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ESSEX COUNTY CIRCUIT COURT

ISIDOR POLOW, Plaintiff-Appellant,  vs. MICHAEL SILVERMAN and ANNA SILVERMAN, Defendants-Appellees.	}	Action at Law. Grounds of Appeal and Notice.	10
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To Meyer M. Semel,

Attorney for Michael Silverman and Anna Silverman.

Sir:—Please take notice that the plaintiff-appellant Isidor Polow, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the judgment entered in this cause in the Essex County Circuit Court on June 7, 1928 on the following ground:

1. That the Circuit Court erred in directing a verdict for the defendant.

FAST & FAST,

Attorneys for Plaintiff Appellant.

Filed June 14, 1928. 30

John H. Scott, Clerk.

The State of New Jersey,  
To Michael Silverman and  
Anna Silverman.

SEAL.

10 You are summoned to answer the annexed com-  
plaint of Isidor Polow, in an action at Law in the  
Essex County Circuit Court.

And take notice that unless you file your answer  
to said complaint with the Clerk of the Essex  
County Circuit Court, at Newark, New Jersey with-  
in twenty days after service upon you of this writ  
and the annexed complaint, the plaintiff may pro-  
ceed in the suit and judgment may be entered  
against you.

20 Witness, Worrall F. Mountain, Judge of the  
Essex County Circuit Court, at Newark, New Jer-  
sey this 1st day of October, Nineteen Hundred and  
Twenty-seven.

JOHN H. SCOTT, Clerk.

Fast & Fast,  
Attorneys.

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ESSEX COUNTY CIRCUIT COURT.

ISIDOR POLOW,

Plaintiff,

vs.

MICHAEL SILVERMAN, and  
ANNA SILVERMAN,

Defendants.

Action at Law  
Complaint.

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The plaintiff of the City of Newark, County of  
Essex and State of New Jersey, says:

1. That he is a real estate broker duly licensed  
to practice said business or profession by the New  
Jersey Real Estate Commission, in accordance with  
the statute in such case made and provided.

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2. That on the 23rd day of May, 1927, the  
defendants, Michael Silverman and Anna Silverman  
engaged the services of the plaintiff Isidor Polow  
to sell their property at 177-179-181-183 Hillside  
Avenue, Newark, New Jersey for the sum of  
\$60,000. and that he was to receive a commission  
of \$1000. for such services.

3. That the plaintiff has done everything of  
him required to be done, in accordance with said  
contract and the premises have been sold through  
him the plaintiff.

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4. That on May 25th, 1927, a notice was served  
upon the defendants, a copy of which is annexed  
hereto and made part thereof, with the same force  
and effect as if herein set forth at length.

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5. That although plaintiff has requested the payment of the said \$1000. but the defendants have refused and still refuse to pay same.

Wherefore plaintiff demands as damages the sum of \$1000. together with interest from May 25th, 1927.

Fast & Fast,  
Attorneys for Plaintiff.

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To Michael Silverman and Anna Silverman,  
149 Fabyan Place,  
Newark, N. J.

In pursuance to the oral agreement made on Monday, the 23rd day of May, 1927, with the undersigned, notice is hereby being served upon you setting forth the terms of such oral agreement, to wit: That I was to sell the property at 177-179-181-183 Hillside Avenue, Newark, New Jersey, for the sum of \$60,000.00 and that I was to receive commission of \$1000. that such sale has taken place, and the premises have been purchased by Harry Rosenberg, of 827 South Eighteenth Street, Newark, New Jersey.

Dated Newark, N. J.  
May 25th, 1927.

Isidor Polow,  
(Signed)

I hereby appoint and depute Donald Strobe, to serve the within writ. Witness my hand and seal this 25th day of Oct., 1927.

Conrad Deuchler, Sheriff  
Alfred C. Walker, Under Sheriff.

SEAL.

Served the within Summons and Complaint Nov. 16, 1927, upon the following within named defendants, personally upon Anna Silverman by delivering to her a true copy thereof at 124 Fabyan Place, Newark, N. J., and upon Michael Silverman by

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leaving a true copy thereof with his wife at his usual place of abode, 124 Fabyan Place, Newark, N. J.

Conrad Deuchler, Sheriff,  
By Donald Strobe, Special Deputy.

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ESSEX COUNTY CIRCUIT COURT.

ISIDOR POLOW,

Plaintiff,

vs.

MICHAEL SILVERMAN, and  
ANNA SILVERMAN,

Defendants.

Action at Law

Answer.

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The defendants, by way of answer to the complaint filed in the within matter, say that:

1. The defendants have no information or knowledge sufficient to form a belief as to the allegations set forth in paragraph one of the complaint.

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2. The defendants deny the allegation set forth in paragraphs two, three, four and five of the complaint.

M. M. SEMEL,

Attorney for Defendants.

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ESSEX COUNTY CIRCUIT COURT.

ISIDOR POLOW,

Plaintiff,

vs.

MICHAEL SILVERMAN, and  
ANNA SILVERMAN,

Defendants.

Action at Law

Reply.

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The plaintiff herein denies all of the allegations contained in the answer filed herein.

FAST & FAST,

Attorneys for Plaintiff.

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ESSEX COUNTY CIRCUIT COURT.

44543

ISIDOR POLOW,

Plaintiff,

vs.

MICHAEL SILVERMAN and  
ANNA SILVERMAN,

Defendants.

Action at Law.

On Verdict by a  
Jury Judgment for  
Defts.

June 7, 1928.

Costs \$71.60

10

Meyer M. Semel, Attorney for Defendants.

This action was tried before Judge William A. Smith with a jury at the Essex County Circuit Court on June 7, 1928.

The cause having been heard and submitted to the jury they return their verdict as follows:

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They find in favor of the defendants, Michael Silverman, Anna Silverman and against the plaintiff, Isidor Polow.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and the defendants recover of the plaintiff costs of which are taxed at Seventy-one Dollars and Sixty Cents.

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Judgment entered and signed June 7, 1928.

William S. Gummere, Judge

John H. Scott, Clerk.

Recorded June 7, 1928, Book 105 Circuit Court Judgments, page 23.

40

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX } ss.

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey.

10 DO HEREBY CERTIFY That the foregoing is a true and correct copy of all the pleadings in the Case of Isidor Polow, Plaintiff-Appellant vs. Michael Silverman and Anna Silverman, Defendants, prepared for removal to the Court of Errors and Appeals, together with a copy of the Judgment Record entered in Book 105 Circuit Court Judgments, page 23, and the same is taken from and compared with Original Copies of all Pleadings and as the same now remains on the files of said office.

20 In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said County at Newark, N. J., this 28th day of June A. D., 1928.

SEAL

JOHN H. SCOTT,  
Clerk.

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ESSEX COUNTY CIRCUIT COURT.

Thursday, June 7, 1928.

ISIDOR POLOW,

vs.

MICHAEL SILVERMAN  
et al.

Action at Law.

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Before Hon. William A. Smith, J., and a jury.  
For the plaintiff appear Fast & Fast, (by Louis Fast).

For the defendants appears Meyer Semel.

(A jury is called and sworn.)

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Mr. Fast opens for the plaintiff.

Mr. Semel opens for the defendants.

THE COURT. Do I understand that there isn't any dispute but that the notice was properly given?

MR. SEMEL. I think we may be able to stipulate certain things on the record which will save a good deal of time. In the first place, it is admitted that the contract was signed and executed by the purchaser on the 23rd day of May, 1927.

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MR. FAST. I offer it in evidence.  
(The same is received in evidence and marked Ex. P1.)

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THE COURT. You mean you admit the contract of sale?

MR. SEMEL. Yes, sir; that we received notice on the 25th day of May, 1927, and I will consent to it going in evidence; I haven't the original.

10 MR. FAST. I offer in evidence the second page of this paper which is the notice.

(The same is received in evidence and marked Ex. P2.)

MR. SEMEL. And I think Mr. Fast will agree with me that the agreement pursuant to the terms was not consummated.

MR. FAST. Oh, no; that title was not passed.

20 THE COURT. Yes. Isn't there a case that you cannot serve notice after the sale?

MR. FAST. Yes, sir, but Justice Parker did not go into the last section of the act.

MR. SEMEL. We may be able to submit it to your Honor on a motion for nonsuit now.

ISIDOR POLOW, plaintiff, sworn in his own behalf.

DIRECT EXAMINATION By Mr. Fast.

30 Q Mr. Polow, what was the agreement as to the amount of the commissions you were to receive?

A \$1000.

BY THE COURT.

Q That was the verbal agreement?

A Yes, sir.

MR. FAST. And it should be admitted that there was no notice sent to us revoking our authority.

MR. SEMEL. We admit that, too, your Honor.

MR. FAST. And it should also be admitted that notice was served—Exhibit P2—on May 25th. 10

MR. SEMEL. Yes, sir.

THE COURT. I will hear you on it, Mr. Fast.

(Argument.)

THE COURT. I think I am bound by Justice Parker's decision, but I think in order to make your record you should ask him the details of his conversation as to the oral contract as set out in his notice. I suppose that was done before the actual signing of this contract. 20

WITNESS. Yes, sir.

BY MR. FAST.

Q Mr. Polow, when did you see Mr. Michael Silverman and Mrs. Anna Silverman with regard to the sale of their property on Hillside avenue?

A Mrs. Anna Silverman called me up on the 21st of May, on a Saturday— 30

Q What year?

A 1927. She got two properties for sale on Hillside and she likes to sell them very bad.

Q And those properties are 177-179-181?

A Yes. She said her husband wasn't home but I could see him Monday morning. I went up to the purchaser and I brought him down and showed 40

him the properties and he looked them over and he said if he could see the owners and I said yes.

Q What was said about the commission?

A On Monday morning I came to Mr. Silverman. He said, "I got a purchaser." I asked him how much he want. He said, "\$60,000." He asked me how much is my commission and I said three and a half  
10 per cent. He said, "I will give you \$1000. Are you satisfied?" I said, "All right." He said, "Go ahead and make the sale."

Q Who were present?

A Mr. Silverman and Mrs. Silverman and myself, and I brought the purchaser down and I asked he should give me the option. He said, "If my wife will sign I will give you the option." We went down and made the contract and Lawyer Appel went up to Pleasantdale and she signed it. I was taken  
20 to the hospital with appendicitis—

Q I am not interested in that. Did you bring Mr. Rosenberg, the party who entered into this contract, Exhibit P1, to Mr. and Mrs. Silverman?

A Yes, sir.

Q And is that the man who purchased the property?

A Yes, sir.

PLAINTIFF RESTS.

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THE COURT. Mr. Semel, do you want to rest so that there will be a direction of a verdict?

MR. SEMEL. Yes, sir.

THE COURT. You might have a cause of action if they said they would sign an agreement.

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MR. FAST. I did not start the suit on that theory.

MR. SEMEL. I move for the direction of a verdict.

THE COURT. Under the case of Casale v. Gash, 138 Atl. 702, I will direct a verdict in favor of the defendants.

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

Exception noted as ground of appeal.

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CONTRACT

For Sale of Property

MICHAEL SILVERMAN AND ANNA SILVERMAN HIS WIFE

To

HARRY ROSENBERG

Dated May 23 1927

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Law Offices MORRIS APPEL Proctor Building 114 Market Street, Newark, N. J.

THIS AGREEMENT

made the Twenty-third day of May, in the year of our Lord One Thousand Nine Hundred and Twenty-seven

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Between MICHAEL SILVERMAN and ANNA SILVERMAN His Wife of the City of Newark, in the County of Essex and State of New Jersey, party of the first part;

And HARRY ROSENBERG of the City of Newark, in the County of Essex, and State of New Jersey, party of second part;

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Witnesseth, That the said party of the first part, for and in consideration of the sum of Sixty Thousand (\$60,000.00) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreement hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that We the said party of the first part, will well and sufficiently convey to

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the said party of the second part, his heirs and assigns, by Deed of Warranty free of all encumbrances on or before the 13th day of June next ensuing the date hereof, ALL that certain lot , tract , or parcel , of land and premises, hereinafter particularly described situate, lying and being in the City of Newark, in the County of Essex, and State of New Jersey.

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First Tract: BEGINNING on the Westerly side of Hillside Avenue at a point therein distant one hundred and ninety-five feet south of Bigelow Street; thence Southerly along Hillside Avenue forty-five feet; thence Westerly at right angles to Hillside Avenue one hundred and thirty feet; thence Northerly parallel with Hillside Avenue forty-five feet; thence Easterly one hundred and thirty feet to the place of BEGINNING.

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Second Tract: BEGINNING in the Westerly line of Hillside Avenue at a point therein distant two hundred and forty feet Southerly from the Southerly line of Bigelow Street; thence Southerly along the Westerly line of Hillside Avenue forty-five feet one and three quarter inches; thence Westerly at right angles to Hillside Avenue, one hundred and thirty feet; thence Northerly and parallel with Hillside Avenue forty-five feet one and three quarter inches thence Easterly at right angles to Hillside Avenue one hundred and thirty feet to the place of BEGINNING.

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And the said HARRY ROSENBERG for his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he, the said party of the second

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part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of SIXTY THOUSAND (\$60,000.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

10 On Execution of this agreement for which this is also a receipt \$1000.00.

On delivery of deed, cash, the balance to be paid, that is the value of the back shares.

By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof.

20 A. #1 Building & Loan Association holds a first mortgage on same.....55,000.00 Second Mortgage ..... 6,000.00

On Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest, payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at % payable for years.

30 The party of the first part warrants that the income is eight hundred and thirty-one dollars (\$831.00) per month and Nine Thousand Nine Hundred and Seventy-two dollars (\$9972) per year.

The party of the first part also warrants that there have been no violations to date.

The closing of title will take place three weeks from today, June 13th, 1927.

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This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And the said party of the part hereby agrees to pay to the licensed and authorized agent a commission of % on the purchase price aforesaid. 10

And it is further agreed, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the — day of — next ensuing the date hereof, and from thence take the rents, issues and profits to — and their use.

And it is further agreed, by the parties hereto, that the said deed shall be delivered and received at office of MORRIS APPEL 114 Market Street, Newark, New Jersey between the hours of 10 o'clock in the forenoon and 2 o'clock in the afternoon on the said 13th day of June next ensuing the date hereof. 20

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed. 30

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

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The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

10 In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

20 It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Superintendent, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply.

30 It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments, or by adverse possession.

The premises above described are sold subject to restrictions appearing of record, and zoning ordinances, if any.

40 If at any time before the delivery of the deed the premises or any part thereof shall be or shall have been affected by any assessment or assess-

ments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed.

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And it is hereby agreed by and between the parties hereto that in case any street improvements are made, or have been made, upon which the property mentioned herein is located, up to the time of the delivery of deed, but not assessed, such assessment shall be borne by the party of the first part their heirs, executors, administrators and assigns.

20

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of \_\_\_\_\_ which they hereby fix and settle as liquidated damages therefor.

In Witness Whereof, the said parties have hereto interchangeably set their hands and seals the day and year first above mentioned.

30

Signed, Sealed and Delivered in the presence of

Michael Silverman L. S.  
Anna Silverman L. S.  
Harry Rosenberg L. S.

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the

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date for the delivery of deed and execution of this contract to at same hour and place

Witness hand and seal this day of A. D. 19

10 STATE OF NEW JERSEY COUNTY OF ESSEX ss.

20 Be it Remembered That on this 23 day of May, in the year of Our Lord One Thousand Nine Hundred and Twenty-seven, before me the subscriber, AN ATTORNEY AT LAW OF THE STATE OF NEW JERSEY personally appeared MICHAEL SILVERMAN AND ANNA SILVERMAN HIS WIFE who, I am satisfied, is the grantors mentioned in the within Instrument, to whom I first made known the contents thereof and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

30 And the said ANNA SILVERMAN being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

Anna Silverman L. S. Michael Silverman

In consideration of (\$ ) dollars to in hand paid hereby assign to this contract and all rights thereunder.

Witness our hand and seals this day of A. D. 19 211—N. J. Contract for Sale of Property. Full Covenants.

Karkus Brothers, Inc. 10 Law Blank Publishers, Perth Amboy, N. J.

TO MICHAEL SILVERMAN and  
ANNA SILVERMAN:

149 Fabyan Place, Newark, N. J.

10 In pursuance to the oral agreement made on Monday, the 23rd day of May, 1927, with the undersigned, notice is hereby being served upon you setting forth the terms of such oral agreement to wit: That I was to sell the property at 177-179-181-183 Hillside Avenue, Newark, New Jersey, for the sum of \$60,000.00, and that I was to receive commissions of \$1000. that such sale has taken place, and the premises have been purchased by Harry Rosenberg of 827 South Eighteenth Street, Newark, New Jersey.

Dated, Newark, N. J., May 25th, 1927.

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ISIDOR POLOW (signed)

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## New Jersey Court of Errors and Appeals

ISIDOR POLOW,

*Plaintiff-Appellant,*

*vs.*

MICHAEL SILVERMAN and ANNA  
SILVERMAN,

*Defendants-Appellees.*

*On Appeal.*

### BRIEF FOR APPELLANT.

#### Facts.

This suit is brought by the plaintiff, a real estate broker, against the defendants, owners of certain property in the City of Newark, for commissions on the sale of real estate. The plaintiff was verbally employed by the defendants to sell their property for a certain sum, and was to receive a commission of One Thousand Dollars (\$1,000.00) for his services. The plaintiff was so authorized on May 23, 1927, and under the statute hereinafter mentioned, served a notice upon the owners on May 25, 1927. A contract for sale of the property was entered into between the owners and the purchaser produced by the plaintiff on May 23, 1927. The signing and execution of the contract for sale was admitted (State of Case, p. 11). The receipt of the notice on May 25, 1927, was also admitted. (State of Case, p. 12). It was further admitted that no notice was sent revoking the plaintiff's authority (State of Case, p. 13).

The broker relies upon the proviso in the following statute, for his right to commissions against the defendants:

“Provided, however, that any broker, or real estate agent who may hereafter be employed by any owner of real estate by oral agreement, to sell or exchange any real estate belonging to such owner, and who shall actually effect the sale or exchange of such real estate pursuant to such oral agreement, before the same shall have been terminated by such owner, in writing, as hereinafter provided, may recover from such owner the amount of commission on such sale or exchange, provided such broker or agent shall within five days after the making of such oral agreement serve upon such owner a notice, in writing, setting forth the terms of such oral agreement and stating the rate or amount of commission to be paid thereunder, and provided said owner shall not have repudiated or terminated such agreement prior to the actual sale or exchange of said real estate; said owner shall have the right, at any time after receiving such notice, to repudiate or terminate such oral agreement by serving upon such broker or agent a notice, in writing, to that effect, and upon the repudiation or termination of such agreement by the serving of such notices upon such agent or broker prior to the actual sale or exchange of such property by such agent, such agreement shall be null and void and no recovery of any commission shall be had thereunder; provided, however, that if any broker or agent shall have entered into negotiations with a prospective customer in good faith, under such agreement, for the sale or exchange of such property, and such negotiations shall be pending at the time of the repudiation or termination of such agreement by such owner, and such sale or exchange is subsequently consummated between such owner and such customer, such agent or broker shall be entitled to recover

his commission on such sale or exchange, notwithstanding the repudiation or termination of such agreement. The notice provided for herein shall be served either personally or by forwarding the same to the person to be served by registered mail, to the last known postoffice address of such person (Rev. 1877, p. 446 (C. S., p. 2617), as amended L. 1911, c. 331, p. 703, L. 1918, c. 273, p. 1020.”

The Court feeling itself bound by the case of *Casale v. Gash*, 138 Atl. Rep., page 702, directed a verdict in favor of the defendants, and appeal is now taken by the plaintiff from such direction.

## THE LAW.

### POINT I.

The owners of realty are responsible for commissions to a real estate broker, notwithstanding that the authorization was verbal, where the broker has served the notice required by P. L. 1918, p. 1020, c. 273; Cum. Sup. Volume I, p. 1452.

### POINT II.

Statutes in derogation of the common law are to be strictly construed.

These two points dealing with the one statute, may be argued together. It will be seen from a study of the facts and the statute, that the plaintiff did all that was required of him, within the prescribed period. Notwithstanding this, the Court directed a verdict in favor of the defendants, owners, feeling bound so to do in face of the case of *Casale v. Gash*, 138 Atl. Rep. 702.

In the *Casale* case, the facts were materially different from those of the case at bar. In the

cited case, no notice was served by Casale, the broker, within the five days required by the statute, but suit was brought by him on a promise made by Gash, the owner, two days after a written agreement of sale was signed between Gash and the purchaser produced by Casale, to pay to Casale, a commission. Obviously, any promise made by Gash to Casale, whether *in writing or not*, after the contract of sale was made, would not be enforceable under the cases of *Stout v. Humphreys*, 69 N. J. Law 436, and *Bagnole v. Madden*, 76 N. J. Law 255, 69 Atl. Rep. 967, and Casale, not having served a notice within the five day period after the oral contract of employment, could not recover under the statute. The finding of the Court, therefore, that the broker could not serve a binding notice upon the owner after the actual sale, although within the five day period, is dictum.

The contract entered into between the defendants and the purchaser obtained by the plaintiff, constituted the "actual sale" contemplated by the proviso as the basis of the right to commission. *Baron v. Wisnowski*, 130 Atl. Rep. 450.

Section 10 of the Frauds and Perjuries Statute (without the amendment of 1918) first became a part of our Statute Law in 1873. *Stout v. Humphreys*, 69 N. J. Law 436. Previous thereto, no written authorization was required in order for the broker to institute suit for commissions against the owner. 9 Corpus Juris 558. *Heyn v. Philips*, 37 Cal. 529. This statute is in derogation of the common law and therefore must be strictly construed. *Selvage v. Talbott*, 95 N. E. Rep. 114 (Indiana Supreme Court), citing *Thornberg v. American Strawboard Co.*, 141 Ind. 443, 40 N. E. Rep. 1062.

In applying this statute as it exists today, affecting the case at bar, the Court could have found either for the owners or for the broker.

(a) It could have found the loss to be on the broker under the dictum of *Casale v. Gash*, 138 Atl. Rep. 702, because a notice was not served before the contract of sale was effected, although within the five day period; or

(b) It could have found the loss on the owners because they made a contract before the five day period after the oral contract of employment to negotiate the sale was past, during which time the broker could have, and did serve a notice, as required by the statute. Ignorance of the law being no excuse, *they knew that they entered into the contract subject to the brokers serving a notice as required by the statute, thereafter and within the five day period, without the right of revoking the same, given to them by the statute, in as much as they, by their own act, entered into the contract of sale; the revocation being required by the statute to be given by the owner to the broker before the entering into the actual sale.*

Narrowed down to the fine point, the alternative situation is: Does the law require the broker to serve the notice before the contract is drawn, and within five days, or does the law require the owner not to enter into any contract for sale within the five day period if they want to reserve for themselves the right to revoke any notice that the broker might serve within that period?

Unless it is held that the second proposition is correct, the broker finds himself in the mercy of the owners. The owners may very easily enter into a contract immediately after the au-

thorization to the broker, and the bringing together of the parties by the latter, notwithstanding anything that the broker may do, and if the first proposition is correct, the broker will not be able to recover his commissions, although he does everything that the statute required him to do. It appears contrary to good morals and, at first sight, shocking to find that in this situation, the broker has no remedy. If the first proposition is upheld, the act would be without any strength, its applicability being subject to the will of one party (the owner). Such construction should be given a statute that will give it full strength. If the applicability of the statute should be subject to the whim or will of one party, much of the strength, if not all, of the statute is withdrawn.

It is respectfully contended that the second proposition should be the correct one. There neither the broker nor the owners have any unfair advantage over the other. The one must do certain things, the other refrain from doing certain things, so that he might reserve his rights, and neither can do anything to interfere with the rights of the owner. It is the more fair of the two propositions and gives full strength and vigor to the statute.

Further, if there is any doubt as to which construction should apply, the second proposition should be applied. The statute is in derogation of the common law rights of the broker to recover without any writing. Therefore, any statutory rights given to the owners, derogatory to their common law liability, are to be strictly construed.

A situation somewhat analogous to the case at bar, is as follows: X is a laborer for the Y Cor-

poration. His labor is used in the erection and construction of a building, and under the mechanic's lien act, is entitled to a preference in payment. (Section 6 Mechanic's Lien Law.) Wages are due X for four months. The Y Corporation then is placed in insolvency. Under Section 83 of the Corporation Act, X has a prior lien only for his labor performed or rendered within two months next preceding the date when proceedings in insolvency were instituted. Reading the two sections of the two acts together, the facts would be as follows: X is entitled to a preference in payment for his labor of four months, but if the corporation for whom he performs, is placed in insolvency, then he is entitled to preference of only the two months next preceding the institution of insolvency proceedings.

The situation of the case at bar, to put it in the same way, would be: The broker (X) is entitled to his commissions if he serves a notice within five days after the oral contract of employment, but if the owner enters into a contract of sale before the five days are up, then he is not entitled to any commissions.

Under the reasoning of *Casale v. Gash* case *supra*, X, the laborer, would be entitled to a preference for wages for only two months; but that is not the law. In *Meister v. J. Meister, Inc.*, Volume 6, N. J. Adv. Rep., page 1136 (#24), it was held that X was entitled to four months' preference. In that case, the two statutes were read together. In the case at bar, we deal with only one statute, but raising a situation similar to that raised by the other two statutes referred to, and we respectfully contend that the reasoning should not be any different. The reasoning in the Meister case is applicable to the case at bar, and the broker having done all that he

was obliged to do under the statute, should be allowed recovery thereunder. To allow him to recover, would be to give a reasonable construction to the statute.

It is therefore submitted that for these reasons the trial court erred in directing a verdict in favor of the defendant, after the defendant rested.

Respectfully submitted,

FAST & FAST,  
Attorneys of Appellant.

LOUIS A. FAST,  
Of Counsel.

87 OCT. 1. 1928

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

Between

ISIDOR POLOW,

Appellant,

and

MICHAEL SILVERMAN, *et als.*,

Appellees.

### BRIEF FOR APPELLEES.

#### Facts.

The facts set forth by plaintiff-appellant in his brief are not disputed except that they are not complete. It was admitted in the records that the agreement to purchase was not consummated by the purchaser (see State of Case, p. 12, ll. 14, 15, 16, 17 and 18 inclusive).

#### THE LAW.

##### Answer to Point One.

Point One is not disputed except as the same is construed by the decision in *Casale v. Gash*, 138 Atl., page 702, which holds "if, as we held in *Baron v. Wisnowski*, *supra*, a written contract of sale will suffice as an actual sale supporting the right to commission under oral employment wherein notice has been served and not repudiated, it follows that in such cases notice should be given before that actual sale is made."

In the case at bar, it is admitted that the contract of sale was entered into between the owner and the purchaser on May 23, 1927, and that the notice was given on May 25, 1927, two days after

the contract was signed. The trial court in the case at bar, directed a verdict under the case of *Casale v. Gash, supra* (see State of Case, p. 15, ll. 8, 9 and 10).

#### Answer to Point Two.

This point is not disputed except that the reasoning of appellant does not seem to be consistent with said point.

Appellant in his brief on page 5, lines 1, 2 and 3, says as follows: "in applying this statute as it exists today, affecting the case at bar, the Court could have found either for the owners or for the broker." Assuming that this is correct, it would appear that appellant, in these proceedings, is not questioning the legality of the direction of the verdict made by the trial court, but is questioning what would appear to be the exercise of the trial court's discretion in directing a verdict in favor of the owner instead of for the broker. Appellant argues with reference to that part of the statute which deals with the revocation of the broker's authority. The statute reads as follows: "said owner shall have the right *at any time* after receiving such notice to repudiate or terminate such oral agreement by serving upon such broker or agent a notice in writing to that affect and upon the repudiation or termination of such agreement by the service of such notices upon such agent or broker prior to the actual sale or exchange of such property by such agent, such agreement shall be null and void and no recovery of any commission shall be had thereunder; provided however, that if any broker or agent shall have entered into negotiations with a prospective purchaser in good faith, under such agreement for the sale or exchange of such property, and such

negotiations shall be pending at the time of the repudiation or termination of such agreement by such owner, and such sale or exchange is subsequently consummated between such owner and purchaser such agent or broker shall be entitled to recover his commission on such sale or exchange, notwithstanding the repudiation or termination of such agreement."

Counsel for appellant on page 5 of the brief argues that the revocation is required by the statute to be given by the owner to the broker before the entering into the actual sale. There was no revocation by the owner or the agent and there was no consummation of sale.

The statute, as construed in *Casale v. Gash* holds that the appellant had no cause of action for the reason that the notice sent by the broker to the owner was sent two days after the contract was signed.

If the broker who based his authorization and right to commissions upon the statute in question, had conformed to the statute, a cause of action would have accrued in his favor.

The testimony of the broker shows that the first request made to him to obtain a purchaser was made by the appellee, Mrs. Silverman, on Saturday, May 21st, at which time he was presumably advised that the property in question was for sale. His testimony also shows that before he was engaged or authorized to act as broker, he brought the prospective purchaser to the owner, introduced him, and on the same day was authorized to act as broker and was promised \$1,000.00 for his services. On the very same day he went to the office of Lawyer Appel, had the contracts drawn and had them signed and executed. (See State of Case, p. 14, ll. 4-20, inclusive.) Appel-

lant may have been over zealous in his desire to earn his commission and by reason of which zealousness he failed to serve notice immediately upon the owner which he could have done before they went to the lawyer's office to draw the contracts.

Counsel for the appellant argues that he had five days in which to do so.

While it is true that the statute allows five days, it was evidently the intent of the legislature that this amount of time be allowed where the notice had to be served by mail. In the case at bar, five days' time was not necessary. The broker could have asked for a written authorization from the owner when the promise to pay was made or could have written out a notice and served it upon the owner before he took the owner and purchaser to the lawyer's office to draw and sign the contracts.

It would appear from the above argument that the owner was taking advantage of the statute to deprive the agent of his commission. This is not true for the reason that the sale was never consummated by the purchaser.

The theory of the court regarding revocation which appears to be criticised by the appellant is not to be regarded as unjust or inequitable for the reason that the statute gave the right of revocation at any time before the actual sale to a purchaser produced by any agent who is authorized to sell. If the statute did not give this right of revocation before a sale, it would be a very easy thing for agents to demand commissions from the owner after a sale by the owner, the agents advancing the argument that they had purchasers who were ready and willing to purchase

thereby perpetrating a fraud upon the owner, after the owner had sold to someone else.

It is for the reasons above stated that appellee respectfully submits that the verdict directed in favor of the plaintiff was correct in law and should stand.

Respectfully submitted,

MEYER M. SEMEL,  
Attorney for Defendants.

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