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Record No. 6152

In the
Supreme Court of Appeals of Virginia
at Richmond

CHARLES R. PRICE

v.

MABEL G. MARTIN

FROM THE CIRCUIT COURT OF THE CITY OF RADFORD

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6152

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 8th day of June, 1965.

CHARLES R. PRICE, Appellant,

against

MABEL G. MARTIN, Appellee.

From the Circuit Court of the City of Radford
William S. Jordan, Judge

Upon the petition of Charles R. Price an appeal is awarded him from a decree entered by the Circuit Court of the City of Radford on the 11th day of January, 1965, in a certain proceeding then therein depending wherein Mable G. Martin was plaintiff and the petitioner was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 8 } The Commonwealth of Virginia,

To the Sergeant of the City of Radford, Greeting:

We Command You, That you summon Max C. Rupe, Attras S. Rupe, 1515 Second Street to appear before the Judge of our Circuit Court of the City of Radford, at the Courthouse thereof, on the 6th day of January, 1965, at 9:00 o'clock A. M., to testify and the truth to say in behalf of the complainant, in a certain matter of controversy in our said Court, before the said Judge, depending and undetermined, between Mabel G. Martin, Plaintiff, and Charles R. Price, Defendant. And have then there this writ.

Witness, Giles W. Goodykoontz, Clerk of our said Court, at the Courthouse, this 5th day of January, 1965, and in the 189th year of the Commonwealth.

GILES W. GOODYKOONTZ, Clerk
By FRANCES N. SUTTON
Deputy Clerk.

(on back)

Executed on the 5th day of Jan., 1965, in the City of Radford, Virginia, by delivering a true copy of the above mentioned papers to each other, to Max C. Rupe and Attras C. Rupe in person.

FRED .....
Sergeant, City of Radford, Va.
By .....
Deputy Sergeant.

* * * * *

page 11 }

* * * * *

DECREE.

This cause, which has been regularly matured, docketed and set for hearing on the joint motion of the parties hereto, after acceptance of service of process by the respondent, came on this 6th day of January, 1965, to be heard *ore tenus,* upon the request of the parties, on the Bill for a Declaratory Judgment filed by Mabel G. Martin, the complainant; upon the answer thereto filed by the respondent, timely service of said answer having been accepted by the complainant; upon the evidence of both parties heard in open court, both being present in person and by their respective attorneys; upon the further evidence of Max C. Rupe and Ted M. Hannah, heard *ore tenus* by the Court, and upon the exhibits filed in open court: and after conclusion of all of said evidence, said cause was argued by counsel.

After maturely considering all of the evidence offered by the parties, and after hearing and considering the arguments of counsel, the Court is of the opinion, and doth find, that the contract which forms the basis for this suit was preceded by a lawful and valid condition precedent to its taking effect; that said contract was to be effective only on condition that another purchaser with whom negotiations had been conducted declined to purchase the property mentioned in said contract; that knowledge of said condition was possessed by Max C. Rupe, who was the then respondent's agent, which knowledge was imputed to the respondent and which condition was binding upon him; that such other purchaser did not decline to purchase said real estate, but did contract and agree to purchase the same, and did pay valuable consideration for a contract of purchase; and that, inasmuch as the condition precedent to the validity of the agreement mentioned in the Bill of Complaint did not occur (i. e. such other prospective purchaser did not decline to purchase said real estate), said contract of sale never took effect and did not in fact mature into an effective enforceable agreement of sale, the effect of all of which is to vitiate the same and relieve the complainant of any further obligation thereunder.

page 12

UPON CONSIDERATION OF ALL OF WHICH, the Court doth declare. adjudge, order and decree that, as between the parties hereto, the said Charles R. Price has no valid contract enforceable against Mabel G. Martin for the conveyance of the real estate mentioned in the Bill of Com-

plaint, nor any rights thereunder, and that said contract is hereby declared to be null, void and of no effect.

In view of the foregoing conclusions, the Court deems it unnecessary to decide and rule upon the remaining legal and factual issues raised by the pleadings and the evidence.

The Bill of Complaint for Declaratory Judgment having contained a prayer for affirmative relief by way of injunction; and the respondent having had notice thereof and showing no cause why such relief should not be granted forthwith; and the Court deeming it necessary and proper that said relief be granted, the Court doth ADJUDGE and ORDER that Charles R. Price be, and he hereby is, forever restrained and enjoined from further asserting any rights under said contract, or of suing for performance thereof or for damages. (Nothing herein contained shall have any effect, however, on any of the usual rights of appeal from the adjudications herein contained.)

To the rulings, findings, declarations, holdings and adjudications of the Court herein contained, the respondent duly excepts on grounds assigned at bar, and which may be filed in writing within five (5) days from the date page 13 } hereof.

The Court doth certify that this proceeding was conducted and concluded by way of declaratory judgment on the motion and by the consent of all the parties, under the provisions of Sections 8-578 through 8-585 of the Code of Virginia and other applicable law; that an actual controversy existed between the parties; that the effect of a written instrument was involved; and that the whole case presented an instance of actual antagonistic assertion and denial of right. The alleged contract was signed by the complainant in the City of Radford, Virginia, involved real estate situated in the City of Radford, Virginia, the suit was such that it could have been brought in the City of Radford, Virginia, had no declaration of right been sought, and the respondent is a resident of the City of Radford, Virginia.

Nothing further remaining to be done in this cause, it is ORDERED that the same be, and it hereby is, stricken from the docket, at the cost of the respondent.

I ask for this Order:

JOHN B. SPIERS, JR.
Counsel for Complainant.

I have seen this Order, and object thereto:

RICHARD W. DAVIS
Counsel for Respondent.

Enter.

W. S. JORDAN, Judge.

Date: January 11, 1965.

• • • • •

page 15 }

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To the Clerk of the Circuit Court of the City of Radford:

Counsel for Charles R. Price, the defendant in the above styled case in the Circuit Court of the City of Radford, Virginia, hereby gives notice of appeal from the order entered in this case on January 11, 1965, and sets forth the following assignments of error:

(1) That the Court erred in admitting into evidence over defendant's objection prior transactions between the defendant and the real estate broker and prior transactions between the real estate broker and third parties.

(2) That the Court erred in permitting the plaintiff, over the objection of the defendant, to examine the real estate broker as an adverse witness.

(3) That the Court erred in allowing testimony into evidence to vary the terms of the written contract.

(4) That the Court erred in holding that the real estate broker was the agent of the defendant, Charles R. Price.

(5) That the Court erred in holding that the plaintiff was not bound by the terms of the written contract.

(6) That the Court erred in holding that the plaintiff was not obligated under the terms of the written contract to convey the property to the defendant.

(7) That the Court erred in granting an injunction against

the defendant, Charles R. Price, in the decree entered on January 11, 1965.

RICHARD W. DAVIS
Counsel for Charles R. Price.

page 16 } I certify that a copy of the foregoing Notice of Appeal and Assignments of Error was mailed to John B. Spiers, Jr., Attorney of Record for Mabel G. Martin, at his office in the Spiers Building, Radford, Virginia, on the 27th day of February, 1965.

RICHARD W. DAVIS
Counsel for Defendant.

Filed in the Clerk's Office, Circuit Court, City of Radford the 1st day of March 1965 at .... o'clock ....M.

Teste:

GILES W. GOODYKOONTZ, Clerk.

• • • • •

Virginia:

In the Circuit Court of the City of Radford.

Mabel G. Martin, Complainant,

v.

Charles R. Price, Respondent.

TRANSCRIPT OF EVIDENCE AND INCIDENTS OF TRIAL.

This proceeding came on the 6th day of January, 1965, to be heard on a Declaratory Judgment filed by the Complainant and the Answer duly filed by the Respondent. The Court having inquired as to whether both parties were ready for trial and receiving an affirmative answer, had all the witnesses duly sworn and directed the plaintiff to call the first witness.

Mr. Spiers: I call Mr. Charles Price as an adverse witness.

CHARLES PRICE,

By Mr. Spiers:

Q. Mr. Charles R. Price, generally trade as Price, Enterprises, is that correct?

A. Right.

Q. You are the party that executed this contract dated the 17th day of December, 1964?

A. That's correct Sir.

Q. Do you know how much property you bargained for, Mr. Price?

A. Do I know how much property? You mean the dimensions of the property? I do.

Q. How much?

A. It's 300 by 260 feet, approximately.

page 2 } Q. Is the price of $19,500.00 by the foot, or total or what?

A. I suppose it's by the foot.

Q. How much was it by the foot? Roughly.

A. $75.00 a front foot.

Q. You knew the property about which you spoke and where it was located?

A. Oh yes.

Q. You could visually see the distance between Norwood Street and the railroad?

A. Oh yes.

Q. Now you are in the restaurant business in the City of Radford and in Pulaski County, are you not?

A. That's right.

Q. Don't you operate or own the Hob-Nob, the Biff-Burger, the Waffle Shop?

A. I do.

Q. I believe you are engaged in preparing a new place of business across the street?

A. No, that is not mine. There's no connection. I have a place in Blacksburg.

Q. Mr. Price, how long have you been acquainted with Mr. Max Rupe?

A. I've known Max for four or five years.

Q. Has the relationship been close?

A. Nothing other than business transactions; that's all.

Q. The business transactions have been frequent, have they not?

A. Not frequent, no.

Charles Price.

Q. You have acquired other pieces of property and disposed of property through Max Rupe?

page 3 } A. One piece of property, that's all in the last five years.

Q. You acquired it through Mr. Rupe and you sold it through Mr. Rupe?

A. That's right.

Q. Specifically the property that was handled by Mr. Rupe was right across the street from the Court House?

A. Right across the street.

Q. On that occasion did you let it be known to Mr. Rupe that you wanted a site near the Court House?

A. Not necessarily.

Q. Whether necessarily or not, did you make it known to him?

A. When he showed me the property, then I did tell him I would like to buy it if it could be bought.

Q. Did he contact you or did you contact him?

A. I can't recall. That's been a couple or three years ago.

Q. You don't remember whether you got a hold of him or he got a hold of you?

A. I don't, I can't really say.

Q. Do you know whether or not he had the property listed for sale?

A. Well. I assumed he had it listed.

Q. Did he ever at any time tell you that he could deliver this property or get you a deed for it?

Mr. Davis: This is altogether different property.

Mr. Spiers: Your Honor. please—

Judge: The nature of the transaction between this man and the alleged agent for Mrs. Martin, I think it would be proper to find out their prior relationship.

page 4 } Mr. Davis: Exception.

Mr. Spiers: I have forgotten what my question was, but what I'm really after is that did Mr. Rupe, when he showed you that property, tell you he had a listing or that he knew the seller would sell or anything like that indicating that he had any agency agreement with anyone?

A. Which property are you speaking of?

Q. Right across the street.

A. I believe he did. I believe, if I recall right, that he was your agent at that time.

Charles Price.

Q. That's the whole point, he was not. I just wanted to know whether or not you knew about it.

A. I didn't know about it.

Q. At any rate he did show you the property and you don't know for whom he was acting for other than what he may have told you or indicated to you?

A. No. he told me who he was acting for when he showed me the property.

Q. He told you he had a listing on it?

A. I can't recall that he did tell me he had a listing on it, I don't recall.

Q. All that he told you was that he knew who owned it. Isn't that about what he told you?

A. That he knew who owned the property. That was back sometime before I ever purchased the property.

Q. A good while before you purchased it?

A. I couldn't say exactly how long, but I'd say some few months.

page 5 } Q. Did you tell Mr. Rupe how you wanted to buy that property?

A. I don't believe I did. I think the terms were set up by the seller to me.

Q. You are just telling the Court that you don't believe, you don't know, you don't have any recollection?

A. I don't have.

Q. Now, sometime later, I believe that property was sold by you?

A. It was.

Q. Sold to the Karres Brothers who were building the shopping center?

A. That's right.

Q. Who contacted you about that?

A. Mr. Rupe.

Q. You did not have it for sale, did you?

A. I didn't have it for sale, but Mr. Rupe was their agent, or acting as their agent at the time.

Q. You paid him a commission though, didn't you?

A. I paid him a commission.

Q. That was the purchaser and he came to you and inquired if you wanted to sell that property?

A. Right.

Q. You made a price on it and then it was sold and you paid Mr. Rupe a commission?

A. That's right.

Charles Price.

Q. He had not been your agent in trying to sell this real estate. He brought to you the prospect, did he not?

page 6 } A. That's right.

Q. Still and all, in the signing of the contract he put himself down as agent and you paid him 5% commission.

A. Right.

Q. Now, he advised you then that he was acting for the Karres Brothers, didn't he?

A. I can't recall.

Q. Did he do what he did before and just tell you who the buyer might be? You don't remember just what the transaction was exactly.

A. Mr. Spiers, he's a licensed real estate agent and that's the way I handled it.

Q. You didn't do anything wrong, Mr. Price, I'm just trying to figure out what Mr. Rupe was doing wearing both hats. He did approach you and you sold him and you paid him a commission?

A. That's correct.

Q. Now, Mr. Price, you have been looking for a prospective site for another place of business on Norwood Street for several months, have you not?

A. Another business on Norwood Street?

Q. Yes sir.

A. I wouldn't say that I had been looking for a place of business.

Q. Let me ask you this. Isn't this a fact that you have contacted several real estate agents and told them you wanted another site and asked them if they knew of any to get in touch with you. Bondurant Insurance for one, Max Rupe for another?

page 7 } A. I did ask Mr. Bondurant about a vacant building, if there was something I could rent, that I needed warehouse space. I rent a building from Graflo Rubber Company now.

Q. I'm talking about if you have not made it known to two or more real estate agencies that you are interested in buying a piece of property in the east part of Radford for the purpose of opening a business?

A. No sir, that is not true. Mr. Rupe is the only man that I have talked to with reference to that.

Q. When did you talk to Mr. Rupe?

A. I talked to Mr. Rupe about this particular piece of property on Norwood Street about the first of November. That

Charles Price.

was the first time we talked about it and we drove down and looked it over and looked at the lot, that was around the first of November.

Q. Did you tell him you were interested in the property?

A. I did.

Q. This was back in November?

A. I'm not sure of the exact date, but it was sometime before all this bubbled up.

Judge: You say you drove by the property with Mr. Rupe at that time?

A. I went down with Mr. Rupe and we looked at the lot.

Q. You got out of the car, didn't you?

A. I got out of the car.

Q. You and he walked around this property?

page 8 } A. We walked over the property, they were dismantling something—the building had burnt down.

Q. You did go to the property and look around?

A. That's right.

Q. Did Mr. Rupe tell you who owned the property?

A. He told me who owned the property then.

Q. Did you tell him you were interested in the property?

A. I told him I was interested in the property.

Q. Did you ask him to see whether Mrs. Martin would sell it to you?

A. At that time I didn't ask him. Later on, a couple of weeks later, I did.

Q. That was sometime in November, at least a week or two before this deal finally came about?

A Yes.

Q. All right then, did Mr. Rupe tell you he would do that?

A. Mr Rupe said he would.

Q Do you know whether he contacted her?

A. I suppose he did contact her. He called me about it later.

Q. He called you about it later, what did he say?

A. He told me that the property could be bought and the dimensions of it. I didn't have the dimensions of the lot at the time. Looking at it you couldn't tell the exact dimensions. He gave me the approximate dimensions.

Q. He gave you the dimensions?

A. Approximately.

Charles Price.

Q. He told you roughly that it was 260 by 300.

page 9 } A. Yes.

Q. Did he tell you where the 300 was?

A. I can't recall. I'd say the 300 would be 300 deep.

Q. At any rate he did tell you that roughly he thought it was 260 by 300.

A. Can I retract something?

Q. Yes.

A. First he said 250 by 300 Then at the time he brought the contract for me to sign, which Mrs. Martin had signed, he said the lot was underestimated in his thinking, that it was 260 by 300.

Q. A difference of 10 feet?

A. Yes.

Q But basically the dimensions were known within 10 feet, or he told you the dimensions within 10 feet of the 260 by 300.

A. He did. It was his idea looking at it and seeing that it was 260 by 300.

Q All right, so sometime later you did advise him that you were interested, and he did get in touch with Mrs. Martin, apparently according to what he told you. and got back in touch with you and told you that it could be bought. Did he tell you the price?

A. At the particular time I believe he said around $75.00 a foot.

Q. Did you still show your interest in it?

A. I still did.

Q. Did you tell him you were interested at that price?

A. I was still interested at that price.

page 10 } Q. What did you tell him to do, see if she would sell it?

A. Yes.

Q. What was the next thing that happened as far as you and Mr. Rupe were concerned?

A. I can't recall anything that happened between that time and the date that he brought the contract for me to sign.

Q. A month later roughly? I don't want to hold you to any certain date.

A. I can't recall.

Q. Roughly it was around the first of November?

A. Around the 10th. Somewhere between the 1st and 10th.

Q. Between the 1st and 10th when he first discussed it with you and you all went down and looked at the property, right?

Charles Price.

A That's right.

Q. Did you go back any other time?

A. No, I never went back, not with Mr. Rupe. I drove by the property myself but I didn't get out.

Q. And then you think that it was between the 1st and 10th of November and then a couple or three weeks later, would you say?

A. I'd say about three weeks later probably.

Q. That would have been around the end of November?

A. Or the first of December sometime. The dates I can't recall.

Q. You told Mr. Rupe then to find out if it could be bought at that price. Then it wasn't until the 17th that he came over with this agreement?

page 11 } A. He came over with the agreement on the 17th. I signed it.

Q. Does your attorney have the original?

A. I have a duplicate of it.

Q. That has on it Realtor's Copy. Isn't it correct that you got another copy or is that the one Mr. Rupe gave you?

A. This copy?

Q. Did he give you a white copy?

A. No, he gave me a yellow copy or a green copy.

Q. That's the realtor's copy there. That's what it says down here.

A. Yes.

Q. Mr. Rupe has given you that since —

A Gave me what since?

Q. This contract.

A. He gave it to Mr. Davis.

Mr. Davis: He gave that to me.

Mr. Spiers: I beg your pardon. At any rate that is not the contract he gave you. He gave you a duplicate on a different paper which was yellow or some other color.

A. Yellow or green I'm not too sure.

Q. That seems to be an exact copy or that is the original and the others are duplicates, are they not? Now when he brought you that contract, how was it filled in, do you remember?

A. How was it filled in?

Q. Yes, was it just like that or did he fill anything in after he got there?

Charles Price.

A. Mr. Rupe filled nothing in after he got there, nothing whatsoever.

page 12 } Q. It says $19,500.00, does it not?

A. Right.

Q. Would you then read the next thing?

A. $5,000.00 cash in hand paid by purchaser to agent as agent for seller, receipt of which is hereby acknowledged by seller and agent, said sum to be held by agent until settlement and then applied on purchase price, purchaser agrees to buy and seller agrees to sell for the sum of BLANK all that certain piece, or parcel of land described as follows, to-wit:

Q. Then it has $5,000.00 on delivery of deed.

A. Right.

Q. And $3,000.00 for each year for four years, last payment on fifth year $2,500.00 plus 5% interest. Lot 260′ x 300′ (approximately). Then the purchase price shall be paid as follows: It substantially recites the terms.

A. $5,000.00 cash on delivery of deed.

Q. We would like to introduce this, Your Honor.

Judge: I'll mark the sales contract plaintiff's Exhibit #1.

Q. Mr. Price, do you recall the time of day this contract was tendered to you?

A. I can't recall the exact time of day. Mr. Spiers, no, but I'd say around 11:00 or 11:30.

Q. In the morning?

A. I believe it was. I can't be exact.

Q. Do you know whether it was on the 17th?

A. I suppose it was the 17th.

page 13 } Q. Do you remember whether it was the 17th?

A. I could look at the calendar.

Q. Well, the 17th was on a Thursday. It was dated the 17th. I just wondered if he gave it to you on the 17th. Do you recall if it was on a Thursday?

A. I can't recall, Mr. Spiers.

Q. Do you know where it was given to you?

A. Oh yes, it was given to me over at the Hob-Nob.

Q. Mr. Rupe didn't tell you anything about a prior offer or anything else?

A. Mr. Rupe told me nothing as I recall at that time.

Q. He didn't tell you that someone else had the refusal of it until Monday?

Charles Price.

A. He didn't tell me anybody had a refusal on it, Mr. Spiers.

Q. You signed this contract in the presence of Mr. Rupe?

A. I certainly did.

Q. Did Mr. Rupe sign it in your presence?

A. I can't recall whether he did.

Q. Did you pay him $5,000.00?

A. I did not pay him $5,000.00. At the time I asked him if it was necessary. He told me at the time it was not necessary at the time because the contract wasn't written up that way.

Q. But it was, wasn't it? $5,000.00 cash in hand. We admit, do we not, Mr. Price, that $5,000.00 was not paid regardless of the reason?

A. It wasn't paid at the time, it has been paid since.

Q. The check for that was not even written until the 26th of December, was it?

page 14 } A. I can't recall the date exactly.

Q. This is it. You can have it. I made that one. Does that look like your writing?

A. That's my writing.

Q. You had given that to your attorney, had you not?

A. That I gave the check to Mr. Davis?

Q. Yes.

A. I gave the check to Mr. Rupe.

Q. On the 26th of December?

A. If that's what the date of the check is.

Q. That's the date it says on here. Whatever date is on that check is the first date you delivered anything to anybody, is that right?

A. That's right.

Mr. Spiers: I want to introduce the photostatic copy of the check, Your Honor.

Judge: A photostatic copy of the check will be marked plaintiff's Exhibit #2.

Mr. Spiers: I think that Mr. Davis would also stipulate that the recitals there in the copy are correct also. to the effect that he brought the check to me as attorney for Mrs. Martin on the 30th day of December at 5:00 in the afternoon, unendorsed.

Mr. Davis: If Your Honor please, the counsel for the defendant will be glad to stipulate that, and would also like to stipulate and let the record show that the attorney,—that it was brought to Mrs. Martin's attorney and he was requested

Charles Price.

to tender the check to Mrs. Martin preceeding a suit for specific performance.

page 15 } Mr. Spiers: We understand that. What was tendered to me was the original of the copy that I am now introducing, and is the same as a tender to Mrs. Martin since I was her attorney.

Judge: All right.

Mr. Davis: That is why it was tendered to Mr. Spiers at that time.

Mr. Spiers: Notice is good due to the fact that I was counsel.

Judge: All right, let the record show that there was an agreement between counsel for the parties hereto, relative to the tender of the check.

Mr. Spiers: Before the check was written, which according to the date was the 26th of December, which was the day after Christmas, had Mr. Rupe been in touch with you in connection with the dispute about this contract?

A. About the dispute of the contract?

Q. In other words. did he notify you that Mrs. Martin was unhappy and did not want to go through with the contract?

A. At the date the check was written, no sir.

Q. He had not gotten—

A. No sir, No sir.

Mr. Davis: Let's clear that up.

Mr. Spiers: I'm wanting Mr. Price to clear it up and I'm asking him questions and I would appreciate it if I can continue.

Judge: Go ahead. You can examine him, Mr. Davis, when your turn comes.

page 16 } Mr. Spiers: Isn't it correct that Mr. Rupe talked with you on the 23rd which was two days before Christmas and wrote a letter on behalf of you and himself to the effect that the contract was then void?

A. Would you repeat that again?

Q. Well, I previously asked you if Mr. Rupe contacted you prior to the date of that check which is December 26, 1964, to advise you that Mrs. Martin repudiated this contract and your answer was that he had not contacted you.

A. He did not contact me and say that Mrs. Martin had repudiated this contract.

Charles Price.

Q. All right, then this letter written by Mr. Rupe on your behalf went beyond your understanding of the extent of his authority.

A. This letter here? I have never seen this letter.

Q. You see the date of it, don't you?

A. December 23.

Q. Would you read that letter to the court?

A. This is to notify you that Mr. Charles R. Price is anticipating a deed to your lot on January 10, 1965. The money agreed on, on sales contract dated December 17. 1964, will be in my hands the date above mentioned. I will be expecting my commission on this transaction which is $975.00 also on that date. I have contacted my attorney and Mr. Price has contacted his attorney and they advise that Mr. Price is due the deed on this transaction.

Q. Now if we assume that Mr. Rupe wrote that letter and signed it and mailed it on December 23rd, he did so without ever having contacted you, without in any way discussing it with you, or indicating in any manner that Mrs. Martin disputed this contract?

page 17 } A. Mr. Rupe contacted me, Mr. Spiers. He didn't say Mrs. Martin had disputed the contract. He said that something had come up in the contract. There would be a letter out about it, be something about it. Then I had the copy of your letter. That was the first thing I knew about it.

Q. He did talk to you however, before the date of this check?

A. Whatever date that was, that's the date he did talk to me.

Q. He told you that she had repudiated the contract?

A. He said something had come up in the contract.

Q. He wrote this on behalf of you and himself, did he not? You were expecting him to take care of whatever came up?

A. Well certainly, he was Mrs. Martin's agent and I was the buyer so I expected that.

Q. You just testified that he also found this property for you, didn't you?

A. I didn't say that he found it for me.

Mr. Spiers: I would like to offer this in evidence with the understanding that I will connect it up, the mailing and receipt of it, later.

Judge: All right. I'll mark it plaintiff's Exhibit #3, the letter and the envelope showing the postmark and certified mail as one exhibit.

Charles Price.

Mr. Spiers: On the date of that letter, which was before Christmas, indicates that Mr. Rupe did not then have any $5,000.00. You had not paid him or tendered him $5,000.00 at that time, had you?

A. Well, I didn't see any—

Q. Had you or not?

page 18 } A. I hadn't at the time, but I saw no reason to. I signed a legal contract with that stipulation in there. I saw no reason.

Q. Why did you then tender it on the 26th?

A. I gave him the check at that time to hold until the 10th of January.

Q. You gave him the check to hold. You gave it to him on the 26th of January, I mean December, excuse me.

A. I asked him, as I told you awhile ago, I asked him at the time that this contract was signed, "Should I pay the $5,000.00—

Q. And he told you no, we know all that, but you did, in fact, give it to him on the 26th of December or around about that time?

A. Right around that time.

Q. It certainly was no earlier than the date of the check?

A. No, it was the date of it.

Q. Why did you do that?

A. Just as I told you just then, that's why I gave it to him so that he would have the check when the time came.

Q. You thought it was necessary that he have that check, did you not ?

A. Well, necessary or not, I didn't think it was necessary.

Q. But you gave it to him?

A. I gave it to him.

Q. You gave it to him under the assumption that you didn't know whether it was useful or not?

A. I knew it had to be there, I knew I had to have the $5,000.00.

Q. On January 10?

A. January 10.

page 19 } Q. Nothing had never come up. That's why you didn't have it on the 17th.

A. That's right.

Q. But you had a letter from me, didn't you?

A. Mr. Spiers, your letter was mixed up to me, I didn't understand that. I had signed a legal contract.

Charles Price.

Q. My letter was clear, was it not?
A. And the contract was clear, as far as I'm concerned.
Q. The letter was perfectly understandable, was it not?
A. You never contacted me. You sent me a copy of the letter you sent Mr. Rupe.
Q. But you read it and it was understandable, wasn't it?
A. I did. But it was not understandable. I didn't understand it.

Judge: What was the date of that letter?
Mr. Spiers: It was the 29th.
Judge: All right.
Mr. Spiers: I'll introduce that. Now upon receipt of my letter, and I think that I mailed it the date of the letter probably, did you get it on the 30th?

A. I can't recall, Mr. Spiers, I don't know.
Q. Had you contacted your attorney at that time?
A. At that time? I don't recall that. I can't remember the dates.
Q. Did you contact your attorney as soon as you received my letter?
A. I probably did. I can't recall that I did directly. I think my attorney can verify that, whether I did or not.
page 20 } Q. Did you ask Mr. Rupe to retain an attorney for you?
A. Did I ask Mr. Rupe? I can't recall that I did.
Q. Do you know whether he had talked to Mr. Davis before you did about this thing?
A. I don't know.
Q. Have you ever seen this letter dated the 30th of December?

Mr. Davis: That my letter?
Mr. Spiers: Yes. Had you contacted Mr. Davis before this letter was written? You don't remember?
Mr. Price: I don't have a copy of this letter and on December 30 apparently I had contacted Mr. Davis.

Q. You had some discussion with Mr. Rupe, hadn't you about getting legal counsel?
A. I could have had.
Q. Did you or not, do you remember?
A. I'd say yes.

Charles Price.

Q. You never gave this check payable to Max Rupe and Mabel Martin to Mr. Davis, did you?

A. I didn't give it to Mr. Davis.

Q. You gave it to Max Rupe?

A. I gave it to Mr. Rupe.

Q. Do you know how Mr. Davis got it?

A. I don't know how Mr. Davis got it.

Q. Do you know whether he was representing Mr. Rupe?

A. Repeat that, Mr. Spiers.

page 21 } Q. He was representing both of you, wasn't he?

A. Representing both of us?

Q. Yes, you all were acting together on this whole thing.

A. I don't know. Mr. Davis has been by attorney previous.

Q. You had not consulted Mr. Davis at the time you tendered the $5,000.00 to Mr. Rupe?

A. Not to my knowledge.

Q. You didn't know about any dispute other than what Mr. Rupe told you, that something had come up and he would get a letter out on it?

A. I knew nothing.

Q. Other than what he told you?

A. Other than what he told me.

Q. That there was trouble about it and that there would be a letter out on it, and you expected him to take care of it.

A. He said something had come up. He didn't say what.

Q. He didn't suggest that you pay $5,000.00, did he?

A. He didn't suggest that I pay $5,000.00.

Q. But you expected him to take care of it and get this contract through.

A. Well, I did.

Mr. Spiers: That's all.

Judge: Before you get into this, I assume you're making him your witness at this time.

Mr. Davis: Yes.

page 22 } By Mr. Davis:

Q. Mr. Price, do you recall how many times that you and Mr. Rupe discussed the property prior to the 17th when this contract was signed?

A. Well, I had talked to Mr. Rupe about it I'd say back on two or three occasions about the fact that I was interested in this property down there, several months back. I can't recall the dates or the discussions we had about it.

Charles Price.

Q. The sale price is $19,500.00, do you recall who set that sales price?
A. Mrs. Martin.
Q. Now, this contract was hand carried to you by Mr. Rupe on the 17th. is that right?
A. It was.
Q. I believe you stated to Mr. Spiers that you were at your place of business, is that right?
A. I was.
Q. Is this the contract as it was presented to you minus your signature?

Mr. Spiers: I think he said it was.
Mr. Price: It is.

Q. That's the original?
A. That's the original.
Q. I believe you told us that you retained a copy and Mrs. Martin received a copy.
A. That's right.
Q. The terms were all cited in the contract?
page 23 } A. Everything was there. It was all worked out.
Q. The agent's commission and the whole thing?
A. That's right.
Q. Was anything said to you by Mr. Rupe or anybody else?
A. Nothing.
Q. About anything other than this contract?
A. No.
Q. The contract was brought to you and you signed it and that was it, that right?
A. That was it.
Q. I believe you told Mr. Spiers that you offered Mr. Rupe $5.000.00?
A. I did.
Q. At that time?
A. I did, I mentioned it at that time.
Q. What did he tell you?
A. He said it wasn't necessary because it wasn't written in the contract that way. I had until the date of delivery of the deed, January 10.
Q. You felt that you were bound by the contract at that time?
A. I certainly felt like I was obligated then for $19,500.00 when I signed my name to it.

Max C. Rupe.

Mr. Spiers: Let me ask you one thing. You never contacted Mrs. Martin at all, did you?

A. I never.

Mr. Spiers: Mr. Rupe did that?

page 24 } A. Mr. Rupe did that, Mr. Spiers.

Mr. Spiers: That's all.
Judge: All right, stand aside. Call the next witness.
Mr. Spiers: I call Mr. Max Rupe, adverse witness, Your Honor.
Judge: Mr. Max Rupe called as an adverse witness.
Mr. Spiers: There may be some question about the adversity of Mr. Rupe in this thing, whether to call him adverse or hostile. The letter I gave you and the letter given to Mr. Davis which I assume will be allowed in evidence indicates that both people had the same lawyer and their interests were the same.
Judge: He is an adverse witness to the plaintiff in this suit according to the pleading and the evidence so far. Mr. Rupe, come around and have a seat, please.
Mr. Davis: Exception.

MAX C. RUPE,

By Mr. Spiers:
Q. Your name is Max C. Rupe?
A. Yes sir.
Q. You are a licensed real estate broker with your place of business in the City of Radford, is that right?
A. Yes, sir.
Q. Mr. Rupe, do you know Mr. Charles R. Price?
A. Yes, sir.
Q. How long have you known him?
A. I guess I have known Charlie for about five or six years.
Q. You have purchased for him and sold for
page 25 } him other real estate before the 17th of December,
the date on which this particular transaction commenced, have you not?
A. Yes, I have.
Q. In an effort to determine these previous relationships, did you negotiate with the owners of the property here across the street for Mr. Price?

Max C. Rupe.

A. Yes sir, I did, and I believe you were one of them.
Q. Did you ever have any listing from me?
A. No, sir.
Q. Did you ever discuss it with me yourself at all?
A. This particular —
Q. Yes.
A. Yes, I discussed it with you. I asked you if your lot was for sale.
Q. Will you refresh your recollection and let me ask you if you didnt' talk to Mr. Hopkins?
A. Well, I probably did. He was one of the owners. I was dealing through you.
Q. Mr. Rupe, I'll tell you what I think of you after this hearing, but Mr. Price had indicated that he wanted to buy that land, had he not?
A. Oh yes.
Q. He asked you to get a hold of the owners. Did you tell him who the owners were?
A. I told him I knew one of the owners and he said, "Well, you go ahead and see him."
Q. He got a hold of you or did you get a hold of him?
A. He got a hold of me.
page 26 } Q. And asked you about getting a hold of this property?
A. Yes.
Q. And then you got a hold of the owner, did you not?
A. Yes.
Q. Then what did you do, get a price?
A. I got your price and presented the price to Mr. Price. I gave him the price and he agreed to buy the property.
Q. On the basis of his inquiry to you, and your going to the owners, this property was sold to Mr. Price, is that right?
A. That's right.
Q. I believe you said there never was any listing or anything of that type, no real estate contract between you and the owners of any description?
A. As far as I can recall I don't think there were any signed contracts.
Q. There was no indication from the owners that you should try to sell the property?
A. You told me it was for sale and you gave me the price.
Q. That's after you talked to Mr. Price. I'm talking about before that.
A. I don't guess there was.

Max C. Rupe.

Q. You know very well there wasn't. don't you, Mr. Rupe? All right, now let me ask you again in further connection with this particular piece of property across the street. I believe you conducted a great many deals or dealings for the Karres Brothers or Gusand Properties, whatever you want to call them?

page 27 } A. Yes.

Q. And assisted in negotiating the purchase of the property up here on which the shopping center is located, did you not?

A. That's right.

Q. Was that property ever listed with you?

A. It was listed in so far as the contract made on that property.

Q. I understand that, but isn't it correct that the way that property was acquired the prospective purchaser contacted you and asked that you find the property and that you did so. You contacted the owner and entered into an agreement with the owner, and the owner paid you a commission, is that right?

A. That's true.

Q. Karres didn't?

A. No, sir.

Q. But you acted for Karres?

A. How's that?

Q. You acted for Karres in finding this property?

A. Sure.

Q. Just like you acted for Mr. Price in this one?

A. Yes.

Q. All right, let me ask you this. Now you later, on this property over here, you sold it for Mr. Price?

A. I did.

Q. What was that understanding? Was it ever listed by Mr. Price?

page 28 } A. It wasn't listed by Mr. Karres. Mr. Karres told me—I mean. let me see, wait a minute, I'm getting the thing wrong—

Q. It's a fact that Mr. Price didn't have it on the market, did he?

A. Mr. Price said, "If you see a buyer, I've had an offer on this land, if you have a buyer, let me know."

Q. You contacted the Karres Brothers?

A. I contacted the Karres Brothers, I did.

Q. You were still working with them, were you not, on various enterprises they had in Radford?

Max C. Rupe.

A. He told me to find him a lot.

Q. To find him a lot. So you found one for him, did you not?

A. I did.

Q. You found it owned by Mr. Price?

A. Mr. Charles R. Price.

Q. You then went and sold it and Mr. Price paid you a commission?

A. He did.

Q. You were acting for Mr. Karres, were you not?

A. No, I was acting for Mr. Price at that time.

Q. Mr. Karres told you to find him a piece of property, didn't he?

A. Well—

Q. Did Mr. Karres pay you anything?

A. No, sir. Mr. Price paid me commission.

Q. On the sale of the shopping center property up here, did Mr. Karres pay you anything?

A. No sir.

page 29 } Q. The seller paid you, didn't he?

A. The seller paid me.

Q. You found that property for Mr. Karres?

A. Yes.

Q. All right, so now on this particular piece of property we are dealing with here, it's owned by Mabel Martin. According to Mr. Price you discussed this matter with him sometime in November, 1964.

A. There about, it might have been a few days before, but the first thing was that I called Mrs. Martin and asked her if she wanted to sell the lot where the fire was. Furniture was still in the store. She said, "Yes, but I'm not listing that property with no real estate man in this city. If you find a buyer and the price suits me, we will do some dealing on it."

Q. In other words, she in effect told you that if you had an offer, to come to her.

A. That's right, she did.

Q. She would consider the offer of the purchaser, right?

A. Yes.

Q. All right, that I assume is the last word you had with Mrs. Martin until this matter came up between Mr. Price?

A. Yes, that's the only time because I called her one time and she told me if I had a buyer at her price, she asked me what it was worth and I told her for her to name a price.

Max C. Rupe.

She said she had good authority to say that the lot was worth $75.00 a front foot and if I could get anything near that price, to come see her.

page 30 } Q. And she would talk to you about it then?
A. Yes, sir.

Q. She specifically declined to list it with you or designate you as her agent?

A. Or anybody else.

Q. Or anybody.

A. That's right, wouldn't going to sign it up to me.

Q. She wasn't going to list it or employ any agent at all to sell that property?

A. That's right.

Q. How did you and Mr. Price happen to get together?

A. Well, I was down the street and I came back into the office at 1126 Norwood, Nationwide Insurance, and Herb Dodson said, "Max, Charlie Price wants you to call him at the Hob-Nob. He left his number on a pad." So I called Charlie. I said, "Charlie, did you call me?" He said, "Yes. Max, I was figuring on this lot over here that Mrs. Martin owns." He didn't say Mrs. Martin, he didn't even know who she was, he'd never met her. He said, "What about that lot?" I said, "I think I can get that lot for you, Charlie."

Q. In other words, he was talking about this lot?

A. Yes, this particular lot.

Q. Whether he named it or not, you both knew which lot?

A. We had went and looked at the lot.

Q. You said, "I think I can get it for you."

page 31 } A. Yes, "I'll try to get it for you." He said, "Come on over and let's go look at it." So I took my automobile and went over there and at his leisure we got in the car and drove down and looked all over the lot and I said, "Charlie, I think she's got about 250 feet here and at this figure of $75.00 a front foot it would come to $18,-750.00." So I called Mrs. Martin on the 16th of December.

Q. The day before?

A. The day before we had our appointment. I said, "Mrs. Martin, I have a buyer for your lot. I'd like to discuss it with you and I don't want to discuss it over the telephone." She said, "Well, Mr. Rupe, I've got company. It would suit me all right if you could come up sometime in the morning. What time would suit you?" I said, "You name your time. I'll make it." She said, "Around 10 o'clock." So I went up to Mrs. Martin's and knocked on the door and a lady came and

told me to come in. I went in the living room and she said, "Have a seat." So I sat down. She got through with the phone and came in and said, "What is it about this lot?" I said, "Mrs. Martin, I've got a buyer for your lot." She said, "It's not a Mrs. Roberts, is it?" I said, "No, it's not. It's Charlie Price. He's the operator of the Hob-Nob and this hamburger place across the river, and he also owns the Waffle Shop." She said, "Well." I said, "According to the way I figured it up, you have got $18,750.00 worth of property at 250 feet. She said, "Oh, Mr. Rupe, I've got 260 which makes it $19,500.00." Well I said, "Assuming that Charlie Price is interested in your lot, if you want to sign a contract so he can have this lot, I'll fill it out right now." She
page 32 } said, "O.K." and she signed it. She said, "Now listen, there's one thing I'd like to mention to you. Ted Hannah, my son-in-law, has been talking to Mrs. Roberts. I would like for him to have a chance to go back to Mrs. Roberts in case she wanted it, I would like for her to have it. I'll let you know in two days, two days." And she says, "If she don't want it, it belongs to Mr. Price." I said, "Well. O.K."

Q. You knew from that conversation that Mr. Hannah had been negotiating with somebody?

A. She said he had. I didn't know that he had.

Q. That's what she told you, she told you that.

A. She told me that.

Q. All right, you knew it. You took this contract with that understanding, did you not, that someone else might get it?

A. Mrs. Roberts would be the one that I understood wanted it.

Q. Regardless of who, you understood the fact that someone else had negotiated for it and had the first shot at it and that she would let you know about whether or not that person was going to take it, isn't that right?

A. She mentioned this one person to me, that's all she mentioned to me.

Q. Is that correct that you knew if this other person took the property, then this contract wasn't any good?

A. A Mrs. Roberts, yes.

Mr. Davis: If Your Honor please, I'd like to make a motion that all this evidence be excluded under the parole evidence rule, the contract speaks for itself.
page 33 } Mr. Spiers: If Your Honor, please—
Judge: I overrule the motion.

Max C. Rupe.

Mr. Davis: Exception.

Mr. Spiers: Now that was on the 17th, wasn't, it, Mr. Rupe?

A. That was the day I wrote the contract out.

Q. Right. She told you then that this other prospect existed and that person would have to decide whether they wanted it or not?

A. Yes, sir.

Q. All right. Now, did you contact Mr. Price and tell him you had gotten this property for him?

A. I imagine I contacted Mr. Price inside an hour and a half, two hours, not later than two hours after I left Mrs. Martin's house and went directly to Mr. Price's. I knew what time to go because he told me he never left before 12:00.

Q. That was on the same day?

A. Same day, yes sir.

Q. All right, and you did then go to Mr. Price's, roughly around 11:00 or shortly after, and contacted him at the Hob-Nob?

Yes, I said, "Mr. Price," No, I said, "Charlie, I have your lot for you provided the price suits you. She has 10 feet more and the price is $19,500.00." And he had offered $4,750.00 down. I told Mrs. Martin and she said, "No." She said. "I would like to have just a little money left after paying you. I want $5,000.00." I said, "Well, we will write it up for $5,000.00 down on delivery of deed." I put down the years there. The first year would be $3,000.00 plus 5% interest.

page 34 Q. Mr. Rupe, to keep you from testifying from recollection merely, this is the contract that you filled out, wasn't it?

A. It's the same.

Q. You filled it out in your own hand?

A. My handwriting.

Q. Completely?

A. Completely.

Q. You put in $19,500.00 at the top?

A. At the top.

Q. You put $5,000.00 cash in hand paid to be held by you until closing, did you not?

A. $5,000.00 on delivery of deed, right here.

Q. Mr. Rupe, would you answer my question, then we will get to the rest of it. Did you fill in $5,000.00 cash in hand the receipt of which is acknowledged by the agent to be held until closing?

Max C. Rupe.

A. I put it in there. but I omitted it right down here.
Q. You did put it in there thought, didn't you?
A. I put it in there. That's my handwriting.
Q. Mr. Price read the contract, didn't he?
A. He read the contract.
Q. He signed it in your presence?
A. He signed it in my presence.
Q. Did he give you $5,000.00?
A. He asked me, "Max, do you want that $5,000.00 now?" I said, "Charlie, I don't think that you need to put it down now because I put $5,000.00 on delivery of deed." You can read right here.

page 35 } Q. You didn't refuse to take the $5,000.00, did you, Mr. Rupe?

A. Yes, I said, "I don't think there is any need."
Q. You said, "I don't think there is any need." But did he tender you the $5,000.00?
A. Not that day he didn't.
Q. Did you ever refuse to take any $5,000.00?
A. No. I didn't. After this question came up with the money down, I said, "Charlie, maybe you better give me a check for $5,000.00 and maybe they won't have anything more to say about it."
Q. All right, let's go into that a little bit. I talked to you on the 23rd or there about, did I not?
A. You talked to me on the 24th.
Q. When did you write that letter?
A. I wrote that letter on the 23rd.
Q. The day before I talked to you?
A. The day before you talked to me.
Q. Why did you write that letter?
A. Because I had already been advised by lawyers to notify Mrs. Martin.
Q. Why had you been advised by a lawyer?
A. Because I wanted to see if my contract was good.
Q. Did you have any reason to think there was any dispute?
A. I didn't know whether there had been any.
Q. Didn't you know for a fact, on the 22nd you were notified. that the other purchaser had taken the property and that the contract was void.

page 36 } A. Mrs. Martin called me and told me she wasn't going through with it, that she was going to sell to somebody else.

Max C. Rupe.

Q. Did she tell you in fact that the other party she was talking about had taken it?

A. She didn't tell me the other party she was talking about, she told me a man and I said. "You told me it was a woman, Mrs. Martin." She said, "Well, it's a man."

Q. Does that make any difference on this thing? It was somebody else, wasn't it?

A. Well, I was going by what she said at first, a Mrs. Roberts.

Q. Do you know a Mrs. Roberts?

A. I don't know Mrs. Roberts. I know some, but I don't know whether I know the one she was talking about. She didn't go into details.

Q. The contract I just showed you, you say you filled out, that's plaintiff's Exhibit #1, is that right?

A. That's right.

Q. Mr. Rupe, the 17th of December, 1964, was on a Thursday?

A. Yes. I guess that's right.

Q. Did Mrs. Martin call you and leave a message that you received from anyone in your family after that?

A. She called me the 22nd.

Q. No, I'm talking about before that. Isn't it correct that on Sunday prior she called you at home and left a message that the person had not decided yet and she would let you know the next day?

page 37 } A. I didn't get the word about the deciding. My wife said Mrs. Martin had called and would call tomorrow. I was at a church meeting and that's all I knew about it, and she didn't call me until the 22nd.

Q. Well, let me ask you this. Did you give Mrs. Martin a copy of the contract on the 17th?

A. I gave her the copy on the 21st because I told her that it was subject to Mr. Price taking this lot at a higher price. And I said, "Mrs. Martin, he asked me to get you to sign the contract and he would sign one and I'll bring you a copy just exactly like the one you signed.

Q. You did what Mr. Price asked you to do and you got her to sign the contract.

A. Right.

Q. And then you gave it to her.

A. I gave her a copy of it, I did.

Q. When did you do that?

A. The 21st of December.

Max C. Rupe.

Q. Where was that?

A. It was down around about the front of Whitehead's Pharmacy on Norwood Street, on the street, she was coming up the street.

Q. Did she tell you then that she hadn't heard from the other person?

A. She told me then that Ted hadn't got to see the party yet. I didn't make any comment.

Q. You didn't argue about it. did you, you knew that condition was there?

A. I didn't make any comment.

page 38 } Q. You didn't say, "Well, you can't see that person, I've got a valid contract?"

A. I didn't say anything. I didn't make any comment.

Q. You just didn't say anything?

A. The only thing I said to Mrs. Martin was, "I promised you a copy of this contract, and here it is."

Q. And she said, "Well, Ted hasn't got to see those people yet." You didn't make no comment.

A. I made no comment about it.

Q. Did she say she would let you know?

A. She said, "I'll let you know tomorrow." I believe she said by tomorrow.

Q. As late as the 21st everybody knew about the condition, you knew about it and you made no argument about it, and you tell the court that you had not told Mr. Price anything about it?

A. I hadn't told Mr. Price anything about it until she came and told me she wasn't going through with it, and I went . . .

Q. That was the next day though.

A. No, that was the night she told me. I went over to Charlie's. The night that she told me at 7 or 8 o'clock that she wasn't going through with it, I said, "Well, now listen, Mr. Price, the last time I talked to him, he was very interested in this lot." and I said. "I have no right to break the contract. I'll just have to see what he wants to do about this."

Q. At any rate whatever day it was, it wasn't the day you gave her this copy, it was the day after, wasn't it?

page 39 } A. It was the day after.

Q. You say you gave her that contract on the 21st?

A. Yes.

Q. That was on a Monday?

Max C. Rupe.

A. On a Monday. On Tuesday she told me she wasn't going through with it.

Q. Did she tell you that the other people took it?

A. No, she told me that somebody had took the option, another man had took the option up on the lot. I said, "Another man?" She said, "Yes." I said, "I thought it was Mrs. Roberts that you were talking about." She said, "No. it's another man."

Q. Did you ask her who it was?

A. I didn't ask her but I said, "I saw something going on today that I didn't like."

Q. What was that. Mr. Rupe?

A. I said, "A friend of mine come into the office and said, 'I see E. C. Dickens and Bill Kenny out of Roanoke are down there looking over that lot.' "

Q. Was that on the day Mrs. Martin called you?

A. That was on the day Mrs. Martin called me.

Q. The 22nd?

A. The 22nd.

Q. You told her about that?

A. Yes.

Q. What did she say? Did she say that was who it was?

page 40 } A. She didn't say. She didn't say who it was. She said another man. I said, "Well, beings it's another man and Mr. Price is so anxious for the lot. I'll have to contact him to see what he says." So I told Mr. Price and he said, "I'm sorry to hear that."

Q. You told Mr. Price all of this, did you not?

A. I told Mr. Price the exact day. the 22nd.

Q. You didn't call Mr. Price and say that there is some trouble here?

A. No, I didn't call him, I went over there and told him there was some trouble, that she didn't want to sell it to him and asked him, "What do you want to do about it?" He said, "Have you seen a lawyer?" I said, "I called one, and he was away so I went back and called another one."'

Q. Did Mr. Price tell you to call a lawyer?

A. Mr. Price said, "Who did you contact?" I said, "I contacted Richard W. Davis, and he said the contract is good," and I said, "We will go from there."

Q. What else did he tell you?

A. That's about all I know he said.

Q. This all occured on the night Mrs. Martin talked to you?

A. Right after she talked to me on the 22nd. I came down

Max C. Rupe.

town the next morning and talked to Mr. Davis again. I said, "Charlie says you are his attorney." I said. "Should I get another attorney or you handle both cases if you want to." There was some question as to him representing both of us, so I told him to discharge me and I got another attorney if there was any further action.

Q. On the 23rd of December you wrote Mrs. Martin a letter, didn't you?

page 41 } A. I did.

Q. This was after you had seen Charles Price?

A. Yes.

Q. After you talked to Mr. Davis?

A. After I talked to Mr. Davis.

Q. Mr. Davis advised you to write this letter?

A. He did.

Q. It was your understanding then that Mr. Davis also represented Mr. Price?

A. Charlie told me that he was his attorney.

Q. Did Mr. Davis dictate this letter?

A. No, sir.

Q. What did he tell you to do?

A. He said I should notify Mrs. Martin, and I tried to get her on the phone and couldn't get her, so I just sit down and wrote her a letter.

Q. This is the letter?

A. That's the letter.

Q. Plaintiff's Exhibit #3, dated December 23. 1964, did Mr. Price know you were going to write this letter?

A. No, Mr. Price didn't know that.

Q. Did he know you were going to notify her?

A. I don't know whether he knew that or not.

Q. Mr. Price testified that you told him you were going to write her and notify her, is that right?

A. I don't know if I told him that or not. I don't recall that. I know that later I had to tell him because she said she wouldn't accept it.

page 42 } Q. She had already told you that?

A. She told me that the 22nd.

Q. The letter was dated the 23rd and the postmark is the 23rd, isn't it?

A. It was the 23rd and I can show you when it was delivered. I got that in my pocket.

Q. It was delivered on the 24th, wasn't it?

A. Yes, sir.

Max C. Rupe.

Q. Do you want to put that in evidence?
A. There's the receipt where it was delivered the 24th.
Q. Do you mind if we put it into evidence?
A. Put it in there.
Q. Your Honor, I'd like to enter this as plaintiff's Exhibit #4 to be read in connection with #3.

Judge: All right, it will be so marked.

Q. Mr. Rupe, you thereafter contacted Mr. Price and told him that he better pay this $5,000.00, didn't you?
A. Yes, I talked to Mr. Davis and he said, "Max, if I were you I'd get Charlie to give me a check for $5,000.00." He said that would kill the objection made by Mr. Spiers because there wasn't any money paid down.
Q. There wasn't any money down on the 17th. was there?
A. There wasn't any money down but there was that written in there on delivery of deed that there be $5,000.00 cash.
Q. Those two clauses there are just diametrically opposed to one another, aren't they?
page 43 } A. In one way you look at it.
Q. Did you contact Charles Price on the 23rd. the day you wrote that letter, or after that, suggesting the $5,000.00?
A. I believe it was after I wrote the letter. I went over there to see him again and told him there was some question maybe about this $5,000.00 and would he mind giving me a check. Balance it off with that check, the objection.
Q. Did he give you the check?
A. He gave me the check.
Q. It was quite some time after the 17th, even after the 22nd?
A. He said, "I have had this check here for you." Of course the holiday came in there, you know, and he's closed Christmas Day.
Q. He said he had that check there for you? Did he say how long he had that check?
A. I didn't ask him.
Q. When did you contact him?
A. About the 23rd, I think it was.
Q. Is that when he told you he had this check there for you?
A. He said he would have me a check over at my office the next time I came over there. I went back and he was closed. I didn't get to go until the 26th.

Max C. Rupe.

Q. You went back the 26th?
A. I went back the 26th.
Q. It was, wasn't it? It was the 30th, wasn't it?
page 44 } A. Probably was about that time because Christmas was over with then.
Q. Didn't you get the check on the day that you gave it to Mr. Davis?
A. No, I didn't, no.
Q. When did you get it?
A. I got the check before. I gave it to Mr. Davis the next day after I got it.
Q. Mr. Davis had it on the 30th, then you must have given it to him on the 29th, right?
A. The 28th or 29th.
Q. Charlie told you that you could have the check that was waiting on you?
A. Yes.
Q. Do you know how long he had had the check?
A. No, I don't.
Q. He didn't have it the 17th or the 22nd, did he?
A. No, because I hadn't told him anything about it until the 23rd.
Q. I'll show you plaintiff's Exhibit #2, and ask you if that looks like a duplicate of the check?
A. Yes, that's it.
Q. The date on it is the 26th of December?
A. The 26th of December, 1964.
Q. And drawn on the Peoples Bank of Radford?
A. That's right.
Q. For Deed on January 10, 1965.
A. That's right. There's real estate.
page 45 } Q. Payable to who?
A. Payable to Mabel Martin and Max C. Rupe, and he didn't have room to put agent or he would have put agent there.
Q. Whether he did or not, you went and got that check, did you not?
A. Yes, I asked him.
Q. And he gave it to you?
A. That's right.
Q. You had asked him that he better do it and be safe. You were going to hold this check?
A. Yes sir. I'm still holding it.
Q. Until the 10th of January?

Max C. Rupe.

A. On or about the 10th of January.

Q. That is when she is to receive the $5.000.00?

A. That's when she is to receive it or she can have it now if she wants it, I reckon, I don't know.

Q. The contract says you are going to hold it until then, so if we go by the contract, you will hold it.

A. I was to hold it until the deed was delivered, and then she would get her money.

Q. You gave it to Mr. Davis the next day for what reason?

A. Because he asked me to give it to him.

Q. Do you know what he did with it?

A. It appeared to me he made a photostatic copy of it.

Q. I understand that. Do you know whether he tendered it to anybody?

page 46 } A. I don't know.

Q. Was he acting for you?

A. He was at that time.

Q. For you and Mr. Price both?

A. I asked him to discharge me the 30th which he did.

Q. That was the 31st, wasn't it, the next day?

A. Somewhere about then, the 30th or 31st. I went to his office.

Q. Did you endorse that check?

A. No, there wasn't any use to endorse it, I couldn't—

Q. I want to know if you endorsed it or not.

A. I didn't endorse it on the back, no sir. It's made to me.

Q. Did you try to cash it?

A. No, I didn't.

Q. Do you have the check now?

A. No, it's in another attorney's hands.

Q. Is it in your actual or constructive possession, that is, your possession or someone for you?

A. I can get it any day that I want it.

Q. It has still not been cashed?

A. No, sir.

Q. It's not going to be cashed until January 10?

A. It's not going to be cashed until Mrs. Martin signs it and I sign it together.

Q. Max, this letter dated December 29, 1964, does that look like a duplicate of the letter I mailed to you with a copy to Mr. Price?

page 47 } A. Yes.

Q. Did you talk to Mr. Price as soon as you got that letter?

Max C. Rupe.

A. Not just as soon. I think I went over there that evening and showed him the letter and said, "Looks like you are going to get a copy, too." He said he couldn't see nothing wrong that he wouldn't get the property.

Q. That letter there was written by Mr. Davis at which time he was your attorney. is that right?

A. Yes.

Q. Yours and Mr. Price's?

A. Yes.

Q. You authorized that letter, I guess?

A. I authorized it.

Q. I'd like to introduce both of these letters.

Mr. Davis: I'd like you to introduce the other one where he discharged me. You going to do that?

Mr. Spiers: I will.

Mr. Davis: All right.

Mr. Spiers: My letter of December 29 will be #5 and Mr. Davis' letter of the 30th will be #6.

Judge: A copy of the letter from Spiers and Spiers to Max C. Rupe, dated December 29, 1964, is plaintiff's Exhibit #5 and letter from Richard W. Davis to John B. Spiers, Jr., dated December 30, 1964 will be marked Exhibit #6.

Q. The following day after tendering all, you saw Mr. Davis and you all discussed the matter at which time you told him to discharge you and you would get other counsel?

A. That's right.

page 48 } Q. He then wrote a letter to me correcting that representation on the 31st.

A. Yes, I have a copy.

Q. "I have this day conferred with Mr. Max C. Rupe of Max C. Rupe Agency and he advises me that he no longer wishes to retain my services in the above styled matter and he will seek other counsel in the event same is necessary. Accordingly this is to correct my letter of December 30 to you wherein I advised you that I represent Mr. Rupe and Mr. Price, and to now advise you that I represent only Mr. Price in this matter."

A. That's right.

Q. I introduce this letter.

Judge: A letter from Mr. Davis to John B. Spiers, Jr., dated December 31, 1964, marked as plaintiff's Exhibit #7.

Max C. Rupe.

Mr. Spiers: That's all.

Judge: Mr. Davis, you can either examine him now or call him back.

Mr. Davis: I'll examine him now.

Judge: All right.

By Mr. Davis:

Q. Mr. Rupe, when did you first contact Mrs. Martin about this lot on Norwood Street?

A. It was a while after the fire. I imagine it could have been along about July, I'd say July probably.

Q. Had Mr. Price contacted you at that time?

A. Not at that time, he hadn't, no Sir.

Q. What did you contact Mrs. Martin for?

page 49 } A. I had a—I can name the client if you want me too, I had two men who said, "See what you can get that lot for." That's the reason I called her. She told me that she wasn't listing it with no real estate man but if I had a buyer at her price and the terms suited her, and she went on to say that she would sell it at a 5% rather than 6%.

Q. Let me ask you this. Do you object to giving the court the names of your other clients?

A. No, I don't.

Q. Would you tell us who was interested in it back in the summer?

A. Mr. H. C. Thomas and Mr. Ingram, his partner.

Q. You contacted Mrs. Martin shortly after the fire?

A In fact I called Mrs. Martin over Mr. Thomas' phone downtown.

Q. Did she tell you at that time as to the sale price of that property?

A. She said, "Mr. Rupe, what do you think that lot is worth?" I said, "Mrs. Martin, I would rather not price your property. You can give me your price if you don't mind, and I'll see what I can do." She said. "I have been advised by good authority," I didn't ask her who. "to sell the lot at $75.00 a front foot." And I assumed she had about 250 feet. I told Mr. Thomas that I could go up to the courthouse and see about the footage, but I think she said about 250 feet at $75.00 a front foot.

Q. Let me expedite a matter. Did that fall through?

A. Yes, it did. I gues you might say it feel through because Mr. Ingram did tell me to go ahead and fix it up. And I said, "Thomas, your partner said to fix that contract up, that he

Max C. Rupe.

wanted to buy that lot." Thomas said, "Well, he's
page 50 } gone to Florida, let's wait until he comes back."
So in the mean time Charlie called me about the lot.

Q. When did Mr. Price contact you?

A. I moved down in the office, I hadn't been there long, I moved downtown October 1, 1964. I think this would be the latter part of October somewhere. maybe November. Anyhow we went and looked at the lot.

Q. Did you quote the price that Mrs. Martin had told you previously?

A. I quoted him at $75.00 a front foot and I said, "I believe she has got 250 feet." I didn't know at that time that she had 260 feet, but I found out later that she had 260 feet. The tax ticket told me.

Q. And at a later date, did you finally . . .

A. I finally brought a contract to Mrs. Martin from Charles R. Price.

Q. When did you contact Mrs. Martin?

A. I contacted her by telephone on the 16th and she asked me not to come that night that she had company, to come the next day at 10:00 which was the 17th.

Q. And you did?

A. I was there at 10:00.

Q. When you came there, was the contract, how was the contract fixed?

A. The contract was carried down there with carbon paper.

Q. Was there anything written on this contract at that time?

A. Not a thing, no date or nothing.

Q. Was the sales price or anything else on it, no signature or anything?

A. No, I said, "You see, Mrs. Martin, I have written that
there be $5,000.00 on delivery of deed."
page 51 } Q. Now wait just a minute, I'm kind of like Mr.
Spiers, you just answer my questions on this thing.

A. All right.

Q. When you got there, was the sales price increased?

A. Yes, she had a paper in her hand, and she said, "You are wrong on that price. We figured it up to $19,500.00." I said, "Well, Charlie was thinking he was buying 250 feet, I don't imagine he would object to 10 more feet." I said that would make it $19,500.00.

Q. At $75.00 a front foot and with 260 feet that made the

Max C. Rupe.

total sales price $19,500.00. That was what Mrs. Martin told you at that time?

A. That's what she wanted for the property.

Q. How much was discussed as to what would be paid down and the terms?

A. I told her, "I believe Mr. Price told me he would pay you $4,750.00 down." She said, "I want $5,000.00 down." I said, "I expect he will go along with that, he seems to be interested in the property." I said, "If you want to sell this property to Mr. Price, you sign it and I'll take it over there and get him to sign it and I'll also sign it, and I'll get you you a copy of it."

Q. Now, was the contract as completed with the two copies all completed in the presence of Mrs. Martin?

A. Yes Sir, all except Mr. Price signing it.

Q. All except Price's signature. Was the sale price and the terms as indicated satisfactory with her and at her direction?

A. She seemed to be very satisfied with it and thanked me for coming and having an interest in the property.

page 52 } Q. Now the 5% agent's commission that she agreed to pay you, did she agree to do that?

A. Yes, she said, "The reason I want $5,000.00, I want to have just a little money left after paying you your 5%."

Q. Mrs. Martin told you that the reason she wanted more down payment was so she would have enough money to pay you and have some left. is that right?

A. Yes, and have some left.

Q. When you took this contract on the 17th, you then left and went to Mr. Price's?

A. Yes, sir.

Q. I believe you previously told that you contacted him later on that morning. is that right?

A. I contacted him the same day she signed it because I like to get things signed up and over with.

Q. When you took this contract to Mr. Price, is it the same contract you left Mrs. Martin's with, with the exception of his signature?

A. Yes.

Q. Did he sign it?

A. He signed it.

Q. Was there any statement made by you or anyone else to Mr. Price?

A. No, I didn't make any statement about any other thing —nothing mentioned about it.

Max C. Rupe.

Q. You just showed him the contract and asked him to sign it if he wanted it for $19,500.00?

A. That's right.

page 53 } Q. Did he offer you the $5,000.00 down?

A. He said, "Do you want me to pay you the $5,000.00 now?" I said, "Well, Charlie, I don't guess there won't be any use, I put in the contract that this is due on delivery of the deed, January 10, 1965." I said, "If I have to have any money, I'll call on you later." Something like that.

Q. I believe you previously told that some time two or three days later, or three or four days later, that you contacted Mr. Price and that was the first knowledge he had that there was anything wrong, is that right?

A. That's right.

Q. To your knowledge?

A. To my knowledge.

Mr. Davis: That's all.

Mr. Spiers: I'm interested in one thing. You gave this contract to Mr. Price without telling him about this other potential purchaser, but you knew about the other purchaser.

A. Mrs. Martin said . . .

Mr. Spiers: I know, but now wait a minute, you knew about another purchaser?

A. Yes.

Mr. Spiers: You didn't tell Mr. Price. What were you going to do if the other purchaser came through?

A I was going to wait and see what to do.

Mr. Spiers: You knew Mr. Price would take care of you, didn't you?

A. He don't have to take care of me. It's up to him to go to Mrs. Martin on what he has already done here.

page 54 } Mr. Spiers: He never contacted Mrs. Martin as far as you know?

A. I don't guess he did.

Mr. Ted M. Hannah.

Mr. Spiers: You did all the dealing for him?

A. I was Mrs. Martin's agent.

Mr. Spiers: You were Mrs. Martin's agent? Well, you came to her with a purchaser and a price, didn't you?

A. I did, I had a good buyer there for her, I think it was sold well and still think so.

Mr. Spiers: Step aside, that's all.
Mr. Spiers: Your Honor, I've talked to Mrs. Hannah for the first time just now, and she doesn't know anything material, so she will not be a witness.
Judge: All right. Call the next witness.
Mr. Spiers: Mr. Ted M. Hannah.

MR. TED M. HANNAH.

By Mr. Spiers:
Q. Mr. Hannah, I believe you are Mrs. Mabel Martin's son-in-law?
A. That's right.
Q. As such in connection with her property on Norwood Street which used to have Martin Motor Company on it, did you try to sell or negotiate with prospective purchasers for the purpose of disposing of that property?
A. Yes, I did.
Q. So far as you know, did Mrs. Martin ever indicate to you that she had employed any agent or any person other than yourself to try to find a buyer for that property?
A. She had not.
page 55 } Q. In October or November or some vicinity around December, did you enter into any negotiations with or for Mr. William Kenny?
A. Yes. I did.
Q. Would you relate to the court just briefly how those negotiations proceeded?
A. Well, initially the contact was made by a Mr. Broyles who works at the plant. This was sometime last summer after the building burned on the property, stating that he was contacting me on behalf of Mr. Kenny as to whether or not there was an interest in selling the lot. I indicated to him that Mrs. Martin would be interested in selling the lot. He

Mr. Ted M. Hannah.

contacted me subsequent to that two different times. The latter time was sometime in late fall in October or November at which time he told me that a local agent would contact me on behalf of Mr. Kenny. The agent did contact me and told me that he was interested and speaking for Mr. Kenny and wanted to know what price was placed on the lot.

Q. Did you indicate a price to him?

A. I did.

Q. What was the price?

A. The price initially was $22,000.00.

Q. All right Sir, then at that time was this contract that we are in court over signed or executed?

A. It was not.

Q. Did the negotiations continue?

page 56 } A. Yes, further contact was made, I think around the 15th or 16th of December, at which time I told the agent that we would like to decide one way or the other whether they were interested in the property. He told me that he would contact his client and that they would give us an answer the following week which would have been somewhere around the 21st, 22nd or 23rd of December.

Q. Was the price quoted then $19,500.00?

A. It was.

Q. You advisd them that a decision would have to be made the following week?

A. That's right.

Q. Did you indicate that any other persons may have been interested in the property?

A. I told him that there was another party that I understood was interested, that was why we would like to get a decision from them as to whether they wanted it or not, so if not, Mrs. Martin would like to negotiate with other parties.

A. All right Sir, now did you at any time negotiate with anybody named Roberts, Mrs. Roberts, Mr. Roberts, or anybody by that name about this property?

A. Never at any time.

Q. Did you ever tell Mrs. Martin that you had such a contact?

A. Not to my knowledge.

Q. Did you tell Mrs. Martin that you had a prospective purchaser?

A. I did.

Q. Who was that?

Mr. Ted M. Hannah.

A. Mr. Kenny.

page 57 } Q. She knew you were negotiating with someone?

A. That's right.

Q. Do you recall whether or not you told her his name?

A. I think I did. I know that I told her I had a contact through a Mr. Broyles, but I am under the opinion that I did tell her that Mr. Kenny was the interested party.

Q. Now, did you ever at any time have any negotiations with Max Rupe?

A. Never.

Q. Charles Price? Anybody representing him?

A. Never.

Q. Do you know anything about this offer, specifically. other than what Mrs. Martin may have told you, of December 17?

A. Only what she told me.

Q. Did she tell you this?

A. What she told me when she called me on the phone was that we were talking about the prospect which I had on the property and she told me that she had told Mr. Rupe that I had a prospect and that she had signed an agreement with him giving him the option to sell this property if the prospect which I had did not buy the property.

Mr. Davis: Your Honor, I object, this is parole evidence.

Judge: That's already just a reiteration of what you have already said.

Mr. Davis: Let me say for the record, if Your Honor please, all evidence we would like to object and except to, and I won't make it again, in regard to any parole evidence outside of the written contract.

page 58 } Judge: I am going to sustain your objection to Mr. Hannah's evidence as to the conversation with Mrs. Martin as being in violation of the parole evidence rule and hearsay evidence, but the other evidence of Mr. Rupe, I will reiterate, is exactly the same.

Mr. Spiers: Mr. Hannah, what happened to the offer of Mr. Kenny, was it concluded?

A. It was concluded on Tuesday afternoon, December 22, at which time he paid a $500.00 deposit and gave me a check at that time and tentative agreement was written, tentatively identifying the property.

Mr. Ted M. Hannah.

Q. The agreement tentatively identified the property but is it a real estate sales contract in all other respects, says the debt subject to verification of the deed and all that?

A. That's true.

Q. The terms and all would be agreed upon. $19,500.00 with $500.00 cash was the consideration of the contract?

A. That's true.

Q. This was paid?

A. At the time, on the Tuesday afternoon, the 22nd.

Q. I'd like to let the court see these and read them. The check here has not been cashed.

Judge: You may introduce them as Exhibit #8 and #9 and later withdraw them and substitute photostatic copies. Numbering will not be put on the originals. The contract will be #8 and the check #9.

Mr. Spiers: Mr. Hannah, do you know anything further about these relations between Mr. Rupe, Mrs. Martin and Mr. Price?

page 59 } A. No, I don't.

Q. Have you had any contact with Mr. Rupe, or he with you, about it since?

A. None at all.

Q. What you told us is all you know about it?

A. That's true.

Q. Except you do say you never negotiated with anyone named Roberts?

A. I did not.

Q. All right. The party here who paid this $500.00, is that the same party you had told Mrs. Martin was a prospect?

A. That's true.

Mr. Spiers: That's all.

By Mr. Davis:

Mr. Davis: Mr. Hannah, you are Mrs. Martin's son-in-law?

A. That's right.

Q. As such you want to do what you can to help Mrs. Martin, is that right?

A. Yes.

Mr. Ted M. Hannah.

Q. You have had this lot for sale for sometime, have you not? I mean as far as a son-in-law trying to find a buyer?

A. Well, I'd say a period of months, yes.

Q. Did you have it before the fire at Wayside?

A. The entire property had been up for sale prior to the fire, yes.

Q. And you, as her son-in-law, had endeavored to find a purchaser for the property?

A. That's true.

page 60 } Q. I believe you told us that Mr. Broyles contacted you. when was that?

A. I think it was sometime during the summer was the initial contact. I talked with him on three different occasions at different times during the summer up until around the early fall. October or November.

Q. The original price that you set was $22,500.00?

A. $22,000.00.

Q. $22.000.00. Now when did you come off the $22,000.00 offer?

A. Tuesday, the 22nd.

Q. Tuesday, the 22nd, is when you offered the property to Mr. Kenny. Did you contact him personally?

A. He was in my office at the plant.

Q. With Mr. Dickens?

A. That's true.

Q. At that time you knew that Mrs. Martin had already previously signed a contract for $19,500.00, did you not?

A. I didn't know that she had signed a contract for $19,-500.00. I think I said in my testimony before that she had signed an agreement giving Mr. Rupe the refusal to sell the property to his client should the person whom I had as a prospect did not buy it.

Q. You didn't know that the $19,500.00 was the same figure that was on the contract signed by Mrs. Martin on the 17th?

A. I was aware of that, yes, but I didn't know that she had signed a contract to that effect as I said. I was aware that she had priced the property at that price.

page 61 } Q. At $19,500.00?

A. Right.

Q. Did you know on the 22nd that she had signed a contract?

A. Well, I'll reiterate that I had only known that she had signed a contract giving Mr. Rupe the right to sell it to his client in case the person that I was dealing with did not buy it.

Mr. Ted M. Hannah.

Q. I won't labor that, Mr. Hannah. Mr. Dickens was the agent representing whom?

A. Mr. Kenny.

Q. Mr. Kenny. and was the contract drawn up in your office?

A. Yes.

Q. At that time you, you, on behalf of Mrs. Martin, on the 22nd, had agreed to give Mr. Dickens the finder's fee of $500.00, is that right?

A. That's right.

Q. That was considerably less, about $450.00 less, than the straight 5% that she had asigned to the agent.

A. As I said, I don't know what her agreement was, but if it were 5%, it would be less.

Q. Did you ever see the contract that she had prior to your signing?

A. I did not.

Q. Did you know that she had one in her possession on the 21st?

A. Again I say, the only thing I knew that she had in her possession was this agreement which I have already explained.

Q. And you saw this?

A. No, I did not see it.

page 62 } Q. She told you that she had it, is that right?

A. She told me that she had signed an agreement giving Mr. Rupe the option to sell the property in the event that the person whom I was dealing with did not exercise their wanting to buy it.

Q. Did she further tell you that $19,500.00 was what she signed that contract for?

A. She told me that was the price she had made. I didn't know what was in the contract whether that was included in the contract or not. I had not seen the contract.

Q. Nothing was done as far as closing out the final price on this thing as far as you know with Mr. Kenny until December 22?

A. That's right.

Q. In fact that is the first day you came off your offer of $22,000.00?

A. That's right.

Q. I think that's all.

Judge: Stand aside.

Mr. Spiers: Mrs. Martin.

MRS. MARTIN,

By Mr. Spiers:

Q. Mrs. Martin. to clear the record you are Mabel G. Martin of Radford, Virginia, and the owner of the property which is in dispute, is that correct?

A. I am.

Q. Did you list this property with Max Rupe or in any way engage him to perform any services for you in connection with the selling of it?

page 63 } A. I did not.

Q. Would you tell us how Mr. Rupe knew about it or what transpired prior to this time that may have indicated to him that you were in the market if he found a client?

A. He called me in the summer and asked me if I wanted to sell the property. I said, "I will sell it if I get enough money for it, but it's not on the market to sell. I'll sell it if I get enough price for it." He said, "Would you let me talk to you about it?" I said, "I will talk to you about it."

Q. Did you ever talk to him about selling the property until the time he contacted you about Mr. Price?

A. No.

Q. Now in connection with that situation, Mr. Rupe's contract here is dated the 17th of December which I assume is the day you signed it?

A. Yes.

Q. Did he contact you the day before he came?

A. He asked me if he could come up. He had a buyer for it, and I said, "I'll talk to you about it but I have company now, come in the morning."

Q. Did he come the following morning?

A. He came, a little late. He was supposed to come at 10:00.

Q. At any rate he came to see you about it?

A. Yes, he did. He came to my house.

Q. Did he tell you who his client was?

A. Yes, finally. He didn't at first, but he went on to say he had a buyer and then he said who the client was.

page 64 } Q. That was Charles Price?

A. Yes.

Q. I assume this is a copy of the contract which has been marked Exhibit #1. that's the sales agreement with Max. When he came up, was that filled in or not?

A. No. it was not.

Q. How did you all arrive at a price?

Mrs. Martin.

A. I told him $75.00 a front foot.

Q. Mr. Rupe has testified that you told him that way back in the summer, is that right?

A. I don't remember telling him back in the summer. I said I would see about it. I got a good price for it. At that time I don't think I knew the price. I had contacted several people about the value of it because I didn't know.

Q. In December, 1964, your son-in-law was trying to sell this property for you, was he not?

A. Yes, he had told me he had a couple of people looking at the property.

Q. The price was not $19,500.00, was it?

A. He did not mention the price. I hadn't discussed the price with him.

Q. But you knew your son-in-law had prospects?

A. Yes, he had more than one.

Q. Now with reference to the one which he was dealing with in December or November or October, did you know who it was?

A. No, I didn't remember. When you get old, you don't remember anymore.

page 65 } Q. Do you recall whether or not he had told you who it was?

A. He told me about the man at the plant. I assume he told me about the other one, I couldn't swear to it.

Q. You don't recall the names at any rate?

A. No.

Q. How old are you, Mrs. Martin?

A. That's a personal question, I was born in '91.

Mr. Davis: It certainly is, I object to that.

Judge: I'll have to overrule the objection. I'll close my ears.

Mrs. Martin: I was born in '91, now you figure it from there. so I won't make any mistake on that.

Q. When Mr. Rupe came up to see you and brought this contract, was it filled in at all?

A. No, it was a blank one.

Q. You told him then that you thought $75.00 a foot would be right?

A. He said, "Would you take $75.00 a front foot?" I said I thought that would be a very good price.

Q. Did he fill out the rest of the contract?

A. He said, "Would you sign a contract if the other people

do not take it and I will have it bonafided that my client will take it." I had told him about the other people, my son-in-law having contacted somebody to buy the property. Unfortunately I did not have it listed, he did not write it in the contract. That was my mistake.

Q. It's already testified he knew about it.

page 66 } A. Yes, he knew about it.

Q. He definitely knew there was another purchaser?

A. He definitely knew.

Q. He has testified that you said a Mrs. Roberts . .

A I don't know where I got it, out of the air somewhere, I don't know. I said, "Maybe, I think it is." There was nothing definite about it. I don't know where I got it.

Q. You told him your son-in-law had another purchaser?

A. I did. I told him he had contacted this person.

Q. You thought her name was Mrs. Roberts or something?

A Or something, I don't know.

Q. He never negotiated with a Mrs. Roberts?

A. No, I don't know where I got that, out of the clear blue sky, just senile.

Q. Did you ever at any time after talking with Mr. Rupe go out and find another purchaser that nobody had heard of?

A. I did not, I didn't find anybody.

Q. In other words, this agreement which has been entered as evidence as Exhibit #8. is that the party to whom you were referring to on the 17th?

A. Yes.

Q. There had been no new party?

A. No, it was the party that my son-in-law had been contacting for some time.

Q. Mr. Rupe, you told him about your son-in-law?

A. I told him several different times. I told him in my living room, he said, "You have a man with the cash to pay, why not sell it?" I said, "Because I have promised

page 67 } the other people to give them the refusal of it." He said, "Do you have a written contract or verbal?" I said, "I did not say anything whatsoever about it," so I shut-up.

Q. You told him this man had the refusal?

A. I told him that my son-in-law had contracted, I had agreed to let the other man have the refusal of it, the other person, the other people, who ever it was.

Q. Did you tell him when these people were going to let you know?

Mrs. Martin.

A. I was trying to get in contact with them. I had been and thought maybe in a couple of days I could get in contact. Unfortunately, I didn't. So I called him on Sunday night and said that I still hadn't been able to get in contact and I'd let him known as soon as I got in contact. His wife said he had gone to church and would tell him.

Q. Did you later see Mr. Rupe?

A. I saw him on the street Monday, the 21st, and he said, "I had your contract signed." And I said, "Mr. Rupe, you know I have not heard from the other people, but as soon as I hear then I will let you know."

Q. Did he argue with you?

A. No, he didn't say a word.

Q. Or seek to vary that agreement?

A. No, he didn't say a word about it, he knew I had been talking to those other people, therefore there was nothing more to say. He said it would just save him a trip to the house, so I took the contract before Christmas. Then my son-in-law contacted me and said he had contacted page 68 } the other man and gotten a check for $500.00 and that he was going to take the property. I called Mr. Rupe and told him that the other people were going to take it.

Q. Did you have any idea that there was any misunderstanding at this point?

A. No, I thought he understood. I thought he was a man of his word. I was of mine and I thought I was dealing with a valid person and whose word was worth something.

Q. Did you ever authorize him to deliver the contract to Mr. Price or do anything, employ him in any way other than agree to pay him the 5% for the commission after he got the purchase?

A. No.

Q. When you called him, what happened?

A. He got a little angry. He said, "I'll have to see my prospect and we will probably take it to court about it."

Q. Did he say anything about a woman having been the prospective purchaser?

A. I don't recall it.

Q. Did you tell him the other man took it?

A. I told him that the other party took it.

Q. Mr. Rupe then got angry?

A. He seemed to be, he didn't talk very friendly.

Q. At the time you signed this contract, had Charles Price signed it?

Mrs. Martin.

A. He had signed it, the one he handed me on the street.
Q. Yes. I know, but I'm talking about when you signed it.
A. No.
Q. Just blank, you signed it and then Mr. Rupe took it to his client to get it signed.
page 69 } A. That's right.
Q. $5,000.00 consideration was recited in it?
A. Yes.
Q. Did you ever receive that?
A. No.
Q. Do you know whether Mr. Rupe did?
A. I do not.
Q. Did you expect under this agreement, if it went through and the other people didn't take it, that Mr. Rupe would pay this $5,000.00 when the deed was delivered?
A. That was my understanding.
Q. On January 10?
A. Yes.
Q. You consulted me, Mrs. Martin, on the 23rd of December, I believe. Did you know prior to the 23rd of December that the $5,000.00 had not been paid? By the time I went and asked Mr. Rupe?
A. I didn't know. I hadn't received it so I didn't know anything about it, whether he had gotten it or not. He didn't say.
Q. You didn't authorize him not to get it. did you?
A. No.
Q. I also introduced into evidence Exhibit #9 which was a check from Mr. Kenny, was that actually tendered and paid to you pursuant to the contract which is Exhibit #8, you actually got the money from that one?
A. I didn't cash it because of the controversy.
Q. It was paid to you and you didn't cash it?
page 70 } A. Yes.
Q. There were no restrictions on cashing it?
A. No.
Q. You didn't have to wait until the 1st of February or any other time?
A. No, I could have cashed it that day if I had wanted to.
Q. Mr. Rupe also said that there was some question about the width of the lot.
A. He said he thought it was 150 and I said, "I think it's 160. I didn't look up the deed to see which it was.
Q. 160 or 260?
A. I mean 260. I think it was.

Mrs. Martin.

Mr. Spiers: That's all.

By Mr. Davis:

Q. I just have a few questions I want to ask you. I believe you said that Mr. Rupe contacted you sometime back in the summer.

A. He called me on the phone and said. "Would you be interested in selling your lot?"

Q. What did you say?

A. I just said, "If you get a good price, I'll talk to you."

Q. Do you recall telling him at that time that you thought the frontage was about 250?

A. I don't recall mentioning it. I don't think anything was mentioned about the dimensions of the lot at that time.

Q. Do you recall anything as to what you thought was a fair market value?

page 71 } A. No. he asked how much and I said, "Well, different people have told me $150.00 to $190.00." I have talked to different people, and I have, different people.

Q. I believe that he called you on the 16th and then came to your home on the 17th, is that right?

A. Yes.

Q. This contract which you have been shown by Mr. Spiers, that's the contract that was completed in your presence, is that right?

A. He said, "Would you sign a contract saying that if your people do not take this or whoever your son-in-law contacted, doesn't take this that I can have the sale of it?" But I didn't have that put in.

Q. Let me ask you this, Mrs. Martin. Was this contract completed in your presence?

A. Yes.

Q. Were the terms as directed by you?

A. No. he just wrote it in there.

Q. Did not you increase the sales price on the 17th?

A. I told him that there was that much footage and he knew that $75.00 a foot was more than $18,750.00.

Q. He originally came to you with an offer of $18,750.00, did he not?

A. Yes. with 250 feet.

Q. You told him on the morning of the 17th that wasn't acceptable, that you would have to have $19,500.00.

Mrs. Martin.

A. I told him I would have to have $75.00 a front foot with 260 feet, and we figured it up.

page 72 } Q. Now this January 10, the closing date. that is your date, isn't it, Mrs. Martin? You suggested to Mr. Rupe that it be carried over into next year, did you not?

A. I did.

Q. As to the terms of $5,000.00 down, it was your understanding at that time that $5,000.00 would be paid on delivery of deed?

A. Yes, that's what he said.

Q. You requested that the $5,000.00 be carried over into 1965. did you not?

A. Yes, I said I thought the sale would go over into 1965.

Q. The sale would go over into 1965 and that the 1st, 2nd, 3rd and 4th years you would be getting $3,000.00 plus 5% interest on the unpaid balance and on the 5th year you would be getting $2,500.00. You signed this contract at that time, did you not?

A. I did.

Q. There's no stipulation in here or otherwise about anything else?

A. No, there is not.

Q. Do you know Mr. Price, Mrs. Martin?

A. I do not. I have never seen him before today to recognize him.

Q. You don't know anything against him?

A. I do not.

Q. I believe you told Mr. Spiers that you said you told Mr. Rupe that you would let him know in a couple of days if this contract wouldn't—

A. I thought I could get in contact, Mr. Hannah thought he could get in contact in a couple of days with him

page 73 } and I told him in a couple of days; I didn't know there was any particular rush about it, so I called him and told him I hadn't been able to get in contact, at least Mr. Hannah hadn't been able to get in contact with his client. On three occasions I told him that, but there was nothing said about it. He knew there was another person.

Q. So you didn't contact him on the 19th or 20th or 21st, to tell him that it had been sold?

A. No.

Q. In fact it wasn't until the 22nd that Mr. Hannah advised you that he had found a buyer for it.

Mrs. Martin.

A. He said that the people he had been contacting, he had finally gotten a hold of and they had agreed to take the property.

Q. Let me ask you this, Mrs. Martin. As the seller of this property, does it make any difference to you who buys this property?

Mr. Spiers: If Your Honor please, I don't think that has anything to do with it.

Mrs. Martin: It's the same thing to both people.

Judge: Under the law, it doesn't make any difference.

Mrs. Martin: The only thing I had given my word to Mr. Hannah that the people he contacted had the refusal of it. I like to back up word. That's it. I told Mr. Rupe the same thing. I said, "I have given my word to Mr. Hannah to contact his people first." And I am as good as my word.

Mr. Davis: I know you are, Mrs. Martin, there's no question about that.

A. I like to back up my word.

page 74 } Q. I'm certain that everyone here understands that, Mrs. Martin. The original down payment on this when you talked to Mr. Rupe on the 17th was $4,500.00, I believe. was it not?

A. He mentioned that and I told him I wanted $5,000.00.

Q. Did you tell him you wanted the $5.000.00 so you could have a little extra to pay his commission?

A. I don't remember, I could have said it, but I wanted $5,000.00. I don't remember those exact words.

Q. You understood this contract that the seller agrees to pay to the agent for his services 5% of sales price?

A. Yes.

Q. You signed it with the stipulation that you were going to pay Mr. Rupe 5% of $19,500.00?

A. If he sold the property, I mean, if that particular buy went through.

Q. There seems to be some question here about a Mrs. Roberts. Did you not tell Mr. Rupe, you didn't mention a Mrs. Roberts?

A. I mentioned a Mrs. Roberts, where I got it, out of the blue sky, I have no idea. I said I didn't know. I couldn't have told any name at that particular price. He said, "Who is it?" I said, "I think it's a Mrs. Roberts." Where I got it, I don't know.

Mrs. Martin.

Q. But on the 17th you signed the contract and you set the terms and set the price?

A. That's right.

Q. And also the agent's commission?

page 75 } A. Yes.

Q. That's all.

Judge: Step down please.

Mr. Spiers: That's all. The plaintiff rests.

Judge: All right, the plaintiff rests. Any further evidence?

Mr. Davis: If Your Honor please, I believe the defendant rests. All of their evidence will be cumulative.

Judge: All right gentlemen, you may have 10 minutes on the side to argue if you desire.

Arguments of Counsel.

Ruling of Court:

In view of the whole case, I think there can be no question but what in July or December of 1964, Mr. Rupe attempted to become the agent of Mrs. Martin and that attempt proved futile and she denied him that agency. Certainly a preponderance of the evidence shows, if not the undisputed evidence, that Mr. Rupe became the agent of Mr. Price in the latter part of October or November, and at that time viewed with Mr. Price the real estate in question. The undisputed evidence is that Mr. Price at that time authorized Mr. Rupe to contact the owner for him. And acting in that capacity as agent for Mr. Price, he did contact Mrs. Martin. And although it was left out of the contract, the condition precedent to the effectiveness or to the contract becoming effective was that the prior purchaser whether it be Mrs. Roberts, Mr. Kenney or someone else, a prospective purchaser was disclosed to the agent of Mr. Price. Mr. Price's agent, Mr. Rupe, saw fit

page 76 } for some reason unexplained at this time to withhold that information from his principal. Nevertheless the principal will be bound by the knowledge of the agent. For that reason the contract never came into being between Mrs. Martin and Mr. Price. That is the Court's opinion and for that reason the contract will be declared void. Having reached that conclusion it is not necessary for the Court to pass upon the other points of law raised and no comment will be made thereon.

Mr. Davis: If Your Honor please, we would like to ask that the Court's verdict be set aside as contrary to the law and evidence, and except to the Court's ruling.

Judge: You may note your exception to the ruling of the Court and let the order show that he objected and duly excepted to the ruling of the Court.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Appeal Awarded	1
Record	2
Subpoena for Witness	2
Decree—January 11, 1965	3
Notice of Appeal and Assignments of Error	5
Proceedings	6, 22, 56
Witnesses:	
Charles Price	7
Max C. Rupe	22
Ted M. Hannah	42
Mrs. Martin	48