A. He may have come in and told me prospects he had.

Q. Did you send him over or authorize him to go over to New York on one occasion to see whether or not he could sell the property?

Mr. Cole: I object. What has the selling to do
20 with it?

Mr. Bourgeois: This is simply to refresh his memory. I want to find out what he did.

The Court: No; I think that is entirely outside of the issue in this case.

Mr. Bourgeois: Well, let me ask this question, then:

30 Q. Can you tell me on the day that you signed the lease with Mr. Marx if Mr. Littman then was on business over in New York for the executors, or for you, trying to sell the property?

A. Mr. Littman was never on our business. He was acting as a broker in anything he did, in which

business there were a number of brokers doing the same thing.

Q. Was he authorized to sell the property if he could, and find a purchaser for it?

Mr. Cole: I object.

The Court: I will permit it. Mr. Bourgeois seems to want to know about it.

Mr. Bourgeois: I only want it for the purpose of fixing the time.

10

A. In order to answer the question, Mr. Bourgeois, the property, being an estate, of course, it was to be wound up at some time and naturally we have set a price on the property and a number of brokers know that. I have inquiries at least two or three times a year, regarding the sale of the property. It is my recollection that Mr. Littman did have some-
body he wanted to ask about it, and he came and asked me what the selling price was and he said he was going to take it up with a New York concern.

20

Q. Now, do you know whether or not on the date he went to New York on that errand you signed the lease with Mr. Marx?

A. That would be impossible for me to remember.

RECESS TO 1. 30 P. M.

30

AFTER RECESS.

QUINCY A. GILMORE, recalled.

Cross-examination (Resumed).

By Mr. Bourgeois:

10 Q. Now, Colonel, did you before entering into these leases and each of them ask or call Mr. Littman to find out whether he had anything to do with the finding of these tenants or not?

A. No, sir.

Q. Didn't notify him that a lease was going to be entered into, or anything of that sort?

A. No, sir.

20 Q. You testified that the tenant didn't tell you anything about Littman. Did you ask the tenants if they had had negotiations with Mr. Littman?

A. After Mr. Littman told me —

Q. I mean before you signed the lease; before you signed the leases did you ask them whether or not they had any negotiations with him?

A. I think I did; I am not sure.

Q. Not sure. You cannot recall whether you did or not?

A. It is entirely probable that I did, Mr. Bourgeois, but I cannot positively state.

30 Q. If you had Littman in mind, why didn't you call Littman and find out from him?

A. You asked me whether I had spoken to Littman. He had come and spoken to me about it. I had not spoken to Littman.

Q. Littman told you beforehand he had negotiated with them?

A. After the arrangements had been made to lease

the stores to tenants, Mr. Littman advised me he considered he was entitled to commission.

Q. That was before the leases were signed?

A. I believe that was—it might have been before or it might have been after; I am not positive. I think it was before.

Mr. Bourgeois: I called for a letter this morning, Judge. Do you remember? A letter from Mr. Littman to Colonel Gilmore dated September 28th, also 10 of September 26th.

Mr. Cole: There is one already in evidence of September 26th.

Q. I show you letter dated September 28th, and ask you whether you received that from Mr. Littman?

A. In all probability I did. I cannot positively state it.

20

(The paper referred to is marked as an exhibit for the plaintiff for identification, P15.)

(Witness excused.)

DEFENDANT RESTS.

Mr. Bourgeois: I offer in evidence this letter of 30 September 28th.

Mr. Cole: Objected to. It is not rebuttal and it is wholly self-serving; it is not relevant.

The Court: I will admit it.

Mr. Cole: Exception.

(The paper referred to is received in evidence and marked as an exhibit for the plaintiff P16, and is read to the jury by Mr. Bourgeois.)

PLAINTIFF'S REBUTTAL.

10

ABRAHAM LITTMAN, recalled in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bourgeois:

20 Q. Mr. Littman, you testified this morning about having called upon Mr. Bacheller. Mr. Bacheller came on the stand and testified that he never had seen you regarding the lease. Have you any explanation to make or do you still stand by your previous testimony?

Mr. Cole: I object.

The Court: Yes; I think that is objectionable.

30 Mr. Bourgeois: May I ask on what ground?

Mr. Cole: He testified he had and Mr. Bacheller testified he had not. That would be the end of that.

Mr. Bourgeois: Not necessarily. May I hear the question?

Q. (Repeated by the stenographer.) Mr. Littman, you testified this morning about having called upon Mr. Bacheller. Mr. Bacheller came on the stand and testified that he never had seen you regarding the lease. Have you any explanation to make or do you still stand by your previous testimony?

Mr. Bourgeois: The Court overrules that?

The Court: Yes.

10

Mr. Bourgeois: Allow me an exception.

Q. Mr. Littman, Mr. Marx, I think it was—yes—testified that you did not call at his store or place of business about the leasing of the store—no, not about the leasing, but about having stated to Mr. Slack that you had nothing to do with —

Mr. Bourgeois: Withdraw it.

20

Q. Mr. Marx testified after the leasing of the store by him you did not call at his store and that you did not speak to him about having made a written statement to Mr. Slack saying that you had had nothing to do with the renting of the store—with him renting the store, and that he did not say to you that it made no difference if he had signed the statement; that you could sue for it. Was his statement true? 30

Mr. Cole: I object. It is not rebuttal and I object to the form of it.

The Court: Well, part of it is rebuttal and part of it is not.

Mr. Bourgeois: I am trying to contradict a witness.

The Court: It is rather an involved question.

Q. Mr. Marx testified after the leasing of the store by him you did not call at his store and that you did not speak to him about having made a written statement. Was that statement true, that you did not
10 do it?

Mr. Cole: I object to it both as to form and because it is not rebuttal.

The Court: Objection sustained, because the witness cannot be called upon to comment on another witness' testimony.

Mr. Bourgeois: I do not want him to comment
20 on it. I want to know whether it is not true.

The Court: If he says it is not true he is commenting on it. He is commenting on the testimony of another witness and giving his opinion as to his truthfulness and veracity. You cannot do that.

Mr. Bourgeois: He has a right to contradict him, I suppose.

30 The Court: He has a right to contradict him, yes.

Mr. Cole: If he didn't do it when he testified in the first instance he probably contradicted him in anticipation.

Mr. Bourgeois: He did not testify to all of it.

Q. Did Mr. Marx say to you that he had given Mr. Slack a written statement that you had nothing whatever to do with the renting and that it made no difference as you could sue the company or sue Gilmore if he had?

A. Yes.

Mr. Cole: Objected to both as to form and because it is not rebuttal. 10

Q. (Repeated by the stenographer.)

The Court: I think it is rebuttal. I will permit that.

Mr. Bourgeois: That is all. We rest.

Mr. Cole: So do we.

DEFENDANT'S MOTION FOR A DIRECTION OF VERDICT. 20

Mr. Cole: The defense asks for a direction of verdict on the ground that there is no evidence competent to go to this jury on which they would be justified in finding that the plaintiff has proved his complaint or that he was the procuring cause, which would justify him to commission.

The Court: I will deny the motion.

Mr. Cole: Your Honor will allow me an exception? 30

The Court: Yes.

(Mr. Bourgeois opened the plaintiff's case to the jury.)

(Mr. Cole summed up for the defendant.)

(Mr. Bourgeois summed up for the plaintiff.)

COURT'S CHARGE TO THE JURY.

Ladies and gentlemen of the jury: An agreement to pay a real estate agent a commission presupposes service upon one side and compensation upon the other. A real estate agent is not entitled to a commission merely because he mentions the existence of
10 the vacant stores to several people, but he must be the efficient or procuring cause of their renting those stores. The law says that the duty which an agent undertakes, the obligation he assumes as a condition of his right to demand commission, is to bring the lessor and lessee to an agreement. The agent must be the procuring or efficient cause of the lease.

In the case which you have been trying you are the judges of the facts. It is for you to determine your own conclusions from the testimony as you
20 have heard it, and while I shall comment on the testimony to some extent, if your recollection of the testimony should be different from mine, you will take your own and determine it according to your own recollections.

The plaintiff in this case is a real estate agent. The defendants are the executors of the Helmsley estate, owners of the property at Indiana Avenue and the Boardwalk. They had some stores for rent and they placed the plans of those stores in the hands
30 of a number of real estate agents in Atlantic City upon the implied or express agreement that if any one of those agents procured tenants they would pay him commissions in accordance with the agreement they made.

The plaintiff says that he wrote two letters to Huyler's; that he saw Mr. Bacheller and that he also saw Mr. Marx, and upon that testimony, as I recall

it, he claims to be entitled to a commission for the renting of these stores.

If he was the procuring or efficient cause of these tenants renting the stores it would seem to me that the tenant and the landlord would know it. The landlord says that he gave him the plans; that he offered to pay him a commission for the stores that he should rent, based on five per cent the first year and two and a half per cent for succeeding years, and the claim made in the complaint of the plaintiff is that the said Gilmore agreed to pay a commission of five per cent on all the stores that plaintiff might be successful in renting. That is the basis of the complaint that you are trying. It seems to be conceded that plaintiff did not actually rent any of the stores and this case has been tried upon the theory that he was the procuring cause of the renting. 10

Mr. Gilmore says that he never brought any of these tenants to him; that Huyler came to him through Mr. Bangs of Washington; that Marx came to him of his own volition and so did Bacheller. Mr. Huyler comes here from New York and Mr. Bangs comes from Washington, and they appear as witnesses in the case. Their testimony is that they did not know Mr. Littman in the transaction at all. Mr. Marx's testimony is that Littman came in to see him one day and he told him that he knew all about it and that he was himself alone in negotiating his lease. Mr. Bacheller tells you he did not even know Mr. Littman, never has known him and never saw him concerning the stores. Against their testimony is the testimony of Mr. Littman that he at least undertook to procure these various persons as tenants. I say to you again that the duty and obligation which the real estate agent assumes as a condition of his rights to demand a commission is 20 30

to bring the lessor and lessee to an agreement. He must be the procuring or efficient cause of the lease. If you find that he was, your verdict would be for the plaintiff. If you find he was not, your verdict would be for the defendant for no cause of action.

I may also say to you that these three leases stand alone and if you should find a verdict for the plaintiff for less than the whole amount, you should render your verdict indicating which particular ten-
10 ant you think he procured and what the amount of his commission would be in that case.

You may retire and consider your verdict.

(The jury retired.)

Mr. Bourgeois: I object to where the Court said the agent, in order to be entitled to commission, must bring the lessor and lessee to an agreement. I know that is the general proposition of law, but I do not
20 think it is the law in this particular case. I would like an exception to it.

The Court: You may have it.

Mr. Bourgeois: Also to where you said if any of these agents rented they would pay them.

To that portion of the charge where the Court said that the plans had been put in Mr. Littman's office and a number of other offices.

Then there was something about if the agent
30 rented them they were to be paid. I except to that.

Also to where your Honor said if he was the procuring cause the landlord and tenant would know of it.

Then to where you said that Bangs testified and Huyler testified they did not know Littman at all. My thought is that that is immaterial. I do not know whether it does any harm or not.

DIRECTION OF VERDICT.

ATLANTIC COUNTY CIRCUIT COURT.

ABRAHAM LITTMAN,
 Plaintiff, }
 v. } Action at Law. 10
JOHN B. SLACK, *et al.*, } On Re-trial on Rule
 Defendants. } to Show Cause.

APPEARANCES:

MESSRS. BOURGEOIS & COULOMB, for plaintiff.

MESSRS. COLE & COLE, for defendants.

20

The above entitled case was tried February 15, 1926, before HON. THEODORE W. SCHIMPF, Judge, and a jury.

Mr. Bourgeois: We offer in evidence under stipulations the testimony in this cause in the prior case. It is stipulated between the parties and their respective attorneys that the testimony filed in this cause in the prior case shall be considered the testimony in this present case. 30

The Court: To be submitted to the jury, and upon that testimony the case will be determined.

Mr. Bourgeois: Yes, sir, and upon that testimony so submitted the case is to be determined. I offer that testimony in evidence, marked Exhibit 1.

Mr. Cole: I move for a direction of verdict on the ground that it does not sufficiently appear that the plaintiff was the procuring cause, or that he complied with the terms of his own agreement as set up in the complaint.

10

The Court: The motion for a direction will be granted because I think that the jury would not be justified in finding from the testimony submitted that the plaintiff was either the efficient or the procuring cause of the leases upon which commission is claimed.

Ladies and gentlemen of the jury, you will, therefore, render a verdict in favor of the defendants in this case and against the plaintiff.

20

Mr. Bourgeois: Allow me an exception.

(Which exception was duly allowed and noted.)

(The jury found as directed.)

30

EXHIBIT P1.

INTERROGATORIES
ATLANTIC COUNTY CIRCUIT COURT.

ABRAHAM LITTMAN,
Plaintiff,

vs.

JOHN B. SLACK, ANNA H.
HEMSLEY and QUINCY A.
GILMORE, Executors of
the last Will and Testa-
ment of FREDERICK HEMS-
LEY, deceased,
Defendants.

10

Action at Law
Interrogatories

TAKE NOTICE:

That John B. Slack, Anna H. Hemsley and Quincy 20
A. Gilmore, the defendants, are required to answer
the following interrogatories within ten (10) days
upon service of a copy of said Interrogatories:

Interrogatory No. 1.

Did Quincy A. Gilmore, one of the Executors and
one of the defendants aforesaid, deliver to plaintiff's
office on the Boardwalk, the plans of a number of
stores situate on the Boardwalk, in said city, which
were a part of the estate of Frederick Hemsley, de-
ceased; and if so, did he engage the plaintiff to pro- 30
cure tenants for said stores; and if so, did he agree
to pay to the plaintiff a commission of five per cent
on all stores that plaintiff might be successful in
renting?

Interrogatory No. 2.

Was Quincy A. Gilmore, one of the executors and one of the defendants, authorized by his executors to engage the plaintiff to procure tenants for said stores, and was he authorized to agree to pay plaintiff a commission of five per cent on all the stores that plaintiff might be successful in renting.

Interrogatory No. 3.

10 Did the defendants lease one of the stores, situate at #1723 Boardwalk, to the Huyler Company for a term of five (5) years, at the yearly rental of Ten Thousand (\$10,000.00) Dollars per year?

Interrogatory No. 4.

Did the defendants lease one of the stores, situate at #1725 Boardwalk, city aforesaid, to the Hanan Shoe Store, for a term of five (5) years, at a yearly rental of Eight (\$8,000.00) Dollars per year?

Interrogatory No. 5.

20 Did the defendants lease one of the stores, situate at #1727 Boardwalk, Atlantic City, New Jersey, to the Bacheller Jewelry Store Company, for a term of five (5) years, at a yearly rental of Eight (\$8,000.00) Dollars per year.

TO:

COLE & COLE,

Attorneys of Defendants.

Respectfully submitted,

Parsons & Parsons,

Attorneys of Plaintiff.

30

ATLANTIC COUNTY CIRCUIT
COURT

ABRAHAM LITTMAN,

Plaintiff,

VS.

JOHN B. SLACK, ANNA H. HEMS-
LEY AND QUINCY A. GILMORE,

EXECUTORS OF THE LAST
WILL AND TESTAMENT OF
FREDERICK HEMSLEY, DE-
CEASED,

Defendants.

ACTION AT LAW.
INTERROGATORIES

Due and legal service acknowledged
this 9th day of January 1924.

Cole & Cole,
Attys. of Defts.

110

Law Offices
PARSONS & PARSONS
Rooms 33-34-35-36 Law Building
Atlantic City, N. J.

EXHIBIT P2.

20

ANSWERS TO INTERROGATORIES.
ATLANTIC COUNTY CIRCUIT COURT.

ABRAHAM LITTMAN,
Plaintiff,

vs.

JOHN B. SLACK, ANNA H.
HEMSLEY and QUINCY A.
GILMORE, Executors of
the last Will and Testa-
ment of FREDERICK HEMS-
LEY, deceased.

Action at Law.
On Interrogatories.
Answers to Inter-
rogatories.

30

Defendant, answering the interrogatories sub-
mitted, says,

AS TO FIRST INTERROGATORY:

To the first clause, Yes; to the second, Yes, but the commission was to be 5% for first year and two and one-half per cent for all succeeding years and the tenant procured was to be acceptable to the executors. No commission to be paid after fifth (5th) year (? ? ?)

AS TO SECOND INTERROGATORY:

Yes, subject to answer to first interrogatory.

10 AS TO THIRD INTERROGATORY:

Leased from January 1, 1923 for ten years at \$12,000 per year.

AS TO FOURTH INTERROGATORY:

No.

AS TO FIFTH INTERROGATORY:

No.

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS

20 Quincy A. Gilmore, one of the executors of the estate of Frederick Hemsley deceased, and authorized to make this affidavit, being first duly sworn according to law upon his oath says that he has read the answers to the interrogatories submitted and that such answers are true to the best of his knowledge and belief.

Quincy A. Gilmore

Sworn and subscribed to before
me this 24th day of Jan. 1924.

30 (SEAL) Edward C. Cashin
New York County

Notary No. 322 Register 4221

ATLANTIC CO. CIRCUIT COURT

ABRAHAM LITTMAN,

Plaintiff,

vs.

JOHN B. SLACK, et als, Executors,
&c.,

Defendants.

Action at Law.

ANSWERS TO INTERROGATORIES.

Service of a copy of the within interrogatories acknowledged this—— day of January 1924

Attys. of Plaintiff.

Parsons & Parsons

COLE AND COLE

Law Offices

Atlantic City, N. J.

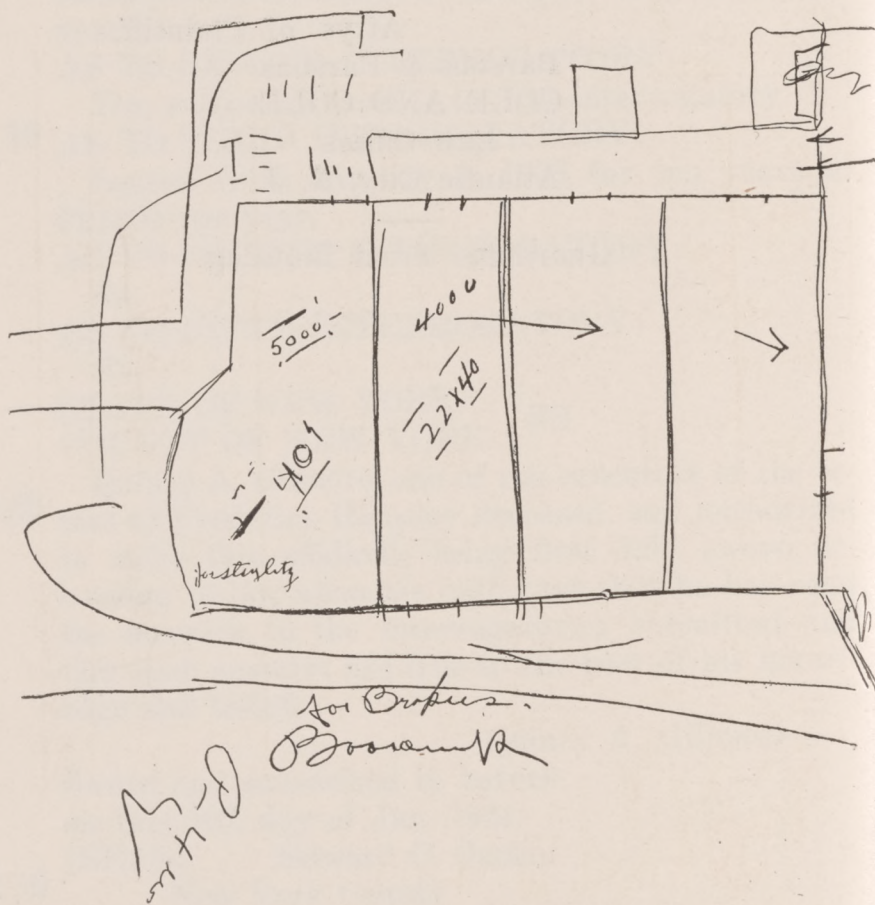
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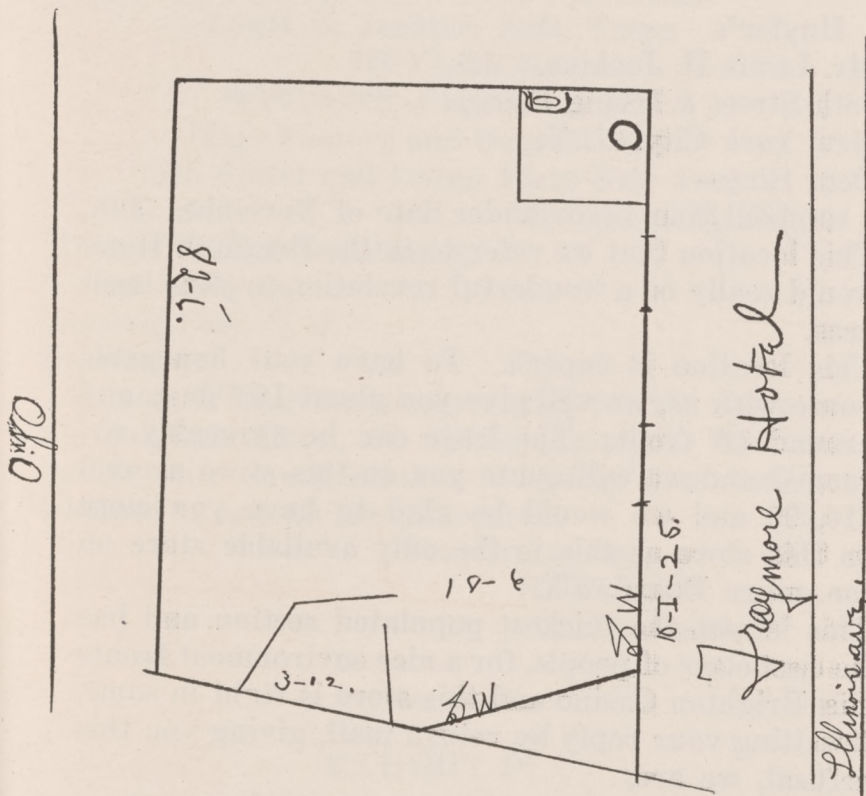
Guarantee Trust Building

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EXHIBIT P4.





BOARD WALK

EXHIBIT P5.

Dec. 1, 1921

Huyler's
Mr. Lewis H. Jenkins,
18th Street & Irving Place,
10 New York City, N. Y.

Dear Sir:—

I received your favor under date of November 30th. This location that we refer to in the Brighton Hotel would really be a wonderful revelation to your business.

This location is superb. To have your honorable house with us, we will give you about 100' deep and around 18' front. The lease can be agreeably arranged and we will quote you on this store around
20 \$10,000 and we would be glad to have you close on this store as this is the only available store on the entire Boardwalk.

This is also the thickest populated section and has the best class of people, for a nice environment fronts this Brighton Casino and this store is right in same. Awaiting your reply by return mail, giving you this refusal, we are,

Yours very truly,
Wilkins & Littman

30 AL:EEB 9

EXHIBIT P6.

Frank DeKlyn Huyler,
President

David Huyler,
Vice President

Coulter D. Huyler, Sec'y & Treas.

Lewis H. Jenkins, Asst. Treas.

HUYLER'S

BONBONS, CHOCOLATES

Main Factory and General Offices

18th Street and Irving Place New York

10

November 30, 1921.

Messrs. Wilkins & Littman,
8 Seaside Block,
Atlantic City, N. J.

Dear Sirs:

If you will advise us the rental for the store in
the Brighton Hotel, we will be pleased to take the
matter into consideration, advising you further
whether or not we are interested.

20

Very truly yours,

HUYLER'S

L. H. Jenkins.

EXHIBIT P7.

Nov. 21, 1921

Mr. Jenkins,
c/o Huylers,
136 E. 18th Street,
New York City, N. Y.

30

Dear Sir:—

We have an elegant location; where at, we would
care to locate an honorable house, like your concern.
The store is now under construction and will be

available for occupancy in the early part of January of the new year.

Space is about 18' front x 100' deep, fronting the Boardwalk, of the Brighton Hotel, next to the Hotel Traymore, it is the best possible location existing.

This would divide Atlantic City equally in the way you have your present locations and I venture to say that it would make your best paying store and would prove the best advertisement for your entire
10 concern.

If this proposition is interesting to you, kindly look into it at once.

We are,

Yours very truly,
Wilkins & Littman

AL:EEB

EXHIBIT P8.

20

HOTEL BRIGHTON
Atlantic City

September 28, 1922.

Mr. Abraham Littman,
8 Seaside Block,
Atlantic City, N. J.

My dear Mr. Littman:—

At the request of Colonel Gillmore, I am replying to your letter of the 26th instant, and beg to advise that we have for some time been negotiating with a
30 man who is the real estate manager for Huyler's. He is their official representative in matters of this kind and we have had all dealings directly with him.

Very truly yours,
HOTEL BRIGHTON
J. S. Lehman

Manager.

JSL/cfm 11

EXHIBIT P11.

Estate of
FREDERICK HEMSLEY
Hotel Brighton
Atlantic City, N. J.

February 23, 1922.

Messrs. Wilkins & Littman,
Atlantic City, N. J.

Attention Mr. Littman

10

Dear Sir:—

I acknowledge receipt of your letter of February 22, 1922 with enclosure and beg to advise you that we rented store to Mr. Marx without the intervention of any real estate agent and therefore do not owe any commission on this rental.

Very truly yours,

John B. Slack

Executor

20

JBS/CFM 16

EXHIBIT P16.

Oldest Established Real Estate Office on Boardwalk
Boardwalk Property a Specialty Tel. 46

ABRAHAM LITTMAN

REAL ESTATE

30

Bought, Sold and Exchanged

INSURANCE

—of all kinds—

Rooms 8 and 10 Seaside Block
Pennsylvania Avenue and Boardwalk
ATLANTIC CITY, N. J.

(Cut)

ATLANTIC CITY

All the Time

License No. Br. 3255

All Kinds

Insurance

Mortgage

Loans Negotiated

Notary Public

10 Telephone 56

See me for
 Building Large
 Hotels, Cottages
 and Bungalows.
 Best Locations
 Surveyed, Ad-
 vanced and Built
 Sale, Rental and
 Management of
 Property in All
 of Atlantic City
 Tell Me of Your
 Desires

September 28, 1922

Dear Mr. Gilmore:

I wish to advise that I received your letter from Mr. Lehman wherein he states that you advised him to write me disregarding this office in the matter, should it come to pass, of Huylers' renting a store on your premises. Mr. Gilmore, to enlighten you in the method of such action, when your office turned over plans and specifications to me to represent you in the renting of those stores, we accepted this proposition in good faith and went to unlimited expense and trouble. It has been very costly advertising and traveling to out-of-town concerns, and when you disregarded our cause for the renting of a store to Marks Shoe Store, we did not feel right about it.

We have correspondence in our possession which will verify the fact that we have been in direct correspondence with Huylers. I want you to understand that should it come to pass that Huylers lease

from you, we expect our commission regularly allowed by the Real Estate Board.

Yours very truly,
Abraham Littman.

Mr. Quincy Gillmore
Brighton Hotel
Atlantic City, N. J.
AL CFH

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NEW JERSEY COURT OF ERRORS
AND APPEALS.

ABRAHAM LITTMAN,
Plaintiff-Appellant,

v.

JOHN B. SLACK, *et al.*,
Defendants-Respondents.

ON APPEAL.

BRIEF OF APPELLANT.

STATEMENT.

This was an action for commission by appellant against the executors of the Frederick Hemsley Estate, which commission was claimed on the renting of three properties, situate on the Boardwalk, belonging to said estate.

This case was tried before the Atlantic County Circuit Court, with a jury, on March 16th, 1925, and resulted in a verdict in favor of the plaintiff.

This verdict was set aside by Judge Schimpf, and the case came on for re-trial on February 15th, 1926 (p. 85), at which time it was stipulated that the testimony taken in the cause at the previous trial should be considered the testimony in the second trial.

The testimony was offered in evidence, and both parties rested, and a motion was made by the defendants for a direction in defendants' favor, and granted.

An exception to that direction was taken (p. 86, l. 20)—hence this appeal.

The record shows that interrogatories were submitted by appellant to respondent, the first of which was (p. 87, l. 25):

“Interrogatory No. 1. Did Quincy A. Gilmore, one of the executors and one of the defendants aforesaid, deliver to plaintiff's office on the Boardwalk, the plans of a number of stores situate on the Boardwalk, in said city, which were a part of the estate of Frederick Hemsley, deceased; and if so, did he engage the plaintiff to procure tenants for said stores; and if so, did he agree to pay to the plaintiff a commission of five per cent on all stores that plaintiff might be successful in renting?”

The answer was as follows (p. 90, l. 1):

“To the first clause, yes; to the second, yes, but the commission was to be 5% for the first year and two and one-half per cent for all succeeding years and the tenant procured was to be acceptable to the executors. No commission to be paid after fifty (5th) year.”

The third interrogatory was (p. 88, l. 10):

“Interrogatory No. 3. Did the defendants lease one of the stores, situate at #1723 Boardwalk, to the Huyler Company for a term of five (5) years, at the yearly rental of Ten Thousand (\$10,000.00) Dollars per year?”

The answer to the third interrogatory was (p. 90, l. 12):

“Leased from January 1, 1923, for ten years at \$12,000 per year.”

There were other interrogatories directed to other stores, but they were answered in the negative.

Appellant contended and testified that he was the procuring cause in securing tenants for the three stores mentioned in the complaint. The effort made by him in furtherance of the renting of said stores to Huyler's is found on page 16, beginning with line 25, and Exhibits 4 (p. 92), 7 (p. 95), 6 (p. 95), 5 (p. 94) and 8 (p. 96). His testimony concerning his effort with regard to the renting of the store to the Hanan Shoe Company is found on page 17, beginning with line 35, and his testimony touching his effort to lease the other store to Mr. Bacheller is found in the state of the case, beginning with page 19, l. 20.

ARGUMENT.

It appeared in the testimony and in the interrogatory that appellant was to procure tenants only. The tenants to be procured by him were to be subject to the approval of the executors, and the appellant had no authority to execute a lease, the executors reserving unto themselves this power.

There was no dispute but that the tenants which appellant contended he procured, or was instrumental in procuring, occupied the premises.

As to the Huyler's lease, the defendants endeavored to show that the leasing was brought about

through Huyler's Washington agent, but the testimony showed that it was plaintiff who brought the matter to their attention, and he continued to negotiate with them until they took the matter up through their own agent.

There was testimony which showed that it was plaintiff who brought the matter of leasing to the attention of Mr. Marx for the Hanan Shoe Company and to Mr. Bacheller:

"A trial Judge is only justified in granting a non-suit or directing a verdict upon a Court question arising from the admitted or uncontroverted facts of the case." *Dickinson v. Erie Railroad Co.* (85 L. 586); *Troiano v. Baker* (86 L., 288).

"In passing upon motions to non-suit and for the direction of a verdict, the Court cannot weigh the evidence, but must take as true all evidence which supports the view of the party against whom the motions are made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor." *Andre v. Mertens* (88 L., 626).

In directing a verdict for the defendant, the trial Judge said:

"The motion for a direction will be granted because I think that the jury would not be justified in finding from the testimony submitted that the plaintiff was either the efficient or the procuring cause of the leases upon which commission is claimed" (Case, p. 86).

This pronouncement of the Judge shows that he misconceived the law applicable to the direction of a verdict. There being testimony in favor of both

parties touching the right of plaintiff to recover commissions, it is apparent that the trial Judge concluded that the testimony of the defendant outweighed the testimony of the plaintiff, and, therefore, directed a verdict in favor of the defendant; whereas, the law touching the direction of a verdict is that:

“A trial Judge is only justified in granting a non-suit or directing a verdict upon a court question arising from the admitted or uncontroverted facts of a case, and the weight of conflicting testimony must always be submitted to a jury for their consideration and determination.” *Dickinson v. Erie Railroad Co.* (85 L., 586-588).

It is admitted that the plaintiff was authorized to procure tenants for the property in question. It is further admitted that the plaintiff had no authority to enter into a lease himself, nor had he any authority to fix the terms of the lease (Case, p. 16). The sole question presented, therefore, is whether the plaintiff was the efficient or the procuring cause of the renting of the property involved in this suit.

It is submitted that, in directing a verdict for the defendant, the trial Judge decided a question which was clearly one for the jury alone.

In the case of *Clark v. Griffin* (95 N. J. L. 508), in an action by a real estate broker to recover commissions alleged to have been earned for selling certain real estate, the Court of Errors and Appeals said:

“Whether the plaintiff was the procuring or efficient cause of the sale? There being doubt upon that point, the doubt must be solved by the jury under proper instructions from the

trial Court. *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Queen v. Jennings*, 93 Id. 353; *Weeks v. Smith & Sons Co.*, 79 Id. 388; *Hudson Real Estate Co. v. Bauer*, 74 Id. 90."

In the case of *Hudson Real Estate Co. v. Bauer* (74 N. J. L. 90), the New Jersey Supreme Court held that:

"In suits by real estate brokers to recover commissions on the sales of land committed to their agency, the question always is whether, under the peculiar conditions of the given case, the agent was the efficient cause of the sale."

Also that the question of whether the plaintiff was the efficient cause of the sale is a question of fact.

In the case of *Vreeland v. Vetterlein* (33 N. J. L. 247), Chief Justice Beasley speaking for the Supreme Court, said at p. 249:

"It is certainly true, as a rule of law, that, under ordinary circumstances, where a broker, employed to sell property, brings about an introduction of a buyer, and when a negotiation, resulting in a purchase ensues on that foundation, the owner and the buyer cannot, by any arrangement, disappoint the claim of the agent for remuneration. If this could be done, it is obvious the agent would, in all cases, be in the power of his employer, who, by taking matters into his own hands, could, at will, defeat the just expectations and equitable rights of the broker or middleman. In this class of cases, the question then always is, whether, under the peculiar conditions of the given case, the agent

was the efficient cause of the sale; and, when there is real doubt upon that point, such doubt must be solved by the jury. To this extent there seems to be entire uniformity in the decisions.”

In the present case, plaintiff was authorized to procure a tenant and the testimony of the plaintiff shows that the plaintiff was solely instrumental in first bringing to the notice of the Huyler Corporation the fact that the property in question was for rent. On November 21, 1921, the plaintiff wrote a letter to Huylers calling their attention to the property in question, and to the fact that there was space available for rent. This letter was subsequently acknowledged by Huylers, by Mr. Jenkins, who was at that time assistant treasurer of the corporation, and in this letter the Huyler Corporation inquired as to particulars with regard to the amount of rent for this store. The plaintiff subsequently replied to this latter giving further information with regard to this property (Case, pages 94, 95 and 96). The plaintiff also testified that he not only had this correspondence with the Huyler Corporation, but that he reported the same to one of the defendants and was told to keep after them (that is, Huylers) and that he did continue to keep after them. Mr. Coulter D. Huyler, testifying on behalf of the defendant, stated that he never met Mr. Littman, and that he never saw the correspondence above referred to. He admitted, however, that Mr. Jenkins was the assistant treasurer of the corporation, and that he took care of the treasurer's business in his absence, and it is perfectly clear that a letter received and answered by one of the officers of the corporation was the act of the corporation with regard to the facts stated in the

letter, regardless of whether one of the individual officers of the corporation knew about it or not.

As stated, Mr. Littman was the one who first brought to the notice of the Huyler Corporation the fact that this property was for rent, and it is conceded that the Huyler Corporation subsequently rented this very same property.

In the case of *Weeks v. Smith & Sons Co.* (79 N. J. L. 388), a ship broker brought action to recover for commissions on the sale of a steamboat. The trial Judge charged the jury that:

“An agent employed to sell real estate who first brings it to the notice of the person who ultimately becomes its purchaser, is entitled to his commissions on its sale, nor can the owner avoid the liability by the selling of the property when a reduction is made through another broker.”

The Supreme Court held that the proposition set forth in this charge was substantially correct.

Littman was employed to lease this property and first brought it to the notice of the Huyler Corporation, and under these circumstances it is submitted that, under the rule laid down by the cases above cited, the very least that can be said for the plaintiff's case is that there was some evidence as to whether or not he was the efficient cause in bringing about the lease to the Huyler Corporation, and whether or not he was entitled to a commission on same, and, this being so, it was clearly error for the trial Judge to take the case from the jury and himself decide that the plaintiff was not the efficient or procuring cause of this lease and was not entitled to his commission.

As to the Marx lease, the plaintiff, Littman, testified that he interviewed Mr. Marx, making a definite proposition as to the rental of one of these stores, and Mr. Marx made a counter proposition which was submitted by the plaintiff to the defendant, Gilmore. Defendant Gilmore told the plaintiff to return to Mr. Marx and see if he could not get a higher rent, and the plaintiff stated that he kept calling on Mr. Marx continuously thereafter and finally learned that the store had been leased to Marx while the plaintiff was away on business. It is true that Marx, testifying for the defendant, denied that Littman had anything to do with leasing this property. He admitted, however, on cross-examination that he finally rented the very same store which Littman talked about to him.

Under this state of facts it was surely for the jury to say which of these two stories was to be believed; that is, whether Littman was telling the truth or whether Marx was telling the truth, and the effect of the direction of a verdict for the defendant by the trial Judge was that the trial Judge decided that the jury should believe Marx and not Littman; which it was clearly not the province of the trial Judge to do.

In the case of *Schmidt v. Marconi Wireless Telegraph Co.* (86 N. J. L. 183), the Court of Errors and Appeals held that:

“Where the assignee of a right to subscribe to stock of a company brings suit against the company for damages accruing from a refusal to receive the subscription, and the defendant company at the trial produces a witness who testifies that the plaintiff’s assignors admitted to him that they had no right to subscribe, such testimony, although uncontradicted, should be submitted to the jury.”

Also that:

“In every case where the issue depends upon the determination of facts the existence of which is not admitted, the jury, not the Court, must determine them.”

In the case of *Bennett v. Busch* (75 N. J. L. 240), at p. 244, the New Jersey Supreme Court states:

“The rule which controlled the action of the trial Judge on the motion to direct a verdict was this: That, where fair-minded men might honestly differ as to the conclusions to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury.”

In the case of *Longstreth v. Korb* (64 N. J. L. 112), our Supreme Court held, in an action to recover a commission by a real estate broker, that where under all the evidence and circumstances, different conclusions can be drawn, the question of whether the agent was instrumental in making the sale is one for the jury.

It is submitted that, under the rule laid down by the above cases last mentioned, the questions at issue in the present case should have gone to the jury, and that it was error for the trial Judge to direct a verdict for the defendant.

In the case of *Nell v. Godstrey* (90 N. J. L. 709), at p. 712, the Court of Errors and Appeals said:

“It is obvious that the trial Judge failed to perceive the distinction between court questions and jury questions arising from evidence. In cases where a new trial is granted because the verdict is against the weight of the evidence, the direction of a verdict at a second trial on

the same or similar evidence, where a substantial conflict of testimony is present, is not justified. Conflicting testimony is always for the jury.”

The same rule is laid down in the case of *Dickinson v. Erie Railroad Co.* (85 N. J. L. 586).

It is submitted that in the present case, a substantial conflict of testimony was present, and, under these circumstances, it is submitted that it was error for the trial Court to direct a verdict for the defendant.

It is further submitted that the judgment in favor of the defendants should be reversed, and a new trial granted.

BOURGEOIS & COULOMB,
*Attorneys of Plaintiff-
Appellant.*



New Jersey Court of Errors and Appeals

ABRAHAM LITTMAN,

Plaintiff-Appellant,

v.

JOHN B. SLACK, *et al*, Executors &c.,

Defendants-Respondents.

ON APPEAL FROM ATLANTIC CIRCUIT.

BRIEF FOR RESPONDENTS.

STATEMENT.

Action, upon an express contract, to recover commission for services claimed to have been rendered in procuring three several tenants for three stores upon the boardwalk in Atlantic City.

At a previous trial, the jury awarded appellant a verdict as to two stores, and against him as to the third. The verdict was set aside as being against the clear weight of the evidence. By stipulation, the record in the previous trial was offered, and with nothing more, the Court granted respondents motion for a direction upon the broad ground that there was no evidence to justify a verdict in favor

of the appellant. There was no amendment to the complaint, so that the discussion will be in the light of the complaint and evidence.

ARGUMENT.

THERE WAS NO EVIDENCE TO WARRANT A JURY IN FINDING A VERDICT IN FAVOR OF THE APPELLANT THAT ANY TENANT WAS PROCURED BY HIM.

Appellant's agency was not exclusive, the renting was open to all real estate brokers (p. 70-71-73-75).

Paragraph 3 of the complaint (p. 3), reads:

"That on or about the first day of July, nineteen hundred and twenty-two, Quincy A. Gilmore, one of the executors aforesaid, brought to plaintiff's office the plans of a number of stores situate on the boardwalk in said city, *for which he engaged the plaintiff to secure tenants for the estate of Frederick Hemsley, deceased*; that at the time he delivered the plans to the plaintiff, the said Gilmore agreed to pay a commission of five per cent *on all the stores that plaintiff might be successful in renting.*"

Three stores were in fact rented; 1723, 1725 and 1727 Boardwalk: one to Huyler Company, one to Hanan Shoe Store and one to Bacheller Jewelry Store.

APPELLANT WAS NOT SUCCESSFUL IN RENTING ANY ONE OF THE STORES.

That he made some effort to rent one or more of them may be conceded.

All his negotiations touching his contract was with Gilmore. At p. 15 and 16 the contract stated:

“That I get tenants that would be subject to their refusal, and that I lift up the space there at the rental that he furnshed me with.

That I secure a tenant for the—tenants that I would interest to secure for the space, would be subject to his refusal.

My compensation was five per cent on the leases that I would secure for the locations.

Q. Well, you were to do nothing except get these people who were willing to rent?

A. Just get the tenants.

Q. Providing they were satisfactory to them?

A. Providing they were satisfactory to them.”

Appellant did not draw the leases; they were drawn by Slack, one of the executors (p. 68).

He never reported to Slack that he had a tenant (p. 70). He did not deny Slack's testimony.

He did no close a lease with any one named in his complaint. The utmost that can be said for him, giving his evidence its fullest weight, is that he talked with and wrote the parties. But nothing was concluded.

We contend that here was no evidence from which, legitimately, it could be concluded that he had been successful in procuring a tenant.

No decision with which we are acquainted, has modified or repudiated he views, so well expressed by Chief Justice Beasley in *Vreeland v. Vetterlein*, 33 L., p. 247. He sums up the whole matter by saying that the agent must be the “efficient cause.” Appellant necessarily fails by this test.

Dealing with each tenant specifically.

BACHELLER JEWELRY STORE.

Appellant's account.

“Q. P. 19. Now, tell us about Bacheller. Did you have any conversation with Bacheller?

A. I called on Mr. Bacheller one day. I have a memorandum there that will make him recall it that I did call on him and asked him would he become interested in locating at the Brighton.

A. I can't recall the correct date, the correct time, but, nevertheless, he told me that he really was not interested at that time but I learned that—but I &c.”

The foregoing is the total of his testimony touching negotiations with Bacheller.

Bacheller's version, p. 64.

“Q. Will you tell the jury how you came to rent?

A. I went and rented myself.

Q. What had Littman to do with renting?

A. I don't know Mr. Littman, never met him.”

His negotiations were voluntarily and directly with Gilmore. He stood adamant on cross-examination.

HANAN SHOE STORE.

Appellant's story, p. 17:

“Q. Now, you say that you went and saw Mr. Marx. Who is Mr. Marx?

A. He runs the Hanan Shoe Store.

Q. What conversation did you have with Mr. Marx?

A. Why, my conversation with Mr. Marx was his lease—knowing that he was going to make a change I thought it would be best for him to locate in the new location of the stores. He was interested *but not at the rental I had offered to him.*

Q. What rental did you state to him?

A. \$12,000, and he told me to offer a proposition of \$8500, which I did.

A. Mr. Gilmore. That was rather early in the building. He told me—so he said, 'It is rather early in the construction. Let us wait a while and see if we can't get a little more. Well, I said I thought I would report to you,' and I returned with the report to Mr. Marx *that he couldn't rent it at \$8500 &c.'*

Thus ended the negotiations without a lease being concluded.

Mr. Marx gives his version at pages 59-60-61-62-63.

He thought of renting one of the large stores before Littman called. Littman spoke of the small store, which at that time he did not want to rent.

“Q. P. 60. Now, with whom did you negotiate?”

A. With Mr. Slack—first with Mr. Lehman, (an employee at Brighton Hotel, not Littman), then with Mr. Slack and Mr. Gilmore.

Q. Who drew the leases for you?

A. Mr. Slack.

Q. Did Mr. Littman ever produce you to either Mr. Slack or Mr. Gilmore as the prospective tenant?

A. No, sir.

Q. Did he have anything to do with your renting that store?

A. No, sir."

It would be trifling with words to say the foregoing, which places appellant in the most favorable light, could make him the "efficient cause" of the renting.

HUYLER COMPANY.

In this case appellant never met or negotiated with any one in authority to speak for the company. Apparently he did try to interest the company. That is a full concession so far as the evidence discloses.

Let appellant speak, p. 16:

"Q. And whom did you communicate with or deal with?

A. Why, I communicated with Huyler's, and I called on Mr. Marx who is——

Q. Take one at a time. What was the effect or the result of your communication with Huyler's?

Q. You dealt with Huyler's?

A. Yes, sir.

Q. Now, did you get any reply from Huyler's?

A. Yes, sir.

Q. What did you do then so far as the estate was concerned?

A. I made my report to Mr. Gilmore."

That is the total of his direct examination so far as relevant to his alleged contract and performance. The foolish and unnecessary cross-examination developed Huyler's somewhat, p. 23:

"Q. Well, suppose you produce a letter under

date of Sept. 28th, 1922, to you, won't you, about the Huyler——”

Letters were later offered and are self-explanatory:

“Q. P. 27. Now, did you ever go with Mr. Huyler to Mr. Gilmore and say to Mr. Gilmore that Mr. Huyler was a tenant that you have procured for him?

A. Never did.”

Pages 28 and 29 call for the the full Huyler correspondence.

Appellant admitted that he saw no one connected with Huyler, p. 20, and that his entire efforts were embraced in the correspondence.

November 21, 1921, p. 95, appellant writes one Jenkins, care Huyler's mentioning store. Acknowledgment is made November 30, 1921. Replied to December 1, 1921, p. 94. Correspondence ends. No lease made. On September 28, 1922, Lehman writes appellant showing negotiations directly with the real estate manager for Huyler's.

At page 39 and forward Mr. Huyler explains how the lease came to be made. He never saw the alleged correspondence, he never met Littman and he negotiated with “Bangs.”

Bangs tells his connection beginning with page 47:

“Q. Did you have anything to do with the Huyler Company renting the Brighton Store?

A. I did.

Q. Did you introduce the matter to Mr. Huyler, who was just on the stand.

A. I did.

Q. When was the first time?

A. I should say about the early summer.

Q. Of what year?

A. 1922.

Q. And again after that, was it?

A. Yes.

Q. When?

A. I should say about a month later.

Q. How did you come to do that?

A. I was in Atlantic City and saw a sign in the window—in that window and one adjacent to it in the Traymore, in which it was stated that the stores were for rent, and applied for the name of the landlord, the executor.”

Then follows a detailed account of his negotiations with Gilmore to effect a lease which would be satisfactory to Huyler's, demonstrating the folly of the claim of appellant that he was the “efficient cause” of the renting.

Respondents did not confide it as a secret to appellant that the stores were for rent. They refused him exclusive agency and no agents sign was allowed in the windows. The signs read: “For Rent. Apply Hotel Brighton,” page 70, Slack's testimony.

If appellant can recover upon the strength of the testimony submitted, then a half dozen or more agents could recover upon a mere showing of effort and speaking to persons, who might thereafter become tenants, regardless of the relation between such efforts and the consummated leases.

The direction as right and the judgment thereon should be affirmed.

Respectfully submitted,

COLE & COLE,

Attorneys of Respondents.

C. L. COLE.

Of Counsel.

