

INDEX

	Page
Grounds of Appeal	1a
Notice of Appeal	4a
Opinion	5a
Summons	1
Complaint	2
Schedule A—Agreement	4
Answer	8
Reply	11
Postea	12
On Postea	13
Rule to Show Cause	14
Reasons	15
Testimony	16
Motions for Nonsuit	187, 198
Motion for Direction of Verdict	297
Charge of the Court	301

WITNESSES

Plaintiff's:

Thomas Ely,

Direct	19
Cross	47
Re-direct	65
Re-cross	72
Re-direct	100
Re-cross	110
Re-direct	111
Recalled:	
Direct	190
Cross	193
Re-direct	193

	Page
William J. Couse,	
Direct	114
Walter M. Brown,	
Direct	121
Cross	131
Re-direct	167
Re-cross	172
Re-direct	174
Recalled:	
Direct	179
Howard Opdyke,	
Direct	174
Edward R. Luke,	
Direct	179
Cross	180
Re-direct	181
Re-cross	183
Re-direct	186
Samuel D. Walker,	
Direct	194
 <i>Defendant's:</i>	
Thomas Ely,	
Direct	204
Recalled:	
Cross	205
Emma C. Katz,	
Direct	205
Recalled:	
Direct	206
Cross	208
Re-direct	211
Elsie Tilton,	
Direct	211

	Page
Robert G. Macdonald,	
Direct	213
Cross	216
Direct	223
Cross	232
Recalled:	
Cross	249
Re-direct	259
Re-cross	260
Frederick F. Shock,	
Direct	247
Wallace Jeffrey,	
Direct	264
Samuel D. Walker,	
Direct	265
Cross	275
George Slater,	
Direct	288
Cross	289
Re-direct	291
Howard Opdyke,	
Direct	291
Cross	292
Re-direct	293
Re-cross	293
<i>Rebuttal:</i>	
Thomas C. Ely,	
Direct	294

EXHIBITS

Plaintiff's:

	Offered Page	Printed Page
Exhibit P-1—Salesman's Agreement .	23	312
Exhibit P-2—Commission Statement .	32	317
Exhibit P-3—Agreement	114	318
Exhibit P-4—Statements	177	
Exhibit P-5—Statement showing sales of Walter Brown	178	

Defendant's:

Exhibit D-1—Check for \$750.00	142
Exhibit D-2—Receipt	148
Exhibit D-3—Check, dated Dec. 20, 1926	204
Exhibit D-4—Contract, dated Dec. 13, 1926	274

New Jersey Court of Errors and Appeals

WALTER M. BROWN, Plaintiff-Respondent, vs. MORRISEY & WALKER, INC., body corporate, Defendant-Appellant.	}	10 On Appeal
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GROUNDS OF APPEAL. 20

To Ward Kremer, Attorney for Plaintiff-Respondent:

Take Notice that the appellant, Morrisey & Walker, Inc., writes down the following grounds of appeal on its appeal from the whole judgment to the Court of Errors and Appeals:

1. The Trial Court erred in permitting the following question to be asked over objection and exception: 30

“Q. Will you state now, Mr. Ely, what was said at that meeting, at 320 Cookman Avenue, I believe?”

2. The Trial Court erred in permitting the following question to be asked over objection and exception:

“Q. Well, how much did they sell?” 40

Grounds of Appeal

3. The Trial Court erred in permitting the following question to be asked over objection and exception:

“Q. What does it show?”

10 4. The Trial Court erred in permitting the following question to be asked over objection and exception:

“Q. What commission did they receive from Shark River Hills Company?”

5. The Trial Court erred in permitting the following question to be asked over objection and exception:

20 “Q. Can you tell us whether or not Morrisey & Walker received from the Shark River Hills Company their commission on the sale of the lands by Brown and his team?”

6. The Trial Court erred in permitting the following question to be asked over objection and exception:

30 “Q. Do you know of any payments made by Morrisey & Walker?”

7. The Trial Court erred in permitting the following question to be asked over objection and exception:

“Q. How are payments made for commissions on these—?”

40 8. The Trial Court erred in permitting the following question to be asked over objection and exception:

Grounds of Appeal

“Q. In 1926 can you tell us whether or not the Shark River Hills Company paid the Morrissey & Walker Company any commissions for sales in Shark River Hills?”

9. The Trial Court erred in denying the defendant's motion for a nonsuit. 10

10. The Trial Court erred in refusing to direct a verdict in favor of the defendant.

11. The Trial Court erred in charging the jury as follows:

“Of course, it may well be that when you come to examine some of these sales, such as the Katz sale, if you find as a fact that the Morrissey & Walker Company ratified that sale, even though its terms were contrary to the general sales contract existing between the plaintiff and that company, I nevertheless am of the opinion, and I so charge, that the Morrissey & Walker Company would not be permitted to take advantage of the Katz contract, even though irregularly made, and then deny plaintiff his commissions, because they cannot take a benefit on something in its behalf by its agent or employee and then deny compensation to that agent or employee for his work in securing it. That is the simple proposition of law that I think is applicable to that situation.” 20 30

Respectfully yours,

QUINN, PARSONS & DOREMUS, 40
Attorneys for Defendant.

Notice of Appeal

Service of a copy of the within grounds of appeal is hereby acknowledged this 31st day of May, 1929.

WARD KREMER,
Attorney for Plaintiff.

10

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT

20	WALTER M. BROWN, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">vs.</div> MORRISEY & WALKER, INC., body corporate, <div style="text-align: right;">Defendant.</div>	}	Action at Law
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To Ward Kremer, Attorney for Plaintiff:

Sir:

30 Take Notice that the defendant, Morrisey & Walker, Inc., appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above entitled cause.

Dated: May 29, 1929.

Yours very truly,

40 QUINN, PARSONS & DOREMUS,
Attorneys for Defendant.

Opinion

Service of a copy of the within notice is hereby acknowledged this 31st day of May, 1929.

WARD KREMER,
Attorney for Plaintiff.

10

OPINION.

(Filed April 19, 1929)

NEW JERSEY SUPREME COURT

No. 3, JANUARY TERM, 1929

20

WALTER M. BROWN,

Plaintiff,

v.

MORRISEY & WALKER, INC.,

Defendant.

On Rule to
Show Cause.

Submitted January Term, 1929; decided April 19th, 1929.

30

Before Justices Black, Campbell and Case.

For the Rule: Messrs. Quinn, Parsons & Doremus.

Contra: Mr. Ward Kremer.

PER CURIAM.

This suit was brought to recover one thousand dollars (\$1,000.00), as a bonus or prize for the

40

Opinion

sale of real estate. The trial resulted in a verdict and judgment in favor of the plaintiff. The defendant obtained a rule to show cause and writes down nine reasons for a new trial. Our reading of the testimony sent up with the rule
10 to show cause and a consideration of the reasons filed thereunder lead us to the conclusion that the rule to show cause should be discharged. The rule is, therefore, discharged.

New Jersey Supreme Court

SUMMONS.

New Jersey, ss: 10

THE STATE OF NEW JERSEY TO THE SHARK RIVER HILLS COMPANY, INC., Body Corporate, and MORRISEY & WALKER, INC., Body Corporate, GREETING:
(L. S.) You, THE SHARK RIVER HILLS COMPANY, INC., Body Corporate, and MORRISEY & WALKER, INC., Body Corporate, are hereby summoned to answer the annexed complaint of WALTER M. BROWN, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to the said complaint with the Clerk of the said New Jersey Supreme Court at Trenton within twenty (20) days after service upon you of this Writ and the annexed Complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 20

Witness, WILLIAM S. GUMMERE, Esq., Chief Justice of our Supreme Court of Judicature, at Trenton, this 15th day of March, A. D. 1927. 30

EDWARD KELLEHER,
Clerk.

Ward Kremer,
Attorney.

COMPLAINT.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10 WALTER M. BROWN,

Plaintiff,

vs.

THE SHARK RIVER HILLS COM-
PANY, INC., Body Corporate,
and MORRISEY & WALKER, INC.,
Body Corporate,

Action at Law

Defendants.

20

The plaintiff, residing in the City of Asbury Park, County of Monmouth and State of New Jersey, complaining, says that:

1. On or about the 1st day of April, 1926, plaintiff and defendants entered into a contract for the employment by the defendants of the plaintiff as a real estate salesman, a true copy of which contract is attached hereto and made a part here-
30 of and marked Schedule A.

2. Under the terms and provisions of the contract by which this plaintiff was employed by the defendants, plaintiff entered into an agreement with the defendants by which it was provided and understood and agreed between the plaintiff and defendants that seven other salesmen in the employ of the defendants should, together with
40 the plaintiff, constitute a team of salesmen who were to work together in the sale of the lots of

Complaint

the defendants in Monmouth County, known as Shark River Hills.

3. It was further understood and agreed between the plaintiff and the defendants that if the total gross sales consummated by the plaintiff and the seven men composing his team should, up to and including December 15, 1926, aggregate \$200,000.00 or exceed that amount, then and in that event the plaintiff was to receive from the defendants, and the defendants promised and agreed to pay to the plaintiff \$1,000.00 as a bonus or prize for the sale of the said real estate. 10

4. Plaintiff further says that between April 1, 1926, and December 15, 1926, the plaintiff and the other salesmen who were members of the team assigned to the plaintiff, consummated sales of lots in Shark River Hills for the defendants aggregating \$204,000.00, and that thereby the plaintiff became entitled to receive from the defendants \$1,060.00. 20

5. Plaintiff further says that the defendants promised to pay the plaintiff the said sum of \$1,060.00, but that the defendants have failed and neglected to pay the same or any part thereof. 30

Plaintiff demands as his damages \$1,060.00.

WARD KREMER,
Attorney for Plaintiff.

SCHEDULE A.**SALESMAN'S AGREEMENT.**

EMPLOYMENT AGREEMENT, Between Shark River Hills Company, Inc., Morrisey & Walker, Inc., Body Corporate, hereinafter referred to as principal,
10

AND W. Middletown Brown of the address Asbury Park, N. J., hereinafter referred to as salesman.

Whereas, the principal above mentioned desires to employ the salesman above mentioned,

And whereas said employment is of mutual advantage and consideration each to the other,

20 NOW, THEREFORE, in consideration of the premises and all the mutual covenants herein in their entirety, the parties do hereby agree as follows, viz:

1. Salesman is employed by the principal for the term of from April 1st, 1926, to November 1st, 1926, to sell property on the Shark River Hills Company Tract at Asbury Park, New Jersey, or such other property as the principal may
30 designate.

2. The compensation for the salesman for making sales is as follows, viz:

A commission of 8 per cent. on all sales made and consummated by said salesman and if the total sales during the life of this contract exceed the sum of \$25,000 then the commission will be 9 per cent. on all sales made during contract
40 period, and should the total sales during the life

Complaint—Schedule A

of this contract equal or exceed a total sum of \$50,000.00 then the commission will be 10 per cent. on all sales, made during the contract period, and such additional 1 per cent. or 2 per cent. as the same may be will be settled at the close of contract period. 10

An additional bonus will also be paid if the salesman makes and consummates sales exceeding the total of \$50,000.00 within the contract period, which bonus will be \$100.00 for each \$10,000.00 of sales, over and above a total sale of \$50,000.00.

3. A commission is not considered earned or due until 20 per cent of the purchase price has been paid to the principal, and contract signed by buyer. Statements of commissions will be made monthly and settlement made monthly. 20

4. The salesman agrees to devote his entire time to work herein mentioned, and not act as agent, salesman or broker for any other person or property and have no other employment and in consideration of the aforesaid, and of the further valuable consideration of securing connections with the principal and receiving the opportunity of learning their system and practice with them, and having information regarding their clientele, the salesman also agrees not to engage in the business of broker, salesman or agent for himself or anyone else in selling real estate or to be employed for such purpose either directly or indirectly for the period of one year after November 1, 1926, within a radius of five miles of the Keansburg office of Morrisey & Walker, Inc., 40 30

Complaint—Schedule A

of Keansburg, New Jersey, and the Asbury Park Office of the Principal.

10 By engaging in the said real estate business within a radius of five miles of the said Keansburg Office and the said Asbury Park Office, it is understood that this not only means operating from an established office in the said territory but selling to customers within said territory or making sales of any land or property within said territory regardless of where the customers may be.

5. All sale contracts to be subjected to acceptance by officers of principal.

20 6. Salesman is to secure at his own expense a salesman license from the New Jersey Real Estate Commission as salesman for the Shark River Hills Company, Inc., Body Corporate, and should the salesman fail to renew the said license or should the same be revoked, then this contract is at once terminated. Salesman is also to secure automobile liability policy on any automobile used by salesman in performance of his work, said policy to be written to protect Morrisey & Walker, 30 Inc., which is satisfactory to the principal for the sum of \$5,000.00, which is to be secured at the expense of the salesman. Salesman is to abide by all rules of the New Jersey Real Estate Commission and all laws of the State of New Jersey and to conduct himself in a polite and proper manner and abide by all rules of the principal.

40 7. The principal shall not be responsible for any expenses of any sort, kind or description incurred by the salesman unless there is an agree-

Complaint—Schedule A

ment in writing contrary to this proviso, it being understood that the salesman is to bear all of his expenses, unless the principal expressly stipulates in writing to the contrary.

8. Violation by salesman of any of the provisions herein to be sufficient cause for dismissal, but such dismissal not to release the salesman of any of the obligations hereof nor liability for the violation thereof. It is understood that at the termination of this contract, either by expiration of time or dismissal that the salesman will turn over all receipts, books, literature, etc., to the principal and these shall be delivered to the office of the principal as all of said property is recognized as belonging to the principal. 10 20

9. It is understood that should this contract be terminated by the principal dismissing the salesman or should the salesman violate any of the agreements herein, then in that case the right to any bonus of any kind or nature will be forfeited and the right to secure the additional 1 per cent or 2 per cent above set forth will also be forfeited and the commission in such case shall only be considered 8 per cent. and any money 30 that may be claimed to be due to the salesman in event of such dismissal or termination hereof, may be held by the principal at its option in order to determine whether the same shall be offset by any claim for damage due the principal from the agent by reason of the violation of the conditions hereof. In case of misrepresentation by salesman and the Shark River Hills Company returns buyer's money paid, salesman shall re- 40

Answer

turn any commission paid to him on such sale or sales.

Dated April 18, 1926.

10 SHARK RIVER HILLS COMPANY, INC.
MORRISEY & WALKER, INC., Agents
By Thomas C. Ely
Salesman Walter M. Brown (L. S.)

Note: Salesman will be given an opportunity to secure contracts for the erection of new buildings and to sell erected buildings, for account of the Morrisey & Walker Construction Company, Inc., at a commission of 5 per cent.

20

ANSWER.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

30	WALTER M. BROWN, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">vs.</div> THE SHARK RIVER HILLS COM- PANY, INC., Body Corporate, and MORRISEY & WALKER, INC., Body Corporate, <div style="text-align: right;">Defendants.</div>	}	Action at Law
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40 The defendant, Morrisey & Walker, Inc., a body corporate, by way of Answer to the Complaint herein filed, says that

Answer

1. It admits Paragraphs 1 and 2 of said Complaint.

2. It denies Paragraphs 3, 4 and 5 of said Complaint.

FIRST DEFENSE.

10

Plaintiff did not consummate bona fide sales, but, on the other hand, with the connivance of other salesman, made certain fake sales.

SECOND DEFENSE.

Plaintiff further fraudulently and with intent to cheat the defendant, caused certain sales to be entered up, contrary to the rules and regulations of the defendant, of which rules and regulations plaintiff was well aware, and more particularly entered fictitious names as buyers and also caused certain sales to be entered by transferring accounts without authority of the holders of said accounts.

20

THIRD DEFENSE.

30

Defendant owes plaintiff nothing, but on the other hand, plaintiff is indebted to defendant as more particularly set forth in suit instituted by this defendant against the plaintiff.

FOURTH DEFENSE.

Plaintiff was employed under a written contract, the terms and particulars of which he

40

Answer

breached in many respects, and more particularly breached said contract in that he charged for commissions before twenty percent. of the purchase price had been paid; in that he did not devote his entire time to the work mentioned; in
10 that he engaged in selling real estate, contrary to his agreement, in the same locality; in that he executed sales contracts which were not accepted by this defendant; in that he did not comply with his contract in turning over documents to this defendant.

FIFTH DEFENSE.

20 Defendant, by the contract, had the right to declare forfeited any bonus or commission for breach of the contract and has elected to declare that such bonus and commission as forfeited pursuant to the terms of said contract.

QUINN, PARSONS & DOREMUS,
Attorneys of Defendant,
Morrisey & Walker, Inc.

REPLY.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

 WALTER M. BROWN,

Plaintiff,

vs.

 THE SHARK RIVER HILLS COM-
 PANY, INC., Body Corporate,
 and MORRISEY & WALKER, INC.,
 Body Corporate,

Defendants.

10

Action at Law

20

The plaintiff, residing in the City of Asbury Park, County of Monmouth and State of New Jersey, replying to the answer of the defendants in the above entitled cause, says that:

1. The matters and things therein contained are denied.

2. The plaintiff joins issue thereon.

30

WARD KREMER,
 Attorney for Plaintiff.

40

POSTEA.

(Filed Aug. 2, 1928)

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10

WALTER M. BROWN, Plaintiff,

vs.

THE SHARK RIVER HILLS COMPANY, INC., Body Corporate, and MORRISEY & WALKER, INC., Body Corporate,

20

Defendants.

Action at Law

This case was tried before Circuit Judge Rulif V. Lawrence with a jury on July 25, 26, and 27th, 1928.

The jury rendered a general verdict against the defendant, Morrisey & Walker, Inc., body corporate, and in favor of the plaintiff for One Thousand Ninety-seven Dollars and forty cents (\$1,097.40).

RULIF V. LAWRENCE, Judge.

A true copy
Fred L. Bloodgood, Clerk.

40

ON POSTEA.

NEW JERSEY SUPREME COURT

WALTER M. BROWN, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">vs.</div> MORRISEY & WALKER, INC., Body <div style="text-align: left;">Corporate,</div> <div style="text-align: right;">Defendant. </div>	}	Action at Law 10
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It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of one thousand and ninety-seven dollars and forty cents, besides costs to be taxed *nisi* 20

Entered August 2, 1928.

On motion of

WARD KREMER,
Attorney.

\$1097.40
73.97

30

\$1171.37
R. to S. C.

A true copy

Fred L. Bloodgood, Clerk.

40

RULE TO SHOW CAUSE.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10	WALTER M. BROWN, <div style="text-align: right;">Plaintiff,</div>	}	Action at Law
	vs.		
	MORRISEY & WALKER, INC., Body Corporate, Impleaded, <div style="text-align: right;">Defendant.</div>		

20 A verdict having been rendered in favor of the plaintiff and against the defendant in the above entitled action, on the 27th day of July, A. D. 1928, and application having been made for this rule within six days after the rendering of the verdict herein,

30 It is, hereupon, on this thirtieth day of July, 1928, on motion of Quinn, Parsons & Doremus, attorneys of the defendant, Ordered that the said plaintiff show cause before the Supreme Court of New Jersey, at the State House, in the City of Trenton, on the first Tuesday of October, 1928, at ten o'clock in the forenoon why the verdict herein should not be set aside and a new trial granted.

It is further Ordered that all defendant's exceptions be reserved; that in the meantime and until further order of this Court all proceedings in said cause, or the execution issued or to be is-

Reasons

sued, on the judgment, be and the same are hereby stayed.

Entered August 2, 1928.

RULIF V. LAWRENCE,
Judge. 10

On motion of

QUINN, PARSONS & DOREMUS,
Attorneys of Defendant.

A true copy
Fred L. Bloodgood, Clerk.

REASONS.

20

NEW JERSEY SUPREME COURT

WALTER M. BROWN,

Plaintiff,

vs.

MORRISEY & WALKER, INC., Body
Corporate, Impleaded,

Defendant.

On Rule to
Show Cause.

30

The defendant assigns the following reasons on which it will rest its application for new trial before the Supreme Court, in the above entitled action:

1. There was no evidence to support the verdict.
2. The verdict was against the weight of evidence. 40

QUINN, PARSONS & DOREMUS,
Attorneys for Defendant.

TESTIMONY.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10	WALTER M. BROWN, <div style="text-align: right;">Plaintiff,</div>	}	Action at Law
	v.		
	THE SHARK RIVER HILLS COM- PANY, INC., Body Corporate, and MORRISEY & WALKER, INC., Body Corporate, <div style="text-align: right;">Defendants.</div>		
20			

Freehold, N. J., July 25, 1928.

Before: Hon. R. V. LAWRENCE, Judge, and a Jury.

Appearances:

For Plaintiff: Ward Kremer, Esq.

For Defendants: Messrs. Quinn, Parsons &
 30 Doremus.

Mr. Kremer: If the Court please, I would like to ask, in view of Mr. Parsons' point, whether or not he will concede that if twenty per cent of the purchase price was paid in by a prospective purchaser, that that entitled the agent to credit for that sale?

The Court: Even though the sale might not have been consummated?

40 Mr. Kremer: Even though the sale went no further.

Testimony

The Court: What is your answer?

Mr. Parsons: We will concede that, if your Honor please. May I just state it as it was stated to me by Mr. Walker? If twenty per cent of new money, in other words, money that had never been paid into the Shark River Hills Company 10 before, had been paid in to the Shark River Hills Company—

The Court: On account of purchase price?

Mr. Parsons: On account of purchase price, and the contract signed by the customer, that then the salesman is entitled to the eight per cent.

Mr. Kremer: Regardless of whether any further payments were made by the purchaser or not? 20

Mr. Parsons: That is so.

Mr. Kremer: I gathered from his statement to the jury that it was a different statement. That disposes of one defense.

The Court: I assume that would not be so, necessarily, that the sale might not go through, although made by the agent. The agent would not be responsible for the collection subsequently.

Mr. Parsons: That twenty per cent of the purchase price. 30

The Court: The owner of the land had an enforceable contract.

Mr. Kremer: That is it exactly. We are not claiming in all these sales that every dollar was paid in which the purchaser agreed to pay, but we do claim that if the agent got the twenty per cent, that entitled him to his commission without anything else being paid.

The Court: Of course there was a contract in writing? 40

Mr. Kremer: Yes.

Testimony

The Court: Of course, which is obtained.

Mr. Kremer: Which is obtained from him, signed by the agent of the company.

The Court: In other words, an enforceable contract that might be on each salesman's statement.

10 Mr. Parsons: Not if the agent got the twenty per cent, if the company got the twenty per cent.

Mr. Kremer: Less the commission which he is entitled to of eight per cent.

Mr. Parsons: Unless the agent put it in his pocket.

Mr. Kremer: I don't think there is any question of that.

The Court: I do not think there is the slightest suggestion of that, at all. We ought not to allow any prejudicial statement to be made, naturally.

Mr. Kremer: What I gathered from Mr. Parsons' opening was that objection was made to the fact that after the owners had paid into the concern their twenty per cent, that they did not pay anything more in, and yet the plaintiff claims credit for that sum. Of course, we claim credit because under the law we are entitled to it. The
30 agent didn't guarantee that the parties would pay in the rest.

The Court: Provided he made a valid sale and got a contract in writing.

Mr. Parsons: To clear up my statement before the jury, your Honor—I don't want to be in that position—the allegation of our charge is with reference to these sales that after the twenty per cent had been paid, that the agents transferred
40 that same twenty per cent—

Thomas Ely—Direct

The Court: I get your point; they used it as a duplication?

Mr. Parsons: They used it as a duplication.

The Court: Certainly; that is what you claim. You have got to prove that, though.

10

THOMAS ELY, sworn for plaintiff.

Direct-examination by Mr. Kremer:

Q. Where do you live, Mr. Ely? A. Asbury Park.

Q. What business are you in? A. Real estate.

Q. How long have you been in the real estate business? A. Since 1922.

Q. And were you ever employed by Morrisey & Walker, one of the defendants in this suit? A. Yes, sir. 20

Q. When did you commence your employment with them? A. 1922.

Q. And where? A. In Lawrence Harbor.

Q. Were you employed by them in 1926? A. Yes.

Q. In what capacity? A. As their general sales manager.

Q. And where were you located? A. At Asbury Park. 30

Q. Were Morrisey & Walker interested with or in the tract known as Shark River Hills? A. Yes.

Q. Where was the tract located? A. On Shark River.

Q. And by whom was it owned? A. By the Shark River Hills Company.

Q. Is that a corporation? A. I believe it is, sir. 40

Thomas Ely—Direct

Q. What was the connection of Morrisey & Walker with the Shark River Hills Company?

Mr. Parsons: Objected to.

The Court: If he knows he may state.

10 Mr. Parsons: I think the best evidence is any agreement that may exist between the parties.

The Court: Let's see what the answer is. You admit it in your answer, don't you?

Mr. Kremer: I think so.

20 The Court: I think you do, the way it looks here. "Also there is a contract in existence between the Shark River Hills Company and Morrisey & Walker, Incorporated."

Mr. Parsons: I mean the relation between the Shark River Hills Company and Morrisey & Walker.

The Court: Let's see. You admit paragraphs one, two and three.

(Further argument.)

The Court: Produce your contract.

30 Mr. Kremer: I haven't the contract between Morrisey & Walker and the Shark River Hills Company. I am not sure but what I called for those contracts. I may not have done so. I noticed Mr. Parsons to produce several documents in regard to this case.

40 The Court: Morrisey & Walker admits paragraphs one and two of the complaint and denies three, four and five. They, however, charge that the plaintiff did not consummate *bona fide* sales. Well, what is

Thomas Ely—Direct

the question, were Morrisey & Walker agents for the Shark River Hills Corporation in the sale of its lots? That is the question?

Mr. Parsons: No, I think not.

The Court: Will you read that? 10

Mr. Kremer: I will ask him that. I asked him what the relation was between Morrisey & Walker and the Shark River Hills Company.

The Court: If he knows he may state.

Mr. Parsons: May I object on the ground that the best proof is in—

The Court: I don't know what he is going to say. I am going to find out. 20

Mr. Parsons: The best proof is in the written contract.

The Court: I agree, if there was any such written contract.

By the Court:

Q. Do you know the relation between Morrisey & Walker and the Shark River Hills Company?

A. They were hired as agents.

Q. How do you know? 30

Mr. Parsons: Objected to.

A. Because I was told by Mr. Walker and I worked that way for them for three and a half years.

Mr. Kremer: If the Court please, Mr. Couse was subpoenaed—he is the president of the company and he was subpoenaed to bring the records with him and that con- 40

Thomas Ely—Direct

tract. We excused him for the afternoon on account of a bank directors' meeting.

The Court: I am rather inclined to think that this answer admits enough, however, to justify that inference. You may tell him what you do.

10

By Mr. Kremer:

Q. During the year 1926 what business were you engaged in for Morrisey & Walker? A. Why, selling Shark River Hills, Shark River Hills Manor.

Q. And where is Shark River Hills, please?

A. Shark River Hills was on the north side of Shark River.

20

Q. And what kind of a tract is that? A. Well, that is a development belonging to the Shark River Hills Company.

Q. How many lots were there over there? A. About seven thousand.

Q. And where is Shark River Hills Manor? A. That is on the westerly end or next to the Marconi Station on Shark River.

Q. What was your job in connection of the sale of that land? A. I was the general sales manager for Morrisey & Walker. It was within my power to hire and fire men and to generally aid and promote sales.

30

Q. And when did you commence your job as general sales manager? A. 1923.

Q. You continued from that time up until 1926? A. Yes, sir.

40

The Court: Judge, why don't you call for that contract? You have set it up in your pleading here. Oh, Mr. Couse has that?

Thomas Ely—Direct

Mr. Kremer: Mr. Couse has that.

The Court: The contract is not set out in full here.

Mr. Kremer: I think another contract is set out. The contract between the plaintiff Brown and Morrissey & Walker is set out, if I mistake not. 10

The Court: Well, go on.

Mr. Kremer: The salesman's agreement is what your Honor has reference to?

The Court: Yes, the salesmen's agreement.

Mr. Kremer: That I have called for. Have you that?

(Paper produced by Mr. Parsons.) 20

Q. Now do you know Walter Brown, the plaintiff in this suit? A. Yes, sir.

Q. Was he employed by Morrissey & Walker during the spring of 1926? A. Yes, sir.

Q. I show you what purports to be a contract between Mr. Brown and the Shark River Hills Company, by Morrissey & Walker, agents. Did you ever see that paper before? A. Yes, sir.

Q. Does it bear your signature? A. It does. 30

Q. What other signatures are there? A. Walter Brown.

Q. Did you see him sign it? A. Yes, sir.

Mr. Kremer: I want to offer that.

The Court: I understand there is no objection. It may be marked.

(Paper marked Exhibit P-1.)

Q. Will you state whether or not Mr. Brown went to work under his contract? A. Yes, sir. 40

Thomas Ely—Direct

By the Court:

Q. How were you related in the enterprise, do you say? A. I was the general sales manager.

Q. You were the general sales manager in the employ of whom? A. Morrissey & Walker.

10 Q. And you were dealing with the land at Shark River Hills? A. And Shark River Hills Manor.

By Mr. Kremer:

Q. I understood you to say, Mr. Ely, that you had the power of hiring and firing men? A. Subject to Mr. Walker's approval only.

Q. What was Mr. Walker's position in the company? A. He was my boss.

20 Q. And did you hire Mr. Brown? A. Originally I did, yes.

Q. When did you first hire Mr. Brown? A. 1924, I think.

Q. And can you state whether or not he worked for the company continuously from that time up until 1926? A. With the exception, I think, of the winter of 1925, he sold automobiles in Lakewood, as I remember.

30 Q. Now, after the contract which has just been offered in evidence was entered into you said Mr. Brown went to work? A. Yes, sir.

Q. Now, Mr. Ely, after the contract was entered into and Mr. Brown went to work was any other arrangement made with him? A. Yes, sir.

Q. When did it take place? A. Around the latter part of May, 1926.

Q. And was that before or after this contract was entered into? A. After.

40 Q. Now, what was that arrangement?

Thomas Ely—Direct

Mr. Parsons: Now, if your Honor please, I object to that.

Mr. Kremer: I will withdraw that.

Q. Where was it made? A. It was made in our office at 320 Cookman Avenue and confirmed at a salesmen's dinner at the Berkeley-Carteret Hotel by Mr. Walker. 10

Q. At the meeting in your office, 320 Cookman Avenue, Asbury Park, who was present? A. Mr. Brown, Mr. Parsels, Mr. Bassett, Mr. Oldham, as I remember, and Mr. Walker and I think Mr. Schlobohn.

Q. Mr. Walker was present? A. Yes.

Q. Now, will you state what was said? 20

Mr. Parsons: Now, I object to that, that this is a verbal contract, an oral contract. It is within the statute of frauds, that any commission or demand made for the sale of real estate must be in writing.

The Court: To an agent?

Mr. Parsons: So far as the Shark River Hills Company is concerned, yes. To bind the Shark River Hills Company in any way— 30

The Court: I think that that verbal agreement would bind the persons who made it. As I understand, the claim here is that Morrisey & Walker made an agreement with the plaintiff. I will define the issues before we get through. But if a verbal contract was made by a selling agent with special agents or employees of theirs it is not within the statute. 40

Thomas Ely—Direct

Mr. Parsons: But it would not in any way bind the Shark River Hills Company.

The Court: I will see whether it does or not.

Mr. Parsons: May I have an exception?

10

The Court: You may have an exception, and the Court will now state that the contract, as it now appears to be, can bind only the Morrisey & Walker Company, understand.

Q. Will you state what was said? A. We were to divide our selling organization into five teams. Mr. Brown was appointed a captain and was allowed to have seven men in addition to his own efforts. He was to receive, or rather, to get credit for all the business that his team did; also what bungalows were sold that year for the Morrisey & Walker Construction Company.

20

Q. Will you state where those bungalows were located? A. In Shark River Hills or in the Manor. And also all sales that were made in Shark River Hills Manor.

Mr. Parsons: I object to that and ask that that be stricken out, Shark River Hills Manor, because that is what Morrisey & Walker individually made, must be in writing, that the Morrisey & Walker Building Company owned, must be in writing. They are not sales agents for that.

30

The Court: I am not so sure about that. There is quite a recent case on this subject, as I recall, decided by the Supreme Court, where they held that such an agreement

40

Discussion

was not within the statute, it was not within that provision of the statute which relates to the owner of land agreeing to pay a real estate agent commission for procuring a purchaser.

(After argument.)

10

The Court: I am not so sure that in this case, that develops as is now indicated by this testimony, that you are not estopped from raising this question by reason of what you do. I think you adopted the contract itself as a matter of fact, and it may well be that the doctrine of estoppel applies. I am not going to pass on that question. I am going to rule against you, and if I find I am wrong before the close of the case I will strike the testimony. 20

Mr. Parsons: I ask for an exception. I would like to state on the record the grounds for my objection and exception are these, namely: that the agreement that is being proved now is an agreement to pay salesmen a certain amount of money for the sale of lands, referring particularly to the land of the Shark River Hills Manor and the lands of the Morrissey & Walker Building Company; that this agreement, as has been testified to, was an oral agreement made by Mr. Walker; that such testimony is barred by the statute of frauds, and that any agreement to pay any sum of money for the sale of lands as between owner and salesman must be in writing. 30 40

Thomas Ely—Direct

The Court: I may call your attention to the fact that that is a defense. We haven't arrived at your side of the case yet.

Mr. Parsons: But they must prove their case in accordance with the statute.

10 The Court: That is what they are trying to do. It doesn't appear yet that you own Shark River Manor and not Shark River Hills. Proceed. I will control the situation as far as the issues are concerned.

(Objection noted for defendants as ground of appeal.)

Q. Will you state now, Mr. Ely, what was said
20 at that meeting at 320 Cookman Avenue, I believe? I believe you said Mr. Walker was present and yourself and other gentlemen.

Mr. Parsons: I ask an exception to all this line of testimony.

(Objection noted for defendants as ground of appeal.)

30 A. We chose—or rather, Mr. Walker and I prior to that time made up our minds who would make captains. At that time we chose the teams in the presence of all of them. We decided at that time the men, in other words. A little bit later that day we went to a banquet at the Berkeley-Carteret, where all the salesmen were present, and Mr. Walker addressed them primarily for the good business of the season, and so forth, at which time—

40 Q. Just a moment before you get to the banquet. Will you state what was said and what the con-

Thomas Ely—Direct

versation was at your office? A. Well, they were made captains.

Q. Yes, and what else was done? A. They were offered a prize of one thousand dollars if they and their team did \$200,000 worth of business. 10

Q. Now, who said that?

By the Court:

Q. On what property was that? A. That was Shark River Hills Manor, Shark River Hills itself, and what bungalows they sold was to apply towards that business.

By Mr. Kremer:

Q. Who said that? A. Mr. Walker. 20

Q. Was Mr. Brown present? A. Yes, sir.

Q. What did Mr. Brown say? A. He accepted it.

Q. And was the team chosen there? A. Tentatively, yes.

Q. How many teams were chosen? A. Five.

Q. And can you tell us who were the captains of the teams? A. Mr. Walter M. Parsels, Mr. Arthur F. Schlobohn, who later was taken over by E. D. Carlow, Mr. Cecil A. Bassett, Mr. Clarence Oldham and Walter Brown. 30

Q. Very well; and then after they had that meeting there you say you went to the Berkeley-Carteret? A. Yes, sir.

Q. What happened there? A. Mr. Walker addressed the salesmen and made an announcement of our plans for the season.

Q. Was anything further said about the agreement that you have just referred to? A. Inas- 40

Thomas Ely—Direct

much as he told who the captains would be, that there would also be a prize of an additional thousand dollars to the high captain and the high team was to get another thousand dollars divided pro rata for the amount of business that they did.

10 Q. Now, after that dinner was held at the Berkeley-Carteret what happened then? A. We went to work.

Q. Well, did you continue to work for the company throughout the summer? A. Yes.

Mr. Kremer: If your Honor please, if I may interrupt again, addressing myself to the objection that Mr. Parsons made, as I understand it, this question on the statute of frauds, I think it must be pleaded. It is not set out in the answer.

20

Mr. Parsons: It doesn't have to be pleaded.

The Court: I will decide this.

Q. Do you know whether Brown worked? A. Yes.

Q. Do you know who were the members of Brown's team? A. I don't remember.

30 Q. Do you know any of them? A. Why, Eddie Luke, as I understand it, Gar Brown—that is Mr. Brown's brother—a man by the name of George Major, George Miller; I don't remember the rest.

Q. And can you state whether or not Mr. Brown worked continuously? A. Yes, he did.

Q. Did he devote his whole time to this enterprise, so far as you know? A. So far as I know, yes.

40 Q. Well, you were his immediate superior? A. Yes.

Thomas Ely—Direct

Q. Did you ever have any knowledge of him working at anything else during that summer except this? A. No, sir.

Q. How long did you say Mr. Brown had been with the company? A. That was the third year.

Q. Had you been his superior all that time? 10
A. Yes.

Q. What can you tell us as to the character of the work that he did for the company?

Mr. Parsons: Objected to as absolutely immaterial.

Mr. Kremer: I think in his opening and in his answer it says that he did not work honestly and did not work continuously 20 during that time.

The Court: Never mind the defense; prove your case first. You meet that in rebuttal.

Q. You say that he did work during that summer? A. Yes.

Q. Now, was anything said at either of those meetings you have just referred to about how the \$200,000 was to be made up for which the team captain was to receive credit? A. Yes. 30

Q. What was the agreement? A. That he was to get all the business that his team did, his own personal business in the Hills and in the Manor and on what bungalows were sold; also what business his team did, ten per cent of that was to be added to his own personal business in the form of what we call a gross commission.

Q. Very well. Now do you know of your own knowledge whether or not Mr. Brown's team, with 40

Thomas Ely—Direct

himself, went over the top and sold \$200,000 or more that year? A. Yes.

Q. Well, how much did they sell?

10 Mr. Parsons: I object. The books and records are the things that are finally conclusive.

Mr. Kremer: I don't think so, if your Honor please. I don't see why the books of the defendant company should be binding upon us. He says yes, he knows.

By the Court:

Q. How do you know it? A. Why, they were taken from the records of the statements that
20 were rendered by Morrisey & Walker to the Shark River Hills Company at the end of the year. All the captains were present at that time and they proved their business.

Q. In the presence of Mr. Walker? A. No, sir.

Q. Where are the statements?

Mr. Parsons: They are all here.

The Court: You call for them?

30 Mr. Kremer: I call for them. I may be in error about this, but I do not concede that we are bound by what their books show. They own the books and keep them, not us. Of course it will be a self-serving transaction. Whatever they may have on their books, we cannot control them. They employ bookkeepers.

40 The Court: Well, I am not so sure, if it appears that it was a system of bookkeeping with regard to such sales, that the best evidence would not be such bookkeeping.

Thomas Ely—Direct

Mr. Kremer: That depends on how they are recorded.

The Court: I will allow you to show in the first instance that such sales were made. That is a subject of cross-examination, of course, and what defense they may inter- 10
pose.

Mr. Parsons: I ask an exception on the following ground, namely: that there are books of account which have been demanded.

The Court: That is not yet clear.

Mr. Parsons: I will state at the present time that there has been a notice to produce served upon the defendants to pro- 20
duce the books, and that they are here in court; that those books are the best evidence; in the second place, that any statement of this witness cannot bind the defendant the Shark River Hills Company, for it has no authority to bind the defendant the Shark River Hills Company.

Q. What is your source of information as to the sales made? A. From the books. 30

Q. And what books? A. The Shark River Hills Company's books.

Q. And the books to which counsel has just referred? A. Yes.

The Court: Now, they have referred to them, that is the best evidence.

(After further argument.)

The Court: I will allow an answer to the question. You have taken an exception. 40

(Objection noted for defendants as ground of appeal.)

Discussion

Mr. Parsons: I wish to call your Honor's attention that this witness has said that his knowledge is gained from the books, so his knowledge is only secondary knowledge.

10

The Court: And moreover, he didn't make all the sales, that is the difficulty. There were as a matter of fact seven men working under him. He can only speak of what he himself knows. I will straighten this record out. What was that question over which the debate began?

Mr. Kremer: Did that team sell over \$200,000? He said, yes.

20

The Court: I think it is admissible in view of the fact, when you come to reflect on it, that here were seven men in that team. Now, he is presumed to know what they do. But how can he speak with authority? He is not the best evidence on that. The objection is sustained. You take an exception. I have ruled both ways on the subject; you ought to be satisfied.

(Objection noted for plaintiff as ground of appeal.)

30

Mr. Kremer: What I should like to do is to explore his knowledge, to develop this fact independently of the books.

The Court: I will allow you to do that. I am not going to force you to produce the books. He cannot testify as to what Henry Jones says at this time.

40

Mr. Kremer: He may know of his own knowledge.

Thomas Ely—Direct

By Mr. Kremer:

Q. Now, in December of 1926 did you have any meeting with Mr. Walker about Mr. Brown's account? Did you see Mr. Walker? A. No.

Q. Did you see Mr. Walker at that time? A. Yes, I saw Mr. Walker two or three times just 10 before these statements were made out.

Q. Well, what statements were made up? A. The statement of Morrissey & Walker to the Shark River Hills Company of the salesmen's statement.

Q. Who made up the salesmen's statement? A. I did.

Q. And when did you do that? A. Why, I believe it was December 15th. 20

Q. Was that part of your job? A. Dictated from the books, yes.

Q. I show you what purports to be a statement bearing date December 15th and I ask you if that is what you refer to? A. Yes, sir.

Q. Did you prepare that statement? A. I did.

Q. Whose signature is on it? A. Walter M. Brown.

Q. For what purpose was Mr. Brown's signature obtained? A. Why, someone must have paid 30 him his money.

Mr. Kremer: I offer this.

Mr. Parsons: No objection to that.

The Court: It may be marked.

(Paper marked Exhibit P-2.)

Q. Now, Mr. Ely, can you tell us whether that statement shows the amount of sales of land made during that summer by Mr. Brown and his team? 40

Thomas Ely—Direct

Mr. Parsons: Objected to.

A. No, it does not.

Q. What does it show? A. It shows—

Mr. Parsons: I object to that.

10 The Court: I will allow him to answer.

(Objection noted for defendants as ground of appeal.)

Mr. Parsons: The exception is on the ground that it is hearsay testimony gained from the books and from the statement made by Mr. Ely from the books; and upon the further ground that any state-
20 ment made to Morrissey & Walker is not binding upon the Shark River Hills Company, the other defendant in this suit.

The Court: For the present it will be admitted with regard to the defendant Morrissey & Walker.

Q. Will you read the statement? A. That is dated December 15, 1926, the salesman of Walter M. Brown, between Morrissey & Walker, Incorporated. "Purchaser, E. Lund, Lots 73 and 74,
30 Block 43-A."

Q. Will you proceed and read the statement, Mr. Ely? A. "Lots 73 and 74, Block 43-A." That is Section A. "\$1,250. 4 per cent commission, \$50."

E. W. Purdy, Lot 37, Block 24, \$350. 8 per cent commission, \$28.

J. L. Staegor, Lots 21, 22 and 23, Block 39, \$1,-
40 800. 8 per cent commission, \$144.

Thomas Ely—Direct

E. Katz, Lots 24 to 27, Block 46, \$10,000. 8 per cent commission, \$800.

E. R. Palmer, Lot 20, Block 13, Section C, \$550. 8 per cent commission, \$44.

G. Feehan, Lots 1236 and 1237, Section D, \$600. 10 8 per cent commission, \$48. Making a total of \$1,114. He received on account \$250, which was deducted, leaving a balance of \$864.

Then for the year 1926—this was the winding up of the year—he had a total gross business of \$100,000. 10 per cent on his team's business, which is \$10,250. Making a total of \$110,250.

By the Court:

20

Q. By Brown? A. By Brown. He gets a two per cent bonus, which is \$2,250. He gets \$100 for each \$10,000 over \$50,000 worth of business, which is according to the contract which you have in evidence. Making a total commission due of \$3,714.

By Mr. Kremer:

Q. What was the total sales as shown by your agreement by Brown and his team? A. Appar- 30 ently his team had \$102,500, and the \$100,000 himself, plus ten per cent added to his own personal business from his team.

Q. Now, just let me get those items.

By the Court:

Q. Making a total of what? A. Well, it would be \$212,750.

By Mr. Kremer:

Q. \$212,750? A. Yes, sir.

40

Thomas Ely—Direct

Mr. Parsons: It is understood my objection runs to this testimony the same as it did to the previous testimony.

10 The Court: I understand the witness to say, however, that he himself made this calculation and compilation from the books of the company.

Q. You made that yourself that day? A. Yes.

Q. After you made that calculation, making a total, as you say, of \$212,750, what did you do?

A. Why, this statement we then sent to Keansburg.

20 Q. What is Keansburg? A. That is the main office of Morrisey & Walker.

Q. And to whom were they sent there? A. To Mr. Walker, I believe.

Q. Was he in charge of the office at the time? A. Yes, sir.

Q. Do you know whether or not Mr. Walker received a statement identical with the one you have in your hand? A. Why, they were made up—

30 Mr. Parsons: You can answer yes or no to that.

A. Yes.

Q. Did he? A. Yes.

Q. And what happened then? A. I don't know. I was no longer in their employ.

Q. Well, after you sent that statement to Mr. Walker did you see him any more in relation to this matter? A. Yes.

Q. Where did you see him? A. In Keansburg.

40 Q. What was said by either of you about Mr.

Thomas Ely—Direct

Brown's commission and prize when you saw him at Keansburg? A. He told me that when the books were audited by the auditor he would pay the commissions. I went up and asked for my own commissions.

Q. What did he say about Mr. Brown's commissions? A. He didn't say anything particular about Mr. Brown's commissions, as I remember.

Q. What else did he do at that time if anything? A. Nothing.

Q. Did you receive any checks then? A. I did not, no.

Q. Was Mr. Brown with you? A. No.

Q. Now, about when was that conversation with Mr. Walker in relation to the date on this agreement, which is December 15th, as I understand it?

A. Well, it must have been the 16th or 17th.

Q. And after that what did you do? A. I went on a hunting trip.

Q. Well, you said he made some reference to auditing your books? A. He said that Mr. McDonald would come down and go over the books.

Q. Do you know whether or not that was done? A. Yes.

Q. How do you know that? A. I went over with him.

Q. With Mr. McDonald? A. Yes.

Q. Is he a member of the firm of auditors that were referred to by Mr. Parsons in his opening?

A. What is the name of that firm?

Mr. Parsons: Hill, Bieth & McMahan.

Q. Do you know whether or not the Mr. McDonald that you have referred to as auditor was a member of that company? A. Yes.

Thomas Ely—Direct

Q. Was he? A. Yes.

Q. Now, you say you went over the books with him? A. Went over the statement of Morrisey & Walker to the Shark River Hills Company, from which this statement was taken.

10 Q. Did that statement of Morrisey & Walker to the Shark River Hills Company contain the records of sales by Brown and his team? A. Yes.

Q. Will you state whether or not Mr. McDonald approved the statement as far as it related to Brown, if you know?

Mr. Parsons: Objected to.

20 The Court: That is of no materiality, whether he did or not.

Mr. Kremer: Well, if the court please, Mr. Parsons in his opening said that they went over the books and found them all wrong and full of fictitious sales and so forth.

The Court: You don't have to anticipate their defense. Go ahead and prove your own case. Wait for rebuttal.

30 Mr. Kremer: I think, if your Honor please, that the approval will have some materiality here.

The Court: I think it is a *prima facie* situation that your client with his team sold \$200,000 worth. The objection is sustained. You may have an exception. It is immaterial what McDonald did.

(Objection noted for plaintiff as ground of appeal.)

40 Q. You have referred to the statement by Morrisey & Walker to the Shark River Hills Com-

Thomas Ely—Direct

pany. What do you mean by that? A. That is a statement of commissions due Morrisey & Walker from which they pay the salesmen.

Q. What commission did they receive from the Shark River Hills Company?

Mr. Parsons: Objected to. The contract will speak for that. 10

Mr. Kremer: Well, what they received, I think, if he knows as a fact.

The Court: Who received?

Mr. Kremer: The Morrisey & Walker Company, out of which this item was paid.

The Court: I will allow him to answer and find out whether he knows. If he doesn't know in an authoritative way the answer will be stricken. 20

Mr. Parsons: If your Honor please, there is testimony now that there is a written contract.

The Court: Between whom?

Mr. Parsons: Between the Shark River Hills Company and Morrisey & Walker, which will be produced here in court tomorrow morning.

The Court: I am going to find out. I will allow him to answer first. 30

(Objection noted for defendants as ground of appeal.)

The Court: Yes, it may be stricken out later.

Q. Do you know what commission Morrisey & Walker received from the Shark River Hills Company? A. Yes. 40

Thomas Ely—Direct

By the Court:

Q. How was that established, the agreement in writing? A. It was billed each month to them.

Q. To the Shark River Hills Company? A. To the Shark River Hills Company.

10 Q. All you know then is certain bills in deduction for commission each month? A. Yes.

Q. Were sent to the Shark River Hills Company? A. Yes.

The Court: That is all he can testify.

Mr. Kremer: That is all I am asking.

By Mr. Kremer:

20 Q. Can you tell us whether or not Morrisey & Walker received from the Shark River Hills Company their commission on the sale of the land by Brown and his team?

Mr. Parsons: Objected to, if your Honor please.

The Court: As a fact, you mean, Judge?

Mr. Kremer: Yes.

The Court: State your objection.

30 Mr. Parsons: On the ground that whether Morrisey & Walker received any commission or some commission is absolutely immaterial. Morrisey & Walker may receive money that they have to pay back or have paid back.

The Court: Don't argue. Objection overruled and an exception. You may answer.

40 (Objection noted for defendants as ground of appeal.)

Thomas Ely—Direct

By the Court:

Q. Do you know whether they received commission? A. Yes.

Q. On the land sold by Brown and his team? A. Yes.

By Mr. Kremer:

10

Q. On \$212,500? A. I don't know.

Q. Do you know of your own knowledge and part of your duties as general sales manager what step was taken by Morrissey & Walker in regard to these accounts before these bills were submitted to the Shark River Hills Company? A. Why, they were simply taken from the books.

Q. Were the books audited? A. The books were audited by the auditor each month. 20

Q. And this account of Brown's team was audited? A. I presume it has been.

Q. Why do you presume it? A. Because it always was done. I wasn't with them at that time.

Q. I understood you to say you went over the books? A. I did.

Q. With Mr. McDonald? A. With Mr. McDonald.

Q. And it was after that that the Shark River Hills Company paid Morrissey & Walker? A. No, it was before that. 30

Q. Now, after that audit was made by Mr. McDonald with yourself present did you then have any further conversation with Mr. Walker? A. No.

Q. Did you see him after that? A. Not to my knowledge.

Q. Did you have any meeting with him, or with Mr. Brown? A. No. 40

Thomas Ely—Direct

Q. Now, who generally paid the commissions and prize money to the captains of the teams, if you know?

10 Mr. Parsons: Objected to. I don't see where it is material at all who generally paid it.

The Court: I don't see why you object. You represent the Shark River Hills Company too?

Mr. Parsons: Represent them both, attorney of record of both of them.

The Court: Go ahead.

A. I generally disbursed the money.

20 By the Court:

Q. On whose account? A. Morrisey & Walker.

By Mr. Kremer:

Q. You generally disbursed it? A. Yes.

Q. Did you pay Mr. Brown his prize? A. No.

Q. Why not? A. I didn't pay him anything in this case.

Q. Why not?

30 Mr. Parsons: Objected to as absolutely immaterial, why this man didn't pay it.

Mr. Kremer: If the Court please, I think on the state of the facts it would be material.

The Court: He says he wasn't there.

Mr. Parsons: And the books were not audited yet.

40 Mr. Kremer: It appeared according to that the books had been audited and the account approved.

Thomas Ely—Direct

A. The accounts had been gone over but they hadn't been settled up for the month by any means.

Q. When were they settled up? A. I don't know.

The Court: He left.

10

By the Court:

Q. When did you in fact leave? A. I think it was the 17th or 18th, or perhaps the 20th.

Q. Of what? A. December.

Q. 1927? A. 1926.

The Court: Go on.

By Mr. Kremer:

Q. Do you do anything in regard to payment of Mr. Brown? A. No.

20

Q. Had this agreement in regard to teams and prizes ever been in effect in previous years? A. Yes, sir.

Q. And was in effect in 1925? A. Yes.

Q. Did Mr. Brown captain a team that year? A. No.

Q. Was he on a team? A. Yes.

Q. And was that thousand dollar prize paid to teams that went on— A. Yes.

30

Mr. Parsons: I object to what happened the year before. It is absolutely immaterial.

The Court: Oh, I am not so sure that it is immaterial. They show a course of practice.

Mr. Kremer: If the Court please, my purpose is in regard to the statement.

40

Thomas Ely—Direct

The Court: I am with you. You don't have to argue it.

Mr. Kremer: We may show a ratification of this agreement.

10 Mr. Parsons: May I state my objection? This suit is based upon a specific contract for one year. No matter what the results were five or ten or twenty years back, they have no relation to the specific contract on which suit is brought.

20 The Court: Of course it may be that that question might involve the rebuttal of the plaintiff rather than the present case. All you have to do is to prove at present a *prima facie* case and then put the defendants on their defense.

Mr. Parsons: I ask an exception.

The Court: You may have it.

(Objection noted for defendants as ground of appeal.)

Q. At the time you went over Mr. Brown's account with Mr. McDonald was Mr. Walker present? A. No.

30 Q. Was any objection made to Mr. Brown's account at that time?

Mr. Parsons: Objected to as absolutely immaterial.

The Court: Walker was not present.

Mr. Kremer: Well, his representative, McDonald, was auditing the books.

40 The Court: That is of no consequence. He was probably a proving auditor. It

Thomas Ely—Cross

would not necessarily show that he had any agency to bind Morrisey & Walker.

Mr. Kremer: It would tend to show whether the account was approved or not, was my only purpose.

The Court: That doesn't follow. 10

CROSS-EXAMINATION by Mr. Parsons:

Q. Mr. Ely, you testified that a prize of one thousand dollars was offered; is that correct?

A. Yes, sir.

Q. Who did Mr. Walker tell you was going to pay that prize? A. To the man that did over—

Q. No, who was going to pay the money? Who was going to furnish the money? A. Why, Morrisey & Walker offered it themselves. 20

Q. Did he say that Morrisey & Walker offered it? A. Well, it came direct from them.

Q. It came direct from them? You consulted with Judge Kremer when these suits were brought, didn't you? A. Not on this one particularly.

Q. Well, when all of them were brought? A. Not necessarily.

Q. I am not asking you not necessarily. You did consult with him, didn't you? A. Yes. 30

Q. And consulting with him about bring these suits you told him the facts, didn't you? A. So far as I know.

Q. Didn't you tell him that the Shark River Hills Company had offered this thousand dollars? A. No.

Q. You didn't say that? A. No.

Q. As a matter of fact the Shark River Hills 40

Thomas Ely—Cross

Company offered the thousand dollars? A. Not to my knowledge.

Q. You are positive of that? A. Yes.

Q. And so far as you know as general sales manager, until this day the Shark River Hills Company had nothing whatsoever to do with this prize of one thousand dollars? A. So far as I know.

Q. There was no contractual relationship of any kind? A. None whatsoever.

Q. And you were present at all conversations between Morrissey & Walker and their officers?

The Court: The plaintiff Brown.

20 Q. And Brown and the rest of the salesmen when this arrangement was made? A. Yes.

Q. So that you can say positively, so far as you know—and your knowledge would cover anything that any salesmen would know—that there was never any offer or agreement made by the Shark River Hills Company to in any way pay any bonus or prize? A. Not so far as this one prize is concerned, whatsoever.

Q. So far as this one prize is concerned? A. I
30 don't think so.

Q. You were there? A. Well, I don't remember, even if I was there.

Q. Wouldn't you remember it if it had been done? A. It was not; it was offered by Morrissey & Walker.

Q. Offered by Morrissey & Walker? A. Yes.

Q. And that was the prize of one thousand dollars that you refer to? A. Yes.

40 Q. Is that right? A. Yes.

Thomas Ely—Cross

Q. You know yourself, of your own knowledge, do you not, that Shark River Hills Manor, the land which you have mentioned, was owned by Morrisey & Walker? A. Yes.

Mr. Kremer: I object. I don't think his knowledge would be the best of evidence of title to the land. 10

The Court: Well, it may or may not be. I will allow him to answer. He says he believes that they owned it.

By the Court:

Q. In any event you were working on that land under their direction as owner, were you not? A. Yes, sir. 20

By Mr. Parsons:

Q. Who is the Morrisey & Walker Construction Company? A. Morrisey & Walker.

Q. Now, the contracts which were made were made in pursuance of the contract which you have there; is that right? A. Made what?

Q. The contract of \$1,000 was made in pursuance of the contract?

The Court: That is a report, that is not a contract. He simply has a statement. 30

Q. Is it made in pursuance of this contract, Exhibit P-1, which I show you? A. Yes, it was made after this.

Q. Made after that? A. Yes.

Q. Was there any other contract made between Morrisey & Walker and the Shark River Hills Company and Brown except this contract, any other contract in writing? A. No. 40

Thomas Ely—Cross

Q. None whatsoever? A. No.

Q. So there was no contract in writing between Morrisey & Walker and the Shark River Hills Company or Brown that had anything to do with any sales after the term specified in this contract?

10 A. None whatsoever to my knowledge.

Q. Were there any arrangements or any contract made between the salesmen beside and excepting this thousand dollar prize to the men verbally? A. Yes.

Q. What other contracts were made verbally beside the bonus of one thousand dollars? A. That when thirty per cent of the year's business or thirty per cent of a contract was in they would
20 be given one per cent for gasoline, but no claim was ever made for it.

Q. Were there any other contracts? A. That they were to receive on all bungalows built on the Shark River Manor and Shark River Hills a commission from the Morrisey & Walker Construction Company, but it was to be allowed to go on their gross or towards this prize money.

Q. Were there any other contracts? A. Not
30 to my knowledge.

Q. No question of that in your mind now, and you are general sales manager and you would know of every contract made? A. Yes.

Q. No question of that? A. I don't remember anything else at all.

Q. Now, you went over—you were general sales manager, weren't you? A. Yes.

Q. And it was your duty to make out these reports of sales and so on, wasn't it? A. Yes.

40 Q. They were under your direct supervision? A. Yes.

Thomas Ely—Cross

Q. During that period of time Morrissey & Walker had several other developments on? A. Yes.

Q. Lawrence Harbor, Cliffwood Beach and so on? A. Yes.

Q. Shark River Hills was left to your discretion, wasn't it? A. More or less. 10

Q. And whatever you put in as a man making a sale went, didn't it? A. It was on the books, yes.

Q. Of course as general sales manager it was your duty to go over carefully the sales, wasn't it? A. I didn't audit the books, no.

Q. But you watched the sales? A. Yes.

Q. Watched them carefully? A. Yes.

Q. You also watched the sales carefully that 20 are mentioned in this statement that you have there? A. Yes.

Q. You watched the sale to Emma Katz, did you not? A. Yes.

Q. Did you know about that sale? A. I did.

Q. What was the money paid down on that sale, do you know, of your own knowledge? A. Two hundred dollars, as I remember.

Q. Two hundred dollars? A. Yes.

Q. You oversee the entries that are made in 30 the books? A. No, sir.

Q. You don't? A. No, sir.

Q. Well, how do you know whether a sale goes through or not unless entries are made in the books? A. They are put in by the bookkeepers themselves. When I have the date of settlement I simply take the books and know what is there, that is all.

Q. So your information is entirely based on 40 what is in the books? A. Yes.

Thomas Ely—Cross

Q. Isn't that so? A. Yes.

Q. What would have been the ordinary payment that would have been entered on the books in the case of a sale such as that? A. \$2,000.

Q. And how much do you say was paid? A. 10 In cash, \$200.

Q. \$200? A. Yes.

Q. You O.K.'d the contract? A. Yes.

Q. By the way, Mr. Ely, your compensation was also based on the number of sales that the salesmen put through, wasn't it? A. It was my only compensation.

Q. That was your compensation; and the more sales that were put through or that you made O. 20 K., the more money you got, didn't you? A. If Morrissey & Walker first received them, yes.

Q. And you O. K.'d the Katz sale, didn't you? A. Yes, I have good reason for it.

Q. Isn't it true that on the books there was entered a payment by Brown of \$750 by his own personal check on that Katz sale?

Mr. Kremer: I think the books are the best evidence of that.

30 A. I don't know.

Q. You don't know? A. No.

Q. Don't you know, and weren't you in a consultation at the time with Mr. Walker about a check of Brown for \$750 upon which payment had been stopped? A. No.

Q. You never heard of that check before until today? A. I know it was given by Brown, that was all.

40 Q. On what transaction was it given by Brown? A. On the Katz sale.

Thomas Ely—Cross

Q. So that Brown himself personally was giving his own check on the Katz sale? A. Yes.

Q. You knew of that? A. Correct.

By the Court:

Q. Why did he give that check? A. Why, Mr. McDonald asked for it. 10

By Mr. Parsons:

Q. Mr. McDonald asked for it? A. Yes.

By the Court:

Q. Why did McDonald ask for it, if you know?
 A. Mrs. Katz had bought, as I remember it, two or three times prior to this sale. She had surplus moneys in on her account over and above the usual twenty per cent. That fall we asked—our usual way of doing business—we sent all our men out to get business or reloading among our customers. Mrs. Katz had a surplus, as I understand, over and above her twenty per cent on other sales, of something like \$2,000. Mr. Brown showed the new business to me and showed me a check for \$200. I asked him about it. He naturally went to the bookkeeper to find out what was what. I didn't take care of that. The sale goes through on the books. But I remember that I gave to them first the record with a statement from Morrisey & Walker to the Shark River Hills Company, and pay them the commission. From that statement I make up the salesmen's statements. They must be made from the Morrisey & Walker statement to the Shark River Hills Company, and they must be identical. 20 30

Thomas Ely—Cross

By Mr. Parsons:

Q. Did you report that that sale was \$1,800 short in cash to Mr. Walker? A. I never reported any sales to Mr. Walker.

Q. You never reported any sales? Didn't you
10 make it your business as general sales manager to report errors or incorrections or anything that was wrong with the business down there? A. That was nothing wrong with that.

Q. Wasn't the credit of \$1,800 there all wrong? A. It wasn't there.

Q. Did you look over the contract? A. Yes.

Q. It was your business to O. K. contracts, wasn't it? A. Yes.

Q. It is also true, is it not, that you couldn't
20 make a conditional contract? A. There was no conditional contract.

Q. You say there was not in the Katz case? A. Not to my knowledge.

Q. If there was a conditional contract you had no authority to make it, did you? A. Unless it was reasonable.

Q. Oh, then did you have authority to make conditional contracts? A. If they were reasonable,
30 only, or the salesman would make a definite statement.

Q. Do you mean to say that you had authority to bind the Shark River Hills Company for anything else than was contained in their stereotyped printed form of contract? A. It all depends. I would generally check it up with Mr. Walker.

Q. You would generally check it up with Mr. Walker? A. Use my own discretion.

Q. Would you ever check it up with any official
40 of the Shark River Hills Company? A. No.

Thomas Ely—Cross

Q. You would not? A. No.

Q. And if this contract is a conditional contract, the contract with Emma Katz, whom did you take that up with? A. I didn't take it up with anybody.

Q. You didn't take it up with anybody? 10
Where did you get your authority to make a conditional contract?

Mr. Kremer: Now, if the Court please, there is no proof that this one was.

The Court: It is not clear just what he said. He said first he would do it in a routine way and then afterwards he would take it up with Walker. I am not sure. 20

A. It all depends on what change was to be made. If it was something that was not usual I would have to take it up with Mr. Walker.

By the Court:

Q. Did you make a conditional contract or allow it to be made in the Katz case? A. Yes, I did.

Q. What was that conditional contract? A. She bought, as I remember, four lots. They were in the filled-in area. She wanted a guaranty that those lots would be filled in. They had been taken in after and were really under water at the time of the purchase. I remember they were under water and were being filled in at that time. She wanted to know whether a bulkhead would be erected, as I remember it. 30

Q. So you guaranteed it? A. I guaranteed it. She paid \$10,000 for four twenty-five-foot lots and she also asked that we guarantee to build a boardwalk in front of those lots, which I declined. 40

Thomas Ely—Cross

to do, because I didn't know whether it was going to be done. Since that time a boardwalk has been built. She also wanted to know whether the hotel was to be erected. It was under the course of construction. We guaranteed that. Every-
 10 thing that we guaranteed has been done.

The Court: Go on.

By Mr. Parsons:

Q. You say that is the only condition that is contained in that contract? A. As far as I know.

By the Court:

Q. Did you submit that to Walker for ratifica-
 20 tion? A. No.

Q. Did you submit it to anybody of the Shark River Hills Company for ratification? A. No, sir.

Q. Took it upon yourself to do? A. Yes, sir.

Q. And you say that that is the only condition that is contained in that contract? A. So far as I know, absolutely.

Q. Who made good for the \$750 for which Brown's check went bad? A. I am not sure; I
 30 don't know.

Q. That was a necessary—

Mr. Kremer: If the Court please, there is no proof of that at all in this?

The Court: No, that is right.

Mr. Parsons: He said so.

Mr. Kremer: There is no proof that Mr. Brown's check went bad.

The Court: He didn't say it went bad.
 40 Ask him.

Thomas Ely—Cross

Q. Did Brown's check go bad? A. I don't know. I wasn't there.

By Mr. Parsons:

Q. Didn't you say you knew about it a few minutes ago? A. No, I said I knew he gave a check. 10

Q. And don't you know that that check was not made good by Brown? A. I am sure I don't.

Q. If that check wasn't made good by Brown the sale was not a good sale, was it?

Mr. Kremer: I object. If I may state, there is a weight of difference between a check not being made good, for various reasons, and a check going bad; and I don't think Mr. Parsons should insinuate that 20 there were not sufficient funds unless he expects to prove it. There is no proof here that there was any spurious check given in this transaction.

The Court: The witness says he doesn't know anything about it. Why try to have him say something he doesn't know?

Q. How much money did Mrs. Katz actually pay? A. \$200. 30

Q. And did you know why Mr. Macdonald asked Mr. Brown for \$750 more? A. Because he questioned one sale, whether forty per cent or at least forty per cent was paid in, and he said he would not allow that money to be transferred. There was a difference of \$725.

Q. You were general sales agent, were you not? A. Yes.

Q. You knew that the \$750 was demanded from Mr. Brown, didn't you? A. According to the 40 books it was not necessary for him to pay it, no.

Thomas Ely—Cross

Q. You knew it was demanded from Brown, didn't you? A. Yes, I did.

Q. You knew that Brown paid it? A. I knew that he gave a check.

Q. You knew that he gave a check? A. Yes.

10 Q. Brown was under you? A. Yes.

Q. Why didn't you go and see Walker and tell Walker that they were trying to make Brown pay something he didn't have to? A. Because Mr. Macdonald was there at the request of Mr. Walker to look over the books and he was the one that asked him for the check.

Q. And when was that? A. I imagine about the 17th or 16th of December.

20 Q. When was this lot sold? A. I don't know. I imagine the latter part of November or the first of December.

Q. How long did that remain in the books? A. I don't know. The sale may be still there.

Q. After November 1, 1926, can you tell us how many sales were made by Brown? What was the total amount of sales? A. I don't know.

30 Q. Can you tell us after November 1, 1926, how many sales were made by Brown and his squad or team? A. I don't know.

Q. Did he make considerable sales after that? A. Well, not any more than usual, I don't think.

Q. Isn't the big time for sales during the summer months? A. Absolutely.

Q. Do you know how Brown's sales ran during the summer?

40 Mr. Kremer: I object to this, if the Court please. I don't think the fact that the sales were made in any—

Thomas Ely—Cross

The Court: I don't know what your purpose is in asking that question. Why do you ask that question?

Mr. Parsons: I was afraid and I didn't disclose my purpose. I mean I would put the witness on guard if I disclosed my purpose. I would like him to answer the question. 10

The Court: If the witness desires to answer the question I am going to allow him.

A. I don't know.

Q. It is true, is it not, that during the summer months is when you have your prospects and make your sales? A. As a rule, yes.

Q. And you as general sales manager keep in very close touch with the work, do you not? A. As best I can. 20

Q. And you as general sales manager made an endeavor, did you not, to protect Morrisey & Walker and the Shark River Hills Company from paying double commissions? A. Always.

Q. Didn't it strike you unusual that Brown put in far more sales in the month of December than in any other month? A. No. 30

Mr. Kremer: I object to that, if the Court please. There is no proof that he did.

Q. Is it a fact that he did put in more sales in December than in any other month? A. I don't know. He could have made sales in October and that they were not closed until December. They couldn't pay a commission until twenty per cent of the money was received. Sometimes sales were made six months before the money was paid. 40

Thomas Ely—Cross

By the Court:

Q. There has to be a record? A. Yes.

By Mr. Parsons:

Q. There would be a record when the first pay-
10 ment was made? A. Yes.

Q. You would enter on a slip, at least? A. Yes.

Q. And that was like these slips I showed you?
Before the contract was entered there would be a
small slip like this given to the purchaser? A.
Yes.

Q. And that would show that the sale was en-
tered into, wouldn't it? A. Yes.

Q. Now you say it didn't strike you at all unus-
20 ual—

Mr. Kremer: I object. There is still no
proof that he made more sales in December
than in any other month. I don't think a
question is proper based on something that
is not established in the case.

The Court: Probably they are going to
establish this, but it is not established yet.

Q. With the exception of the month of October
—let me ask you, with the exception of the month
30 of October, wouldn't it strike you, in your posi-
tion as general sales manager, very peculiar that
Brown should make more sales in December than
in any other month?

Mr. Kremer: Objected to.

The Court: I will allow the witness to
answer.

A. No; there were more reasons why he should
40 than against.

Thomas Ely—Cross

Q. And if that is true why is it true that all the other salesmen of Brown's squad with the exception of two made no sales?

Mr. Kremer: Objected to.

The Court: In December?

10

Mr. Parsons: In December.

Mr. Kremer: I object. May I state the reason for my objection? I don't think it is a fair inference that the jury could draw that because sales were made in December more than in May that that would be a ground of fraud or misconduct on the part of a salesman, because so many other elements might enter into it. A man might work hard in December and not in August; and on account of the fact that many other elements would enter into the situation, I do not think it is a fair state of facts on which an inference could be based that there was padding, as Mr. Parsons suggested.

20

The Court: I will allow the witness to answer the question. You may take an exception. What is the question? Is there any significance in the fact that four salesmen made no sales in December?

30

Mr. Kremer: They probably were not working.

(Objection noted for plaintiff as ground of appeal.)

Q. Is there any significance to it that nobody, even Brown himself, saving one man whose name was Luke, sold anything in Shark River Manor during December?

40

Thomas Ely—Cross

10 Mr. Kremer: Objected to for the same reason. I think there should be some limit as to what is proper cross-examination. There has not been a suggestion in the direct-examination as to what the other salesmen sold at the same time or where they sold the property.

The Court: I think the examination has gone far enough as it is.

20 Mr. Parsons: If I understand that I am willing to cross-examine this man no further along this line, if I understand that his testimony as to the amount of sales that were made is not binding; in other words, is not considered good. But if he has testified correctly on the question as to the amount of sales I think I have a wide latitude.

The Court: But you are going a bit afield when you talk about the other men. He said they were not working. What is this question that was objected to?

(Last question repeated.)

30 Mr. Parsons: The very item in this suit.

A. That is entirely up to the salesman. Some salesmen sold one section, other salesmen sold another section in the same tract. I believe Mr. Brown and Mr. Luke, as I remember it, sold more lots in the Manor than any other two salesmen we had in the whole organization.

40 Q. Didn't it strike you unusual that all Mr. Brown's sales should be in Shark River Hills and

Thomas Ely—Cross

none in the Manor, if he is one of the big salesmen of the Manor?

Mr. Kremer: Objected to.

The Court: Objection overruled.

Mr. Kremer: I would like to object 10
further to the form, if it didn't strike him
as unusual. That is simply calling for a
conclusion.

The Court: Well, it does have that tendency, of course.

Mr. Parsons: I will reframe the question.

Q. As general sales manager didn't you investigate the reasons why all of the sales by Brown, 20
who is one of the high salesmen, as you have stated, were all Shark River Hills sales, having none on the Manor, during the month of December? A. No.

Q. That didn't strike you peculiar? A. No, because there was quite obviously a good reason for it.

By Mr. Kremer:

Q. What was the reason? 30

Mr. Parsons: You can ask later, Judge.

Mr. Kremer: All right. Aren't you going to ask him the reasons? I noticed a couple other reasons you didn't ask him either.

By Mr. Parsons:

Q. Now in going over those sales did you investigate each sale or take charge of checking up to 40
see that each sale and each contract upon which

Thomas Ely—Cross

you were recommending commissions to be paid
was a bona fide sale and a bona fide contract?

10 Mr. Kremer: I object. There is no proof
that he recommended that the commissions
be paid.

Mr. Parsons: He has testified that, that
he made the list shown to Morrisey &
Walker.

The Court: I will allow it.

A. I simply took them from the books.

Q. As they were entered? A. I didn't see
every sale that came into the office.

20 Q. You didn't take it upon yourself to check
over the contracts and find out if you were rec-
ommending payment of commissions by Morrisey
& Walker to the salesmen upon sales that were
void then? A. I don't quite understand your
question.

Q. You didn't try to find out anything—

By the Court:

30 Q. Did you compare the contracts as entered
on the books with the copies of contracts as filed
in the office before making up your statement? A.
The bookkeepers do that.

Q. Well, you personally didn't? A. No.

The Court: Personally he didn't.

By Mr. Parsons:

40 Q. In recommending the salesmen for commis-
sion did you find out whether the requisite amount
of cash had been paid upon the sale? A. No, but
shown on the books before Morrisey & Walker
were even paid themselves and pay it that way.

Thomas Ely—Re-direct

Q. Did you find out? A. No, I saw it on the books.

Q. That is all you did? A. That is up to the bookkeepers.

RE-DIRECT EXAMINATION by Mr. Kremer: 10

Q. Now Mr. Parsons asked you a moment ago if you didn't regard it, if it didn't strike you as unusual, that more land was sold in the Manor by Brown and Mr. Luke at this time than in Shark River Hills; and you said, as I recall it, that there was a very plain reason for that.

Mr. Parsons: No, just the opposite: that more land was sold in Shark River Hills than in the Manor; is that right? 20

Mr. Kremer: That was in the month of November, he said.

Q. You said there was a very good reason for that? A. Yes.

Q. You tell us what the reason was. A. Why, our usual season is, of course, April, May, June, July, August and September. During the year 1926 we had a rotten business. I think it was the 15th day of September all of the men, including myself, went to Newark. We ran busses from Newark down to Shark River Hills and we got the old customers that were on the books—some had canceled, some increased their business, some we sold new sales to, made new sales to. That continued on up until about the 10th of December of that year. So we were working entirely among Shark River Hills' old customers, not new. 30 40

Thomas Ely—Re-direct

By the Court:

Q. During October, November and December?

A. Yes; that was totally unlike business we had ever done before. In fact, it was the best piece of business that was ever done in the Hills.

10

By Mr. Kremer:

Q. And that was during the months of September— A. September, October, November and December, and when the season is actually over.

20

Q. And is that your reason for— A. We were working entirely among Shark River Hills customers, nothing to do with the Manor at all. We tried to sell the same we sold in the other. Mr. Brown and Mr. Luke, I believe, sold more in the Manor than any other two salesmen.

30

Q. Mr. Parsons also questioned the fact that with the exception of the month of October that Mr. Brown's statement showed more lots sold in December than in any other month, and you also stated there were several reasons for that, but he didn't ask you. Now will you tell us what those reasons were? A. The purpose of the companies was to close up business, create business, create a rivalry among salesmen.

By the Court:

Q. You mean competition? A. That is better. And it was to wind up for the season what business he had on the books. He had to close or he wouldn't get his bonus on it.

By Mr. Kremer:

40

Q. When is the entry made on the bonus? A. When the sale is made.

Q. When the sale is made; do you mean when

Thomas Ely—Re-direct

the contract is signed? A. No, when the deposit is made.

Q. Was that the windup of his season's business? A. Yes, sir.

Q. And if a salesman visited a customer there would be no record of merely the result of that fact; there would be no record on your books, would there? A. Oh, yes. At the last there were lots of sales that were left that commissions had not been paid on; deposits of individual people, I mean. 10

Q. But the first entry is made— A. Only when the sale is made.

Q. When the sale is finally reduced to writing in some way? A. Yes. 20

Q. Now to direct your attention to this Katz transaction again, I understood you to say that you guaranteed to Mrs. Katz that there would be a fill, an enclosure of her lots?

The Court: A bulkhead filled in, a boardwalk and a hotel.

The Witness: Not a hotel.

The Court: Bulkhead is what he refers to. 30

The Witness: Yes.

The Court: You constructed a hotel though?

The Witness: Yes.

Q. Is it there? A. Yes.

Q. You guaranteed to fill in a bulkhead? A. They were doing that at the present time.

Q. Was it done? A. The bulkhead was up and the boardwalk partly built. 40

Thomas Ely—Re-direct

Q. And that making those lots water front lots?

A. Yes.

Q. On Shark River Bay? A. Yes.

Q. The purchase price of those lots was how much? A. \$10,000.

10 Q. Why was it that only \$2,000 was paid? A. Because she had incomes over and above what was in on other accounts.

By the Court:

Q. \$2,000 on deposit already? A. \$2,000 on deposit already, over and above the twenty per cent.

By Mr. Kremer:

20 Q. More than she actually needed on the other sales? A. For the other lots that she was purchasing, yes.

Q. All those lots were purchased on time payments, weren't they? A. Yes.

By the Court:

Q. How did she happen to deposit more? A. A. Because she had bought lots two or three years before that that she had been making monthly payments on. For instance, a woman
30 buys a lot for a thousand dollars—

Q. How does she accumulate a surplus if she is simply paying in monthly payments? A. Because she has been paying on account two or three years.

By Mr. Kremer:

Q. Did she pay before payments were due? A. In what way?

40 Q. Well, as the Court has asked you, if she only paid what was called for by her contract how

Thomas Ely—Re-direct

could she secure a surplus? A. We consider a sale when twenty per cent is in and commission is paid. That is the way the salesmen worked. We went out this fall to secure new business from our customers. Some were dissatisfied and some were satisfied. If we canceled the old agreement they entered into new agreements— 10

Q. Let's stop there a moment. When you would cancel the old agreement of a dissatisfied customer and sell him a new lot in the fall of 1926 or during the time this agreement was in force, did the salesman get credit for the new sale? A. He got credit for a new sale only he made an increase.

Q. Increase of what? A. If his first purchase was \$350 and the second purchase was \$1,350, he would be paid on \$1,000. 20

Q. And was that an approved practice in the company? A. Absolutely.

Q. Can you tell us whether or not Mr. Walker knew of that practice? A. Always had been since I had been in his employ.

Q. Now, with regard to Mrs. Katz's purchase of her lots, you say that the reason you didn't charge her more than \$200 down was that she had a surplus? A. I didn't charge her; Mr. Brown, he sold her. He naturally gets as much money as he can. 30

Q. What was done with the surplus that she had as far as the purchase was concerned? A. Transferred to her account on the books.

Q. Was that a general practice that had been approved by your company? A. Yes.

Q. Did Walker know of that? A. Yes, and this 40

Thomas Ely—Re-direct

was the last of the fall, into the months of September, October and November, after the season was over, that was what we were doing. Ordinarily the men leave our employ in October. We tried to get them to do business and did do
 10 business.

Q. You approached old customers? A. Yes.

Q. Do you know whether or not Mr. Walker knew of that practice? A. Absolutely.

Q. How often would he meet with you? A. He was in our office in Newark every once in a while. Before we make up new fields we talk it over with Mr. Walker first.

Q. How often was he at the Asbury Park office?

20 A. I wasn't in Asbury Park; I was in Newark.

Q. Do you know why Mr. Brown put up his own check for \$750? A. Because he was asked to by Mr. Macdonald.

Q. What was the reason? A. Because Mr. Macdonald said in one sale it would interfere with the second ten per cent commission on his customer, the commission which they received when forty per cent was in. This is Greek to you, perhaps, but nevertheless it is true.

30

By the Court:

Q. A method of accounting, I suppose? A. Worked out by itself.

By Mr. Kremer:

Q. Can you state whether or not it was the approved practice in your company for salesmen to make up deposits when purchasers did not make the full amount expected of them? A. I
 40 don't quite get that clear.

Thomas Ely—Re-direct

By the Court:

Q. Did they ever carry people? A. Yes.

Q. When? A. While I was in their employ.

Q. Frequently? A. Yes.

Q. The agent would have to give a check? A. Yes, provided he knew he was going to get it back again. 10

Q. Was he to get it back? A. He did.

Q. He did get it back? A. Yes.

Q. From whom? A. Either from the customer or the Shark River Hills Company.

Q. How did the Shark River Hills Company figure in that? A. That is, the bookkeepers paid them back.

Q. The bookkeepers? A. Yes. 20

The Court: All right. Anything more?

By Mr. Kremer:

Q. Do you know whether Mr. Walker approved of that course of dealing? A. It was perfectly all right to sell people that way. I have done it myself when I worked with them in Lawrence Harbor.

Adjourned until July 26, 1928, at 10:00 30
a. m.

Thomas Ely—Re-cross

Freehold, N. J., July 26, 1928.

Trial of the cause resumed at 10:00 a. m.

THOMAS ELY, resumed.

10

Re-cross examination by Mr. Parsons:

Q. Mr. Ely, you are well acquainted with the contract which is Exhibit P-1, are you not? A. Which one is that?

Q. Which is the contract of Brown. A. Yes.

Q. And it is true, is it not, that no commission was to be paid until twenty per cent of the purchase price had been paid for the property? A.

20

Yes.

Q. So any contract of sale on which there had been less than twenty per cent of the purchase price paid the salesman was not entitled to his commission?

Mr. Kremer: I object. The contract speaks for itself.

Mr. Parsons: All right, as long as that is understood.

30

Q. Now with reference to what you stated on the stand yesterday, if there was a sale and a transfer, the salesman would only be entitled, as I understand you to say, upon the increase of business? A. Unless it was an old account that had been canceled for two or three years, that is true.

40

Q. So that if a sale had been made to a man for \$500 and then a new sale had been made to him for \$1,000, and the purchase price or down money was transferred to the new sale of \$1,000, the

Thomas Ely—Re-cross

agent would only get a commission on \$500? A. If that had been an active account, yes.

Q. Now with reference to the salesmen's statements, you are well acquainted with those, are you not? A. They were taken from the books.

Q. And you supervised all those statements, didn't you, of the sales of land? A. I supervised those statements. 10

Q. I show you a sales statements of Walter M. Brown. Do you recognize them as statements which you have supervised? Do you recognize them? A. Yes.

Q. Will you go through them and see if they are the statements you have supervised? A. Yes. 20

Q. Will you take a pencil and paper and add up the statements of Brown? A. These are Shark River Hills, not Shark River Hills Manor.

Q. I will have those for you later.

The Court: May I ask Judge Kremer in this case whether he expects to show any testimony or offer any testimony which will contradict, as it were, the statement of this witness yesterday that the Shark River Hills Company had nothing to do with this contract of Brown? 30

Mr. Kremer: Well, that will probably develop in the course of the trial, if your Honor please, as to who was to make the payment.

The Court: Of course on this witness' statement—and you are bound, I suppose, by it—there is nothing to indicate that the Shark River Hills Corporation as such was 40

Thomas Ely—Re-cross

in any way concerned with this contract of Morrisey & Walker.

Mr. Kremer: The Shark River Hills Company appears as principal on this contract and named in it.

10 Mr. Parsons: If your Honor please, it is a separate contract. This is a verbal agreement.

The Court: The thing you are suing on is a verbal contract. Of course the salesmen's employment, apparently, was by both the Shark River Hills Company, Incorporated, and Morrisey & Walker, Incorporated.

20 Mr. Kremer: The contract was peculiarly drawn.

The Court: It doesn't seem to indicate who is the principal, except that it may be both Morrisey & Walker and the Shark River Hills Company.

Mr. Kremer: It is why they were both made defendants, because the contract is drawn in such fashion that it doesn't indicate who is principal and who is agent.

30 The Court: Well, at the bottom it does indicate that Morrisey & Walker were agents for the Shark River Hills Company. There is nothing to indicate that the Shark River Hills Company had anything to do with the making of this particular contract of Morrisey & Walker.

Q. Now will you add those up, please?

40 Mr. Kremer: May I ask if these are all the statements?

Thomas Ely—Re-cross

Mr. Parsons: These are the statements of Shark River Hills of Brown individually.

A. \$71,105.

Q. Are you sure your additions are correct? 10
A. I will go over them again if you wish.

Q. I note that you have included in Mr. Brown's gross certain terms as "split commissions." If those sales were made by another salesman would they be included in Mr. Brown's gross? A. No.

Q. I point out to you "Gross to White, \$48.75." You have included that in there? A. I simply take the statements as given to me.

Q. Should that be deducted then from this account? A. Absolutely. 20

Q. Will you please deduct it? I show you another split commission which is marked "Gross to Moore, \$600," on the individual statement. Should that be deducted? A. Yes, sir.

Q. Will you kindly deduct that? That leaves, according to your figures, a total of \$65,630? A. Yes, sir.

Q. Now will you take the Manor statements? They were also made under your supervision, were they not, Mr. Ely? A. Yes, sir. 30

Q. Will you take the Manor statements and run through those and total the amounts of sales made by Brown in the Manor statements? Will you total those, please? A. I have \$19,270.

By Mr. Kremer:

Q. That is in addition to the \$65,630? A. Yes.

By Mr. Parsons:

Q. Now in addition to that Brown made two 40

Thomas Ely—Re-cross

sales of the Construction Company totaling \$10,415, did he not? A. I don't know.

Q. Well, will you refer to this? Is this part of the office records of the Morrissey & Walker Company? A. Yes. This one is a double gross.

10 Q. And by double gross you mean what? A. Twice that.

By Mr. Kremer:

Q. Is this double gross a bungalow sale? A. Just this one.

By Mr. Parsons:

Q. Now you total all of those, please. May I ask before you total that, what do you mean by
20 a double gross? A. Why, there were two bungalows in Shark River Hills that were built the year before and they offered a double volume towards the prize money if they were sold. Mr. Moore sold one and Mr. Brown sold the other.

Q. Who made that offer? A. Morrissey & Walker.

Q. Does that appear in here anywhere? A. No, sir; it was a posted notice.

Q. This is the contract which shows the amount
30 of commission paid or the office records showing the amount of commission paid and so on, does it not? A. Mr. Brown received ten per cent commission on the sale instead of five, as I understand it. It was double all the way through.

Q. He received commission on the sale then? A. He received a double commission, and he also received a double credit to his volume.

Q. Do you mean that they paid a double
40 commission and put on a double credit? A. Yes, on that one bungalow.

Thomas Ely—Re-cross

Q. Who made that agreement? A. It was posted on the wall by Mr. Walker.

Q. Posted by Mr. Walker on the wall? Who instructed him to do that? A. It was there for the whole year.

Q. Oh, you did that? A. Yes, Mr. Opdyke too, 10
as a matter of fact.

Q. You posted it then? A. It was there for the whole year.

Q. And you posted it? A. Yes.

Q. Did you prepare statements showing that on the records? A. What do you mean?

Q. When they were paying commissions to these men did you prepare statements showing that? A. In what way? 20

Q. Showing the double gross. A. No, it was understood by everybody.

Q. Why didn't you prepare a statement showing that, if you were general sales manager? A. He received a double commission. I had nothing to do with that at all. He received ten per cent commission, which was a double commission.

Q. But in preparing the amount of his sales why didn't you say a sale of \$10,000 then? A. Why, I had nothing to do with this. 30

Q. Weren't these office records of the Shark River Hills Company? A. Yes, sir.

Q. Kept under your supervision? A. No, they were not.

Q. Not kept under your supervision? A. No, absolutely.

Q. Wasn't it your particular duty to see what entries were made by the salesmen and what sales they made? A. No. 40

Thomas Ely—Re-cross

Q. It was not your duty? A. No.

Q. And you were not general sales manager then in charge of that? A. I was general sales manager, though.

Q. What was your duty as general sales manager then? A. To promote sales.

Q. Hire and fire salesmen? A. I worked out of the city that fall.

Q. Did you have any supervision at all in determining who got commissions as between salesmen? A. Yes.

Q. You governed split commissions, didn't you? A. Yes.

Q. What else did you do? A. If there were any questions about a sale the bookkeepers brought up with me I either O. K'd it or I didn't.

Q. So then you did take up the question of sales? A. Surely.

Q. And you took up the question of whether the agreements were entered and the proper prices put in, did you not? A. No, I didn't.

Q. You didn't? A. No.

Q. Didn't you go over each one of these salesmen's statements? A. I certainly did.

Q. And didn't you O. K. them? A. Yes.

Q. And didn't you on these salesmen's statements obtain payment from the Morrisey & Walker Company or the Shark River Hills Company for the salesmen? A. No, I sent the statements up to the Morrisey & Walker Company.

Q. Didn't you O. K. the statements and weren't they prepared under your supervision? A. Certainly.

Q. So that the salesmen's statements and the

Thomas Ely—Re-cross

records were all under your guidance, weren't they?

Mr. Kremer: Objected to. There is no evidence that the records were.

Mr. Parsons: Salesmen's statements.

Mr. Kremer: I think Mr. Parsons should 10
distinguish between the books of the company and the salesmen's statements. The witness has said that he had no jurisdiction over the books; they had bookkeepers for that.

The Court: He is asking that now.

By the Court:

Q. Your jurisdiction was over the statements? 20

A. I dictated the statements, that is all.

By Mr. Parsons:

Q. And in dictating these statements did you use the permanent records of the office? A. There is no record of this company at all in Asbury Park.

Q. Didn't you have records in Asbury Park showing the sales made by the Asbury Park salesmen? A. In Shark River Hills and Shark River Hills Manor. 30

Q. And where were those sales made, in Shark River Hills and Shark River Hills Manor? A. Yes.

Q. So that you had records in your office showing those sales, and those records were under your supervision, were they not? A. Yes.

Q. Then did you not put down in preparing these statements the amounts for which these salesmen made the sales? A. Except on the 40

Thomas Ely—Re-cross

bungalows, I had nothing to do with it whatever.

Q. Didn't you supervise the advertising campaign to the salesmen for the bungalows? A. No, sir.

10 Q. Didn't you report the sales? A. No, sir.

Q. Had nothing to do with that? A. Absolutely nothing.

Q. On that statement that you read yesterday of Brown, wasn't that gross sales in there? A. Yes.

Q. And weren't those sales obtained from sales of bungalows? A. Through Mr. Opdyke.

Q. You obtained those sales? A. From Mr. Opdyke.

20 Q. What sales did you put on that gross statement? A. Just exactly as you have heard.

Q. Do you remember them? A. Yes.

Q. No question of that? What is the book kept by Mr. Opdyke from which you took those statements? A. It is over in Keansburg, I presume.

Q. Is there a book? A. I presume so.

Q. Will that book also show us what the sales were? A. Yes, I suppose so.

30 Q. Give us the total. A. I have \$100,055.

Mr. Parsons: I would like to have these statements of Brown marked for identification.

The Court: They may be so marked. I may say to counsel in this suit that it can be very much shortened if attention is confined to the civil situation. The claim is here made that sales were made by Brown to the amount of \$200,000. Then he should have received a prize of \$1,000.

40

Thomas Ely—Re-cross

Now the defense is that no valid sales to that amount were ever made. And the defense under it in the circumstances is to show that say \$3,000 or \$4,000 in sales were not made as indicated, which would make the maximum below \$200,000. 10

Mr. Parsons: We can do that, but, if your Honor please, to get that first I want to get an answer—

The Court: I hope counsel will bear that in mind and shorten it as much as possible. A very simple situation—if he was one dollar under the \$200,000 he could not recover the \$1,000—that much between him and victory. 20

(Paper marked Exhibit A for Identification.)

Q. Now will you run through these statements, the statements of the different salesmen, and see if those statements are the statements which were prepared under your supervision? Perhaps I can shorten this up, Mr. Ely. Will you just take those statements and let me check with you very quickly? Which one have you there, Oatman? 30
Oatman made \$3,900 sales in October; is that correct? A. Yes, sir.

Q. Now what salesman have you there, Major?
A. Yes.

Q. Major's first sale was on the October 18th statement, \$1,225? A. That is three sales, yes.

Q. Is that right? A. Yes.

Q. November 15th, \$725; and that is all that Major made? A. Yes. 40

Thomas Ely—Re-cross

- Q. What is the next one? A. G. G. Brown.
 Q. June 11, \$950? A. Yes.
 Q. August 6, \$1,150; September 13, \$3,700? A.
 They have here, "June 11th statement missing."
 Q. September 13, \$3,700? A. Yes.
 10 Q. October 18, \$1,415? A. Yes.
 Q. Is that correct? A. Yes.
 Q. That is a statement on which credit is given
 of \$950 which I have already read to you? A.
 Yes.
 Q. \$950 for June 11th? A. I beg your pardon;
 that is right.
 Q. Is that right? A. Yes.
 Q. Now what statement have you there? A.
 20 George Miller.
 Q. June 11, \$1,000; August 6, \$1,500? A. Yes.
 Q. September 15, \$5,870? A. Yes.
 Q. October 18, \$3,625? A. That is right.
 Q. November 15, \$5,200? A. That is right.
 Q. What is the next one? A. Rippey.
 Q. August 6, \$4,450? A. \$4,450 is right.
 Q. October 18, \$3,305? A. Right.
 Q. December 15, \$250? A. That is right.
 Q. All right. What is the next one? A. Ed-
 30 ward Luke.
 Q. April 28, \$12,305? A. Right.
 Q. June 11, \$2,160? A. Yes.
 Q. August 6, \$3,900? A. That is right.
 Q. September 13, \$3,250? A. That is right.
 Q. October 18, \$2,725? A. Right.
 Q. November 15, \$2,575? A. That is right.
 Q. December 15, \$7,110? A. That is right.
 Q. Jasper White, September 13, \$2,425; Octo-
 40 ber 18, \$200? A. Right.

Thomas Ely—Re-cross

Q. November 15, \$3,250? A. Yes.

Q. December 15, \$1,200? A. \$1,700.

Q. That is correct, \$1,700. Now I would like to have you take this—you have watched me check them—I would like to have you take this and check and see if the addition here is correct of the total amount of sales made in Shark River Hills by Brown and his team. A. You mean go over all these additions? 10

Q. Just check those out, yes.

Mr. Kremer: Have you got all seven men of the team? I understood there were seven men. I have only Miller, Brown, Major, Oatman, Luke and White.

Mr. Parsons: I don't know whether all these statements are here. I presume they are. 20

The Court: You are simply asking him to examine the statements submitted. That would be a matter for Judge Kremer to determine, whether they were all under consideration or not.

A. What do you want me to do?

Q. I would like to have you state the total sales made in Shark River Hills— 30

Mr. Kremer: I object to that because I don't think this necessarily represents the total.

The Court: It is subject to cross-examination. He is permitted to go into it. It is up to you to show whether it does or not.

Mr. Kremer: As I understood, the master statement submitted in evidence yesterday— 40

Discussion

10 day was prepared by the books. These are statements prepared from time to time and submitted for various salesmen. I don't think it would have any binding force unless it is shown conclusively by the defense that they are all here.

The Court: They would have binding force as far as they go. You may show that there are others that have not been produced. Go on.

Mr. Kremer: If the Court please, I don't think we would have to show that. We have produced the statement.

20 The Court: Oh, yes; the burden is on you to show that you made \$200,000 worth of sales, that is, of a valid nature.

Mr. Kremer: I agree with that readily, but I do not mean that we have to show that by these statements. We do not have all those statements; they are in the control of the company.

30 The Court: All you have to do is to make out a *prima facie* case, and then they can show by their own side of the case whether your statement—

Mr. Kremer: I submit that that *prima facie* case has been made out. Mr. Ely testified yesterday that over \$200,000 was sold.

40 The Court: And this is an attack upon that \$200,000 on cross-examination. As far as it goes it is valid, of course, but you may show that it is not complete. What is the answer?

Thomas Ely—Re-cross

Mr. Parsons: Mr. Ely said he is satisfied with these figures.

The Witness: If he tells me that Mr. Macdonald added them I am satisfied with his audit.

Q. That total is the total given him for Shark River Hills Company, as a total of \$147,500? A. Yes, that is Shark River Hills. 10

Q. That is Shark River Hills. May I ask you one question, so there will be no question in this matter? Do those names represent the names of all the men that were on Brown's team and no other? A. So far as I know, yes.

Q. Well, you do know, don't you? A. I don't remember. There were forty men. Mr. Brown can verify that. 20

Q. Can you verify it yourself by looking at these names? A. These were his team. Whether there were any more or not I don't know.

Q. How many men were on a team? A. They were limited to eight.

Q. How many are there? A. Seven; plus Mr. Brown is eight.

Mr. Kremer: I don't think you have got them all. Have you a man named Miller there? 30

Mr. Parsons: Yes.

Mr. Kremer: I didn't hear his name at all.

The Witness: I believe this is correct.

Q. Now, Mr. Ely, I direct your attention to the sales of Shark River Manor and the statements of the sales of Shark River Hills Manor. Those 40

Thomas Ely—Re-cross

statements were also prepared under your direction, were they not? A. Yes.

Q. And will you take the statements of Shark River Hills Manor— A. These are Shark River Hills.

10 Mr. Parsons: First I would like to have marked for identification these statements. (Papers marked Exhibit B for Identification.)

Q. I ask you if these statements of the Manor were prepared under your direction. A. Yes.

Q. And I ask you if you will go through these statements of the Manor and also watch this master sheet as I check it. Now will you take Walter
20 M. Brown? June 11, \$9,150; August 6, \$4,075? A. Yes.

Q. September 13, \$2,625? A. That is right.

Q. October 18, \$1,800? A. Right.

Q. November 15, \$2,625? A. Right. None in December.

Q. None in December. And George Miller, one sale, September 13, \$425; G. G. Brown, one sale, June 11, \$450? A. Right.

30 Q. E. R. Luke is next? A. Yes.

Q. June 11, \$5,300? A. Right.

Q. August 6, \$500? A. Right.

Q. September 13, \$650? A. That is right.

Q. October 18, \$300? A. Right.

Q. November 15, \$1,650? A. That is right.

Q. December 15, \$1,800? A. That is right.

Q. Now you have checked those, have you? A. Yes.

40 Q. Now will you check and see if those totals are correct? A. Right.

Thomas Ely—Re-cross

Q. Making a total on the Shark River Hills Manor of \$31,350? A. That is right.

Q. Now will you take the total of \$147,510 and total those two? A. Yes, sir.

Q. And what is the total that you get? A. \$178,860. 10

Q. Now, will you tell us whether there are any more sales excepting that? A. Just in the bungalows.

Q. All right. You have had the amount of that. Will you add that to it? A. There are more than that.

Q. Who made any more sales? A. Mr. Luke.

Q. Mr. Luke made sales of bungalows? A. Mr. Gar Brown. 20

Q. During the year 1926? A. Yes, sir.

Q. Were there any sales made during the year 1926 saving and excepting the sales that are set forth here on this slip? (Paper shown witness.)

A. Here is the Dackerman sale, G. G. Brown, the Abbott sale of Luke, the Canfield sale of Brown and the O'Brien sale of Brown.

Q. Can you tell me when the Dackerman sale was made? A. I don't know the exact date. It was during the year 1926. 30

Q. Can you tell me who made the sale? A. Gar Brown. It was credited to his account anyway. Mr. Opdyke may have helped him close it, which he did in all cases.

Q. Were these memoranda here made by you? A. No.

Q. Do you know whose writing it is? A. Whose writing?

Q. Yes. A. Bob Macdonald's. 40

Thomas Ely—Re-cross

Q. I direct your attention to this and ask you if you know what the writing on that statement means. A. No, I don't.

Q. What records did show the sales of these bungalows by these men? A. Why, I presume the records in Keansburg of the Morrisey & Walker Construction Company.

Q. Was that name Dackerman, Mr. Ely? A. I believe it is.

Q. How much was the sale to Dackerman? A. I don't remember.

Q. What other sale was there? A. One by Mr. Luke.

Q. And do you know how much that sale was? A. I do not.

Q. Was there a salesman in your employ at that time by the name of Logan? A. I believe there was.

Q. As a matter of fact the Dackerman sale was paid to Logan, was it not? A. I don't know anything about that.

Q. Well, you passed upon who had the right to it, didn't you? A. Absolutely not.

Q. Don't you pass and decide on who gets the commissions? A. Not on bungalows.

Q. As a matter of fact Logan did receive it, didn't he? A. I don't know.

Q. Now were these—excepting that sale were there any other sales made beside the sale that you have mentioned of Luke and the sale of Brown on the bungalows? A. I don't know. I haven't the records.

Q. Well, so far as you know were there any? A. So far as I know there is not.

Thomas Ely—Re-cross

Q. There is not? A. So far as I know.

Q. All right. Now what is the total that you have there? A. \$178,860.

Q. Were there any other amounts to be added to that except the bungalows? A. Not to my knowledge.

10

Q. How much were the bungalows? A. If you will tell me the amount of Abbott I can tell you.

Q. The Abbott was \$2,360. A. Dackerman?

Q. The Dackerman statement is here that it was paid to Logan. So that makes a total—will you add that to the \$178,860?

By Mr. Kremer:

Q. Have you got the Dackerman? A. No.

Mr. Parsons: This is paid Luke.

20

Mr. Kremer: Dackerman \$3,455.

The Witness: What was the record of those bungalow sales? Put that on Brown's with double gross.

Mr. Parsons: First is \$2,360. You have that. Until we check up on it you may take the figures that appear on this statement here. And may I show you—Is this the statement that is marked in evidence?

30

Mr. Kremer: No, not yet.

Q. May I ask you in whose handwriting this statement is? A. It looks like Mr. Brown's.

Q. Looks like Mr. Brown's? A. Yes.

Q. Well, I don't want to use that. You say you don't know the amount of the Dackerman sale? A. No.

Q. The amount of the Canfield sale was \$4,675. Will you add that, please? And the amount of 40

Thomas Ely—Re-cross

the O'Brien sale was \$5,740. Now you claim, you say, a double commission on that? A. Double volume.

Q. Double volume; all right. Put that in. We will give you the benefit due. Now will you total
10 those, please? Give us the grand total. A. \$197,370.

Q. \$197,370? A. That is without the Dackerman sale.

Q. And that is even including in there the O'Brien sale twice?

The Court: But without the Dackerman sale?

Mr. Parsons: Without the Dackerman
20 sale.

The Witness: Without the Dackerman sale.

Q. Are you acquainted with the Katz sale, the sale to Katz? A. Yes.

Q. You know Mr. Brown made a sale there to Katz, do you? A. Yes.

Q. Of \$10,000 worth of lots? A. Yes.

Q. Do you know how much cash he received on
30 that? A. Yes.

Q. How much? A. \$200.

Q. And under the contract no sale was to be credited to a salesman until twenty per cent had been paid? A. Twenty per cent was in on it, yes.

Q. Twenty per cent was in? A. It was transferred from other accounts.

Q. Now does that which you have there constitute the final volume? A. With the Dackerman
40 sale.

Thomas Ely—Re-cross

The Court: Now wait a moment. Let me understand that. I thought you said that \$197,000 does not include the Dackerman sale.

The Witness: It does not include it.

Mr. Parsons: It does not include the 10
Dackerman sale.

Mr. Kremer: With the Dackerman sale that would wind it up.

Q. Now I want you to understand me clearly now that there is no question in your mind, Mr. Ely, but that the amount of money there is the final volume of all sales saving and excepting the Dackerman sale? A. So far as I know.

Q. And included in that amount you have 20
included one sale twice, have you not? A. No, sir; I haven't included it twice. I have simply as per agreement, that is all.

Q. But you have doubled the purchase price of the sale put in there? A. Doubled the volume for the gross.

By the Court:

Q. Which sale was that? A. That was the 30
O'Brien sale.

Q. What was the original sale? A. \$5,500. It was a bungalow, it was not a lot.

Q. Did you put it in as \$11,000? A. Got double the volume toward the prize.

Q. In other words, instead of putting it down as \$5,500 you put it down as \$11,000? A. It was more than that; it was \$5,700. We put in twice that.

Q. \$11,400? A. That is right. 40

Thomas Ely—Re-cross

By Mr. Parsons:

Q. Also there is included in that, is there not, the Katz sale of \$10,000? A. Yes.

By the Court:

10 Q. That is put down as \$10,000, is it? A. Yes.

By Mr. Parsons:

Q. And you say that on the books of the company there was transferred from another account— A. From other accounts of hers, yes.

Q. Now let me ask you this, Mr. Ely: upon all of these contracts payments are made in installments after the twenty per cent is made, isn't it? A. Yes.

20 Q. And to make any transfer to the Katz account you had to take paid up payments that were made in accordance with the contract and transfer to the Katz account, didn't you? A. Subject to her approval.

Q. Subject to her approval, and you say she approved it? A. Mr. Brown made the sale, I didn't.

Q. Do you know Mrs. Katz' writing? A. I don't know that I do.

30 Q. I show you a letter of hers and ask you if you recognize her writing.

The Court: He says that he doesn't know that he recognizes it.

Mr. Parsons: He may recognize it.

Q. I show you a letter and ask you if you recognize that as Mrs. Katz' writing. A. I do not.

40 Mr. Parsons: She will be here later today. I would like to have this marked for identification.

Thomas Ely—Re-cross

Mr. Kremer: I object. I don't see any reason why it should be marked now.

The Court: There is no immediate reason why it should. What you will have to do is to put her on the stand, if she is to be here. She is the best evidence if you 10
produce her.

Mr. Parsons: I just want to show this. There may be some other evidence to connect it up.

The Court: Oh, he says he doesn't know anything about it. If Brown were on the stand that would be another story.

Q. What you did then was to transfer the 20
installments— A. I didn't do it, no.

Q. What was done, you say, was to transfer installments paid from the account on which payments had been made and kept up to date? A. That is right.

Q. You took those installments and transferred it to a new sale? A. Yes.

Q. And by doing that you threw the other account into arrearages? A. No, we didn't; we 30
always left twenty per cent in, which was the contract price. Naturally we couldn't do this unless it was subject to their approval.

By the Court:

Q. Really Mrs. Katz had paid whatever she had paid on account of other contracts? A. Yes, sir; absolutely.

Q. Was she ahead in her payment? A. Yes.

By Mr. Parsons:

Q. Oh, you say she was ahead in her payments? 40

Thomas Ely—Re-cross

A. So far as I know. But that wouldn't make any difference anyway.

Q. No question of that? A. It wouldn't make any difference anyway.

10 By the Court:

Q. Were Morrisey & Walker in the habit of taking money from one account which had apparently been applied in the purchase of lots to apply on account of new business? A. Provided they kept up their old business and signed a contract for the new and it was their own money.

Q. Wasn't that withdrawing payments which were due? A. Not necessarily. That is the way we conducted our business all the way through.

20 Q. Mrs. Katz didn't pay in advance, did she? A. No.

Q. When she paid it was appropriated or applied to certain purchases? A. It was all her money, applied to her accounts.

The Court: All right. Go on. I didn't mean it was all right, but go on.

Mr. Kremer: That was entirely explained yesterday afternoon.

30 By Mr. Parsons:

Q. In addition, Mr. Ely, there were no conditional contracts to be signed, were there? A. In what way?

Q. Well, you had no authority to sign conditional contracts, had you?

40 The Court: He said that he had no authority yesterday. He testified that he had no authority to sign conditional contracts excepting that in one instance he did,

Thomas Ely—Re-cross

and it was in regard to the Katz sale, as I understand it.

Q. From whom did you receive authority to sign that contract? A. From no one.

Q. From no one? A. Myself.

Q. You presumed to take authority upon yourself to sign it? A. Which I believe is perfectly right and correct. 10

Q. But you did take authority upon yourself to do that? A. Yes.

The Court: He said he never submitted that to Walker or Morrissey, either of them.

Q. And you say that the only changes that you made or conditions that you made in that contract were what? A. When she bought the lots from Mr. Brown, as I understand it, she asked—or rather, on the strength of his selling talk to her, she had the lots on the strength of the hotel being erected, the lots being filled in, a bulkhead erected and the street graded in front of the lots. 20

By the Court:

Q. The only thing you didn't guarantee—you guaranteed the hotel, didn't you? A. Yes, the hotel was in construction at the time. 30

Q. The thing you didn't guarantee was a bulkhead? A. No, the boardwalk. She asked for that. It was simply a confirmation of what he had asked her. It was the only condition or change that was made in the ordinary line of contracts, was the insertion—

The Court: You need not go over that again. You went over it yesterday. As a matter of fact the boardwalk was put down. 40

Thomas Ely—Re-cross

By Mr. Parsons:

Q. Now, I show you the contract and ask you if that is your signature on the contract? A. Yes, sir.

Q. And do you know if it is the signature of
10 Emma C. Katz in the contract? A. I do not.

Q. I ask you to look at this contract and tell us what other conditions are contained in that contract that are not in accord with the usual custom of doing business.

Mr. Kremer: I object. I don't know what application it has to this controversy.

The Court: Well, of course we are concerned with valid contracts, I suppose, that
20 these men were authorized to make. Are there any others that you know of?

The Witness: No.

By the Court:

Q. The only one that you have in mind is the Katz, isn't it? A. That is the only one I know of.

The Court: He so testified yesterday.

Mr. Parsons: I ask that this be marked
30 for identification.

The Court: It may be marked.

(Paper marked Exhibit C for Identification.)

By Mr. Parsons:

Q. So it was your custom, Mr. Ely, to sign contracts for the sale of lots without providing for any installment payment? A. No.

Q. Then is that contract different from the
40 other contracts? A. I didn't notice that.

Thomas Ely—Re-cross

Q. Oh, you didn't notice it? A. I didn't see it.

Q. How many lots had Mrs. Katz purchased?

A. I have no idea.

Q. In whose name had those lots been purchased? A. What do you mean?

10

By the Court:

Q. Had they been purchased in her name? A. I presume so.

By Mr. Parsons:

Q. Well, you wouldn't certainly transfer money from anybody else— A. Oh, certainly.

Q. Unless it was in her name? A. Certainly.

Q. No question in your mind that these lots were purchased in Mrs. Emma C. Katz' name? 20

A. Mr. Brown made the sale.

Q. Not a bit of doubt about that? A. None whatever.

Q. Approximately how much had been paid? A. I have no idea.

Q. Had \$2,000 been paid? A. Considerably more than that must have been paid.

Q. Had \$2,000 in addition to twenty per cent of the purchase price of the original lots been paid? A. According to the books when I went over them with Mr. McDonald there was. 30

Q. There was? A. Yes, as I remember it.

Q. Then will you tell us why Mr. McDonald ordered Mr. Brown to give a check for \$750 to consummate that sale? A. Because one sale, as I remember it, complicated with the second ten per cent of Morrisey & Walker. In other words, forty per cent—

40

(Interruption.)

Thomas Ely—Re-cross

Q. Now, Mr. Ely, if the first contract from which those funds were transferred stood in another name than Emma C. Katz the transfer was wrong, wasn't it? A. Absolutely.

Q. Do you know the sale made to one Balke?
 10 A. I remember the name; I don't remember the sale.

Q. I show you a book and ask you if by reference to this book you can tell us the amount of that sale.

Mr. Kremer: What is the purpose of this, may I ask?

Mr. Parsons: These are sales that are invalid.

20 Mr. Kremer: There was nothing in the direct-examination—

The Court: No, there was not. I think you need not go into that at this moment. This is your defense. Now confine it to that Dackerman sale that you didn't include in the other.

Mr. Parsons: All right. We will put it in on our defense.

30 Q. Now, directing your attention to the sales in general, no commission was given or allowed to a salesman, was there, until the contract had been signed by the customer? A. That is correct.

Q. You said that in all these cases there were contracts signed by the customer? A. There should have been.

Q. Well, were there? A. That is up to the bookkeepers. I don't know anything about that.

40 I didn't check the contracts.

Thomas Ely—Re-cross

Q. You were general sales manager? A. I had plenty of duties without going back over the books. I didn't take care of the books.

Q. You didn't check the contracts? A. No, sir.

Q. Isn't it a matter of fact that these salesmen would go through the books and if a man had paid \$500 on account of a contract and never paid anything more and simply disappeared, they would put through a slip that they had received \$500 on a new sale? 10

Mr. Kremer: I object unless it can be shown that this man did it some part of his time.

Mr. Parsons: Sales made under his supervision. 20

Mr. Kremer: We can't be charged with that.

The Court: Is it a fact? Now, you are asking him is it a fact. If he doesn't know he will say so. He may answer.

A. I don't know. I didn't check them through the books.

Q. I want to direct your attention once again while you are still on the stand to Exhibit C for Identification and ask you whether you received authority to provide for payments as is provided in that contract. 30

The Court: Well, he has said that the only conditional contract that he was interested in at all or had anything to do with was that of Mrs. Katz.

Mr. Parsons: That is the Katz contract. 40

The Court: Oh, well, reserve it, then,

Thomas Ely—Re-direct

for your defense. He says that he had no authority from the Morrissey & Walker Company. He has already testified, didn't submit it to them.

10 RE-DIRECT EXAMINATION by Mr. Kremer:

Q. Now, Mr. Ely, when you finished making these calculations a while ago, the total that I took was \$197,370. A. That is right.

Q. Had you included in that total the ten per cent that the agent was entitled to on the gross business done by his team? A. No.

Q. Well, now have you the figures before you? A. Yes.

20 By the Court:

Q. That should be added, \$19,700, wouldn't it be? A. No, only on what the other men sold, not on Mr. Brown.

Q. On what figure should that be added, the ten per cent? A. Only what the salesmen did, including Shark River Hills, the Shark River Hills Manor, and I don't know what the Dackerman sale is.

30 By Mr. Kremer:

Q. Will you give me the salesmen's total without the Dackerman sale? A. Yes. \$97,215 without it.

Q. Now, how much credit on that figure would Mr. Brown be entitled to in reaching his grand total? A. \$9,721.50.

Q. Will you add \$9,721.50 to your figure of \$197,370 and give us the total? A. \$207,191.50.

40 Q. Well, then he was over \$200,000 without the Dackerman sale, wasn't he? A. Yes.

Thomas Ely—Re-direct

Q. Now, do you know what the Dackerman sale was? A. It was a bungalow.

Q. Where? A. In Shark River Hills.

Q. Do you know the value of it? A. I had nothing to do with it whatsoever.

Q. Don't know anything about the sale? A. 10
Don't know anything about it excepting that the house was sold, built.

Q. I show you what purports to be a statement made to Morrisey & Walker Company and ask you if you ever saw that paper before? A. No.

Q. Can you state whether or not that contains the Dackerman sale?

Mr. Parsons: Objected to. He has never 20
seen the paper before.

The Court: He says he doesn't know anything about it.

Mr. Kremer: I will show Mr. Parsons this paper and then offer it, just for the sake of getting the figure of this one sale in the record.

Mr. Parsons: That is the very same thing, a self-serving statement in his own handwriting. 30

The Court: Oh, well, you will get that in later.

Q. Now, you made some reference to a notice that you posted in the office—

The Court: Of course, Mr. Parsons, I don't agree with you that any statement made by Brown in regard to that sale would be self-serving. He knows what the sale was. He made it. 40

Thomas Ely—Re-direct

Mr. Parsons: That is just our contention, that a man named Logan negotiated it, and the commission was paid to Logan, as we understand it.

The Court: All right.

10 Q. You said you posted a notice in regard to the double gross. Was that on the Dackerman property or another one? A. No, that was only on the O'Brien.

Q. And was that a part of the list of sales for which Brown is claiming credit? A. Yes.

Q. Now, on whose instruction did you post that notice? A. Mr. Walker's.

20 Q. When did he give you that instruction? A. The year before, 1925.

Q. And in relation to that particular house? A. Yes, and one other.

Q. How long did that instruction stay posted in your office? A. Over one year.

Q. Was it there until 1926? A. Until this house was sold.

Q. Did Mr. Walker know all about that? A. Absolutely.

30 Q. Can you tell us whether or not he approved it? A. Yes, he did.

Q. Have you the figures before you that you made up at Mr. Parson's request, all of the figures? A. Practically.

Q. You gave us at first a figure of \$100,055 as representing property sold by Mr. Brown himself? A. That is right.

40 Q. Now, will you give me again, please, the items that make up that total? A. \$65,630, Shark River Hills itself.

Thomas Eby—Re-direct

Q. What is that? A. That is the sales.

Q. Shark River Hills? A. Sales, yes. \$15,155, Shark River Hills Manor.

Q. Well, from what data do you get that total?
A. From Mr. Parsons' sheet. Wait a minute.
No, it is \$19,270. 10

Q. Well, that figure you gave me, \$19,270.
Now then, in addition to that what have you? A.
We have the \$15,155 for the Canfield and O'Brien
sale.

Q. Now, what was the O'Brien sale? A. \$5,-
740, the bungalow, twice.

Q. Double, that is the gross? A. Not paid
twice on it; no commission is paid twice—

Q. \$5,740 twice? A. Yes. Not commissions; 20
don't misunderstand that; not paid twice on that.

Q. That is O'Brien? A. That is O'Brien.

Q. How much is Canfield? A. \$4,675.

Q. Are you sure about that? A. From their
records. I know nothing else about it.

Q. You didn't know anything about that sale
at the time? A. What do you mean?

Q. The Canfield sale? A. No, I had nothing
to do whatsoever with bungalows.

Q. And all that you know about that figure, it 30
was given to you or what was taken from the
statement Mr. Parsons had here this morning?
A. Absolutely.

Q. You don't know as a matter of fact whether
that sale was for a greater amount or lesser
amount, do you? A. I do not.

Q. Did you ever receive any statement from
Mr. Opdyke of the bungalows that he sold? A.
Yes. 40

Q. You have that here? A. Yes.

Thomas Ely—Re-direct

Q. Where is it? A. I have it in my pocket.

Q. Will you produce it, please?

(Witness produces paper.)

Q. Does that refer to the Canfield house?

10 By Mr. Parsons:

Q. May I ask in whose handwriting that is?

A. Mr. Opdyke's.

By Mr. Kremer:

Q. And who was Mr. Opdyke, again? A. He was the man in charge of the construction work.

Q. For the Morrisey & Walker Company? A. Yes.

20 Mr. Kremer: Any objection to his referring to it?

Mr. Parsons: No; you refer to the name.

Q. May I just ask at this point, Mr. Ely, the figures there are not in Mr. Opdyke's writing?

A. No.

Q. They are in your writing? A. Yes.

Q. Is there any figure there for the Canfield house in Mr. Opdyke's writing? A. Yes.

30 Q. Well, that is what I want to refer to.

By the Court:

Q. How much is it? A. \$460.

By Mr. Kremer:

Q. Then your other figure that Mr. Parsons gave you was a little shy, wasn't it? A. Yes.

By the Court:

40 Q. How much? A. \$185.

Thomas Eby—Re-direct

By Mr. Kremer:

Q. That makes your total, then, instead of \$100,055, makes it how much? A. \$185 more; \$100,240.

Q. You don't add very well for our side. A. Well, 185 and 55 is 240. 10

Q. You had \$100,055. Now you are going to add \$185 to it? A. Yes.

Q. How much does that make? A. \$100,240.

Q. Now, is the figure of the Dackerman sale— A. Yes, it is.

Q. Will you state what it is? A. \$3,455. It is in the name of Gar Brown.

Q. How much? A. \$3,455.

Q. \$3,455? A. Yes. 20

Q. Now, will you add the Dackerman sale to your grand total? A. Well, you will have to change your other figures.

Q. Well, you had \$9,721.50 added to that? A. Yes, the Dackerman sale changes those figures.

Q. That is why I want to add it.

(Intermission.)

Q. Did you add the Dackerman sale? A. Yes.

Q. Was Mr. Brown entitled to any additional commission on that? Wasn't he entitled to ten per cent here, like on the others? A. It was added to his volume. It has nothing to do with commissions at all. 30

Q. Have you made a total computation of all those figures? A. Yes.

Q. Were you correct about that item of \$100,055 or not? A. No, I was not.

Q. What is the correct item? A. It is \$101,240. 40

Thomas Ely—Re-direct

Q. How is that made up, again, please? A. It is taken from their records. It is made up of \$19,270 of the Shark River Hills Manor, \$16,240 on bungalows—

Q. \$16,240 or 340? A. 240; and \$65,630—

10 Q. I want to get this correct as we go. Your item of \$16,240, will you state what that is made up of? A. Canfield and O'Brien sales.

Q. Now, the O'Brien sale was \$5,740 twice? A. That is right.

Q. And what other item, \$4,675? Isn't that \$4,860, as a matter of fact? A. Well, it is changed, yes. I gave you the right total. I simply took the figures I have here that was given me by Mr.
20 Parsons.

Q. Well, that was the one we corrected to \$4,860? A. Yes, making a total of \$16,240.

Q. Well, as I total \$5,740, \$5,740 and \$4,860, they make \$16,340. A. You are correct.

Q. Now, have you computed the grand total of all the credits? A. I will. Of Brown?

Q. Everything that he would be entitled to, his commissions, his ten per cent on his salesmen's sales, and then probably some by the other men.

30 A. May I include the Dackerman sale?

Q. Yes, include the Dackerman sale. That was included in the original computation, wasn't it?

A. No, it was added on later.

Q. Well, I mean was it included in the account when you went over the accounts with Mr. Macdonald in that year? A. Yes.

Q. Was it included then? A. Yes.

Q. Well, then, I want it included now. What is
40 your total? A. I haven't got the total figures here

Thomas Ely—Re-direct

in writing what he gave me on the other salesmen.

Q. This morning? A. Yes. I can give you the totals, as far as that is concerned.

Q. Well, have you got an item of \$147,510 that you gave Mr. Parsons? A. Yes. 10

Q. An item of \$31,350? A. Yes.

Q. And then an item of \$2,360? A. Yes.

Q. The Abbott sale? A. That is right.

Q. Now, you gave us a total of \$197,370? A. That is right.

Q. Have you got the figures out of which that was made? A. Yes.

Q. Then you have added \$9,721.50? A. That is not correct. It should be more than that. 20

Q. All right. Will you get that figure straight for us? A. I get \$212,890.

Q. \$212,890? A. Yes.

Q. Now, that is \$140 more than the figure that was claimed yesterday; is that so? A. I believe so.

Q. That is Mr. Brown's grand total? A. It is a little bit more than his statement was made up for.

Q. Now, was that figure obtained from the statement Mr. Parsons produced this morning? 30

A. Yes, sir.

Q. Does it correspond with his statement? A. Apparently so.

Q. Now, referring to this Katz transaction, did you tell us whether or not Mrs. Katz paid in twenty per cent on the sale? A. She first paid \$200.

Q. And how was the balance made up? A. The balance was to be transferred— 40

Thomas Ely—Re-direct

The Court: He has told us that three or four times, Judge, by transferring from other accounts carried by Mrs. Katz—

Q. And including the money so transferred, did she pay twenty per cent? A. Yes.

10

Mr. Kremer: We didn't raise that issue, but so much has been said about it I would like to get it out.

The Court: He has explained it a number of times; \$200 in cash she paid down; the balance was made up of transfers from payments on other items.

The Witness: Excepting that he gave a check for \$700.

20

The Court: Excepting that Brown gave a check for \$750, which was afterwards returned to him.

Q. Now, can you tell us whether or not that practice of transferring from customers' accounts was a general practice of your company?

A. With the consent of the customer, yes.

Q. Did Mrs. Katz consent to that? A. She must have. I didn't make the sale. He had her signature to the contract.

30

Q. Did she sign the contract? A. Yes.

Q. Now, you told us that you, on your own authority, inserted in the contract these provisions that the bulkhead would be done— A. Yes.

Q. That the hotel would be built? A. Yes.

Q. After you did that, did you consult with Mr. Walker about that contract? A. It was not necessary. It was simply reaffirming what he had already told her.

40

Thomas Ely—Re-direct

Q. What Mr. Walker had told her? A. No, what Mr. Brown had told her. She asked for a guarantee that these things would be done. They were being done at the time. In other words, it was the rest of this property we offered to sell in Shark River Hills. 10

By the Court:

Q. To get to his point, as a matter of fact, Brown could guarantee anything that was actually being done at the moment? A. That is the point. It wasn't a change of contract in any way.

Q. In other words, you guaranteed a thing you saw being done.

By Mr. Kremer: 20

Q. In other words, the hotel was under construction? A. Yes.

Q. And so you guaranteed the construction? A. Yes.

Q. It was being built, being done? A. Yes.

Q. That was being done; you guaranteed that? A. Yes.

Q. The only thing you didn't guarantee was the Boardwalk and that was left out?

The Court: No, there was no guarantee that would be done. 30

A. It was built afterwards.

Q. Oh, they built the boardwalk afterwards?

A. I believe they are building one at the present time.

Q. Now, in regard to contracts that salesmen brought in, was it your duty to check over all those contracts? A. No.

Q. When a salesman obtained a signed contract, 40

Thomas Ely—Re-cross

what became of it? A. It was put in the files and given to the bookkeepers for filing.

Q. And then do you know what the bookkeepers did with the sale? Did they make any entry of it? A. The sales that were made were checked
10 up by the bookkeepers on the books every month.

Q. And the bookkeepers kept those books? A. Absolutely.

Q. Now, when you went over the books with Mr. Macdonald in December, did the books show this total of \$212,750? A. They simply showed the last statement, and the books had been audited prior to that time. We did find some mistakes. I think there was a difference of two or
20 three thousand dollars worth of business which was corrected at the time.

Q. And the total that you adhered to was the total that you arrived at after all the mistakes had been corrected? A. Yes.

Q. And what was the paper, you say, that had that \$212,750? A. The papers shown me this morning.

Q. Those same papers? A. They have all been checked over now.

30

RE-CROSS EXAMINATION by Mr. Parsons:

Q. Mr. Ely, if that Abbott sale were made in 1927, that shouldn't be included in these statements? A. No, sir.

Q. If I told you the Abbott sale was made January 10th, 1927, that sale would go out, then, would it not? A. Absolutely, if it were made at that time.

40 Q. If I told you that the Dackerman sale was consummated April 23, 1927, that would go out?

Thomas Ely—Re-direct

Mr. Kremer: I object. I don't know what he means by consummated. The title might have passed at that time.

A. If the title passed at that time, the contract may have been done six months before.

Q. The signing of the contract, and if that was not consummated until April 23, 1927, that should not be in? A. I don't know anything about it. 10

Q. Now, you have mentioned about this sign being posted about this other sale, the O'Brien sale, in 1925? A. Yes.

Q. And it was on the authority of that sign that there would be a double commission allowed that you did this, that sign was posted in 1925? 20

A. And reiterated again in 1926.

Q. But the sign was posted in 1925? A. Yes, absolutely.

Q. And there was no prize or team prize in 1925? A. Yes, there was.

Q. There was a team prize in 1925? A. There was.

RE-DIRECT EXAMINATION by Mr. Kremer:

Q. You said there was a prize in 1925? A. Identically the same. 30

Q. You offered that same arrangement to your team captains and members in 1925? A. Absolutely the same.

Q. Did that have Mr. Walker's approval at that time? A. Absolutely.

Q. How about 1924? A. None.

Q. Started the practice in 1925? A. 1925.

Q. Now, in regard to these Abbott and Dackerman sales Mr. Parsons has referred to, suppose 40

Thomas Ely—Re-direct

the money were paid in in 1926, during the time the drive was on, but no contract was actually signed until later; would the agent be entitled to his commission when he brought the money in, or not?

10 Mr. Parsons: I object to that. The contract itself speaks for itself.

Mr. Kremer: I am not referring to the terms of the contract.

The Court: The test is when was the sale actually made.

A. I don't know. The man that made the sale is here in court. You may ask him.

20 Q. But I want to ask you this about the practice of your company. You told us yesterday, I believe, that some little slip was taken by the salesman when the money was paid in? A. The deposit.

Q. When the deposit was made? A. Yes.

Q. Now, assuming that the necessary twenty per cent were paid during 1926 on any sale, and the deposit slip signed—

The Court: And the contract not signed.

30 Q. —And the contract not signed; would you then credit your agent from that time as having made a sale?

Mr. Parsons: Objected to.

The Court: He may state the practice.

Mr. Parsons: May I state my objection on the record?

A. No.

40 The Court: He says no.

Thomas Ely—Re-direct

A. (Continued.) I would not give him credit even though he brought in the twenty per cent—

Q. If the money was in?

Mr. Parsons: Objected to. I submit that that is covered by the written contract and the provision as provided here that the commission shall not be paid until twenty per cent is in and the contract signed. 10

A. It has nothing to do with the bungalows. I don't know anything about them. They were done by Mr. Opdyke and Mr. Morrisey. I had nothing to do with them.

Q. You say this written contract has nothing to do with the bungalows? A. Absolutely. 20

Q. And this was a bungalow transaction? A. Absolutely.

Q. If the agent brought in his customary twenty per cent, who drew the contract? A. I believe it was drawn in Keansburg.

Q. Who had charge of that? A. I don't know. Mr. Morrisey, I presume.

Q. The agent had nothing to do with drawing the contract, so that if the agent brought in the twenty per cent, his work was through? A. Yes, as far as I know. 30

William J. Couse—Direct

WILLIAM J. COUSE, sworn for plaintiff.

Direct-examination by Mr. Kremer:

Q. Where do you live, Mr. Couse? A. Asbury Park.

10 Q. Your occupation? A. Banking.

Q. You are president of the Asbury Park Trust Company? A. I am.

Q. You are also president of the Shark River Hills Company, I believe? A. Treasurer.

Q. Mr. Couse, can you tell us whether or not Morrissey & Walker acted as agents or salesmen for the Shark River Hills Company development?

A. Sales agents.

20 Q. Is that under a written contract? A. It is.

Q. Have you the contract? A. I have.

Q. Will you produce it, please? A. I will. (Produces paper.)

Mr. Kremer: I assume there is no objection to it. It is the original Mr. Couse produces.

The Court: It may be marked.

(Paper marked Exhibit P-3.)

30 Q. And Shark River Hills is located where, Mr. Couse? A. About one and a half miles southwest of Asbury Park.

Q. I notice that this contract is dated June 16, 1923. I guess there will be no objection to my stating that fact. Can you tell us whether or not Morrissey & Walker were operating under the contract in 1926? A. As far as I know, they were.

40 Q. You are treasurer of the Shark River Hills Company? A. Yes.

William J. Couse—Direct

Q. Can you tell us whether or not you had any drawing accounts for salesmen employed by the Shark River Hills Company for that year? A. I cannot.

Q. Don't remember? A. I don't recall. I would have to refer to the books. 10

By the Court:

Q. Do you know anything, Mr. Couse, of an arrangement made or alleged to have been made, by Morrisey & Walker with their agents, whereby teams were formed with a captain and the latter was offered a prize of one thousand dollars in the event that such team sold \$200,000 or more of property? A. Only as I heard it discussed informally. I think there was a plan discussed of offering a bonus. 20

Q. Did the Shark River Hills Company have anything to do with that arrangement? A. I don't recall. I would have to refer to the records. I know it was discussed informally but I don't know what final action was taken on it.

By Mr. Kremer:

Q. Where was it discussed, Mr. Couse? A. As I recall, it was discussed in one of the meetings. 30

By the Court:

Q. Of what? A. Meeting of the Shark River Hills Company. That is my recollection, but I wouldn't want to state that as a positive fact without referring to our minutes.

By Mr. Kremer:

Q. Your recollection is it was discussed at a directors' meeting? A. I think so. 40

William J. Couse—Direct

By the Court:

Q. Of course, the answer to that would be the minutes themselves? A. Yes; I would have to refer to the minutes.

10 Q. So far as you know, did your company take any formal action to authorize the Morrisey & Walker firm or your company to enter into such an arrangement?

Mr. Parsons: If your Honor please, I object to your Honor's question on the ground that the minutes are the best proof of the evidence that this witness—

20 The Court: Well, the second question will answer that, and you may answer that question.

Q. Did your directors take any formal action on the proposition?

(Objection noted for defendants as ground of appeal.)

A. I don't recall. I would have to refer to the minutes. To my recollection of it, the matter was discussed informally, in general terms.

30 Q. But the action taken you don't know about?
A. I don't know at all.

The Court: Of course, the thing to do is to produce the minutes to see.

By Mr. Kremer:

Q. Can you recall whether or not you gave drawing accounts to the salesmen during that fall?

40 Mr. Parsons: Objected to as absolutely immaterial. It has nothing to do with this case.

William J. Couse—Direct

The Court: I don't know what you want to show, Judge Kremer. What is it?

Mr. Kremer: Well, that would tend to show from whence the payment came.

Mr. Parsons: The contract speaks for itself. 10

Mr. Kremer: If payments were made by the company it would tend to show the consummation of this agreement we are urging.

The Court: I will allow the question.

Q. Do you know of any payments made by Morrisey & Walker?

Mr. Parsons: May I have an objection? 20

The Court: Note an objection.

Mr. Parsons: My reasons are that any testimony by this witness is in contravention of the written agreement which is in evidence, and also, further, that the best evidence is the minutes of the company.

Mr. Kremer: Well, if he knows.

By the Court:

Q. The question is, do you recall any such payments? A. I do not specifically. I would have to refer to the minutes. 30

Mr. Kremer: I am not asking him about payments; I am asking him if drawing accounts were not opened for the salesmen.

A. I don't recall. I would have to refer to the minutes.

By Mr. Kremer:

Q. Would the minutes show that? A. I pre- 40

William J. Couse—Direct

sume they would, if any official action was taken in the organization or by the board.

Q. Where are the minutes? A. Mr. Pittenger is secretary and has the minutes.

10 Q. Where are the records of the sales of property in Shark River Hills? A. In the Morrissey & Walker Company office.

Q. The Morrissey & Walker Company have those records? A. Yes; I have nothing to do with the detail records.

Q. And where are the check books? A. At the Morrissey & Walker Company office.

Q. They have the checkbooks of the Shark River Hills Company? A. I presume they do.

20 Q. You don't have them? A. No.

Q. How are payments made for commissions on these—

Mr. Parsons: I object to that again on the same general ground; that this general testimony is immaterial in this case, irrelevant.

The Court: Well, if he knows, he may state. Do you know how they are submitted?

30

(Objection noted for defendants as ground of appeal.)

The Witness: For commissions?

Mr. Kremer: Yes.

The Witness: Due the agents?

The Court: Or Morrissey & Walker Company.

40

Mr. Parsons: May I also state on the record a further objection to this line of

William J. Couse—Direct

testimony on the ground that the written contract speaks for itself.

The Witness: The Morrisey & Walker Company has furnished a selling organization for all sales and pay for the sale.

The Court: That would be an answer 10 to it.

The Witness: That is the answer.

Q. In 1926 can you tell us whether or not the Shark River Hills Company paid the Morrisey & Walker Company any commissions for sales in Shark River Hills?

Mr. Parsons: Objected to as immaterial. It has nothing to do with this case. 20

The Court: What do you want to show?

Mr. Kremer: I want to show, if we can show, that on this particular transaction for which we are claiming our commissions and prize money, that the Morrisey & Walker Company received the amount due to them under the contract with the Shark River Hills Company.

The Court: The prize money?

Mr. Kremer: No, not the prize money, 30 but commissions on the basis of over \$200,000 having been sold by this team.

Mr. Parsons: Every salesman has been paid his commissions. It is not a question of suing for commissions. The salesmen were paid their commissions and the question now is whether \$200,000 of property has been sold, and as I conceive it, the Shark River Hills Company had nothing 40 to do with that.

William J. Couse—Direct

Mr. Kremer: I want to show that there was \$200,000 worth of property sold, because the Morrisey & Walker Company were paid their share of commissions on that sale.

10 The Court: It may tend to have a corroborating effect. I think I know what the witness is going to say, however.

(Objection noted for defendants as ground of appeal.)

A. I assume that they received checks for commissions in the regular course of business.

20 Q. Do you know whether or not they got paid in full for commissions on the sale? A. They always were paid. Whenever sales were made, in due course they received their commissions.

Q. That would indicate, however, that a commission on \$200,000 worth of business—that meant about \$50,000—were paid under your contract with them?

The Witness: Your Honor, I qualified that by saying any payments were made in regular course.

30 The Court: Yes, from time to time, I suppose.

Walter M. Brown—Direct

WALTER M. BROWN, sworn for plaintiff.

Direct-examination by Mr. Kremer:

Q. Where do you live, Mr. Brown? A. Asbury Park.

Q. And what is your business? A. At present, 10 brokerage.

Q. Real estate brokerage? A. Yes.

Q. How long have you been engaged in that business? A. Well, as a broker only a year; as a real estate salesman four years.

Q. Four years as a real estate salesman? A. Yes.

Q. Were you ever employed by the Morrisey & Walker Company? A. Yes.

Q. When were you first employed by them? A. 20 1923.

Q. And in what capacity? A. As salesman.

Q. Where did you go to work? A. Shark River Hills.

Q. And where was the office of the company out of which you worked? A. 320 Cookman Avenue.

Q. 1923 you say that was? A. Yes, sir.

Q. Up until what time did you work for them? 30 A. Up until about—well, the middle of December, 1926.

Q. Now, who was your immediate superior there? A. Mr. Ely.

Q. In 1926 did you enter into a contract with the Morrisey & Walker Company? A. I did.

Q. Is this the contract in question? (Paper shown witness.) A. Yes, sir.

Q. Is that your signature on it? A. Yes.

Q. Now, did you go to work in pursuance of 40 that contract? A. Yes.

Walter M. Brown—Direct

Q. Selling what? A. Selling real estate and bungalows.

Q. Where were the bungalows? A. Only bungalows on Shark River Hills or Shark River Hills Manor.

10 Q. Now, after that agreement was made, did you have any further conversation with Mr. Ely about your employment? A. Yes, sir.

Q. Where did that take place? A. In the office.

Q. And when? A. Well, before the season started.

20 Q. Well, about what time? A. Well, during the latter part of March or April, somewhere around there.

Q. Was it before or after you signed this contract? A. It was after I had signed this contract.

Q. And what was that conversation?

Mr. Parsons: Objected to, a conversation with Mr. Ely.

Mr. Kremer: Well, perhaps I should have asked who else was present.

30 A. Well, perhaps the first time that we saw him about it there was—well, I couldn't say.

Q. Well, I mean the first time you talked about it after this written contract was signed. A. The first time that it really amounted to anything, Mr. Walker was present as well as—

Q. Who else? Mr. Walker, Mr. Ely and who else? A. Three or four other men who were chosen for the same capacity.

40 Q. Well, can you tell us who they were? A. Mr. Parsels, Mr. Schlobohn, Mr. Bassett and myself are all that I can remember.

Walter M. Brown—Direct

Q. What was said by Mr. Walker at that time?

A. Well, we were going—we were told that we could have a team—we were to captain teams of eight men. In the event that we, captains of our teams, consummated over \$200,000 worth of business we were to be given a prize or a bonus of one thousand dollars. 10

Q. And over what period was that drive, as it were, to extend? A. Well, that was to extend up until December 15th of 1926.

Q. And how was that \$200,000 to be computed?

A. Well, it was the sale of property in Shark River Hills and Shark River Hills Manor, together with the sale of bungalows.

Q. Well, that doesn't exactly answer my question. Will you tell us what credits were to go to make up the \$200,000? A. Why, the sale of property and bungalows, and the captains were to be given ten per cent of their gross business as volume added to their business. 20

Q. And were the sales made by the team members to count for the captain in the \$200,000? A. Yes.

Q. Now, you say Mr. Walker outlined this program? A. Yes, that was Mr. Walker. 30

Q. Now, that conversation that you have referred to took place in the office? A. Yes.

Q. What happened after that? A. Then we went down—well, after that we chose our teams right there in the office.

Q. Did you choose your team then? A. Yes.

Q. Who was your team? A. Mr. Luke, Mr. Adams, Mr. Logan, Mr. White, Mr. Miller and another Mr. Brown, Mr. Rippey. 40

Walter M. Brown—Direct

Q. Mr. Logan was on your team? A. Yes, sir.

Q. Now, after you chose your team, what did you do then? A. Well, I forget whether it was the same day or not, but shortly after that we had a banquet at the Berkeley-Carteret including
10 the whole sales force, at which time Mr. Walker explained—

By the Court:

Q. The plan? A. The plan.

By Mr. Kremer:

Q. And after that did you go to work under the plan? A. Yes.

Q. Now, did you work during that summer? A.
20 Yes.

Q. With the same team? A. Yes, sir.

Q. And did you devote your time to anything else? A. No, sir.

Q. How late in the fall did you work on this? A. Well, up until December, I think, the last.

Q. Now, can you tell us whether or not your team sold over \$200,000 worth? A. Yes, sir.

Q. How do you know that? A. Well, from the records.

30 By the Court:

Q. You rely on the Morrisey & Walker records, do you? A. Yes.

Q. Just as Mr. Ely has explained that here? A. Yes, sir.

Q. You say those records are correct, do you? A. To the best of my knowledge.

Q. Being \$212,000 worth, approximately, of property sold in which they received a commis-
40 sion of ten per cent; is that right? A. Yes.

Q. That is right? A. Yes.

Walter M. Brown—Direct

By Mr. Kremer:

Q. Now, when December 15th came, what did you do? A. Well, in what way?

Q. Well, did you have any conversation with Mr. Walker?

By the Court:

10

Q. Did you get your money? A. Yes, I got all my commission.

Q. All your commission?

By Mr. Kremer:

Q. When did you first get it? A. Well, first the statements were made up and I went to Keansburg to get my commission check.

Q. How much did your commission check amount to? A. Well, I can't recall to the particular dollar, but around—you have got the statement there, I think. 20

Q. I show you a paper that is in evidence, Exhibit P-2, showing commissions due, \$3,714. A. Yes.

Q. Now, was that the commission on \$212,750? A. Well, that was the commission on \$100,000 and ten per cent volume of my team. That was only my commission, except the bonus that I got from my team. 30

Q. Didn't you get a commission on the whole \$200,000 under your contract? A. Yes.

The Court: Well, he means that he got a commission not only on himself as an individual, but the other six; and that aggregated how much?

Mr. Kremer: The total seems to be \$3,714. 40

Walter M. Brown—Direct

Q. What I want to know is, did you get commissions on \$212,750? A. I got commissions stating that I had done \$212,000 worth of business.

Q. You did? A. Yes.

10 Q. Now, did you get it all at once? A. No, sir.

Q. Now, when you went to Keansburg to get this check you have told us of, what happened?

A. Well, as I recall, I went in and saw Mr. Walker and he congratulated me on the business that I had done.

Q. Was anything said then about how much you had sold? A. Yes, he thought it was very good
20 business.

Q. What was said as to how much you had sold?

A. Nothing, except the remark that I had done very well.

Q. Now, how much money did you receive that day, if any? A. The first day I got a check for \$1,000 on account, pending examination of the books.

Q. And that was about what time? A. That was about around the 20th of December.

30 Q. Do you know whether or not the books were examined? A. Yes, sir.

Q. Were you present when they were? A. Well, not officially, but I saw them being examined.

Q. Who examined them? A. Mr. Macdonald and Mr. Ely.

Q. And after the books were examined, what happened then? A. I got a check for the balance of my commission.

40 Q. On \$212,750? A. Yes.

Walter M. Brown—Direct

Q. Well, who gave you that check? A. Mr. Walker.

Q. And where? A. In the office, Cookman Avenue, Asbury Park.

Q. Was anything said at that time about any additional payment? A. Yes, I asked about my 10
bonus and he said I would get it next week.

By the Court:

Q. Walker said that? A. Yes.

Q. That you would get it the following week?
A. Yes.

By Mr. Kremer:

Q. What do you mean by bonus?

By the Court: 20

Q. One thousand dollars? A. One thousand dollars.

Q. A thousand dollar prize, at his office? When did you have that conversation with him? A. At the time I received my last statement, and, of course, with this \$3,700.

By Mr. Kremer:

Q. What did he say? A. When I asked about the bonus he said I would get it next week. 30

Q. Did you go back the next week for it? A. Yes.

Q. What happened then? A. Well, I never—I didn't get it.

By the Court:

Q. What did he say? A. I didn't see him.

Q. Did you see him afterwards and ask for it?
A. No.

Q. Never asked for it after that? A. No, sir. 40

Walter M. Brown—Direct

Q. Never saw him? A. I might have seen him but not to speak to.

Q. Did you make a demand for it? A. Yes, sir.

Q. How? A. Well, I forget whether I wrote a letter or what, but he knew that I wanted it.

10 Q. Well, did you have any personal interview with him? A. Only that one.

Q. When he said you would receive it on the following week, did he ever tell you why he didn't pay it to you? A. No, sir.

Q. When did you first learn why? A. When did I first learn why?

Q. Yes, why the Morrisey-Walker Company hadn't paid it. A. When the other captains found
20 out, I imagine.

Q. You received indirectly some information from another captain; is that right? A. Yes, sir.

By Mr. Kremer:

Q. Now, at the time you had this conversation in which you told us, I believe, that Mr. Walker said you would get your prize check the following week, had the audit then been completed? A. Yes, sir.

30 Q. Did you leave the employ of the Morrisey-Walker Company about that time? A. Well, shortly after that; yes, sir.

Q. Now, at the time that you have told us you had conversation about the prize, did you have any other conversation with Mr. Walker? A. Why, not at that particular time, no. At the time that I—the first thousand dollars that he gave me on account we talked over future business and I understood that he was putting out a three-year
40 contract, and I didn't say that I wouldn't work and I didn't say that I would.

Walter M. Brown—Direct

Q. Was anything said to him about your working? A. Yes.

Q. What did he say? A. He said that he didn't want me to leave, naturally.

Q. Well, what else did he say? A. Well, he went on to tell about their plans for—what they were going to do, and that I could work—why not continue right on making very good money, working for him. 10

Q. What did you say? A. I said that I hadn't decided what I would do.

Q. Well, did you see him later about that? A. No, sir.

Q. Well, did you accept a contract from him? A. No, sir. 20

Q. Was one offered to you? A. Well, not literally, but I understood that—

Mr. Parsons: I object to what he understood.

Q. Well, you have referred to a conversation you had with him? A. Yes.

Q. Now, did you send any communication to the Morrissey & Walker Company about doing business with them, continuing in their employ? 30

Mr. Parsons: Objected to. I think the communication should be produced.

The Court: He says he didn't continue; he left.

Q. Well, when did you leave? A. Well, about the 15th of January, I guess, somewhere around there.

Q. Now, at the time that Mr. Walker talked to you about giving you a thousand dollar check in 40

Walter M. Brown—Direct

a week, did he make any objection at all to your account? A. No, sir.

By the Court:

10 Q. When did you first know that the defense, as they set up in their answer here, was to be made? Did you know anything about that? A. I don't understand you.

Q. When did you first learn the reason as indicated in their answer for their refusing to pay you the one thousand dollars? A. After we sent that notice that if they didn't pay it we would bring suit.

Q. Then you got a reply, did you? A. We didn't get any reply.

20 Q. Well, then you must have learned it through your lawyer, didn't you? A. Yes.

Q. Was that the first time you knew it? A. That is the first time I knew; yes, sir.

Mr. Kremer: I would like to call for the resignation, in a letter that Mr. Brown sent to the Morrissey & Walker Company about January 15, 1927.

30 Mr. Parsons: This is a fine time to call for it.

Mr. Kremer: All right, if you haven't it, but if you have, I would like to look at it.

The Court: Well, you look for it during recess.

(Recess to 1:15 P. M.)

Walter M. Brown—Cross

(Trial of the cause resumed at 1:15
P. M.)

WALTER M. BROWN, resumed.

Cross-examination by Mr. Parsons: 10

Q. Mr. Brown, you have stated on the stand that you knew nothing about this until after an answer had been filed in this suit; is that correct? A. Knew nothing about what?

Q. Nothing about the claims that these sales were paid commissions and the reasons why they would not pay the bonus.

The Court: Why he wouldn't pay the
bonus. 20

A. I don't just get what you mean.

Q. Didn't you just state before the noon recess that you knew nothing of the reasons why the Morrisey & Walker Company wouldn't pay this bonus until you had heard from your lawyer as a result of the answer filed in this suit? Is that your answer? A. No.

Q. That was not your answer? A. No, that was not what I meant. 30

Q. When did you first know, then, what the reasons were that this bonus would not be paid?

A. When I sent in my resignation.

Q. When you sent in your resignation? A. Yes.

Q. As a matter of fact, suit had been instituted against you to recover back commissions, had it not? A. After they received my resignation.

Q. And that suit was instituted before your
suit was instituted for this bonus, wasn't it? A. 40
Yes, sir.

Walter M. Brown—Cross

Q. Now, I show you a receipt, No. 8,591, and ask you if that is in your handwriting? A. This is, but this is 1925.

Q. And how much was paid on that?

10 Mr. Kremer: I object to it, if the Court please; if it is 1925.

The Court: How is that relevant?

Mr. Parsons: It will come out at the time of the adjustment of these things that this very thing was taken up.

20 Mr. Kremer: Mr. Parsons stated yesterday, I think it is, that it is quite obvious that this contract, if entered into at all, was entered into sometime after May 1, 1926. After the written contract was entered into, Mr. Parsons urged, and I agree with him entirely, that this case has only to do with transactions for 1926. Whatever sales were made in 1925, whatever arrangements were made, could not have any relationship to this case.

The Court: He may state why he asks it.

30 Mr. Parsons: I might further state that counsel changes his ground as he states here, but he did ask questions on 1925.

The Court: That is one of the privileges of counsel.

Mr. Parsons: We are going to show a deficit here, showing that this man gave a deficit here for \$500.

The Court: You don't plead that.

40 Mr. Parsons: This came up and the company knew nothing about it until this

Walter M. Brown—Cross

adjustment of commissions and bonus, the very question was brought up with Brown about this and that.

The Court: That is not your defense. If you counterclaimed in the way of a set-off, it would be another story. 10

Mr. Parsons: We have it in our original suit against this man.

The Court: No, it is not in this suit.

Mr. Parsons: No, it is not; it absolutely is not.

The Court: If I had known that I might have directed you to consolidate; but that other suit is not on the calendar, not reached? 20

Mr. Parsons: It is on the calendar but has not been reached. But there are different parties in this suit.

The Court: The question objected to should not be asked in the circumstances.

(Objection noted for defendants as ground of appeal.)

Q. Mr. Brown, when did you know how the sales of your team had totaled? When did you find that out? A. It was right near the end of the contest. 30

Q. At the end of the contest; and of course your information at that time was correct, wasn't it?

A. As far as I know it was.

Q. And when you took up the question of bringing this suit with your attorney you told him how much of sales had been made by your team, did you not? A. Yes. 40

Walter M. Brown—Cross

Q. And at the time that you took it up with your attorney and told him that amount how much did you tell him? A. Oh, I forget; probably \$212,000.

Q. I call your attention to the fact that you
10 state in your complaint that you made \$204,000. How did you arrive at that figure? A. By your books, the \$212,000.

Q. How did you arrive at the figure of \$204,000?
A. Well, I possibly made a mistake.

Q. You possibly made a mistake? A. In my own figures.

Q. In your own figures? A. Yes.

Q. Where did you get your own figures? A.
20 Well, I got them from my different men of my team.

Q. From the men on your team? A. Yes.

Q. Were those figures checked by Mr. Ely? A.
Not necessarily.

Q. The figures were not checked by Mr. Ely?
A. No, sir.

Q. And the statement on which you based your figures then was a statement which you made up yourself; is that right? A. To my lawyer, yes,
30 sir.

Q. And this amount of \$204,000, will you tell us how it was figured, how you arrived at that amount? A. Why, the same way that you arrive at the amount from the books.

Q. By what way? A. Well—I didn't have access to the books.

Q. You didn't have access to the books? A. Of course not.

40 Q. You didn't have access to the books while

Walter M. Brown—Cross

you were there to determine how many sales were being made? A. No, sir.

Q. And you couldn't find out from the bookkeepers how the sales were made? A. Yes, sir.

Q. You could find out? A. Yes.

Q. And you did, didn't you? A. Found out 10
from the bookkeepers every sale that interested me.

Q. It is true, is it not, that this amount of ten per cent on your team's sales, you were paid a commission on that, weren't you? A. Ten per cent of the volume?

Q. Of the team sales; you were paid a commission on that? A. I was paid a bonus on it.

Q. You were paid a commission on it, were 20
you not? A. Yes.

Q. You received that on commission, didn't you? A. Yes.

Q. That ten per cent was added to your sales because you had to help the men in your team, wasn't it? You gave some time to helping some of the sales from time to time? A. Yes.

Q. That was why the ten per cent was added? A. Yes.

Q. It was also true, was it not, that that ten 30
per cent was not calculated on anything outside but was calculated in the \$200,000? A. It was understood that way.

Q. Who said so? A. It was the agreement when we made our agreement.

Q. Who said that would be made that way? A. Mr. Walker, I suppose. He is the one that made the agreement.

Q. Did you hear Mr. Walker say that? A. That 40
was my understanding.

Walter M. Brown—Cross

Q. Will you answer the question? Did you hear Mr. Walker say that? A. I don't remember who said it.

Q. You don't remember? A. No.

10 Q. Wasn't the first time that it was ever brought up in figuring the figures of this basis here yesterday? A. No, sir.

Q. It was not? A. No, sir.

Q. Was it brought up in figuring your sum of \$204,000? A. It was always—

Q. Will you answer that question? A. I don't remember. I made that up a year and a half ago.

20 Q. And that was right when everything was fresh in your mind, wasn't it? A. Yes.

Q. Now, at the time that that was fresh in your mind did you figure that in the sum of \$204,000?

A. I certainly did.

Q. No question of that in your mind? A. No.

Q. Do you know Mrs. Katz?

Mr. Kremer: You have referred to it as that. Do you mean ten per cent?

Mr. Parsons: Yes, ten per cent.

30 Q. Do you know Mrs. Katz? A. Yes.

Q. Do you know her handwriting? A. I wouldn't swear to it.

Q. How many receipts have you had signed by Mrs. Katz? A. How many receipts have I had signed by Mrs. Katz?

Q. Yes; how many sales did you make to her? A. It is hazy in mind now. I can recall some but perhaps not all.

40 Q. How many can you recall? A. Either three or four.

Walter M. Brown—Cross

Q. And you have seen her signature at least three or four times? A. I never noticed her signature.

Q. Never noticed her signature? A. I saw that she signed it.

Q. Do you recognize that signature? (Paper shown witness.) A. I wouldn't say that I do. 10

Q. You witnessed her signature to the contract? You witnessed Mrs. Katz' signature to the contract, didn't you? A. As I recall, I did.

Q. You know that that was her signature; is that right? A. Yes, I witnessed it.

Q. All right. I show you this signature and ask you if it is not identical.

Mr. Kremer: Objected to. He has already stated that he couldn't. 20

The Court: All you may do in such a circumstance is to have him identify a genuine signature, then it becomes later on in your defense a question for the jury to say whether the writer of the letter is the person who signed the contract.

Q. Is that the genuine signature of Mrs. Katz on this contract? 30

The Court: He has admitted it was. He said he witnessed it.

Q. Do you recognize the signature on that letter?

Mr. Kremer: Objected to.

The Court: What is the objection?

Mr. Kremer: He has already stated that he couldn't identify the signature on that letter. 40

Walter M. Brown—Cross

The Court: I don't know what he will say now.

Mr. Parsons: May I ask it this way:

10 Q. Having identified the signature on the contract and stating that is the signature on the contract, I show you a letter signed "Emma C. Katz" and ask you if you recognize the signature on that letter? A. No.

Q. You don't? A. No.

Mr. Parsons: May I have this marked for identification?

The Court: It may be marked for identification.

20 Mr. Kremer: There has been no proof offered which would make the paper admissible in any way.

The Court: I am not so sure about that. The Katz sale is under attack. They say you have no right to include that in your \$200,000 maximum sales. Now, since that question is up of course any relevant testimony would be competent, although I am not so sure that counsel can get it in in the absence of Mrs. Katz herself.

30

Mr. Parsons: She will be here.

The Court: Then why waste time over it?

Mr. Parsons: I would just like to have it marked for identification.

Mr. Kremer: It has not been identified.

40

The Court: I will allow it to be marked for identification on the assurance of counsel that in some way at some time before the suit is over it is going to be shown to be relevant. If it is not I will strike it.

Discussion

Mr. Kremer: I understand then that it won't go before the jury on the present proof?

The Court: Oh, no; I wouldn't even let the jury see what is in it, I mean at the present moment. I don't know what is in it. 10

Mr. Kremer: I would like to state my objection for the purpose of the record. As I understand it there has been no identification of this paper at all. Mr. Parsons asks to have it marked for identification. No one has even identified the signature on that paper as being that of Mrs. Katz. I don't know what the paper is. I believe it is a letter written to the defendant in the complaint and therefore it is in the nature, as I see it, of a self-serving declaration. It might be that if Mr. Brown said "Yes, I know that is her handwriting," that the paper might then have some competency, but at the present time there isn't anything to show that it was written by your Honor or by her or by myself. 20

The Court: You overlook, however, the fact that the witness has been examined on this paper and disclaims any knowledge of it, whether she wrote it or anything about it. He does identify a signature as genuine of the alleged writer of the letter in question. The point is he denies all knowledge of it. They may show that he received it later on. Therefore for the mere purpose of having it in the record so far as 30 40

Walter M. Brown—Cross

this examination is concerned, it may be marked for identification, that is all.

10 Mr. Kremer: I just want to call your Honor's attention to this: That the signature that he identified as being here is on another document entirely. He has identified no signature in this paper.

The Court: All right. They are going to show that that paper is related to the document on which the genuine signature appears. All that is being done now for the purpose of suspending the present examination is to have it marked for identification. If it does not come in properly later
20 it will go out entirely.

(Paper marked Exhibit D for Identification.)

(Objection noted for plaintiff as ground of appeal.)

Q. Now, Mr. Brown, you were the one that sold Mrs. Katz, were you? A. Yes.

30 Q. At the time that you made this sale of \$10,000 to Mrs. Katz how much had she paid on account of the purchase that she had made from the company? A. All that I know was that she consummated each sale that I made.

Q. Did she pay any more than twenty per cent on each sale? How much cash had you received from Mrs. Katz on this sale? A. \$200.

40 Q. If she had paid no more than the amount to close the previous sales, where did you get the balance, twenty per cent? A. She had owned property there for possibly three years.

Walter M. Brown—Cross

Q. I ask you if she had paid no more than to consummate the previous sales where did you get the additional cash? A. From me. All that I was interested in was the twenty per cent.

Q. Did you get the twenty per cent in this case? 10
A. Twenty per cent was in on the books.

Q. It was on the books; do you know the books of the company? A. Yes.

Q. Can you pick them out? Can you by reading the books tell? A. Well, I am not sure that I can. That has never been my privilege while I was working for the company.

Q. Will you refer to that book and tell us at the time that this sale was consummated, December 13, 1926, the amount of the sale made to Mrs. 20
Katz on the books and the amount which she had paid on account of that sale?

Mr. Kremer: Is that the sale that is now under attack?

Mr. Parsons: No, it is a previous sale.

Mr. Kremer: I object to it because Mr. Brown is not the custodian of the books.

The Court: No, but he has said that Mrs. 30
Katz paid \$200 at the time of the \$10,000 sale; that the balance of the twenty per cent was made up from payments which she had made on previous sales, and by her consent was transferred. Now, they deny that; they say it is not so at all. And now he is asked on cross-examination to show where Mrs. Katz had any money that could be transferred over the \$200. In other 40
words, \$1,800, it would be, whatever the twenty per cent would be. That is, twenty

Walter M. Brown—Cross

per cent of \$10,000 would be \$2,000. Now, he is asked to show where Mrs. Katz had any \$1,800 that could be transferred.

10 Mr. Kremer: But may I call your attention to this: that he not being custodian of the books and not being the bookkeeper, the fact that he could not locate any such entry in books which are not under his control, or supervision, not made by him, is no proof that the thing took place that way.

By the Court:

Q. Where did the \$1,800 come from, Mr. Brown? A. I was told by the bookkeepers how much money could be transferred.

20 Q. Pure hearsay on your part? A. Yes.

By Mr. Parsons:

Q. That is all that you know? At the time, Mr. Brown, that this sale of Mrs. Katz was put through by you, you then clearly understood that there was plenty of money, with the \$200 on hand, to consummate that sale? A. Yes, sir.

Q. No question of that in your mind? A. No, sir.

30 Q. I show you a check dated December 23, 1926, and ask you if that is your signature. A. Yes, sir.

Mr. Parsons: I offer this check in evidence.

Mr. Kremer: No objection.

The Court: It may be marked.

(Check marked Exhibit D-1.)

40 Q. That check is in the amount of \$750, is it not? A. Yes, sir.

Walter M. Brown—Cross

Q. That check was given to Morrisey & Walker, was it not? A. Yes, sir.

Q. Payment was stopped on that check after you had received payment of your commissions from the Morrisey & Walker Company? A. There may have been a difference of the dates; I don't recall. 10

Q. I ask you that question: you stopped payment on this check after you had received payment of your commissions from the Morrisey & Walker Company, did you not? A. I say it may have been a day before or a day after. I can't recall.

Q. Do you remember when you received payment of your commissions from the Morrisey & Walker Company? A. Not the exact date, no, sir. 20

Q. Approximately. A. You mean the final commission?

Q. Yes. A. Well, it was either in the first or second week of January, I think.

Q. The first or second week of January? A. That is what I think. I am not positive.

Q. You offered a statement in evidence here the other day, Judge Kremer, Exhibit P-2, and which I now show you. How soon after that statement did you receive payment of the commissions thereon? A. As I say, I don't recall the day when I received my check. 30

Q. Approximately when? Refresh your recollection from that statement. A. I couldn't give you a definite answer.

Q. Let me refresh your recollection this way. Isn't it true that you received every cent of com- 40

Walter M. Brown—Cross

missions from the Morrissey & Walker Company before Christmas of 1926? A. No, sir.

Q. That is not true? A. No, sir.

Q. Now, how many checks did you receive, checks from the Morrissey & Walker Company, in
10 how many different payments? A. For my commissions?

Q. Yes. A. Two.

Q. Two? A. Yes.

Q. When did you receive the first check? A. Before Christmas.

Q. Before Christmas, and how long before? A. Possibly in the week before.

Q. Did you receive the first check on account of
20 your commissions before they had been figured up? A. For \$1,000, yes, sir.

Q. And that was before, then, December 15, 1926, that you received it? A. No.

Q. I show you a statement and ask you if the statement is not dated December 15, 1926. A. You misunderstand me. Before they were figured up, before they were audited; that is what I understood you to mean.

Q. That is what you meant? A. Before they
30 were audited I received a thousand dollar check on account of my commission statement and was told by Mr. Walker that I would get the balance after the books had been audited, which I got.

Q. How long afterwards? A. Well, that is what is hazy in my mind. It has been quite a while ago.

Q. Now, will you tell us why you gave the check for \$750? A. Because I was asked for one.

40 Q. What were you asked for? A. I was told

Walter M. Brown—Cross

that the percentage had been changed from having twenty to either thirty or forty per cent paid in on the payments, and I was told to give a check for \$750, which I did.

Q. What percentage were you told? A. What?

Q. What percentage were you told that it was changed to? A. What do you mean, from twenty per cent? 10

Q. To what percentage? A. I think it was forty per cent.

Q. Forty per cent? A. Yes.

Q. Forty per cent on \$10,000, how much? A. \$4,000.

Q. And you gave a check of \$750? A. That is what I was asked for. 20

Q. That was what you were asked for? A. Yes.

Q. This was your check? A. Yes, sir.

Q. Are you in the habit of making checks in payment for customers? A. I was not in the habit of doing that, no, sir.

Q. Why did you pay this money for this customer then? A. Simply to avoid a discussion; because I was told by the bookkeepers that there was over twenty per cent, there was enough money in that account to cover the down payment over the twenty per cent and for the other business. 30

Q. And when did that ruling go into effect, or the forty per cent? A. Why, never, as far as I was concerned. That is the reason I stopped payment on the check.

Q. And you gave a check? A. Yes.

Q. Doing as they told? A. Yes. 40

Walter M. Brown—Cross

Q. And you heard that agreement and then you stopped payment afterwards? Is that right? A. Heard what agreement?

Q. Heard that there was no such arrangement, and then you stopped payment afterwards? A.
10 I didn't hear there was no such arrangement.

By the Court:

Q. Why did you stop payment? A. Because I felt that it was not necessary for me to pay in \$750.

Q. How did you come to figure that? A. Because I was told there was more than twenty per cent on the books by the bookkeeper.

20 Q. After you had given the check? A. No, sir; before.

Q. Why did you give it if you knew that before? A. Simply to avoid a discussion, that is all. I knew that I would get it back one way or the other.

By Mr. Parsons:

Q. You are accustomed to giving out checks of \$750 to avoid discussions? A. I knew that I would get it back.

30 Q. How did you expect to get it back? A. I knew that the sale was good.

Q. You knew you intended to stop payment on that when you gave it, didn't you? A. No, I wouldn't say that. I wouldn't say that if I knew the sale was good.

Q. Why did you stop payment on this? A. Because it wasn't necessary for me to turn in \$750 to the company.

40 Q. Why did you give it if it was not necessary

Walter M. Brown—Cross

for you to turn in that money then? A. To avoid a discussion, that is all.

By the Court:

Q. You knew it was not necessary before you did it, eh? A. Well, yes; according to twenty per cent, according to the way that we had transacted business ever since I had been in the company. 10

Q. Didn't you think it would have started a discussion by stopping payment on it afterward?
A. I haven't thought that far.

By Mr. Parsons:

Q. So you give out checks of \$750 to avoid discussion; is that right? A. No, not ordinarily.

Q. But this was a particular case? A. It was. 20
It was a big sale.

Q. Will you tell me, in addition to the \$200 cash which was given to you, was there a note given by Mrs. Katz? A. Yes, sir.

Q. And how much was that note? A. As I recall, \$500.

Q. That note was not cashed, was it? A. Well, she paid it.

Q. For what period of time, do you know that? A. I think it was thirty days. 30

Q. In thirty days time? A. Yes.

Q. That note was not renewed?

By the Court:

Q. Was it ever renewed?

By Mr. Parsons:

Q. It was not renewed? A. Not renewed.

Q. Not renewed? A. No, sir.

Q. Did you understand also that notes are as 40

Walter M. Brown—Cross

good as cash? Is that your understanding? A.
Notes are as good as cash?

Q. Yes.

The Court: Answer it.

10 A. Yes, sir.

Q. You understand that? A. Yes, sir.

Q. They were just as good as cash under your contract, which recites that twenty per cent cash must be paid; is that your understanding? A. Yes, sir.

Q. Now, with the \$800 note and the \$200 cash it took this \$750 to make up the twenty per cent, didn't it?

20 Mr. Kremer: The note was only \$500.

The Court: I don't know what you mean by that question. Of course the Court has not subscribed, either concretely or in the abstract, that the note was as good as cash.

Mr. Parsons: I know it is not.

(Intermission.)

30 Q. Mr. Brown, I show you a receipt and ask you if this is in your handwriting. A. Yes, sir.

Mr. Parsons: I offer this in evidence.

The Court: No objection, I understand, to that, is there?

Mr. Kremer: If this has to do with the \$2,000 sum, as Mr. Parsons says it has, I have no objection.

(Paper marked Exhibit D-2.)

40 Q. How much money did you turn in to the company under that receipt? A. Why, this is a sale, as I—

Walter M. Brown—Cross

Q. Answer that question, please. How much money did you turn in to the company under that receipt? A. I am not sure whether I turned it in or the man who was working under me.

Q. Did you turn in any money under that receipt? A. I am not sure— 10

Mr. Kremer: I would like to ask what is the purpose of this.

The Court: Counsel may state.

Mr. Parsons: It is one of the sales for which credit is claimed under the receipt given.

The Court: Yes, I remember your opening. 20

Mr. Parsons: Showing payment of \$125. No money was paid in to the company.

The Court: No money was actually turned over, although they claim credit for it.

Q. Do you remember the sale made to E. W. Purdy?

Mr. Kremer: What was the name of the one you just had?

Mr. Parsons: Lund. 30

The Court. On lot so and so—

Mr. Parsons: On Lot 37 in Block 24-A.

By the Court:

Q. Do you remember that sale? A. How much was it? Maybe I can—how much was the lot?

The Court: What was the price of the lot?

Mr. Parsons: \$250. 40

A. Yes, I remember that.

Walter M. Brown—Cross

By Mr. Parsons:

Q. Did you get a contract signed by Purdy?

A. Yes, sir.

Q. No question of that? A. No, sir.

Q. Do you remember the sale to Staiger, Block
10 29-A, Lots 21, 22 and 23? A. I don't recall.

Q. You don't recall that sale? A. No.

Q. Made by yourself, in the amount of \$1,800.
Does that refresh your recollection? A. I met
about a hundred different people. I can't recall
them all.

Q. You remember nothing about that? A. No.

Q. Do you remember a sale made by yourself
to Palmer, Block 13-B, in the amount of \$550?

20 All of these sales, I may say, were made in De-
cember, the first two weeks of December.

The Court: 1926?

Mr. Parsons: 1926.

A. Where do they live? Do you know where
they live?

Q. I don't know where they live. A. I am
sorry, but I can't remember all those.

30 The Court: Well, if you don't, say so;
say "I don't remember." It is a very con-
venient phrase for a witness, you know.

Mr. Parsons: Very convenient.

The Court: I take that back. If he
doesn't remember actually, so so.

Q. Do you remember that you got contracts for
every sale that you put in for, signed contracts
by the customer? A. It was the custom from
40 time to time—

Walter M. Brown—Cross

Q. Did you? A. I wouldn't say that every single one, I wouldn't say that. Sometimes they were sent out, mailed out, to people and came back. They were mailed out to people and I never saw them after I made the sale, after the sale was consummated. 10

Q. Isn't it a fact that during the two weeks in December and the latter part of November that you took accounts where payments have been stopped on your own volition, issued receipts for the amounts of payments made on new lots? A. I may have done it in one or two cases after I had seen the people.

Q. After you had seen the people? Did you get contracts signed by the people? A. As I remember, I did. 20

Q. You did? Can you name one or two of those people? A. No, I can't name one right now.

Q. You did sell to Staiger, didn't you? A. If I recalled it I would tell you, but I don't remember.

Q. You recall that you didn't? A. If I recalled it I would tell you, but I don't remember.

Q. It was the custom, was it not, Mr. Brown, and you could have had an absolute check on every sale made, that the salesman had a book of receipts, three receipts: one receipt went to the customer, one receipt went to the company and you kept one? A. Yes, sir. 30

Q. Is that right? A. Yes, sir.

Q. And you could have absolutely checked up every sale made by yourself or your salesmen by using those books, couldn't you? A. Yes, sir.

Q. Where are your copies of those books? A. 40
I have them.

Walter M. Brown—Cross

Q. Have you gone over them for this case? A. Yes.

Q. Have you them here today? A. Yes.

Q. Will you please get them? (Witness produces books.)

10 Q. Have you got the book containing receipt No. 42-A? A. Yes, sir.

Q. Now, may I ask you, it was the custom, was it not, when you turned in the money to the company, that upon your stub would be the receipt of the company; is that right? A. It was the custom, yes, sir.

Q. And the company would sign the receipt? A. It was not always carried out.

20 Q. It was not always carried out? A. Not in a case where a check was given or something like that.

Q. Have you the receipt for that, the stub for that? A. I have.

Q. And is that signed by the company? A. It is not, has not been entered.

Q. It has not been entered? You stated a few minutes ago that the sale was made by somebody else. You find it in your personal stubs, do you
30 not? A. That is all right. That could happen.

Q. Well, I ask you, you will find it on your own personal stubs? A. Yes.

Q. How much did you receive? A. This was \$125.

Q. How much did you turn over to the company? A. They received the money I turned over, \$125.

Q. Did you turn over \$125 to the company?
40 A. I don't remember. If I received it I did.

Walter M. Brown—Cross

Q. You don't remember? You should have turned it if you didn't, shouldn't you? A. If I received it I would.

Q. You would not have given out a receipt unless you took the money, would you? You never give out receipts unless you get money for them, 10
do you? A. No.

The Court: You wouldn't give a receipt for something you didn't receive.

Q. So that you know by looking at that slip there and the corresponding slip here, which is marked Exhibit D-2, you know that you got the money, don't you? A. No, sir; I don't know that I got the money. I was working in conjunction 20
with another member of my team who made the original sale to this party, as I recall now.

Q. Also I ask you again if it is not entirely your handwriting and your signature. (Paper shown witness.) A. It is.

Q. And do you mean to tell me that you would sign slips and receipts to go over to customers for money that was not paid in?

Mr. Kremer: If the Court please, he didn't say that. 30

Q. Would you do that?

The Court: Let him answer it.

A. Of course not.

Q. You wouldn't do it? A. No.

Q. So in looking at this Exhibit D-2 there is no question in your mind now, is there, that you received \$125? A. Yes, there is question, be- 40
cause I may not have taken the money.

Walter M. Brown—Cross

Q. Then you wouldn't give out the receipt, you have just testified? A. I might use my own receipt book.

Q. You might sign receipt books in your name for money, acknowledge receipt of \$125 and not
10 get it, is that what you mean to say? A. Not myself; have the fellow that I was working with turn it in.

Q. Why would you put a memorandum of a sale or a payment on a sale in your receipt book? If you simply put it down as a memorandum why would you put it in your receipt book? A. Why, to keep my own record.

Q. Merely for the purpose of your record? All
20 right. Go on.

By Mr. Parsons:

Q. That is your only answer?

The Court: Is that right?

Q. Is that right? That is your only answer?
A. Certainly, for my own record.

Q. Now, turn to the receipt showing the sale to E. R. Palmer.

30 The Court: Under date—

Q. December 13, 1926.

By the Court:

Q. Have you that receipt stub? A. Have I a stub for that?

By Mr. Parsons:

Q. Yes, December 13, 1926, E. R. Palmer. A. Yes, sir.

40 Q. You have that receipt? A. I haven't any receipt.

Walter M. Brown—Cross

Q. You have the stub? A. Yes.

Q. Will you tell us how much cash you received on that? A. I didn't transact that account at all. It was done by—this party was my prospect. There was a man by the name of Cook who knew them and said he would get the business for me, and I gave him half my commission. 10

Q. And you issued a receipt for money received? A. I didn't issue any receipt.

Q. This is your book, isn't it? A. This is not the receipt.

Q. That is the stub? A. That is the stub showing the price of the lot.

Q. Now, on that book there are two other stubs, are there not? A. Yes, sir. 20

Q. And one stub is turned in to the company, isn't it? A. Yes, sir.

Q. And one stub is given to the customer, and the stub which you give when the money is turned in to the company is signed by the company, isn't it? A. When you turn in money, yes.

Q. When you turn in money? A. Yes.

Q. How much money do you acknowledge in that receipt? A. None.

Q. None? A. No. 30

Q. So that that sale then was never consummated? A. Yes, it was.

Q. Who consummated it? A. Mr. Cook.

Q. And when did he consummate it? A. I don't know. He told me he did. I turned in his book.

Q. Why did you carry it in your book? A. Because it was my prospect.

Q. It was your prospect? A. Yes, and I gave Mr. Cook half the commission. 40

Walter M. Brown—Cross

Q. Mr. Cook consummated the sale? A. Yes.

Q. Where does Mr. Palmer live? A. East Orange.

Q. East Orange? Sure of that now? A. No, I am not sure. Mr. Cook consummated the deal.

10 Q. But it was your prospect? A. It was my prospect.

The Court: No, he was his *alter ego*.

Mr. Parsons: No, Palmer was his prospect.

The Court: Cook was the man who was the go-between?

The Witness: Yes.

20 Q. You think that Palmer lives in East Orange?
A. I didn't see him; Mr. Cook saw him.

Q. But he was your prospect? A. Yes, sir.

Q. You mean that you can get prospects without seeing the man? A. Well, can't I get a name from someone else?

Q. And you call it your prospect when you get the name and don't see the man or do any work; is that right?

30 The Court: You don't get his point.

Mr. Parsons: I get his point, if your Honor please.

Q. In other words, Cook came along and says, "I can sell a lot for you?" A. He had his own prospect.

The Court: He was Cook's prospect?

Mr. Parsons: No, he said it was his prospect and Cook sold the lot.

40

Walter M. Brown—Cross

The Court: Now, he simply represented this man Cook in making the sale to Palmer?

Q. Yes, and Palmer was your prospect, wasn't he? A. Inasmuch as I paid Cook half the commission. 10

Q. How did Palmer get to be your prospect?

The Court: Through Cook.

Mr. Parsons: No, that is just it.

The Witness: Yes, he was.

Q. So Cook gave you Palmer's name? A. Cook gave me Palmer's name, yes.

Q. And then Cook went and sold Palmer and yet you took half the commission; is that the way you do business? 20

The Court: Yes, he says that is so.

Mr. Parsons: I would like the witness—

A. That is the way of that transaction.

Q. What team was Cook on? A. I don't know.

Q. And you did absolutely no work on this and yet you took credit for it and put it in the list in this competition; is that right? A. I took credit for it, yes. 30

Q. Did you ever see Palmer?

Mr. Kremer: If the Court please, I don't see what difference this makes. I don't see why it is that a man should be crucified at all because he had some other assistant help him to get prospects or why he wouldn't be entitled to credit. There is nothing in the contract that said he could not take credit for it. 40

Walter M. Brown—Cross

Mr. Parsons: This is our particular charge: that other men made sales and he got increased commission, he put other sales on his account. That is one of the very things we pleaded.

10 The Court: All right; but didn't he make that sale, so far as the company is concerned?

Mr. Parsons: No, sir.

The Court: Did the company know Cook?

Mr. Parsons: Cook was one of the salesmen of the company.

The Court: That doesn't appear yet except from counsel's statement.

20 Mr. Parsons: He has testified that he was one of the salesmen.

By the Court:

Q. Who is Cook? A. He was one of the salesmen.

Q. For the Morrisey & Walker Company? A. Yes, sir.

By Mr. Parsons:

30 Q. And Cook was a salesman of the Morrisey & Walker Company? A. Yes.

Q. And Cook was on somebody else's team, wasn't he? Isn't that right? A. Yes.

Q. And you took Cook's sale and put it through your own books; is that right? A. It was not Cook's sale.

40 Q. Well, you took a sale where Cook had a prospect—just a minute; let me ask the question—you took a sale where Cook had a prospect, where Cook consummated the sale, and put it through

Walter M. Brown—Cross

your books, didn't you? Will you answer that yes or no? A. Well, that is not right.

Q. All right. Just answer it no then.

Mr. Kremer: If the Court please, I think he is entitled to make his explanation of that. I don't see why he should be bound by Mr. Parsons' testimony. 10

The Court: The witness says, "I can't answer that yes or no. You may take a moment and ask the witness.

Mr. Kremer: I can do that, of course; but I think Mr. Parsons should give him the opportunity to give the reason for it.

Mr. Parsons: I am trying my case my own way. 20

By the Court:

Q. Why can't you answer yes or no to that question? A. Because I had the cards.

Q. You had a card? A. Yes.

Q. For that lot? A. No, with that name.

Q. Oh, with that name? A. Yes. Mr. Cook knows that party. If I give him a card—

Q. Where did you get that card originally?

A. It was one of our old clients. 30

Q. One of the old clients? A. Yes.

Q. One of the firm? A. Yes, sir.

Q. And you had that name on one of your cards? A. Yes, I was given this card.

Q. So Cook said to you, "I know that party in East Orange. I will go over there myself?" A. Yes.

Q. Had a previous sale been made to this man; is that right? A. I believe so. 40

By Mr. Parsons:

Walter M. Brown—Cross

Q. Well, you know so, don't you? A. Well, certainly; I didn't make the sale, but I got a card that a sale had been made to him.

Q. And the previous sale, the man had allowed his payments to lapse, hadn't he? Isn't that
10 right? A. I believe it is.

Q. Had to go through the books to find that out, didn't you? A. I didn't go through the books. I was given this card.

Q. Well, you got a card? A. Yes, sir.

Q. Do you know of any actual cash passed on this? A. I don't know.

Q. You don't know that? A. No.

Q. You claim commission on it? A. Yes, sir.

20 Q. Wasn't it your duty to find out whether cash passed? A. The books are a matter of record.

Q. Did you get a contract signed by this man? A. Mr. Cook handled the whole affair.

Q. Was a contract signed by Palmer? A. I don't know.

By the Court:

Q. Of course you rely upon the books, do you?
30 A. Yes, sir.

By Mr. Parsons:

Q. And you are willing to be bound by the books, aren't you?

Mr. Kremer: Objected to.

Q. You rely on the books, don't you? A. Well, in cases of that kind, certainly.

Q. And in all cases you rely on the books, don't
40 you?

Walter M. Brown—Cross

Mr. Kremer: Objected to.

The Court: Yes, I think he can state that, because I get that impression, that he is really relying upon the books as a result of that audit of Mr. McDonald.

Mr. Kremer: Well, I don't concede that we can be bound by anything that may be on the books, to make a general statement that we rely on the books, whatever they contain. 10

The Court: But you are proving your claim by their books.

Mr. Kremer: We are basing our claim on statements put in here and oral testimony. 20

The Court: All right. Go on. There is nothing before the Court.

Q. Now, I direct your attention to a sale made to Miss Lund, bearing date the date which I have shown you here, October 31, 1926. Did you ever obtain from Miss Lund any more cash than the cash mentioned in this agreement, \$125? A. No, sir.

Q. You didn't? A. No, sir. 30

Q. You claim credit for commission on that sale, do you not? A. When the commission came through I got it.

Q. Now, will you refer to your memorandum of this and see how much cash you collected? A. I have it here.

Q. How much? A. There was \$125 turned in on my receipt book.

Q. How much is twenty per cent? A. \$250. 40

Walter M. Brown—Cross

Q. Was the contract ever signed? A. I believe it was. That was another case where another salesman by the name of Major was on my team.

10 Q. Who was the salesman that made that sale?
A. Major.

Q. A man named Major? A. Yes.

Q. Was he on your team? A. Yes.

Q. He was on your team? A. Yes; I helped him out with it. Perhaps that is how it got in my book.

Q. Now, you made most of the sales, did you not, to Mrs. Katz; is that right? A. I made most of the sales to Mrs. Katz?

20 Q. Yes. A. You mean more than any other salesman?

The Court: Yes, that is what he means.

Q. You made them all, didn't you? A. Oh, no.

Q. Who else made them? A. A salesman in 1923 by the name of Lee.

Q. After 1923 did you make sales to her beside this one? A. Not to my knowledge.

Q. Not to your knowledge? A. No.

30 Q. Isn't it true that in 1925, the previous year, Mrs. Katz purchased a total of \$11,350 worth of lots?

Mr. Kremer: If the Court please, I would like to know the purpose of this, if it is 1925.

Mr. Parsons: Bearing on this very question of twenty per cent.

40 Mr. Kremer: If it is 1925 I don't know what bearing it could have.

Walter M. Brown—Cross

The Court: Because that is testimony of a transfer of a balance?

Mr. Parsons: That is just the very thing that I am going to ask and going to show.

The Court: Proceed.

A. How do I know she purchased? 10

Q. You don't know that? All right. Have you the receipts of the other members of your team there? A. No, sir.

Q. You only have your own individual receipts? A. Yes.

Q. That is all? A. Yes, sir.

Q. Do you know of your own knowledge when the sale of the Abbott place was made? A. I do not. 20

Q. You won't say that that sale was closed in 1926, will you? A. I know nothing about that.

Q. Then why do you make a claim for it—you are making a claim for it—if you know nothing about it? A. Because it was in the books; I didn't know about it.

Q. What books did you see it in? A. I didn't see it.

Q. Then how do you know it was in the books? 30
A. It must have been or it wouldn't have been presented.

Q. Who presented it? A. Well, I don't know. You have it there. I don't know how you got it.

Q. Why do you claim for it? A. Why do I claim for it?

Q. Yes. A. I don't claim anything for it.

Q. Oh, you don't claim anything for it? A. Only the volume of business. 40

Q. And if that sale was not made in 1926 you

Walter M. Brown—Cross

wouldn't claim for it, would you? A. If it was not made in 1926?

Q. Yes; you wouldn't claim for it? A. I don't see how I could.

10 Q. All right. The Dackerman sale: do you claim anything for that sale? A. I believe it was counted in on the volume of business.

Q. It should have been? A. Absolutely, if it was consummated.

Q. Do you know that it was consummated? A. I have every reason to believe it was.

Q. When? A. Sometime during the year. I didn't make the sale myself.

20 Q. You didn't make the sale, your brother made it; is that in the statement? A. My brother and Mr. Logan together.

Q. Now, you have testified under your own testimony that Logan was a member of your team; is that so? A. Yes.

Q. No question of that? A. No.

Q. Will you name the members of your team again, please? A. Mr. Logan, Mr. Oatman, Mr. Rippey, Mr. White, Mr. Major and my brother and myself.

30 Q. That makes nine, doesn't it? A. Well, here; I can answer that very easily.

Q. Oh, you can answer it? A. Yes.

Q. As a matter of fact it did make nine, didn't it? A. It does, yes; but Mr. Logan didn't work the whole season and I took another man in his place.

Q. When did Mr. Logan quit? A. Well, he quit sometime during the year.

40 Q. And who was the man you took in his place? A. I think it was Oatman.

Walter M. Brown—Cross

Q. And when did Oatman start working? A. Oh, I don't recall just when all those things happened, but that is the way it was.

Q. You say that Logan was originally on your team? A. When it started.

Q. Do you know Mr. Carlow? A. Yes. 10

Q. Mr. Carlow was the captain of the team, wasn't he? A. Yes.

Q. And Mr. Logan was on Mr. Carlow's team, wasn't he? A. Mr. Carlow wasn't a captain of a team when it started, was he?

Q. Wasn't he? A. I think he took Schlobohn's team.

Q. Logan was on Schlobohn's team, wasn't he? A. It was my impression that Logan was on my team. 20

Q. It was your impression? A. I haven't anything in writing.

Q. Have you based then the total gross amount of sales on which you are asking this commission upon Logan's sales? A. The sale of the bungalow was between Logan and my brother.

Q. All right. I ask you this question: you say that Logan was on your team? A. That was my impression; that was my memory. 30

Q. Are you asking credit on Logan's sales? A. Not if he is not on my team.

Q. Well, were you?

The Court: Did you?

A. Did I ask him?

Q. Did you? A. If I did I thought he was on my team.

Q. I ask you one simple question. You can answer it yes or no. Did you ask credit on Logan's sales in making up your \$200,000? A. No, sir. 40

Walter M. Brown—Cross

Q. Then why, if you didn't ask credit on Logan's sales, then why did you ask credit and say that Logan was a member of your team in selling that bungalow? A. When I asked credit for that bungalow I thought that it was my brother's business. That is the way I understood it.

10 Q. And hadn't you any book to show that Logan was on your team? A. I forgot about Logan because he quit early in the season.

Q. Didn't you say Logan was on your team? A. Yes.

Q. And the reason you said Logan was on your team was to try to get credit for the sale of that bungalow now? A. No, that was not the reason.

20 Q. When was the bungalow sold? A. I don't know; sometime during the summer.

Q. Was it sold before 1927? A. It was sold; I don't know whether it was consummated or not.

Q. And didn't Logan remain in the employ of the Shark River Hills Company during the summer of 1926? A. To my recollection Logan went to work in a drugstore right on the corner. Whether he continued his relations or not I don't know.

30 Q. Didn't he remain working for the Shark River Hills Company during the season of 1926?

A. As I say, I don't remember.

Q. If you don't remember that why do you say he quit early then? What are you testifying to?

A. Well, listen. He could have remained in the employ and still held down another job.

40 Q. Well, then your former statement that he quit early in the season was not true? A. Quit active work.

Walter M. Brown—Re-direct

Q. Quit active work? A. Yes; putting all his time, you know.

Q. Is that right? That is your statement, is it?

The Court: That is what he says.

10

RE-DIRECT-EXAMINATION by Mr. Kremer:

Q. Now, will you get us your receipt book again, please, and refer to that Lund receipt of \$125?

A. Yes, sir.

Q. That indicates that you gave a receipt for \$125 in that transaction? A. That indicates that a receipt was given out of my book.

Q. Do you know as a matter of fact who made the sale to Mrs. Lund? A. It was made in conjunction with Mr. Major and myself. In other words, Mr. Major had the prospect.

20

By the Court:

Q. Where was Major? A. He was on my team.

Q. On your team? A. Yes, sir.

By Mr. Kremer:

Q. Do you know, Mr. Brown, whether or not Mrs. Lund—it was a Mrs. Lund, wasn't it? A. Well, Elizabeth Lund.

30

Q. Do you know whether or not Mrs. Lund had been a previous customer? A. I don't think she had.

Q. If she had been a previous customer and had credit on your books would any cash have passed?

40

Walter M. Brown—Re-direct

Mr. Parsons: I object. He says he doesn't think she had been a previous customer.

10 Mr. Kremer: Well, I ask, in order to straighten it out, that the account be produced. My notion was that she was a previous customer.

By the Court:

Q. What is your answer in regard to Mrs. Lund? A. Miss Lund—in the first place, I think I can explain this whole thing right now. Miss Lund bought a piece of property through Mr. Major and gave him \$125. It was a single lot near the hotel. She was going in partners with another lady, and this other lady backed out, so that this \$125—

20

Mr. Parsons: I think that this conversation with Mrs. Lund and Mr. Major—

The Court: He is telling the consequence; he is not giving conversations.

Q. Go on. Mrs. Lund backed out? A. No, the other lady backed out, and Mrs. Lund thought it was more than she could handle herself.

30

Q. Did she surrender the contract? A. So I sold her, along with Mr. Major—of course she was his first prospect—a lot for \$1,250 which she could handle, and this \$125 was transferred from the other purchase.

By Mr. Kremer:

Q. Did you say that Major received the money?

A. He received the money on the first purchase,
40 yes, sir.

Walter M. Brown—Re-direct

Q. And that was \$125? A. As I recall. I think she had \$125 credit on the book and that is perhaps this \$125 that I have here; probably gave her credit for her \$1,250 sale lot.

Q. Then when you gave credit there and a receipt for \$125 did you actually receive any cash? 10

A. No; it was the same as cash.

The Court: He says no.

Q. Was that the reason then that you didn't turn any money over at that time to the company? A. Absolutely.

(Intermission.)

20

Q. Now, Mr. Brown, will you refer to the stub that has been mentioned as 42-A? A. Yes, sir.

Q. Now, what transaction does that relate to?

A. Elizabeth Lund.

Q. That is the same one? A. Yes, sir.

Q. Then you have given your explanation of that transaction. Now in regard to the Abbott sale, did you make that sale personally? A. No, sir; one of my team.

Q. Well, which one of your team made that, if you recall? A. Mr. Luke. 30

Q. Eddie Luke? A. Yes.

Q. Is he here today? A. Yes, sir.

Q. Now, referring to the Palmer sale which Mr. Parsons asked you about, do you know whether or not Mr. Palmer was a previous customer? A. Yes, sir.

Q. You said that you got a card with Palmer's name? A. Yes. 40

Walter M. Brown—Re-direct

Q. From whom did you get that? A. I got the cards from Mr. Ely. He handed cards out. In other words, that is the way we do our business; I take someone else's client, in other words, to either increase their business or sell them some-
 10 thing else or some of their friends. And that is how I got his card.

Q. Now, you told us that the bookkeepers said to you that in the Katz transaction—and this relates to that sale—that Mrs. Katz had credit on previous purchases. You made that statement, I believe? A. Mrs. Katz and perhaps her sister. When I made my sales all of my sales went to the one Mrs. Katz; but her sister—I mean they
 20 decided between them—I suppose they decided to carry them together.

Q. Now which bookkeeper was it that you had this conversation with? A. I don't recall.

Q. Well, who was the bookkeeper of the company at that time? A. Well, there was Miss Tilton, Miss Charles and Miss Burdge.

Q. Miss Charles, is she here today? A. Yes.

Q. Is Mrs. Tilton here today? A. Yes.

Q. Now, do you recall which of those ladies it
 30 was that you talked to about the Katz transaction?
 A. I don't recall.

Q. Well, now who told you that \$750 must be advanced by yourself? A. Mr. McDonald.

Q. Mr. McDonald? A. Yes.

Q. You said something about a note made by Mrs. Katz. A. She told me at the time of the sale that she didn't want to be bothered with increasing her monthly payments, and she said, "I
 40 have about—" as I recall it—" \$500 more that

Walter M. Brown—Re-direct

I am going to pay in in a month." Well, I though it would be a good idea to get her note for \$500.

Q. And did you take it? A. Yes, I took it.

Q. To whom was the note made payable? A. Either the Shark River Hills Company or the Morrisey & Walker Company. 10

Q. Do you know whether or not that note was accepted by the Morrisey & Walker Company? A. It was accepted.

Q. As part? A. As part payment? No; it was credited to her account.

Q. And did that go to make up the twenty per cent or do you know? A. That was not the idea in getting it. I understood—I was under the impression—was told that there was money in to consummate the sale. 20

Q. Who did you say told you that? A. The bookkeepers. I don't know which one; whoever it was that looked it up.

Q. Now, that was on or about what date? A. Well, it was sometime in—I think it was sometime in December.

Q. Now, you referred to Mr. McDonald as having told you that you owed \$750. Will you tell the Court and jury what he said to you? A. Why, he said words to this effect: the account was \$750 shy. 30

Q. Which account? A. On this new sale.

Q. Which new sale? A. The \$10,000 sale.

Q. The Katz sale? A. Yes, sir.

Q. Well, that is what I want to know. And it was short how much? A. \$750.

Q. Now, \$200 was paid in after the credit was 40

Walter M. Brown—Re-cross

given her for the balance that she had on account? A. Yes, sir.

Q. Now, will you state whether or not it was a practice of salesmen to advance moneys to make up the requisite twenty per cent? A. It was a
10 practice.

Q. How long had that been going on? A. Ever since I worked there.

Q. Did Mr. Ely permit that? A. Yes, sir.

Q. Mr. Walker? A. Yes, sir.

Q. Now, Mr. Parsons suggested that there was nothing said about you getting credit for ten per cent on your team's business, I think, yesterday. You heard him suggest that to you. I show
20 you this statement in evidence under date of December 15, 1926.

The Court: Marked Exhibit—

Q. Marked Exhibit P-2. Is that your signature? A. Yes, sir.

Q. And on that statement were you given credit for ten per cent of your team's business? A. Yes, sir.

30 RE-CROSS-EXAMINATION by Mr. Parsons:

Q. If Major credited that sale to Miss Lund why did you take credit for it? A. He didn't consummate the sale. I changed the—first she bought—she was going in partners with another lady to buy a more expensive piece of ground, around \$2,500, and the other lady backed out, so that I transferred her to a piece of property worth about half what she was going to buy with
40 this other lady, so that she could carry it.

Walter M. Brown—Re-cross

- Q. And didn't Major put his slip through too?
 A. Not on this sale.
- Q. Never put it through? A. On the first sale he may have, but not on this sale.
- Q. On the first sale he may have put it through?
 A. He may have. I don't know. 10
- Q. And so Major may have claimed commission on the same amount or a double amount?
 A. He may have claimed commission?
- Q. Yes, put through a sale. A. Not unless he got a twenty per cent.
- Q. Did you get a twenty per cent on this sale?
 A. I didn't, no.
- Q. Did you claim commission on this sale? A. I didn't at that time. She may have made arrangements in here to send in the balance. 20
- Q. Do you know that the twenty per cent was ever turned in? A. If I got commission for it it was. Naturally if I made this sale she must have made some arrangements for her to pay in the balance, so I could get the commission.
- Q. Was the contract ever signed on that? A. I don't know.
- Q. With reference to your statement that it is the practice, how many other checks did you put up with the Shark River Hills Company? A. How many other checks did I put up? 30
- Q. Yes. A. None, to the best of my recollection.
- Q. Who else did? A. Who else did?
- Q. Yes. A. I don't know.

Walter M. Brown—Re-direct
Howard Opdyke—Direct

RE-DIRECT EXAMINATION by Mr. Kremer:

Q. Now, Mr. Brown, referring once more to that \$750 check, to whom did you give that check?

10 A. I gave it to the company.

Q. Well, who for the company? A. Oh, I don't know. I imagine one of the bookkeepers got it.

Q. Do you know whether Mr. Walker accepted it? A. Yes.

Q. Well, did he? A. He did. It has gone through the bank. I just saw it.

20

HOWARD OPDYKE, sworn for Plaintiff.

Direct-examination by Mr. Kremer:

Q. Where do you live, Mr. Opdyke? A. Keansburg.

Q. And you are employed by the Morrissey & Walker Company? A. Yes.

Q. What is your job? A. Superintendent of construction.

30 Q. You have charge of the bungalow construction? A. Yes, sir.

Q. And you did in 1926? A. Yes, sir.

Q. I show you a paper here and ask you if it is in your handwriting. A. Yes, that is my handwriting.

Q. And when did you make that list? A. That I couldn't tell you.

40 Q. What does it contain, Mr. Opdyke? A. Well, it contains the contract jobs which we have built.

Howard Opdyke—Direct

Q. Had built when? A. Well, I don't know just when. We built them. They are all jobs that we have built.

By the Court:

Q. We are talking about 1926 now, Mr. Opdyke. 10

A. I couldn't say they were all built in 1926.

By Mr. Kremer:

Q. Were some of them? A. Some of them yes.

Mr. Kremer: I am going to offer it.

Mr. Parsons: Objected to.

The Court: Why do you offer it?

Mr. Kremer: Well, unless your Honor wants me to refer to it I might state it. It is the matter that is in dispute. I think it contains one very important matter, and before I refer to it I suppose it ought to be in evidence or marked for identification. 20

The Court: You may mark it for identification, for that purpose, to examine on it. Mr. Brown did refer to it, certainly, Brown or Ely.

(Paper marked Exhibit D for Identification.) 30

Q. Now referring to Exhibit D for Identification, it contains the name of Dackerman and G. Brown? A. Yes.

Q. That is in your handwriting? A. Yes.

Q. Does that indicate who was the salesman on the Dackerman job? A. No, sir; not the salesman.

Q. Why is the name G. Brown after Dackerman? A. Simply because I was instructed to put his name down on there. 40

Howard Opdyke—Direct

By the Court:

Q. By whom? A. Mr. Ely.

By Mr. Kremer:

10 Q. And the other names on there indicate the salesmen of various bungalows? A. Yes, as far as I know they are all salesmen who sold the jobs, with the exception of that one.

Q. Who furnished the list? A. Evidently I did, sir.

Q. And you were superintendent in charge of construction? A. Yes, sir.

Q. Do you know of your own knowledge who were the salesmen who sold them? A. Yes, sir.

20 Q. So that then when you put the name G. Brown after the Dackerman bungalow it was because G. Brown was the salesman, wasn't it? A. Not personally, no, sir.

Q. Not personally? A. No, sir.

Q. Why do you say not personally? A. Well, because I sold the job myself.

Q. You sold the Dackerman job yourself? A. Yes, sir.

30 Q. Did you get a commission for it? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Then why did you put down G. Brown if you sold it? A. Well, just simply as I told you. Mr. Ely said "It don't make any difference who sold the job, but I want Gar Brown to have the credit of selling it."

Q. Sure about that? A. Yes, absolutely.

40 Q. But you had personal knowledge of those sales? A. Yes, I know them all. I closed all the sales myself.

Howard Opdyke—Direct

Q. That is your job? A. Yes, sir.

Q. You were employed by the Morrisey & Walker Company especially for that job? A. Yes, sir.

Q. And you are employed by them now? A. Yes, sir. 10

No cross-examination.

Mr. Kremer: If your Honor please, I want to offer in evidence the various statements that were used by Mr. Macdonald and testified to by Mr. Ely this morning.

The Court: And examined upon, as I understand it, by Mr. Parsons?

Mr. Kremer: Yes. 20

The Court: If there is no objection they may be marked.

Mr. Parsons: No objection.

(Paper marked Exhibit P-4.)

Mr. Kremer: I also call for the production of the Brown statement.

(Paper produced.)

Mr. Kremer: I now offer in evidence the statements showing sales by the plaintiff Walter Brown personally under date of 30
April 28, 1926; June 11, 1926; August 6, 1926; September 13, 1926; October 18, 1926; November 15, 1926; and the December one is already in evidence; and also statements having to do with Shark River Hills Manor by William Brown, bearing date June 11, 1926; August 6, 1926; September 13, 1926; October 18, 1926; and November 15, 1926; a statement of George 40

Exhibits Offered in Evidence

Miller, September 13, 1926; G. G. Brown, June 11, 1926; E. R. Luke, June 11, 1926; E. R. Luke, August 6, 1926; E. R. Luke, September 13, 1926; E. R. Luke, October 18, 1926; E. R. Luke, November 15, 1926; and E. R. Luke, December 15, 1926.

10

(Papers marked Exhibit P-5.)

Mr. Kremer: If the Court please, I would also like to offer the paper that was referred to by Mr. Opdyke, which is marked for identification.

Mr. Parsons: I do object to that, if your Honor please. There is nothing showing the times when the sales were consummated.

20

The Court: Of course Mr. Opdyke is not sure, other than the fact that he thinks some of them were in 1926.

Mr. Parsons: Doesn't know when they were.

The Court: He doesn't designate. As I recall Ely's testimony the Dackerman sale was in 1926.

30

Mr. Parsons: He said he didn't know. I had a memorandum of the sale when it was closed today and he said he couldn't tell.

The Court: If you want Opdyke's testimony why do you object?

Mr. Kremer: Then I would like to recall Mr. Brown.

The Court: Let him sit right there.

40

Walter M. Brown—Direct

Edward R. Luke—Direct

WALTER M. BROWN, recalled for plaintiff.

By the Court:

Q. Can you fix the time of the Dackerman sale, Mr. Brown? A. I know the sale was made in the summer sometime. 10

Q. Of 1926? A. Yes, sir.

By Mr. Kremer:

Q. Now which of the bungalows did you sell, Mr. Brown? A. I sold Miss O'Brien's.

Q. What was the price of that? A. \$5,550, plus a garage; it was about \$5,700; and Canfield's.

Q. How much was the Canfield? A. \$4,780, something like that. 20

Q. It was in evidence this morning, I believe. Were any bungalows sold by anyone other than yourself who was on your team? A. Mr. Luke.

Q. How many did he sell? A. One.

By the Court:

Q. Which one? A. Abbott.

Mr. Kremer: I will call Mr. Luke then.

30

EDWARD R. LUKE, sworn for Plaintiff.

Direct-examination by Mr. Kremer:

Q. Where do you live, Mr. Luke? A. Asbury Park.

Q. What is your business? A. Real estate broker.

Q. Were you employed by the Morrisey & Walker Company in 1926? A. Yes, sir. 40

Edward R. Luke—Cross

Q. In what capacity? A. Salesman.

Q. Were you present at any meeting when the question of the organization of teams and prize money was discussed? A. I was.

10 Q. Where was that? A. At the Cookman Avenue office, 320, I think, and at the Berkeley-Carteret Hotel.

Q. About what time of the year was that? A. Well, as near as I can recall it was the latter part of April, possibly; about that, I would judge; I couldn't say positive.

Q. At the meeting at the Cookman Avenue office who was present? A. Mr. Walker, Mr. Ely, Mr. Brown, Mr. Bassett and Mr. Parsels.

20 Q. Now was a team organized? A. Yes, sir.

Q. Whose team were you on? A. Mr. Brown's.

Q. Did you proceed to work that summer? A. I did.

Q. Did you sell any bungalows? A. I did.

Q. That summer? A. Yes, sir.

Q. What bungalow? A. William T. Abbott.

Q. And where was the bungalow? A. Located in Shark River Hills.

30 Q. Do you know what the price of it was? A. The price of the bungalow, it was given by the building contractor and the commissions which were paid for were different. The commission was paid on \$2,380 and I think the price was about \$2,500.

CROSS-EXAMINATION by Mr. Parsons:

Q. Mr. Luke, when was that sale consummated?

40 A. As near as I can recall, it would have been in March, I think.

Edward R. Luke—Re-direct

Q. In when? A. I think March; I am not positive.

Q. March, 1927? A. Six.

Q. March, 1926? A. I think it was.

Q. Well, do you recall the date accurately? A. No, I don't. 10

Q. Well, was it after this arrangement at the Berkeley-Carteret or before? A. Afterward, of course.

Q. Just a minute, Mr. Luke. You say that according to your recollection that sale was in March, 1926? A. According to my recollection.

Q. According to your recollection; that is your best recollection? A. It is.

Q. When was the dinner at the Berkeley-Carteret? A. I think, if my memory serves me correctly, it was in May. 20

Q. But according to your recollection this sale was in March; is that right? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Kremer:

Q. I understood you to say that the sale was after the dinner? 30

The Court: Was it or was it not?

Q. Now in other words you mean this—

The Court: Obviously counsel are obfuscated about that.

Mr. Kremer: Well, he has testified both ways, really.

A. Well, my recollection of it is that the contract was taken in 1926. All business during 1926 was applied on the bonus and premium. 40

Edward R. Luke—Re-direct

By the Court:

Q. Even though the conversation occurred in May, 1926? A. Yes, we were working under that.

Q. You were working under that year's business? A. Yes.

10 Q. In other words, when did it start? A. January 1st.

Mr. Parsons: If your Honor please, I hate to object to your Honor's question.

The Court: I may be as wrong as you are sometimes.

Mr. Parsons: But, if your Honor please, the contract itself says April 1, 1926, to November, 1926.

20 Q. Do you remember that? A. I don't remember what the contract stated. Neither am I positive that it was in March.

Mr. Parsons: It happens it was in February, 1926, the Abbott sale.

The Court: Your record will disclose when it was.

By Mr. Kremer:

30 Q. Did the contract have anything to do with the bungalows? A. The agreement made had something to do with the bungalows, as to what premiums the prices were to be paid on.

Q. Well, now at the time that this agreement was made that you referred to, what was said by Mr. Walker or Mr. Ely about bungalows? A. That they were included in your gross sales for bonuses and premiums.

40 Q. Bungalows sold when? A. During the year 1926.

Edward R. Luke—Re-cross

Q. What year? A. During 1926.

Q. At any time during the year? A. At any time during the year.

RE-CROSS EXAMINATION by Mr. Parsons:

Q. This bungalow had already been sold at that time? A. Beg pardon? 10

Q. This bungalow had already been sold at that time? A. If it was sold in 1926 that is a fact.

Q. Your contract provides that it is only to cover business starting April 1, 1926. A. I didn't make any such statement.

Q. You know that your contract provides that, don't you? A. I said I didn't know what the contract said. 20

Q. You signed the contract, didn't you? A. I did.

Q. These contracts were all alike, weren't they, Mr. Luke? A. I don't know.

Q. Well, your contract provided—

By the Court:

Q. April 1st, did it not?

By Mr. Parsons:

Q. April 1st, did it not? A. If you will show me the signed contract of the date and day I will verify it one way or the other. 30

Q. I show you, Mr. Luke, a contract signed by yourself—

Mr. Kremer: I object to this, if the Court please.

Mr. Parsons: A contract signed by himself. 40

Edward R. Luke—Re-cross

The Court: Mr. Luke's contract?

Mr. Parsons: Yes.

The Court: Well, let him look at it.

By the Court:

10 Q. Do you recognize it, Mr. Luke? A. Yes, sir.

Q. Well, that contract indicates sales beginning April 1st, does it not?

20 Mr. Kremer: If your Honor please, the reason of my objection to that is very obvious at this time. The whole theory of this case has been that a written contract was entered into by the plaintiff April 1st, I suppose the same date as Mr. Luke's, having to do with the sale of land in Shark River Hills, and such other places as the principal may designate, and relating to commissions to be paid to agents. Then later there was an oral agreement, which we are resting upon, having to do—

The Court: I so understand, but it related to sales involving the relation of the parties under their contracts.

30 Mr. Kremer: Yes, and in addition to that to bungalows, and the prize money referred to that. But they were an oral undertaking. The fact that Mr. Luke's agreement may have been dated April 1st would not in any way have any bearing upon an oral agreement that Mr. Walker may have entered into in June.

40 The Court: The purpose of the oral agreement was to pay these men a bonus,

Edward R. Luke—Re-cross

that is all. But their relations still existed between the plaintiff and the defendant.

Mr. Kremer: And to fix, as Mr. Luke says, the fact that bungalows so sold any time during the year were to be counted in the bonus. 10

The Court: He says that, but the Brown examination seems to indicate that he views that otherwise. The cross-examination is proper. In other words, if you are including properties that you had no business to, why naturally it could not swell the maximum in that business.

A. I couldn't swear whether it was that or before. 20

By Mr. Parsons:

Q. I didn't ask you that question. I asked you if that was your contract.

The Court: Why, he says it was his.

Q. Is that your contract? A. Yes.

Q. Will you refer to that contract and tell us when your commissions with the Morrisey & Walker Company were taken during the year 1926? A. No, according to the arrangement with me— 30

Q. I ask you to refer to the contract.

By the Court:

Q. Under that contract of April 1st, isn't it?

A. Yes, according to that contract.

Mr. Parsons: I offer the contract in evidence. 40

Mr. Kremer: Objected to.

Edward R. Luke—Re-direct

Mr. Parsons: I offer it for identification.

Mr. Kremer: Objected to.

(Paper marked Exhibit E for Identification.)

10 RE-DIRECT EXAMINATION by Mr. Kremer:

Q. Did you work all the year round or not? A. I did.

Q. Did you work in 1926 previous to the signing of that contract? A. Yes.

Q. Did other men work all the year round or not? A. It is my impression that they did. They all worked all the year round.

20 By the Court:

Q. When were your contracts dated as a rule? How long did you work, by the way, for the Morrissey & Walker Company? A. Three years.

Q. And when were your contracts dated? A. I couldn't say whether April or March.

Q. For example, if you worked three years at that time, 1926, you began then in 1923; is that right? A. Yes, sir.

30 Q. When did you begin in 1923? A. No, I think in 1924.

Q. 1924? A. 1924, 1925 and 1926.

Q. Did you contract from April to April, so that it carried the year through? A. I couldn't say whether I did or not.

The Court: All right. He says he is unable to tell.

40 Plaintiff rests,

Motion for Nonsuit

MOTION FOR NONSUIT

Mr. Parsons: If your Honor please, I have a motion to make.

The Court: What is it?

Mr. Parsons: In the first place, I move 10
for a nonsuit as to the Shark River Hills Company.

Mr. Kremer: I consent to that.

The Court: Counsel for the plaintiff consents that the motion be granted and that a nonsuit be entered as to the Shark River Hills Company. The motion is granted.

Mr. Parsons: Now, if your Honor please, 20
I move for a nonsuit as to Morrisey & Walker, Incorporated, on two grounds, namely: the first ground is that this is a contract, under the plaintiff's own testimony, to pay the sum of \$1,000 for the sale of certain lands belonging to or in which this defendant had an interest. Under plaintiff's own testimony in this case his demand for the \$1,000 is based upon sales 30
of property in Shark River Hills Manor. It is also based upon bungalows owned by the Morrisey & Walker Company. This is real estate. The \$1,000 is commission, a compensation paid to a real estate broker for effecting sales of lots belonging to a land owner. Now there is no evidence in this case—on the contrary the evidence is positive—that any contract that was made 40
was made verbally and orally. The Statute of Frauds requires specifically—

Motion for Nonsuit

The Court: You haven't pleaded the Statute of Frauds.

10 Mr. Parsons: I don't have to. I have denied the existence of this contract; and in two cases that went up to the Court of Errors and Appeals of this state and one in the Supreme Court of this state, in *Owen v. Bradley*, 81 Law, 556, and 95 Law, 72, both cases in this state, it held that simply the denial of the existence of the contract raises the issue. And the reason is sound, in my mind: because a contract is not a contract where the Statute of Frauds provides it must be in writing.

20

(After argument.)

The Court: I disagree with you. I think it has no relation to the Statute of Frauds, which you seek to invoke. A *prima facie* situation has developed here which in my opinion requires the Court to put the defendants on their defense, so far as that phase of the matter is concerned. What else have you?

30

Mr. Parsons: If your Honor please, I would further like to move for a nonsuit on the ground that there is absolutely no proof in this case of any authority—that becomes a matter of law for your Honor to take into consideration at the present time—that there has been shown absolutely no authority on the part of Mr. Walker to bind the defendant body corporate. I rely

40

for such a motion upon the opinion of the

Motion for Nonsuit

Court of Errors and Appeals in the case of the Aerial League of America against the Aircraft people down at Atlantic City, 97 Law, 530, in which an official of the company entered into an agreement—he was the treasurer or assistant treasurer of the company—entered into an agreement to lease space in one of the exhibits in Atlantic City; and a suit was brought and they showed this oral agreement of the official of the company, showed that he was an official. 10

The Court: To do what?

Mr. Parsons: To lease this space for an exhibit; showed the agreement, showed an oral agreement. The Court of Errors and Appeals held that that could not bind, was not sufficient proof to bind the corporation; it was not proof of corporate action. We have got a corporate entity, not an individual or a partner, we have a corporation; and there is no proof here that the corporation in any way authorized that. And the reason there is no proof is that we will be able to show that it was not the corporate action of Morrisey & Walker and it cannot be shown. 20 30

The Court: What have you to say, Judge Kremer?

(Mr. Kremer replies.)

The Court: Your only trouble is that the case is barren of any evidence indicating Walker's relation to the corporation. In 40

Thomas Ely—Direct

fact, there has been nothing said about it at all, other than the statement of several witnesses that Mr. Walker was there at the Berkeley-Carteret Hotel and talked it over with the agents who had been invited.

10 Mr. Kremer: If your Honor please, I must confess that.

The Court: If you wish to open your case for the purpose of showing who he was and what he was and where he came from, at least what he did later, I will allow it; I will allow you to open your case for that purpose.

20 Mr. Kremer: It comes as a matter of surprise entirely. There was no defense set up, and I think on that showing it is elementary.

The Court: I will allow the case to be reopened for the purpose of introducing evidence on the subject.

30 THOMAS ELY, recalled for plaintiff.

Direct-examination by Mr. Kremer:

Q. You know Mr. Samuel Walker? A. Yes.

Q. How long have you known Mr. Walker? A. Since 1922.

Q. Do you know what Mr. Walker's official position is in Morrissey & Walker, Incorporated?

A. I believe he is treasurer.

40 Mr. Parsons: Objected to.

Thomas Ely—Direct

A. Well, he is one of the officers of the company.

By the Court:

Q. And a director? A. If they have a directorate, yes, sir. 10

Q. Well, a corporation usually does have a board of directors? A. Yes, sir.

By Mr. Kremer:

Q. When did you first meet Mr. Walker? You said it was 1922? A. Yes, sir.

Q. And where did you meet him? A. At Keyport.

Q. And when were you first employed? A. In March of 1922. 20

Q. Who employed you? A. Mr. Walker.

Q. Now from that time you continued to be employed by the company up until when? A. Until 1926, in December.

Q. In 1922 where did you work? A. At Laurence Harbor.

Q. Under whose supervision? A. Mr. Walker's.

Q. And what development did the company have in charge then? A. Laurence Harbor. 30

By the Court:

Q. Who paid your salary? A. I received my commissions from Morrisey & Walker.

Q. Checks from them? A. Yes, sir.

By Mr. Kremer:

Q. Who signed the checks? A. Mr. Walker and Mr. Morrisey.

Q. In 1913 were you employed by the company? A. Yes. 40

Thomas Ely—Direct

Q. In what capacity? A. As sales manager.

Q. Was that a promotion or was it the same job you had in 1922? A. It was a promotion.

Q. Who promoted you? A. Mr. Walker and Mr. Morrisey.

10 Q. What did Mr. Walker have to do with the business that year? A. He took entire charge of it so far as general supervision was concerned.

Q. And what did that general supervision embrace? A. That he gave me all instructions what I was to do.

Q. What were those instructions? A. To hire and fire men and to go out and get as much business as I possibly could.

20 Q. And you did that? A. Yes.

Q. Was that business reported to him? A. On the books, yes.

Q. What supervision did he have over the business that you did? A. In what way?

Q. Well, in any way. A. He had all the power over me.

Q. And that was 1923? A. 1923, yes.

30 Q. Now what was the situation in 1924? A. Exactly the same.

Q. Well, did you continue with Laurence Harbor? A. No.

Q. Where did you go in 1924? A. I was still at Shark River Hills.

Q. Were you there in 1923? A. 1923, 1924, 1925 and 1926.

Q. You started Shark River Hills in 1923? A. Yes.

40 Q. Where was your office then? A. 320 Cookman Avenue.

Thomas Ely—Cross, Re-direct

Q. Who was in charge of that office? A. I was.

Q. Under whose direction? A. Mr. Walker.

Q. Where was he located? A. He was down here once a week or more.

Q. Where was he the remainder of the time? 10

A. I don't know.

Q. Where did you get your instructions as to the management of the Asbury Park office? A. From him.

Q. Did you get any instructions from anyone else? A. No.

Q. Was he your sole superior then in 1923? A. Absolutely.

Q. And was that the condition in 1924? A. Absolutely. 20

Q. 1925? A. Absolutely.

Q. 1926? A. Absolutely.

Q. And you worked under his supervision entirely? A. Absolutely.

CROSS-EXAMINATION by Mr. Parsons:

Q. Didn't Mr. Morrissey hire you? A. No.

Q. Absolutely no doubt of that? A. I saw Mr. Morrissey first, he was the first man I saw, but Mr. Walker hired me. 30

RE-DIRECT EXAMINATION by Mr. Kremer:

Q. Now when you made arrangements with the salesmen in previous years under whose instructions were they made?

Mr. Parsons: Objected to.

The Court: He may state as a fact. 40

Samuel D. Walker—Direct

Mr. Parsons: I ask an exception on the ground that the contract is in writing, and that this is relating to the year 1926 only.

10 The Court: No, he is merely asking who actually represented Morrissey & Walker in the negotiation.

Mr. Parsons: In previous years. My objection runs further to the fact that Walker's connection may have changed entirely with the company.

20 The Court: I assume that Judge Kremer is going to call Walker and ask him what position he occupied in that firm before he gets through. First we suggest and then assume he is going to do it.

(Question repeated.)

A. Mr. Walker.

Q. And that was always the case? A. Absolutely.

Q. In 1926 did anyone but Mr. Walker supervise your work at all? A. Nobody.

Q. Nobody else put in an appearance in any way? A. Never.

30

SAMUEL D. WALKER, sworn for plaintiff.

Direct-examination by Mr. Kremer:

Q. Where do you live, Mr. Walker? A. Keyport, New Jersey.

Q. Are you connected with Morrissey & Walker?
40 A. I am.

Samuel D. Walker—Direct

Q. What is your official position? A. Secretary and treasurer.

Q. And who is the president? A. Mr. Morrisey.

Q. How long have you been secretary and treasurer, Mr. Walker? A. About twelve years; since the beginning. 10

Q. Were you one of the original incorporators? A. I was.

Q. You are a director of the company? A. I am.

Q. Now in 1926 where was your principal office of business? A. Keansburg, New Jersey.

Q. And you had an office at Asbury Park? A. Yes. 20

Q. You had supervision over that office? A. I did.

Q. In your control?

By the Court:

Q. What did you do actually? What were your duties?

Mr. Parsons: May I object, your Honor, to questioning any further on that line? Under the case which I cited to your Honor it must be shown either by the by-laws and charter of incorporation or by the minutes what official duties an officer has. 30

The Court: Well, if Mr. Coolidge walked in here right now and you asked him "What position do you occupy?" and he would say "President of the United States," do you think anybody would question it? 40

Samuel D. Walker—Direct

Mr. Parsons: No, I wouldn't, because the laws of the United States are evidence in any court.

10 The Court: Suppose Governor Moore walked in here and I asked him if he was governor?

Mr. Parsons: Because the laws of New Jersey are in evidence in this case.

The Court: Suppose I asked you if you were a member of Quinn, Parsons & Doremus?

20 Mr. Parsons: All right. That has nothing to do with my power, whether I have power to sign checks.

The Court: I am asking what he actually did do, not his power. No, that debate is over. The objection is overruled. He may answer.

(Objection noted for defendants as ground of appeal.)

30 Q. What did you actually do, Mr. Walker, in the year 1926 in the business of the Morrisey & Walker Company? A. I was the secretary and treasurer of the company and my duties were the general supervision of a development known as Laurence Harbor.

Q. 1926 we are talking about. A. Yes, sir; Laurence Harbor and the supervision of our operations at Shark River Hills.

40 Q. The land of the Shark River Hills Company? A. The land of the Shark River Hills Company and the Shark River Manor and another development known as West End Gardens,

Samuel D. Walker—Direct

another development known as Shadow Lawn Manor.

Q. And you say that you were in charge of that development, as it were. What did you actually do with regard to such development? How was it done? A. I had a contract with the Shark River Hills Company and it was my task to see that that was operated. 10

Q. And where did the sales force come from? A. The sales force came partly from our Laurence Harbor development and the rest was built up from our office, 1320 Cookman Avenue.

Q. How was it organized? A. Why, it was organized first by creating a sales manager.

Q. Who employed the sales manager actually? A. The firm of Morrisey & Walker. 20

Q. I mean who did the business? A. I personally.

Q. You personally? A. I took Mr. Ely from Laurence Harbor.

Q. Now what about your sales force, referring now to the body of salesmen? A. Our salesmen came through personal application for the position and through salesmen bringing friends who were salesmen. 30

Q. Who would consult with them as to their employment? A. Mr. Ely, generally.

Q. What did you have to do with it, anything? A. I had final supervision of it.

Q. Final supervision? A. Yes.

Q. In other words, your O. K. resulted in the employment of a man recommended by Ely? A. It was more of a case of my objection. I relied on Mr. Ely's judgment generally, but I had the power— 40

Motion for Nonsuit

Q. Where does Mr. Morrisey live? A. At Keansburg.

Q. Is he an active— A. Yes.

Q. In active service in the corporation? A. Yes.

10 Q. Did he have anything to do with the employment of the sales force? A. At Shark River Hills?

Q. Yes. A. No, sir; he didn't.

Q. You and Ely were in charge of that? A. Yes.

Mr. Kremer: That is all.

The Court: You may renew your motion.

20

MOTION FOR NONSUIT

30

Mr. Parsons: I would like to renew my motion for nonsuit on the ground stated by the Court of Errors and Appeals, that it is incumbent upon the plaintiff to show that the contract upon which this suit is brought is the contract of the corporation, but it must have been proven to have been the act of the corporation under corporate action. I think there is no such testimony here, no testimony showing that Mr. Walker had the power to bind the corporation. And I therefore move for a nonsuit upon that ground, in addition to the previous ground upon which I moved.

The Court: What were the facts in that case? I have in mind another case, Mr. Parsons.

40

(After argument.)

Motion to Dismiss Case

The Court: I incline to the view as a matter of law that there was an implied authority to enter into a contract or arrangement of the matters that are here indicated, and therefore that the motion should be denied. You may have an exception. 10

Mr. Parsons: Now I wish to make one further motion, and that motion could not have been made prior to this time. That this suit as it originally came before your Honor involved two defendants. Now there is only one defendant before your Honor, Morrisey & Walker, Inc. I wish to call your attention at the present time, which is contained on the calender, to a suit by Morrisey & Walker against this plaintiff; that in that suit there is filed a counterclaim, which suit is a previous suit to this one, and in that suit— 20

The Court: By the way, where are those suits, in the Supreme Court?

Mr. Parsons: In the Supreme Court, and in the same suit there is filed a counterclaim covering this identical cause of action, framed in the same words as the complaint in this suit. 30

I move now that this case be dismissed on two grounds: first, on the ground that by virtue of the act of set-off and counterclaim, that where one party starts a suit the other party must file, if they have a liquidated demand, which this is, that the other party must file a set-off and counter- 40

Motion to Dismiss Case

claim, or they are forever after precluded from bringing any action.

The Court: Who brought a suit first?

Mr. Parsons: We brought a suit first.

The Court: Well, I can consolidate.

10

Mr. Parsons: You can consolidate, but we are in no position, because our suit involves individual and numerous sales that are not on here—different reasons and so on. For instance, our suit includes a check which your Honor refused—payment and so forth. I have to produce a witness from Philadelphia to show that. And we would have the right in that suit, as moving first, the first complaint; we are the first to start action.

20

The Court: Did you know when you started the trial?

Mr. Parsons: I did.

The Court: If you did why didn't you call my attention to it? The other record was made up already at the time this suit was made?

30

Mr. Parsons: I had no right to make any such motion as long as the Shark River Hills Company was a party defendant. The law is clear on that: I can only make a motion when it is between the same parties. And the first opportunity I have had to make the motion is now, after the Shark River Hills Company is out. There are three cases in this state.

40

The Court: Well, I think that that really involves the exercise of control by the trial

Discussion

judge in the circumstances. If you consolidated the action—I wish you had told me about it. Well, you couldn't. The Shark River Hills Company was a party. I realize that. What have you to say about it, Mr. Kremer? 10

(Mr. Kremer replies.)

Adjourned until July 27, 1928, at 10:00 a. m.

Freehold, N. J., July 27, 1928. 20

Trial of the cause resumed at 10:30 A. M.

The Court: It appears that Mr. Tilton, one of the jurors, is ill. I have a doctor's certificate here, and you will have to go on with eleven jurors. You may proceed with the case.

I understand that counsel has withdrawn his motion for a nonsuit on the ground that a prior suit had been brought by the defendant against the present plaintiff, which is still pending. 30

Mr. Parsons: If your Honor please, I spoke to your Honor last night. I would like it on this record, however, that the statute should not be set up against us in any other suits that may be pending by reason of our not insisting on the motion to remain. 40

Discussion

10 The Court: Well, I think the situation would be that in the event of a judgment against you in this suit, should there be any, you would be entitled to move the Court to control the situation pending the settlement of the other suit.

I ought to say to counsel in regard to these other cases, it seems to me that they ought to be tried, in the circumstances, in more or less of—what shall I call it?—a chronological order. The defendant's suit was brought before the present suit, as I understand it.

20 Mr. Kremer: If your Honor please, since that motion was brought last night I have been looking over the pleadings in the case, and it seems to me that the matters alleged in the suit of Morrisey & Walker against Brown are practically identical with the defense set up in the present suit of Brown against Morrisey & Walker, and I rather expected that those suits would be consolidated and this defense alleged now. Otherwise we find ourselves in this situation:
30 that if we succeed in this suit it may avail us nothing until that suit is tried. It seems to me a matter of honesty and justice that if that came out in their defense the suits ought to be consolidated now. I may say to your Honor that no motion has ever been made to dismiss this case as far as the defendant Morrisey & Walker is
40 concerned, although such motion might have been made even though the Shark

Discussion

River Hills Company was a party to the suit. If there was a prior action pending they might have moved to dismiss this case in so far as the defendant Morrisey & Walker was concerned on the ground that another action was pending. Now I feel that all the matters ought to be disposed of at once. Your Honor is no doubt familiar with the rule that the actions can be consolidated. 10

The Court: I will control the situation. How many of these suits are there left?

Mr. Kremer: About six cases, but they don't all involve exactly the same thing. I feel that these cases now, the case of Brown against Morrisey & Walker and Morrisey & Walker against Brown, should be consolidated. 20

The Court: The other case has not been reached. I incline to the view that these cases should all be consolidated.

Mr. Parsons: If your Honor please, we are not in a situation. If your Honor will recollect, yesterday I offered in evidence a check, or a receipt, showing the receipt by the Shark River Hills Company of \$550 and the Shark River Hills Company receiving only \$125 out of the \$550. I was not able to prove that or offer it in evidence. I have a witness in this case that is not here today. 30

The Court: I will deal with the situation. We will go on and finish this case, and I indicate now that I think that should be 40

Thomas Ely—Direct

considered. What I think you had better do is to give notice to Judge Kremer that these suits will be consolidated.

10 Mr. Kremer: My trouble is what will be the result in this suit in case the plaintiff is fortunate enough to secure a judgment.

The Court: Oh, your adversary will come along and get an injunction to restrain you from collecting it.

(After argument.)

The Court: Do you want to force him to trial at this time?

20 Mr. Kremer: If he can go to trial.

The Court: No, I won't do it.

 DEFENDANT'S TESTIMONY

THOMAS ELY, recalled for defendant.

Direct-examination by Mr. Parsons:

30 Q. Mr. Ely, I show you a check bearing date December 20, 1926, and ask you if that check is in your handwriting. A. Yes, sir.

Mr. Parsons: I offer it in evidence.

Mr. Kremer: No objection.

(Check marked Exhibit D-3.)

Emma C. Katz—Direct
Thomas Ely—Cross

MRS. EMMA C. KATZ, sworn for defendant.

Direct-examination by Mr. Parsons:

Q. Mrs. Katz, where do you live? A. Newark,
New Jersey. 10

Q. And you are a private secretary for whom?
A. L. Bamberger & Company.

Mr. Kremer: Before this lady is called
may I question Mr. Ely further in regard
to that check which was just offered?

The Court: Yes.

(Witness temporarily withdrawn.)

20

THOMAS ELY, recalled.

Cross-examination by Mr. Kremer:

Q. Mr. Ely, I show you this check which Mr.
Parsons just offered, Exhibit D-3. You say that
is in your handwriting? A. Yes.

Q. Under what circumstances did you draw
that check? A. When the statements were made 30
up for the salesmen, their final payment, this was
the check made up from the Shark River Hills
Company for their bonus or their prize money,
\$1,000.

Q. You drew the check on what bank? A. On
the Shark River Hills account.

Q. At whose direction? A. Mr. Walker's.

Q. Did you ever have any direction from any-
one else to do that? A. I couldn't, sir. 40

Emma C. Katz—Direct

Q. What is that, sir? A. That I didn't or couldn't.

Q. You never was in conversation with Mrs. Katz? A. No, sir.

10 Q. Nor with anyone else? A. No, sir.

MRS. EMMA C. KATZ, resumed.

By Mr. Parsons:

Q. You stated, Mrs. Katz, that you were private secretary at L. Bamberger's, are you? A. Yes.

20 Q. In Newark? A. Yes.

Q. And you purchased certain lots at Shark River Hills? A. Yes.

Q. Do you remember purchasing \$10,000 worth of lots in December, 1926? A. Yes, sir.

Q. Who saw you with reference to those lots, Mrs. Katz? A. Mr. Brown, Walter Brown.

Q. Do you see him here at the table? A. Yes, I believe I do.

30 Q. Will you tell me what transpired with reference to the purchase of those lots?

Mr. Kremer: What is the purpose of this, I would like to ask? The contract was signed and the money paid.

The Court: Oh, yes; go on into it. They may show that it was not a bona fide sale. You are entitled to it.

40 Mr. Parsons: Mr. Brown said Mrs. Katz agreed to transfer—

The Court: I am with you.

Emma C. Katz—Direct

Q. Will you just tell the circumstances of that contract? A. Well, I said I hadn't the money to pay, that is, I hadn't the full amount to put down on it, but he was willing to accept \$700, for which I gave a check for \$200 and a note for \$500, and I had some building and loan I sold and then I found that I had \$300 that I could still pay on that lot, so I gave a check for \$800, making \$1,000 payment on that parcel. 10

Q. Did you know or did you give any consent that funds be transferred from another account to this account? A. No, not on that parcel.

Q. Not on that parcel? A. No.

By the Court:

Q. Did that involve four lots twenty-five feet front? A. Well, I was around the curve, you see, right at the point there. 20

Q. There were four lots? A. There were four lots, yes.

Q. And what were you to pay for them? A. I was to pay \$10,000.

Q. So that really you did pay \$1,000 down but of that \$500 was a note? A. I paid that note. I gave the note at the purchase in thirty days, as soon as I could get the money from the building loan. 30

By Mr. Parsons:

Q. Did you pay at any time \$2,000 in cash for those lots? A. No.

Q. Did you at any time consent, Mrs. Katz, that funds be transferred from other lots which you had purchased to the purchase of these lots? A. No, not these. 40

Emma C. Katz—Cross

Q. Did you ask Mr. Brown or did you know that Mr. Brown gave a check of \$750 on account of your purchases? A. Gave a check?

Q. Yes. A. His personal check?

10 Q. His personal check to you. A. I didn't know anything about that.

CROSS-EXAMINATION by Mr. Kremer:

Q. Mrs. Katz, you had bought other lots in Shark River Hills? A. Yes.

Q. What other lots had you bought? A. I bought some right across from the hotel. That is, through Mr. Brown, you are speaking of?

20 Q. Yes. A. Well, I bought lots right across from the hotel. On those lots I didn't make any deposit. That was to apply to the credit on my account to my sister; and I had bought some right next to these corner lots, this \$10,000 plot, on which we paid twenty per cent. We bought those jointly.

Q. On the ones that you bought in front of the hotel you did pay a deposit? A. I didn't pay anything on it. He transferred money from her account, he said "to apply on your account."
30 How he done it I don't know.

Q. Who said that, Mr. Brown? A. Mr. Brown.

Q. You did have an account then? A. Yes, I had bought lots before that and was paying off on them.

Q. How many lots, all told, did you own in Shark River Hills? A. Well, that I can't say.

Q. Well, those four that you bought for \$10,000, that made four? A. Yes, there was across from
40 the hotel—I don't know where I was—there was

Emma C. Katz—Cross

more than twenty-five feet, that one, and the other one was twenty-five feet front.

Q. There were two there in front of the hotel?

A. Yes, this other property I had bought a year or two before that.

Q. How many at that time? A. Well, I took in 10
four, eight, and a plot of ground.

Q. Eight lots and a plot of ground? A. Yes.

Q. How big was the plot? A. I think it was 50
by 399, something like that.

Q. And do you remember what the price of that
plot 50 by 399 feet was? A. Yes. Do I have to
answer it?

Q. Don't you want to? A. Well, I don't know 20
whether I am supposed to tell.

By the Court: Is there any reason why
you should not tell?

A. No, no particular reason. \$2,950.

By Mr. Kremer:

Q. \$2,950? A. Yes.

Q. How much for the eight lots? A. Well, four
of them were \$675 apiece, and I can't remember.

Q. About \$2,500? A. I can't remember the 30
other. I have a book here which I can consult if
you want me to.

Q. You are not anxious to tell us because if
you came to sell them now— A. Yes, I realize
that.

The Court: I don't know, perhaps she
is wise.

Q. Well, at any rate, Mrs. Katz, you had been
paying in on all those lots, \$2,950 and \$2,500 40

Emma C. Katz—Cross

—about \$5,000 or more worth of stuff? A. Oh, it was \$8,000, I should imagine.

Q. You had an account then? A. Yes.

Q. You had some credit with the company? A. Yes.

10 Q. And when you did come to buy those lots in front of the hotel some of the money that you had paid in on the eight lots and the plot was credited on account of your purchase of the next lots? A. That is it.

Q. And that is the way Mr.—

By the Court:

Q. Was that so? A. They were credited—he said, “I will credit it on your account.”

20 Q. But you don't really know what he did, do you? A. No.

By Mr. Kremer:

Q. Well, you did receive the new lots without putting up any money? A. Yes.

By the Court:

Q. Did you sign an agreement to purchase the new lots? A. Yes.

30 By Mr. Kremer:

Q. That was the way you did business with Mr. Brown? A. Yes, I have the contract here if you would like to see it.

Q. But you did that to relieve the lots that you bought in front of the hotel? A. Yes, that credit was to apply to them. But in this contract it says that I had paid the twenty per cent or I was to pay. Now that is not so.

40 Q. Now I didn't ask you that. You got credit

Emma C. Katz—Re-direct

for the money that you already had on account, did you not? A. Yes.

Q. So that it amounted to the same thing, didn't it? A. Well, I don't know how you look at it.

Q. Well, you didn't put up any money? A. No.

Q. But you already had credit for payments with the company and that money was applied on account of the new purchase? A. So I understood. 10

RE-DIRECT EXAMINATION by Mr. Parsons:

Q. That was not on the last lot, was it? A. No.

Q. Those were on the first lots? A. That was for the lots across on the plaza. There is no such check about this lot of \$10,000. 20

Mr. Kremer: Don't lead her, Mr. Parsons, please.

A. I was about to say he was willing to take \$700 on this \$10,000 lot.

Q. And that is what you did do? A. No, I paid a thousand.

By the Court:

Q. You didn't pay \$2,000? A. No, although my contract calls for I had paid the \$2,000. 30

By Mr. Kremer:

Q. Can you tell us any reason why \$700 was fixed as the amount that you were to pay on this last purchase of \$10,000 worth? A. Because that is all the money I thought I had available; but when I had my building loan cashed I found that I had \$300 more, and of course I wanted to reduce 40

Elsie Tilton—Direct

the indebtedness as much as I could and I gave a check.

10 Q. And was it not a fact, Mrs. Katz, that the reason the \$700 was first agreed upon was that you understood that was all the cash you had available, and Mr. Brown said the balance of \$2,000 would be made up out of the credit that you had on other lots? A. No, he never mentioned anything about that.

Q. Did he do it though? A. On that one on the plaza.

Mr. Parsons: Now, if your Honor please, I have the books of the company here, Mr. Macdonald as auditor.

20 The Court: Well, put Macdonald on.

Mr. Parsons: He has made a synopsis of these books from personal examination. If your Honor desires I will take the book-keeper first and identify the books.

The Court: All right; do that; because it is likely that Judge Kremer will cross-examine.

30

MRS. ELSIE TILTON, sworn for Defendant.

Direct-examination by Mr. Parsons:

Q. Mrs. Tilton, you are employed by whom?
A. Morrissey & Walker.

Q. And were you one of the bookkeepers in their office at Asbury Park? A. Yes.

40 Q. And did you keep the books of that office?
A. I did.

Robert G. MacDonald—Direct

Q. And are a portion of the books which are here in the court room the original books of entry of the office? A. I believe they are.

Q. Do you know what accounting firm installed the system? A. Hill, Bieth & McMahan.

Q. Did they make periodical audits of the books? A. Every month. 10

No cross-examination.

ROBERT G. MACDONALD, sworn for Defendant.

Direct-examination by Mr. Parsons: 20

Q. Mr. Macdonald, with what firm are you associated? A. Hill, Bieth & McMahan.

Q. What is their business? A. Public accounting and auditing.

Q. Did that firm audit the books of Morrisey & Walker and the Shark River Hills Company? A. They did.

Q. And what particular person with that firm did the auditing? A. I did. 30

Q. Have you a synopsis of the records of the sales from October on in the year 1926? A. I have.

Q. From the books of the company? A. Yes.

Q. I direct your attention first to the sales upon which commissions were claimed and which were entered and ask you if you have prepared a sheet from the books of the company showing where accounts were transferred and double commissions claimed. 40

Robert G. MacDonald—Direct

Mr. Kremer: Now, if the Court please, I don't think he should lead the witness as to what he wants to develop. Let him tell what the books do show.

10 The Court: Yes, let him state what his audit disclosed.

By the Court:

Q. What did your audit disclose, Mr. McDonald?

20 Mr. Kremer: If the Court please, I don't see why the audit was made for October. This was a transaction for a whole year. I don't see why they pick out an arbitrary part of the period.

The Court: What is your idea about October, 1926?

Mr. Parsons: It is from October on. Of course that is my argument to the jury, that we found it unnecessary to go back of October.

The Court: You are going to take certain sales?

Mr. Parsons: Yes.

30 The Court: Such as the Katz sale, the Abbott sale and several others?

Mr. Parsons: Yes.

The Court: Of course that will shorten it very much.

40 Mr. Parsons: I don't want to go through the whole book, and the aggregate of those sales would, we do claim, reduce the total sales to less than \$200,000. That will shorten the matter.

Robert G. MacDonald—Direct

By Mr. Parsons:

Q. Go ahead, Mr. McDonald? A. What is the question?

Q. The question is what does your audit disclose from October, 1926, to the end of the year?

A. Well, it discloses certain sales that were not consummated, that is, there was not sufficient cash paid in to warrant the payment of commissions. 10

By the Court:

Q. What were they? What sales?

Mr. Kremer: I would like to know when the audit was made.

By Mr. Parsons:

Q. When did you make the audit? A. Made the audit after the first of the year; started to look it over at the end of the year and continued on with it. 20

By the Court:

Q. Began in December, 1926, and continued up till January 1, 1927? A. That is right.

Q. All right. Tell us about the sales that you say were not consummated. 30

By Mr. Parsons:

Q. Might I first—we have that sort of classified—may I first ask you for sales where a claim was made for commission on the full amount where the account had been transferred and commission paid on previous account?

Mr. Kremer: I object to the form of the question.

Mr. Parsons: Have I got to go through 40 the whole—

Robert G. MacDonald—Cross

The Court: Go ahead. Let him testify.
Go on.

By the Court:

Q. What is the first sale you find was not con-
10 summated? A. Well, I can't tell you the first
one. I can give you the list of them.

Q. All right. Go ahead with the list. A. Do
you want me to go right down this list?

Q. Go right down the list.

Mr. Kremer: If the Court please, can I
cross-examine him as to the system of
bookkeeping?

20 The Court: Yes, I have no objection. Go
ahead.

CROSS-EXAMINATION by Mr. Kremer:

Q. Now, Mr. McDonald, how was the system
kept? A. The books themselves?

Q. Yes, sir. A. Well, first the salesman sub-
mits the sales slip which you have seen in court,
showing the amount of sale and the amount of de-
posit.

30 Q. Submits that to whom? A. To the book-
keeper.

Q. Then where is that entered? A. The amount
of the sale is entered in the sales book and the
amount of the deposit is entered in the cash book.
And then from the sales book the ledger account
is opened, showing the customer's name and ad-
dress, who the salesman was, the amount of the
sale, the lot numbers, and, in short, a history of
the sale briefly.

40 Q. An account for each lot purchased? A. An

Robert G. MacDonald—Cross

account for each sale. Well, it might consist of two or three or more lots. Then from the cash book the amount of the deposit is posted to the account, giving the customer credit.

Q. In the ledger? A. That is the ledger.

Q. Now, when you tell us that a sale was not consummated what do you mean by that? A. I mean that twenty per cent of the purchase price had not been paid in at the time the commission was credited. 10

Q. In cash? A. In cash, yes.

Q. Well, do you have any way of knowing from that account that you are going to testify to whether or not there was any waiver by the company of the payment in that particular case of twenty per cent? A. I don't understand your question. 20

Q. Well, would the ledger account on which the amount of cash shown in the cash book is entered give any entry in a case in which there was a waiver and acceptance of less than twenty per cent? A. No, except that the customer would not have paid the money.

Q. And in the case of a transfer of credit in a customer's account from one account to another, in that case the ledger account would not show the full amount, would it? A. The ledger account would show the transfer if one had been made, yes. 30

Q. The cash account would not show a payment in any— A. It would show the previous payment in some other account and then that would be transferred from the other account to the current account. 40

Robert G. MacDonald—Cross

Q. And would that appear on the last transaction? A. That would appear, yes. If there were a transfer made it would appear in the old account and in the new one.

10 By the Court:

Q. Would the old account be canceled? A. In some cases, if the sale was supposed to be canceled, yes.

The Court: All right. Go on.

By Mr. Kremer:

Q. Go ahead. All right.

20 The Court: Proceed now. Tell us the list you found.

Mr. Kremer: One more question, if the Court please.

Q. Do I understand that these entries that you have on this piece of paper you have here were taken from the accounts of various customers in your ledger? A. That is correct; in connection with the examination of the commission statements.

30 Q. And you audited the books every month, did you not? A. I did.

Q. You went over the books at what time of the month? A. Well, whenever I could get down there and work it in with my regular schedule of work.

40 Q. Then after you made your audit you made an entry as to the amount of commission paid or received by Morrissey & Walker first, did you not? A. I hadn't done any auditing of commissions.

Robert G. MacDonald—Cross

We don't make what you would call a detail audit. We were requested to do certain features of work.

Q. Certain features of work? A. Yes; in other words, we audited certain parts of it, as we were requested to do.

Q. What parts of it were you requested to audit? A. Well, when we started out we audited the cash and certain other bills and we checked the ledger account showing the postings of cash. We checked in detail the postings to the customers' account to see that all moneys that were paid in by the customers were credited to their accounts, then we supervised a general write-up of the books. 10

Q. And what part of the books, do you know, were examined and audited? A. Well, at different times we made our audit—we varied it. In other words, if anything came up that we thought should be checked up we checked it up. 20

Q. Weren't there records then having to do with those very transactions that you didn't examine and audit at all? A. Weren't there what?

Q. Weren't there records of the company having to do with these transactions which you didn't examine and audit at all when you would go there month after month to make your audit? A. Oh, yes, surely. We didn't make a detailed audit of everything. 30

Q. And under the last audit in January, the one you have here, it was not a detailed audit of everything? A. No, it was just a special audit.

Q. Of customers' cash? A. You mean in these commissions?

Q. Yes. A. Well, we checked up the whole commission account. 40

Robert G. MacDonald—Cross

Q. But there were records having to do with these transactions which are under discussion now in this case that you didn't examine when you made this audit in January, 1927; is that so?

A. No.

10 Q. Isn't that so? A. No, I examined the records in this particular audit.

Q. All the records? A. Yes.

Q. What records have you examined? A. Well, I examined the customers' accounts and commission statements, both the master and the individual accounts.

Q. The statements? A. Yes.

20 Q. Those statements were taken from the books, weren't they? A. That is correct.

Q. And they were made by somebody else? A. That is right.

Q. So that they were not actually the original entries at all? A. The statements were original entries, certainly.

Q. Well, weren't they taken from book entries? A. They would have to be.

30 Q. Then they were not original entries, were they? A. They were original entries as far as the statement is concerned.

Q. What do you understand by an original entry? A. An original entry is an entry that is made for the first time, when it is first recorded.

Q. Now, when you take and copy off a book and put it on a piece of paper and make a statement of what is in the book you don't call that copy an original entry of it? A. An original entry as far as the books are concerned.

40 Q. That is what I am asking you. Then those

Robert G. MacDonald—Cross

statements that you examined were not original entries there, they were copies of original entries, weren't they? A. As far as the statement is concerned, they were examined in connection with the books.

Q. But when you took those statements and examined them you took it for granted that they were correct copies of the original entries in the books? A. They were copied from the books. That is what I audited. 10

By the Court:

Q. Did you verify them with the books? A. Surely.

Q. So that you didn't stop with the statement and take that as final; you went to the books? A. Yes, certainly. 20

By Mr. Kremer:

Q. Did you go to the books in every one of these accounts? A. Surely.

Q. Then why would you take the statements at all? A. You wouldn't have anything to audit if you didn't have the statements. I was auditing the commission account. You would have to go to the commission statements for audit. 30

Q. Which commission account? A. The salesmen's commission statements for December and so on back.

Q. For what purpose? A. To determine whether they were correct or not.

Q. And to determine whether or not your employers, Morrissey & Walker, were entitled to their commissions, weren't you? A. That is correct. 40

Robert G. MacDonald—Cross

Q. And they get their commissions on these transactions on the basis of your audit? A. No.

Q. They don't? A. No.

Q. As a result of what did they get their commission? A. As a result of the master statement
10 that Mr. Ely prepared.

Q. And those you audit? A. That had nothing to do with my audit. They had been paid before on an audit which they made.

Q. You did audit this last statement, did you not? A. At a later date I did.

Q. And you audited the master statement in connection with the examination of the original entries in the books themselves? A. That is
20 right.

Q. That is what you have told us? A. Yes.

Q. You took Mr. Ely's master statements and checked them up and verified them by the books? A. That is correct.

Q. And that was the method that you pursued in making your audit? A. Yes.

Q. You did that on or about December 15th, didn't you? A. Did that on December 15th?

Q. December 15th, yes. A. I wouldn't say that
30 it was on December 15th because it probably had been a week or so later.

Q. Sometime about that time? A. Sometime after that date, yes.

Q. And as a result of the audit that you made of the original entries and the master statement it was determined by yourself what commissions Morrissey & Walker were entitled to on those sales; is that correct? A. That is correct, but
40 they had been paid prior to that time.

Robert G. MacDonald—Direct

Q. But you checked it to see that they were all right? A. I did.

Q. Now, isn't it a fact that commissions were paid to Morrissey & Walker as a result of your audit of statements and the books on these very transactions that you are now going to tell us about here? A. That is correct. 10

Q. Morrissey & Walker got their commissions?
A. That is correct.

Mr. Kremer: That is all.

The Court: Proceed.

Further DIRECT-EXAMINATION by Mr. Parsons:

Q. Now, Mr. McDonald, will you proceed with the statement which I originally asked you? A. The first sale that I have is a sale to C. Clayton, of Lots 30 and 31, Block 33-A, and the salesman was Mr. Luke. 20

Q. On whose team was Mr. Luke? A. Mr. Luke was on Mr. Brown's team. The account of the sale was \$1,250, and there is a duplication there, transfer of cash previously used on Lots 17 and 18, Block 17-A; no contract. 30

Q. No contract filed? A. That is correct.

Mr. Kremer: I object unless he states how he knows.

By the Court:

Q. Did you search the files? A. I looked in the files.

Q. Didn't find any. Go on. A. The next sale is a sale to E. W. Purdy, Lot 37, Block 24, Section A, by Walter M. Brown. Amount of sale \$350. 40

Robert G. MacDonald—Direct

There is a dead account or canceled account on which a commission was paid which was not deducted.

Next is a sale to A. and J. Staiger.

10 By Mr. Kremer:

Q. What you have just referred to as a dead account is the Purdy one? A. That is correct.

Next is a sale to A. and J. Staiger, Lots 21, 22 and 23, Block 29-A, the salesman was Brown, and the sale is \$1,800; short of cash and no contract.

20 Next is a sale to Emma Katz, Lots 24, 25, 26 and 27, Block 16, Section A, by Brown. The amount of the sale is \$10,000 and the sale is short; that is, it is not consummated up to twenty per cent.

By the Court:

Q. A thousand dollars short; right? A. Well, it is more than that short.

Q. More than a thousand dollars? A. Correct. I think there was \$200 cash paid in up to the time that the statement was prepared.

30 Q. A note of \$500; that note was made later, wasn't it, Mr. McDonald? A. The note was not paid until January, 1927.

Q. How much did you credit on account of payment? A. I believe there was \$200 credited at the time.

Q. All right. As a matter of fact she says she paid \$1,000. Did you find that record? A. Well, the \$200 plus the \$800 that she paid in January would make the \$1,000.

40 Q. That was not twenty per cent on \$10,000, was it? A. No.

Robert G. MacDonald—Direct

Q. The additional thousand was never paid?

A. Well, it is being paid in very small installments.

Q. All right. How much had actually been paid on that, do you know? A. I can tell you by referring to the books. 10

Q. Well, you can do that later. Go on. A. Next is a sale to E. Lund, Lots 73 and 74, Block 43A, by Brown and Major. Amount of sale \$1,250, and it is short of cash, not consummated.

Next is a sale to Everett Moore, Lots 61 and 62, Block 3, Section A. The salesman is Luke. The amount of the sale is \$900 and there is a cash transfer there, illegal. 20

Next is a sale to E. P. Palmer, Lot 20, Block 13, Section B by Brown. Amount of sale \$550. No new cash, dead account not deducted and no contract.

Next is a sale to T. M. and M. L. Colyard, Lots 21 and 22, Block 11C. The salesman was Luke. Amount of sale \$600. There was a dead account not deducted.

Next is a sale to E. F. Van Hise, Lots 23 and 24, Block 11, Section C. The salesman was White. Amount of sale \$600. Canceled account not deducted. 30

Next is a sale to Ella Warren, Lots 53 and 54, Block 12, Section C, by Luke, \$500. Dead account not deducted.

Next is a sale to E. C. Walling, Lot 18, Block 12C, by Luke, \$300; dead account not deducted. 40

Robert G. MacDonald—Direct

Next is a sale to Eggiman, Lots 6 and 7, Block 10, Section C. Amount of sale \$600. Dead account not deducted.

Next is a sale to Sherman, Lots 12 and 13, Block 10 14, Section C, by Luke, \$600. Dead account not deducted.

By Mr. Kremer:

Q. Can you tell me who was the salesman on that Eggiman sale? A. Luke.

Q. And now on the Sherman is Luke also? A. That is correct; and the amount was \$600.

Next is a sale to J. M. Olson, Lots 1065 and 20 1066, Section D, by Luke, for \$500. That is not consummated.

Q. Not consummated, you say? A. That is right.

By the Court:

Q. No signed contract, you mean by that? A. Well, not enough cash.

Q. Oh, not enough cash? A. Next is a sale to Mary Branson, Lots 336 and 337, Section D, by 30 White, for \$200, is a duplication.

Next is a sale to M. E. Van Note, Lot 1241, Section D, by White, not enough cash to consummate.

By Mr. Kremer:

Q. Price, please? A. \$100.

By Mr. Parsons:

Q. Now, Mr. McDonald, all of those sales which 40 you have just read were contained in the statement of what month? A. December 15, 1926.

Robert G. MacDonald—Direct

Q. Now, have you for the other two months of Brown's team, October and November? A. Yes.

Q. Will you give us those, please?

By the Court:

Q. By the way, did you add up those other sales so as to get the total? 10

Mr. Parsons: I will ask that later, if your Honor please. I just want to get these three. I will take at the close what has been done.

A. The first is a sale to G. Sullivan, Lots 36, 37 and 38, Block 43, Section A2, by Walter M. Brown. There is not enough cash to consummate. 20

By Mr. Kremer:

Q. Price, please? A. Well, \$1,575.

Next is a sale to L. Balke, Lots 6 and 7, Block 8, Section A, by Brown. The amount of the sale is \$970 and there is a dead account not deducted.

Next is a sale to F. McGrath, Lots 61 and 62, Block 40, Section A, by Brown. The amount of the sale is \$3,500 and it is not enough cash to consummate. 30

Next is a sale to G. McLaughlin, Lots 22 and 23, Block 33, Section A, by Brown, \$1,500. Not enough cash to consummate.

Next is a sale to A. Fine, Lots 34 and 35, Block 30, Section A, by Miller, \$1,500. There is not enough cash to consummate.

Next is a sale to H. M. Beech, Lot 2956, Section D, by Miller, \$1,100. Dead account not deducted. 40

Robert G. MacDonald—Direct

Next is a sale to C. Phillips, Lots 70 to 72, Block 8, Section A, by G. G. Brown. I haven't the reason for that one on here. I will have to refer to the books.

10 By Mr. Kremer:

Q. The price? A. \$1,350. I haven't the reason for that, however.

Mr. Kremer: I think that one ought to be stricken off then.

A. Well, take that off. Leave that off.

The Court: Take it off.

20 Q. Who made that sale, Brown? A. G. G. Brown.

Q. He wasn't one of the team, was he? A. He was on the team, yes, sir.

By the Court:

Q. What is the next one? A. Sale to A. Dackerman, Lot 11, Block 9, Section A, by Major, \$350. No cash, no contract.

30 Next is a sale to S. Robinson, Lots 625 and 626, Section D, by White, \$500. Dead account not deducted.

Next is a sale to M. E. Phelps, Lots 16, 17 and 18, Block 9, Section C, by White, \$900. Dead account not deducted.

Next is a sale to W. Scott, Lots 14 and 15, Block 9, Section C, by White, \$600. Dead account not deducted.

40 Next is a sale to E. B. Twist, Lot 13, Block 15, Section B, by White, \$500, dead account not deducted.

Robert G. MacDonald—Direct

Next is a sale to F. L. Irons, Lots 12 and 13, Block 20, Section A, \$750. No contract and not consummated. Not enough cash.

By Mr. Parsons:

Q. Now, can you tell us, were those specified 10
from any separate months that you last read, Mr. McDonald? A. They were on the November 15th statement.

Q. Now, are there any on the October statement? A. Yes. First is a sale to W. C. Cornell, Lots 17 to 22 and 80 and 85, Blocks 41 and 42, Section A. The amount of sale is \$10,070. Sale not consummated.

By Mr. Kremer:

20

Q. Who sold that, please? A. Mr. Brown.

Next, B. Hahn, Lots 1, 2 and 3, Block 17, Section C. The salesman is Brown. The amount of the sale is \$1,300, not enough cash; not consummated.

Next is a sale to W. C. Cornell, Lots 3 and 4, Block 20, Section B, by Brown. Amount of sale \$1,220. Not enough cash to consummate.

Next, C. W. Walton, Lots 68 and 69, Block 3, 30
Section A, by G. G. Brown. Amount of sale \$750. Improper transfer.

A. Next is a sale to I. Steele, Lot 1516, Section D, by Luke. Amount of sale \$500. Duplication.

M. Branson, Lot 336, Section D, by White. Improper transfer. Amount of sale \$400.

Next is E. Cordes, Lots 1838 and 1839, Section 40
D, by Rippey, \$450. Improper transfer. That is all.

Robert G. MacDonald—Direct

By Mr. Parsons:

Q. Mr. McDonald, have you totaled the amount of those sales? A. Yes.

Q. And can you give us the total amount of the sales of those defects? A. \$41,250.

10 Q. Now, have you totaled the amount of sales by each salesman? A. I have.

Q. Will you give us those?

Mr. Kremer: You mean their total or the total defective sales?

Mr. Parsons: Total defective sales by each salesman.

By the Court:

20 Q. How many of that total belonged to Brown, how many to Major, and so on? A. To W. M. Brown is \$28,410.

By Mr. Parsons:

Q. And the total amount is what? A. \$41,250. Do you want the rest of them?

The Court: Yes.

30 Q. Yes, you may as well read the rest. A. George Miller, \$1,725; G. G. Brown, \$465; George Major, \$350; E. R. Luke, \$5,250; Jasper Wight, \$4,600; and H. G. Rippey, \$450.

Q. Mr. McDonald, did you also prepare a statement showing the amount of sales where a transfer was made from one account to another and upon which the commission had been paid on the previous account, upon which the same amount of commission was demanded the second time? A. I have the list of them, yes.

40 Q. Have you the list here? A. Yes.

Robert G. MacDonald—Direct

Q. Will you get it, please?

(Intermission.)

Q. Mr. McDonald, I asked you if you had compiled a statement of those accounts upon which double commissions were paid. 10

The Court: Were paid?

Mr. Parsons: Were paid, yes.

The Court: Actually paid?

Mr. Parsons: Yes.

Q. Have you those there? A. I have.

Q. Will you state the amount? A. The total amount of the new business was \$8,370, and the dead accounts that should have been deducted amount to \$6,450. 20

Q. Now, that \$8,370, were those sales put through as original sales? A. As new sales.

Q. And to make up that \$8,370 there were accounts transferred of \$6,450? A. That is right; deposits from those accounts.

Q. Is that right? A. That is right.

Q. Mr. McDonald, was your firm with which you are associated employed at the Asbury Park office or by Shark River Hills Company or by Morrisey & Walker? A. We were employed by the Shark River Hills Company. 30

Q. And from whom did you receive your pay? A. Shark River Hills Company.

Q. It has been testified here that you asked Mr. Brown to put up a check of \$750 in the Katz sale. Did you do that? A. No, I didn't ask him for it.

Q. Who did? A. Mr. Ely. 40

Robert G. MacDonald—Cross

Q. Were you present when that took place? A. I was present.

Q. And what caused Mr. Ely's request?

Mr. Kremer: Well, how does he know
10 that.

Q. Were you present?

By the Court:

Q. What did you hear said?

By Mr. Parsons: -

Q. What was said? A. I went over the ac-
count with Mr. Ely and we found that there
20 wasn't enough money there to consummate the
sale and Mr. Ely called Mr. Brown over and told
him, and he told him that we needed \$750, and
Mr. Brown drew a check for that amount.

Q. You were present there at that time? A. I was present.

Q. Now, with reference to all of these sales which you have read, Mr. McDonald, have you the book here in court to substantiate those statements? A. We have.

Q. And the sales which you have read are iden-
30 tical as they appear in the books? A. They are.

CROSS-EXAMINATION by Mr. Kremer:

Q. Now, Mr. McDonald, in the course of your examination you have made reference in many of those sales to what you call "dead account not deducted." A great many of those transactions are objected to by you because you say there was a dead account not deducted; is that true? A.
40 That is true.

Robert G. MacDonald—Cross

Q. And that really represents the largest amount of this business that you object to, doesn't it? A. I wouldn't say so.

Q. Well, it represents a great percentage of it? A. A fairly good percentage.

Q. Well, can you tell us how many thousand dollars of that \$41,000 that you say should not have been credited is dead accounts not deducted? A. \$6,450 worth.

Q. Is that all? A. That is correct.

Q. \$6,450 worth of dead accounts not deducted. Now, will you tell the Court and jury what you mean by a dead account not deducted? A. Well, a dead account, as I term it and as it is generally termed, is an account—the original sale is put through and is consummated up to the twenty per cent and commission paid on it. Later on that account is canceled for some reason or other; the customer defaults and the contract is canceled. And then the money from that dead account is transferred to a new sale which is put through, and that money is credited to the new sale.

Q. Is it all within the same year or does it relate to old accounts? A. Well, it relates not necessarily all in the same year, but probably some of it is in the same year.

By Mr. Parsons:

Q. Some on old accounts? A. I couldn't say without checking it up.

By Mr. Kremer:

Q. And this business which you audited in October, November and December, 1926, had to do specially, did it not, with a drive on customers

Robert G. MacDonald—Cross

which were known as dead accounts; isn't that so? A. There was a drive on at that time.

Q. And where a customer had paid in a certain amount of money and had paid a deposit and had never gone on with his contract and had never
10 taken title to his lot, the salesman went after that old customer to try to resell him, didn't he? A. I believe they did.

Q. That was what was going on and that is what a great deal of this business was; is that so?

A. That is so.

Q. Now, if that salesman sold to an old customer another lot for a larger consideration, then he was credited, was he not, on the difference between what had been originally paid in and what
20 he got on the new sale? A. No, that is not true. Those dead accounts were not deducted. That is the point.

Q. Isn't it a fact that they should not have been deducted? A. No, they should be deducted.

Q. Well, now if it was a different salesman that took that old account do you still say that the old account had to be deducted? A. Where the full
30 amount of the deposit was made, yes.

Q. Wasn't it a fact that the only time that deduction should be made was where it was the same salesman reselling to the same customer? A. Well, there is another in there. The account was not even made active. In other words, that transfer was made and there wasn't any new cash; it was just a transfer of that same cash that might have laid there for six months or two or three
40 years, and there was no new money, it was just a transfer and there was no evidence that the account was active.

Robert G. MacDonald—Cross

Q. I am not speaking about the transfers now, I am speaking about cases in which there was a customer on what you call a dead account, and a new salesman went out and he made a sale to that same customer. Now, do you say that that old account should have been deducted, even if it was made by another salesman? A. Surely. 10

Q. You do? A. Yes, sir.

Q. Wasn't that the practice of the company, to give the credit to a new salesman, to give credit to that customer, even if he had previously purchased from somebody else? A. Wouldn't do it.

Q. Wouldn't do it? A. No.

Q. Why do you say wouldn't do it? A. Because it is not the practice. It should have been deducted. 20

Q. Can you tell us any reason why a salesman going out and selling to a customer who had previously made a purchase which had never been consummated, and had made that previous purchase from some other salesman, and now this salesman goes out and sells him over again, can you tell us any reason why that salesman should not get credit on a new sale? A. Yes. 30

Q. Why? A. That deposit contains a certain part of expense, in other words, in the form of commission, and it should not be allowed to be transferred.

Q. But hadn't that dead account already been charged to profit and loss? A. What do you mean by that?

Q. Hadn't it been charged off? A. The commission had been charged off, yes. 40

Robert G. MacDonald—Cross

Q. Yes, but there had been no credit to the new salesman who made the new sales, had there? A. Credit to the new salesman?

Q. Yes. A. No.

10 Q. Then when he made a new sale he did everything that he would be required to do, bringing in a new purchaser and in bringing in a material amount of money? A. He didn't bring in a material amount of money, he used that dead money.

Q. But you then say even though he brought that new sale he should not be entitled to any commission but that the dead account should be deducted? A. I do.

20 Q. And you say that was the practice of the company so far as you knew? A. Yes.

Q. But you don't know as a matter of fact whether they insisted on the dead account being deducted or not, do you? A. I know it was the practice, yes.

Q. How do you know it? A. Because it was done in certain places. At the end of the period they were not deducted.

Q. They were not deducted? A. No.

30 Q. Now, in regard to the transfers, in a great many instances you have spoken about transfers from one account to another, haven't you? A. I have.

Q. Was that a part of the same transaction as you have referred to as a dead account? A. In some cases—well, I assume the part you mean it was not.

40 Q. That practice, however, the transferring of money from one account which was already on the books and crediting a new purchase, that was

Robert G. MacDonald—Cross

a general practice of the company, wasn't it? A. It was done in special cases.

Q. And it was done a great deal throughout this drive, wasn't it? A. That is the point, yes.

Q. For the very reason that in a great many cases the salesmen were going after people who already were purchasers, weren't they? A. That is true. 10

Q. And they were transferring on to a new sale the money that had been paid on some previous sale? A. That was the practice, yes.

Q. Yes, that was the very meat of this whole transaction as far as reselling old customers was concerned, wasn't it? A. That was what was going on, yes. 20

Q. Then there was nothing objectionable about that practice, was there, as far as the right of this plaintiff to his commissions was concerned? A. Except where it was abused.

Q. Where it was abused? A. That is right.

Q. But generally it was not an abuse to do that? A. In special cases it was not, no.

Q. Now, regarding this Katz sale, you say that Mr. Brown put up a check for \$750? A. He did. 30

Q. And that was done, you say, at Mr. Ely's request? A. Yes.

Q. In other words, there wasn't enough cash in on the Katz sale to entitle Mr. Brown to credit on that transaction as a sale; that is right? A. That is correct.

Q. And so Mr. Brown was asked to make good out of his own pocket the amount necessary to make up the difference? A. He was asked for that check, yes. 40

Robert G. MacDonald—Cross

Q. And you approved that as auditor of the company? A. I have no reason to approve it.

Q. You let him do it and took the check, didn't you? A. I didn't take it; he gave it to Mr. Ely.

10 Q. But you were there when Mr. Ely asked him to do it? A. I was.

Q. And that also was done by salesmen occasionally, wasn't it, the payment of a deficit by themselves in order to make up a sale? A. I understand that had been done and was being done at that time. But when it was done previously it was probably done in good faith.

20 Q. Well, now you don't want to give us your opinion about all these transactions that you don't know anything about, do you? A. I am giving ones that I know.

Q. Do you want to give us a reflection now upon the good faith of Mr. Brown at the time he gave you a check? Is that what you are trying to do? A. I don't think he had a proper spirit when he gave it.

Q. I didn't ask you anything about his spirit, did I? A. No.

30 Q. And you didn't come here to give any partial opinion as to whether it was in good faith or not, did you? A. No.

Q. But simply to answer questions fairly before this jury that were asked of you? A. That is right.

Q. Well, now when Mr. Brown gave that check to Mr. Ely you were right there and knew all about the transaction, didn't you? A. I saw it.

40 Q. And then you gave Mr. Brown credit for

Robert G. MacDonald—Cross

that sale? A. He had already received credit on the statement.

Q. But you were making an audit of the books?

A. Yes.

Q. And you didn't take that off? A. I did not.

Q. And you let it stay on as a proper credit to him, didn't you? A. At that time I did. 10

Q. Well, you knew every circumstance of the transaction at that time, didn't you? A. Yes.

Q. Well, what did you take that off later for then? A. Why?

Q. Yes. A. Because in the first place the check wasn't any good.

Q. All right. If the check had been good then the transaction would have been good, wouldn't it? A. No. 20

Q. Well, you were ready to approve it and did approve it at that time when he gave you the check? A. I did at that time because I thought the transfers and so forth that were being made were legitimate.

Q. And you took it off at some other later time because Mr. Walker or somebody said they wanted it taken off, didn't you? A. No.

Q. You say the check wasn't any good. The mere fact that they stopped payment on the check doesn't mean that it wasn't any good, does it? A. I just used the wrong word there. In other words, payment on the check wasn't made. Payment was stopped. I didn't mean to imply that it wasn't any good, no. 30

Q. Now, I want to refer you to some of these sales that you have objected to. The Clayton sale, you say, made by Mr. Luke, for \$1,250, the con- 40

Robert G. MacDonald—Cross

tract was lost; is that right? That is what you said on your direct-examination? A. If I said it was lost—I don't think I did.

Q. Excuse me. That is what I have noted as you went along and I thought I took notes of what
10 you lost. Well, there was no contract? A. No.

Q. You looked for the contract? A. Yes.

Q. And you didn't find it? A. That is correct.

Q. Now, you don't know whether or not that purchaser signed a written contract, do you? A. Except that it was not on file.

Q. It was not there at the time? A. That is right.

Q. It would be possible, of course, for a purchaser to sign a contract and if it was out of the
20 file at the time you wouldn't know it? A. That would be possible.

Q. So that whenever you say that a contract was not signed all you mean to infer is that when you looked in the file for that particular contract it was not there at that particular time; is that all? A. That is true, except in special cases.

Q. Well, in some of these cases you knew contracts were in existence, even though they were
30 not in the file; is that right? A. I will say now that they were never in existence.

Q. You knew that of your own knowledge? A. No.

Q. Then you don't know it? A. No.

Q. You don't want to come here and tell us anything that you don't know of your own knowledge, do you? A. No.

Q. Now, that Clayton sale was through a transfer, wasn't it? A. I believe it was. I couldn't
40 tell without—

Robert G. MacDonald—Cross

Q. That is what you stated before on your direct examination. Now, this Purdy sale, made by Mr. Brown, \$350, you say that was a canceled account? A. I will have to look at it. I can't answer the question.

Q. Well, will you get your statement back, please? A. Are you in the first statement that we took? 10

Q. Yes, I am now. The first one was Clayton and then Purdy? A. Yes, there was no contract on file.

Q. Now the Staiger contract, \$1,800, made by Mr. Brown; you say he was short of cash and there was no contract? A. That is right.

Q. Was that a transfer? A. Yes. 20

Q. Well, then that would account for the fact that it was short of cash, wouldn't it? A. No.

Q. Wasn't there a credit there from the previous purchase? A. By short of cash I mean a twenty per cent sale was not there.

Q. And that was because there was a credit on a former purchase of Staiger that was credited in lieu of cash at that time, wasn't it? A. No.

Q. Isn't that what they did? A. It was an \$1,800 sale and there was \$287 transferred, and where it would take twenty per cent of \$1,800, it would be \$360. He only had \$287. 30

Q. \$287 transferred? A. That is correct.

Q. How much was he credited on the previous account? A. That \$287 was the credit, was the amount that was transferred.

Q. You saw that account at the time that you were there with Mr. Ely and made your audit? A. In December? 40

Robert G. MacDonald—Cross

Q. The Staiger account? A. Yes.

Q. You made no objection to it then? A. I couldn't say whether I did or not.

10 Q. As far as you know you didn't? A. If I saw the account I would, because if there wasn't twenty per cent there I would have checked it, certainly.

Q. But you did see that in December and made your audit on which Morrisey & Walker received their commissions, as you said to me awhile ago, didn't you? A. I think that they had already received it when I made that audit; I couldn't say for sure.

20 Q. I believe you said they received their commissions on all this business? A. They had received it. Don't misunderstand that I had audited before they had received it, because I hadn't.

Q. What is that? A. I say don't misunderstand me that I had already audited it before they received it, because I hadn't.

Q. You went over the books with Mr. Ely about the 15th of December, didn't you? A. I did.

30 Q. And they didn't get their commissions on this business until after that? A. The salesmen didn't.

Q. Morrisey & Walker didn't? A. I can't say whether they did or didn't.

Q. Didn't they get it at the same time the salesmen got it? A. Morrisey & Walker would have gotten it before the salesmen.

40 Q. Just a day or two before, and then paid the salesmen out of their money; that is what they did, didn't they? A. Paid the salesmen out of whose money?

Robert G. MacDonald—Cross

Q. Morrissey & Walker got their twenty per cent from the Shark River Hills Company and then paid the salesmen out of that? A. Yes.

Q. And they got their money out of this business? A. That is true, but not subject to my audit. 10

Q. Now, the Lund transaction, that was sold, you say, by Brown and Major? A. That is right.

Q. \$1,250, and you say that was short of cash? A. That is correct.

Q. Wasn't that a transfer? A. I don't think that was a transfer.

Q. Are you sure about that? A. I can make sure very quickly.

Q. From your books? A. From the books. 20

Q. Well, you might do that in the recess, if you please, so I won't stop you now. A. What reason did I give?

Q. Short of cash and not consummated. A. It is the same thing. By short of cash I mean it is not consummated.

Q. You gave your reason— A. It is the same thing. I am not afraid to change it.

Q. Wasn't the record that you were testifying to on direct-examination the same as you tell me now? A. That is so. 30

Q. Why should there be any doubt in your mind about it now? A. There is not.

Q. You can't tell us, though, whether it was a transfer? A. I can't without referring to the book. No, I don't think it was.

Q. What say? A. I don't think it was a transfer. I think there wasn't twenty per cent there. 40

Q. Everett Moore, \$900, cash transfer. Is that what you said about that? A. Yes.

Robert G. MacDonald—Cross

Q. Sold by Luke. Now, do you know whether that was a transfer or not, from your record there? A. Yes, I have it marked transfer.

Q. Well, then what is your objection to that, the fact that it was a transfer? A. Yes, I would
10 have to see what the transfer was to tell you the objection. I haven't got full details on this sheet.

Q. You don't know whether that was objectionable or not, that one? A. I believe it was.

Q. But you are objecting because it was a transfer of an old account; is that right? A. That is right.

Q. And if it is a fact that such transfer were approved then that would dispose of your objection to that transaction, wouldn't it? A. Yes.
20

Q. Now, I think the next one that you gave us was E. R. Palmer; is that right? Sold by Brown, \$550, no new cash, dead account. A. Yes.

Q. You object to that because it was a dead account? A. That is right.

Q. "T. M. and M. Colyard, dead account?" A. That is right.

Q. That was a canceled account you mean by that, dead account? A. Yes.
30

Q. Same objection? A. Same objection.

Q. Ella Warner, dead account? A. Correct.

Q. E. C. Walling the same; right? A. Right.

Q. Eggiman sale, made by Brown, \$700; dead account? A. That is right.

Q. And Sherman, the same objection, \$600? A. Yes.

Q. Right? A. Yes.

Q. Now, the next one I have is a sale to J. M.
40 Olson by Luke, \$500, not enough cash. Was that

Robert G. MacDonald—Cross

a dead account and transfer? By the way, Mr. McDonald, the contracts were signed on those that I have just gone over, weren't they? Well, I will withdraw that. There is no objection made by you as to that and I suppose it is a fact that they were signed. A. What was the last one you called? 10

Q. J. M. Olson, \$500, not enough cash. A. That is right.

Q. Was that a transfer? A. I don't think it was.

Q. You don't know, though? A. I haven't got it marked.

By Mr. Parsons:

Q. Just give us the lot under that, the Olson one. A. 1065 and 1066, Section D. 20

By Mr. Kremer:

Q. Now, referring to this sale by Brown and White, \$200, duplication—that is the next thing I have on your direct-examination—and Branson—excuse me—sold by White, Jasper White, I suppose, \$200, and a duplication. Now, what do you mean by that? A. I imagine that same sale was duplicated on two different statements. 30

Q. By the same salesman? A. Yes.

Q. Well, do you know that to be a fact? A. I can tell when I refer to it; yes.

Q. You mean referring to your books? A. Yes.

Q. Now, M. E. Van Note, \$100. That was by White. Not enough cash, you say? A. That is right.

Q. Was that a transfer? A. I don't think it was. I haven't got it marked transfer. 40

Robert G. MacDonald—Cross

Q. But you can't tell? A. Not without looking on the books.

Q. If that was a transfer then it would be—
A. It would be still short of the twenty per cent, regardless of what it was. I think that was why
10 it was on here, not twenty per cent of the purchase price paid.

Q. Do you know that? A. I can tell by looking at the books.

Q. Now, the Sullivan sale, \$1,575; was that a transfer? A. Now, the question on the Sullivan sale is what?

Q. Not enough cash, you say? A. That is right.

20 Q. That was a transfer, wasn't it? A. Yes.

Q. So that if that was a transfer that would dispose of your objection that there was not enough cash? A. If it was not a transfer?

Q. If it was a transfer. Well, it was a transfer, I know that, but there was not twenty per cent of the purchase price paid.

Q. Even with the credit from the former account? A. That is true.

30 Q. Can you tell that from this statement? A. From here?

Q. Yes. A. Yes, I have \$200 down here, where they need fifteen—let me see; they need over \$300.

Q. But was that after \$200 of cash had been paid in— A. No, that \$200 was the transfer.

Q. And have you the record there of the amount of cash paid? A. I have on the books in here.

40 Q. L. Balks, \$970. Your objection to that is it was a dead account and not deducted? A. That is right.

Frederick F. Schock—Direct

Q. And McGrath, sold by Brown, \$3,500, not enough cash. Was that a transfer? A. Yes, both. It was \$30 new cash and I believe \$380 transfer. There was \$290—

(Witness temporarily withdrawn.) 10

FREDERICK F. SCHOCK, sworn for defendant.

Direct-examination by Mr. Parsons:

Q. Mr. Schock, you reside at Spring Lake, do you? A. I do.

Q. And you are president of the bank there? 20
A. I am.

Q. Also interested in other enterprises? A. I am.

Q. You are also a director of the Shark River Hills Company, are you? A. I am.

Q. In the year 1926 did the Shark River Hills Company offer a bonus for the sale of its lots to captains of teams? A. They did.

Q. And that bonus was for the sale of lots of 30
the Shark River Hills Company? A. It was.

By the Court:

Q. 1926? A. Yes, sir.

Q. What was the bonus? A. The bonus was a certain amount if they reached a certain volume of sales. I don't just remember the amount.

By Mr. Kremer:

Q. You are a director of the company, Mr. Schock? A. I am. 40

Frederick F. Schock—Direct

Q. Have you the minutes of the company here with you? A. No, I have not.

Q. Was that done by any corporate action? A. Yes.

Q. There are minutes to that effect? A. Yes.

10 Q. Can you produce those minutes? A. I couldn't, no, sir; the secretary could.

The Court: The secretary has them. Of course the best evidence would be the minutes. You will have to have them here.

Mr. Kremer: Especially in view of Mr. Couse's testimony yesterday.

20 The Court: Oh, yes; in view of Couse's testimony.

Mr. Kremer: We are confronted with a peculiar situation. Mr. Couse testified yesterday that the Shark River Hills Company didn't agree to it.

The Court: No, he said he had no recollection. He said he would have to refer to the minutes to ascertain.

Mr. Kremer: And on that we discontinued.

30 The Court: Well, it was because you were not in a position. It is merely one of those artificial situations that do not go to the real merits. You failed to prove, that was all.

Mr. Kremer: Now, I think having done that, that the minutes should be produced.

40 The Court: I agree with you about that. I think the minutes should be produced to show what was actually done.

Robert G. McDonald—Cross

Mr. Parsons: Mr. Schock will come up here and testify to the same thing.

The Court: All right. Bring your minutes. Get your minutes here.

10

ROBERT G. McDONALD, resumed.

(Previous testimony read.)

The Witness: There was \$290 short of the twenty per cent.

By Mr. Kremer:

Q. Was that the live account increased or the old account? A. Was it what? 20

Q. Was it the live account that was increased or was it the old account? A. I couldn't tell without referring to the records.

Q. Well, in making your statement here which have you assumed? A. I can't tell without looking at the books.

Q. You can't tell? A. No.

Q. Well, if it was the live account increased, then the amount of cash would have been sufficient, wouldn't it? A. Not to pay the commission, no. It is \$290 short of that purchase price of the lot. 30

Q. But you don't know how much the increase was, if that was the live account, between \$3,500, which you say was the sale price, and what the price was formerly on the last sale? A. Yes.

Q. How much was the increase? A. The increase was \$2,600. 40

Robert G. McDonald—Cross

Q. How much was paid in? A. How much was paid in?

Q. Yes, with the transfer. A. \$410.

Q. How do you get that? A. \$380 transferred and \$30 new cash.

10 Q. And then you said something about \$200? A. No, that is back on the Sullivan sale.

Q. Well, you were about to say something about a \$200 item. A. I say it was \$290 short of the twenty per cent.

Q. But I understand there was already a live account of this man McGrath and then he bought another lot for \$3,500; that might affect the question of whether the amount of money paid in was
20 twenty per cent or not? A. Absolutely not.

Q. Wouldn't affect it in any way? A. No, sir. The new sale is \$3,500. You have to have twenty per cent of that purchase price.

Q. He only had to pay his twenty per cent in on the increase, didn't he? A. No, on the new sale.

Q. Well, if he had paid his twenty per cent in on the original purchase already— A. But that was transferred, too.

30 Q. And then he would have to pay twenty per cent on the increase, wouldn't he? A. Absolutely not.

Q. Did you tell me what the increase was in this case? A. I believe I did. I have it here. The increase was \$2,600.

Q. Was that the original sale, or was that the increase over the original sale? A. That new sale was \$3,500.

40 Q. What was the old sale? A. The old sale was \$900—an increase of \$2,600.

Robert G. McDonald—Cross

Q. Now, the McLaughlin sale, \$1,500, you say not enough cash. Was that a transfer? A. No.

Q. Sure of that? A. Well, I can make sure by reference to the books. I am sure, yes.

Q. And the Fine transaction, \$1,500, not enough cash; was that a transfer? A. I can't tell. I 10
have to look at the books.

Q. H. M. Kidd, \$1,100; that was a dead account? A. Dead account.

Q. The Dackerman transaction, was that a dead account, \$350? A. Now, I think—there wasn't any dead account there, no.

Q. You say no cash and no contract. A. No cash and no contract.

Q. At least, you didn't find a contract on file? 20
A. I didn't find a contract.

Q. Where did they keep those contracts? A. In a fireproof file, one of those tin files.

Q. And was there anybody that had custody of that? A. There was, yes.

Q. Well, when you examined the file, if you didn't find a contract there, that was all you did? A. That was all I could do, make a search of the office and inquire about them, yes.

Q. Did you inquire about that contract? A. I 30
inquired about all the contracts.

Q. Of whom? A. Different people in the office.

Q. Did you inquire of the salesman? A. If he were there I would have, yes.

Q. Did you investigate and inquire of Major whether or not he had that contract? A. He wasn't there.

Q. So you couldn't inquire? A. No, I couldn't. 40

Robert G. McDonald—Cross

Q. But it would be perfectly possible that the agent would have that contract, or somebody else in the office would have it, and it would not be in the file? A. It is possible, yes.

10 Q. In general course of business, contracts may be called for and be on one man's desk or another man's desk and not on the file? A. Yes, that is possible.

Q. Now, the Robinson account is a dead account, not deducted? A. Yes.

Q. And Phelps the same? A. Dead account, yes.

Q. And W. Scott, \$600, the same? A. That is right.

20 Q. E. B. Twist the same? A. That is right.

Q. That is your objection to all those accounts? A. That is one of the objections to them.

Q. Well, that is the only one you gave us on direct-examination? A. That is the only one, yes.

Q. F. L. Irons, no contract and not consummated; the same is true as regards the contract that you didn't find it in the file? A. That is right.

30 Q. And the sale not consummated; that is what you mean? A. No.

Q. That is what you mean? A. No, that is what I mean.

Q. I understood you so a while ago. A. When I say sale not consummated, I mean that the twenty per cent of the purchase price had not been received.

Q. How much of the purchase price had been received, paid? A. \$125.

40 Q. And was that a transfer? A. No.

Robert G. McDonald—Cross

Q. Can you tell whether or not that was a transfer? A. I can tell by looking at the books, yes.

Q. Now, you saw that account on the 15th of December when you went over the books with Mr. Ely? A. I believe I did, yes. No, I didn't see that. That is on the November 15th statement which I didn't go over with Mr. Ely. 10

Q. On December 15th you didn't go over the November 15th statement? A. No, that was passed a month ago.

Q. When did you go over that? A. Which?

Q. This F. L. Irons transaction. A. Sometime after the first of the year.

Q. Now, W. C. Cornell, \$10,700, by Brown, you say not consummated. Was that a transfer? A. Yes. 20

Q. And that is your objection to that? A. Well, I didn't say that I objected to the transfer; I said that it was not consummated, that twenty per cent was not in.

Q. How much cash was paid in? A. There was a transfer of \$720 and there was \$1,000 in new cash. The sale was \$10,070.

Q. So you say he was about \$280 shy? A. \$294. 30

Q. And you don't know of any other credit that may have been given on that transaction on the previous purchase, do you? A. What do you mean, any other credit?

Q. Well, this man was already a purchaser of property? A. He was.

Q. And do you know when he purchased his previous property? A. Not without referring to the books I don't know. 40

Robert G. McDonald—Cross

Q. And you don't know what other credit may have been given on that transaction on the previous purchase, do you? A. There was \$720, yes.

Q. That is the only credit that you found? A. That is true.

10 Q. Do you know how many lots this man had bought? A. No, I don't know anything about it.

Q. You don't know anything about that? A. No.

Q. Did you examine that transaction when you were there on the 15th of December? A. No.

Q. That had not been done until the November statement; is that right? A. No, we are back on the October now.

20 Q. Well, but you had examined it then? A. Not at that time. All this was done later, after the first of the year.

Q. Do you mean to tell us that when you made the examination of the books on December 15th or about that time, you didn't go over sales which had been consummated in October? A. No.

Q. How far back did you go? A. I just examined that one statement by Mr. Ely, that was all.

30 Q. Which one statement? A. December 15th.

Q. Well, in November did you examine this Cornell transaction? A. No.

Q. You made an audit each month? A. Not of the commission account.

Q. You didn't? A. No.

Q. How often did you examine the commission account? A. I had never examined it before.

40 Q. But you examined the master statements that were taken from the books, showing the commission account, didn't you? A. No.

Robert G. McDonald—Cross

Q. Wasn't the commission account made up on the master statement? A. They were.

Q. And so you regarded it as sufficient when you examined those master statements? A. I never examined the master statements. I never made any audit of the commissions at all until December 15th. 10

Q. So that you never saw anything about this transaction? A. The Irons?

Q. The Cornell transaction. A. Not as far as the commissions were concerned.

Q. But you examined it in January as far as commissions were concerned? A. Yes.

Q. And you approved the payment of commissions by the Shark River Hills Company to Morrisey & Walker on that transaction? A. No, I didn't approve it. 20

Q. You didn't? A. No.

Q. Did they get paid on that business? A. They were paid two or three months before that.

Q. On that Cornell transaction? A. Sure. It was on the October 18th statement.

Q. Now, the Hahn transaction, \$1,300, not enough cash, you say. Do you know whether that was a transfer? A. Yes, that was a transfer. 30

Q. And the Cornell transaction, \$1,220, was that a transfer? A. Yes. No, they were short of cash \$199. I will have to look it up.

Q. You don't know whether that was a transfer? A. Was not credited.

Q. C. W. Walton, improper transfer, you said? A. That is right.

Q. What do you mean by that, an improper 40

Robert G. McDonald—Cross

transfer? A. Well, there was no revival of the account.

Q. Revival of the account? A. Yes.

Q. Revival of the old account? A. In other words, it was just a transfer, a book entry made, and there was no new cash came in in it or anything else. The account was never revived, never passed that mere stage of a transfer from the other account.

Q. Why would there have to be any payment of new cash if there was sufficient credit on the old account? A. There would have to be that so as to show that the account had been actually revived and the customer sold.

Q. Well, that is simply a matter of bookkeeping? A. What?

Q. It was a matter of bookkeeping? A. What was?

Q. The revival of the old account. A. No, the account is supposed to be revived by the salesman, not the bookkeeper.

Q. Well, what do you mean by reviving an account? A. Some activity on the part of the purchaser shown by bringing in money to actually start the sale going.

Q. Well, suppose the purchaser signs a contract; isn't that enough? If the purchaser signs a contract and twenty per cent is credited, either by cash or by virtue of a previous purchase, isn't that a sufficient revival? A. No.

Q. Well, do you say that if a man had sufficient credit on his previous account to give him twenty per cent payment on this new account that he would have to put up some new cash whether he

Robert G. McDonald—Cross

had a proper credit already or not? A. Unless it was transferred from an active account.

Q. Then even though this Walton transaction was attended with the signing of a contract and a credit of a sufficient amount from the former account, you object to it because no cash was paid in? A. Yes. 10

Q. It was not a rule of the company that you had to pay cash if you had a sufficient account on the books, was it? A. Well, where it was transferred from some old account it was, yes.

Q. Couldn't you transfer out of the old account the entire amount necessary to make a payment on the new purchase? A. Couldn't you what? 20

Q. Couldn't you transfer from the old account the entire amount necessary to give you credit on the new purchase? A. From an old account, a dead account? 30

Q. Yes, if it was an old account, if there was enough credit there. For instance, suppose I bought a lot for \$1,000 and had to pay twenty per cent, which would be \$200, wouldn't it? Now, suppose I had other, \$200 more, on the old purchase, the old account— A. By old account do you mean a dead, canceled account, or do you mean an old account that is still active? 30

Q. An account that was used by the company in one of those resales. Now, if I had that credit properly there on the books, so that it could be transferred, couldn't a new sale be made and the salesman entitled to his commission without my putting up any cash? A. In a special—these transfers were always supposed to be special cases. In other words, it was not recognized as 40

Robert G. McDonald—Cross

a general contract, particularly if they went to Newark.

Q. That was exactly what they were working on, as you told us before, I believe? A. In Newark.

10 Q. The sales force was working on that hard? A. I don't think I said that.

Q. I understood you to say they were making a drive. I won't waste time on that, but that is your objection to this? A. That is the objection, yes.

Q. And the same is true of the Branson transaction and the Cordes transaction, sold by Rippey; is that right? A. Yes, I believe that is right.

20 Q. Now, you have made a statement here that you produced a slip of paper stating that double commissions to the amount of \$8,370 were claimed by yourself from an examination of the books; is that right? I wonder if during the recess you could get those books out. A. I have them right here all ready.

30 Q. I don't want to take the time of the Court and jury to go over each one of those items from which you made up that total unless it is necessary, but I would like to have the opportunity of seeing it. That is all.

Recess to 1:05 P. M.

Robert G. McDonald—Re-direct

Trial of the cause resumed at 1:05 P. M.

ROBERT G. McDONALD, resumed.

Re-direct-examination by Mr. Parsons:

Q. Mr. McDonald, in reference to these ac- 10
counts in which it has been mentioned the trans-
fer of funds from the other account and the ques-
tion asked as to payment of commissions upon
the new sale, and using the instance which was
used by Judge Kremer, if a thousand dollars lot
had been sold and \$200 paid on account of that
lot, the salesman would get his commission, would
he not? A. That is correct.

Q. Now, if that \$200 was transferred to a new 20
sale was the commission already paid on that
\$200? A. Yes.

Q. Now, have you certain instances there or one
or two instances which you can show on your
sheets where the salesman was only allowed a
commission on the increased amount of business?

A. I can in some of those, yes.

Q. Will you just refer to one or two of those?
Have you your sheets there? A. No. (Procures 30
sheets.) Now what you want is—

Q. I am asking you now if you will show me
one or two sales where the custom of the com-
pany was shown to give credit on the increase?

A. Where it was paid on the increase only, you
mean?

Q. Where it was paid on the increase only. Di-
recting your attention to the Sullivan sale; the
only demand that was put in was for the increased 40
sale, was it? A. That is right.

Robert G. McDonald—Re-cross

Q. And was that the general custom? A. Yes, that was the way it should be.

Q. Now, there has also been mention made, Mr. McDonald, of dead accounts and old accounts, where there was a transfer made from another
10 dead account or old account to another account; you have mentioned that, have you not? A. Yes.

Q. And where the sale was not consummated even though the transfer was made, the transfer was not enough to make up the twenty per cent; is that correct? A. That is right.

Q. Now, all these figures which you have there, Mr. McDonald, appear in these various books?
A. They do.

20 Q. And can be shown from the books? A. Yes.

RE-CROSS-EXAMINATION by Mr. Kremer:

Q. Now, just a moment, Mr. McDonald. In regard to that Sullivan account, that was what was known as a live account, wasn't it? A. That Sullivan account, a dead account, was deducted on that particular sale. He asked for one of those.

Q. Now, you just told Mr. Parsons about one
30 in which you credited the agent simply with the increases? A. That was true. That was the one he asked for.

Q. There wasn't any dead account, that was a live account, wasn't it? A. Well, there was a dead account deducted, yes.

Q. Well, there was no dead account at all, was there? A. Yes, there was a dead account for \$525.

Q. How old was it? A. I can't tell without
40 looking at the books.

Robert G. McDonald—Re-cross

Q. Wasn't it the same year as the new purchase? A. I don't know.

Q. Now, wasn't this the practice that went on: in the case of a live account, where you had a customer who had purchased and the account had not been canceled, then if a new sale was made to that customer you only credited the salesman with the increase, the difference between what he had already contracted to purchase and what the last purchase was; that is true, isn't it? A. If there was no dead account. 10

Q. Well, I said that, said that it was a live account. A. There wouldn't be any deduction at all in that case.

Q. In that case you give him credit for the increased amount, don't you? A. You would have to give credit for an entire new sale. 20

By the Court:

Q. Because in that particular case the old account was still running, therefore the payments were still due and still being paid and collected?

By Mr. Kremer:

Q. Even when you had made a transfer and credited the amount of the former purchase on the last transaction, did you then give him the full credit for the new sale too? A. I don't understand you. 30

Q. Well, suppose Mr. Sullivan had purchased a \$2,000 lot and had made a part payment and then he transferred and took a \$3,000 lot; instead of the \$2,000 lot then the salesman got credit on the \$1,000, didn't he, in addition to the former \$2,000?

A. That is the way it should be, yes. 40

Robert G. McDonald—Re-cross

Q. That was the way it was, and that was what was known as a live account; isn't that so? If there had been no default on that first purchase—

A. On the first purchase?

10 Q. Yes. A. Then there would not be any deduction, if it had been canceled.

Q. You would credit him only with the increase? A. You would credit him with the whole thing.

Q. Even if there was a transfer? A. If there was a transfer of excess moneys.

Q. Well, do you mean to tell us that if a salesman had sold a \$2,000 lot and then that purchaser decided to take a \$3,000 lot instead of the \$2,000 lot, that you would credit your salesman with \$5,000? A. No, you would credit him with \$3,000 if there was no cancellation.

Q. And if that first account had still been alive you would only credit him for \$1,000 increase, wouldn't you, plus the \$2,000; that is so, isn't it? In other words, he wouldn't get credit— A. I think that you are confused on it.

Q. I don't know whether I am or you are. Maybe I am. In other words, he wouldn't get credit for \$5,000 on such a transaction, he would only get credit for \$3,000? A. That is right.

Q. And the two would be eliminated? A. The two would be eliminated if it was a dead account, yes.

Q. And if it was a live account then what? Now, what do you mean by a dead account? A. Well, by a dead account, as it has been termed here today, we mean an account which is canceled on which a commission has been paid.

40 Q. And suppose that account had not been can-

Robert G. McDonald—Re-cross

anceled but was still running: in that case you would only give the agent credit for the additional business he had brought in, wouldn't you? A. No.

Q. You would let him take credit on the \$3,000 and not on the \$5,000, if there was a transfer made? Bear that in mind, of course. A. No, 10
you wouldn't. You would let him take credit on the full sale.

Q. On the \$5,000? A. Yes.

Q. You are sure of that? A. Sure of that.

Q. Then if a purchaser said, "I will take a \$3,000 lot instead of a \$2,000," it will give him a credit of \$5,000; is that what you mean? A. You mean you are going to credit him and cancel 20
that first \$2,000?

Q. Yes. A. Then you would only credit him with \$1,000.

Q. Then in such a case you would only credit him with the additional \$1,000 as a matter of fact? A. Yes.

Q. That is what I wanted to try to get you to tell us. Suppose that account was a dead account and had been canceled: then isn't it the idea that you would credit him the whole \$3,000 30
and make no deduction? A. The whole account should be deducted.

Q. It should be? A. Yes.

Q. Who told you it should be deducted? A. What do you mean who told me?

Q. Yes; why do you say it should be deducted?

A. From the rules of the organization.

Q. Are you sure of that? A. Yes.

Q. Where did you find it from the rules of the organization? A. It is the practice to do that 40
way.

Wallace Jeffrey—Direct

Q. Isn't it a fact, Mr. McDonald, that in case of dead accounts that the salesmen get credit for the entire full amount of their new sales? A. No.

10 Q. And that there should be no deduction? A. There should be a deduction.

Q. Of the dead account? A. No, that is not a fact.

WALLACE JEFFREY, sworn for defendant.

Direct-examination by Mr. Parsons:

20 Q. You are a certified public accountant of the State of New Jersey, are you? A. I am.

Q. And associated with what concern? A. Hill, Bieth & McMahan.

Q. Did you assist Mr. McDonald in auditing the commission accounts of the Shark River Hills Company? A. I did.

Q. And with your assistance, working together, where those statements prepared from which Mr. McDonald read? A. They were.

30 Q. And do you know that the items on those statements correspond with the books of the company? A. I do.

No cross-examination.

Samuel D. Walker—Direct

SAMUEL D. WALKER, recalled for defendant.

Direct-examination by Mr. Parsons:

Q. Mr. Walker, you are one of the directors and secretary and treasurer, you testified, of Morrisey & Walker? A. Yes, sir. 10

Q. And it is your corporation, the corporation with which you are connected, that has the contract which has been offered in evidence with the Shark River Hills Company? A. Yes, sir.

Q. In the year 1926 did Morrisey & Walker or your concern offer any prize or any bonus to salesmen for the sale of lots? A. Yes, sir.

Q. Your concern, Morrisey & Walker, with reference to the lots of the Shark River Hills Company? A. Yes. 20

Mr. Kremer: Now, don't lead him, Mr. Parsons, please.

Q. For whom did you offer that prize, if anybody? A. Morrisey & Walker, in one instance, as in accordance with the terms of our sales contract.

Q. I get you. Now, I direct your attention now to the \$1,000 prize offered to the captains of the teams, not in reference to the terms of the sales contract, the \$1,000 prize offered to the captains of the teams. Will you tell us who offered that prize? A. Shark River Hills Company. 30

Q. Did Morrisey & Walker offer that prize? A. For the Shark River Hills Company.

Q. Who was to pay the money? A. Shark River Hills Company. 40

Samuel D. Walker—Direct

Q. Was Morrisey & Walker paying the money?

A. No, sir.

10 Mr. Kremer: I object to this question, who was to pay the money, and was Morrisey & Walker paying the money. I think he should ask Mr. Walker what was said.

The Court: Or what was the arrangement. Inevitably the question must be asked who made that offer.

Q. Who made that offer, Mr. Walker? A. I don't understand that question.

Q. Who made the offer to you to offer this prize?

20 Mr. Kremer: I object to that as hearsay.

The Court: No, it would not be hearsay if he was present at the time.

Q. Who authorized you to make that offer?

Mr. Kremer: I object to that, who authorized.

Q. Well, who told you to make that offer then?

30 Mr. Kremer: I object to that unless it can be shown—

Q. Who made the offer? A. The board of directors of the Shark River Hills Company.

Mr. Kremer: That is what I object to.

Q. Were you present at the time? A. Yes, I was.

40 Mr. Kremer: Well, we were not present; nobody representing the plaintiff was present.

Samuel D. Walker—Direct

The Court: Of course that would be so. Where are these minutes? You propose to offer them later, do you?

Mr. Parsons: Yes.

By the Court:

Q. In any event, did Morrissey & Walker make an offer to these sales agents? A. In behalf of the Shark River Hills Company.

Q. But not on its own? A. Not on our own, no, sir.

By Mr. Parsons:

Q. Was Morrissey & Walker the owner of land known as Shark River Hills Manor? A. Yes.

Q. And did the Shark River Hills Company have any connection or any interest in that land? A. No, sir; they didn't.

Q. I show you a deed from George E. Rogers and Mary E. Rogers, his wife, to Morrissey & Walker, Inc., conveying land in Wall Township, which deed is recorded in Book 1,354 of Deeds, at page 433, and ask you if that is the deed or the recorded record of a deed by which Morrissey & Walker obtained title to the Shark River Manor. A. Yes.

Mr. Parsons: I offer that deed in evidence.

Mr. Kremer: No objection.

The Court: It will be received. It is a record in the County Clerk's Office, and it will be recognized as such.

Q. Now, Mr. Walker, with reference to the sale of lots by the captains of those teams, was Mor-

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Samuel D. Walker—Direct

risey & Walker, in accordance with this contract with the Shark River Hills Company, obligated to the salesmen, the individual salesmen, for their commissions?

10 Mr. Kremer: I object to that. I think the contract speaks for itself.

The Court: It will be admitted.

Mr. Parsons: It is admitted already.

The Court: The contract does speak for itself.

Q. In addition, Mr. Walker, to the commissions set forth in the contract, did Morrissey & Walker agree to pay the captains of the teams any additional commission upon the work done by their teams? A. Not to my knowledge.

Q. Now, in reference to these bungalows of the Morrissey & Walker Construction Company, did the Shark River Hills Company have any interest in those bungalows? A. They did not, no, sir.

Q. Who owned those bungalows? A. Morrissey & Walker.

Q. And by whom was the work done? A. Morrissey & Walker Construction Company.

30 Q. And with whom were the contracts? A. With individuals that had purchased lots.

Q. With the Morrissey & Walker Construction Company? A. Yes, sir.

Q. Who received the money for the buildings? A. Morrissey & Walker Construction Company.

Q. Was there any interest in any way, shape or manner between the Morrissey & Walker Construction Company and the moneys that were to
40 come due under these contracts and the Shark

Samuel D. Walker—Direct

River Hills Company? A. Only in the sense that we sold some of those building tracts later to the Shark River Hills Company.

Q. Now, did you sell any of those building tracts to the Shark River Hills Company which are mentioned in this case? A. I couldn't tell you. 10

Q. You don't know that? A. No.

Q. Were these contracts entered into that are in evidence prior to any sale to the Shark River Hills Company? A. No.

Q. Directing your attention now to the system in which business was done, Mr. Walker, and the approvals, upon what were salesmen paid their commissions? A. On sales that they had consummated, and the stipulation of a consummated sale was that a contract had to be signed and accepted with Morrisey & Walker— 20

Mr. Kremer: I object to this on the ground that the contract contains these clauses.

The Court: Not with the buyer. They contain the agency contract. He is talking about his arrangement with the salesmen whom he employed. 30

Mr. Kremer: Yes, and that is what is in the contract.

Mr. Parsons: That is perhaps true. I will withdraw the question.

The Court: Oh, did you say as to commission as between Morrisey & Walker and the salesmen?

Mr. Parsons: That is right.

The Court: All right. Go ahead. 40

Samuel D. Walker—Direct

Q. Now, in reference, Mr. Walker, to accounts which were known as dead accounts, will you explain the system in which those were handled?

10 A. A dead account, as defined here today, was an account on which some money had been paid and then for reasons the purchaser discontinued making any further payments. These dead accounts were handled, in one or two—

By the Court:

Q. Now, pardon me a moment. I want to get that clear. In other words, a buyer entered into a contract with Morrisey & Walker to purchase a certain lot. Such person was required to pay
20 twenty per cent down on the purchase price. He made his payment. Morrisey & Walker received it. And then, instead of continuing his payment, he forfeited his contract? A. Yes, sir.

Q. Morrisey & Walker kept the money, of course, which he had already paid? A. The Shark River Hills Company kept it.

Q. Well, whether it was you or the Shark River Hills Company? A. Yes.

Q. They kept that ten per cent advance pay-
30 ment, first payment? A. Yes, sir.

Q. Now, of course the purchaser decided not to go on with the contract, for one reason or another, but the Shark River Hills Company retained the first payment? A. Whatever was paid in.

Q. That they had paid in or whatever was paid in? A. Yes.

Q. Now, no deed had been delivered in that case because the contract was practically suspended
40 or canceled? A. Yes.

Q. And the purchaser forfeited what he paid?
A. Yes.

Samuel D. Walker—Direct

Q. To the Shark River Hills Company? A. Yes.

Q. Now, you decided, or the Shark River Hills Company decided, that in those cases they would endeavor to re-interest the purchaser in other purchases? A. Yes. 10

Q. And that is what you call a dead contract? A. Yes.

Q. Or an abated contract. You didn't undertake to return these moneys that had been paid on the contract that had not been carried out? A. No.

Q. But it was a forfeited payment? A. Yes.

Q. That is your statement? A. Yes. 20

By Mr. Kremer:

Q. That is the difference between a live account and a dead account? A. Yes, a live account is one where the purchaser continues to pay, with the idea that he could sometime take a deed.

By the Court:

Q. Is there anything more to be said on it? A. Why, to Mr. Parsons' question there is.

Q. What is it? 30

Mr. Parsons: I think I asked him to explain the method in which it was—

By the Court:

Q. How was a dead account handled? A. In an account, for instance, where a lot had been sold for \$1,000 and we had only received \$100 on account, no salesman under those circumstances ever received a commission. Therefore we would be willing to allow that \$100 on the account 40

Samuel D. Walker—Direct

of any purchase that that customer could be induced to make, sign a contract and continue to live up to their contract under that sale.

Q. Whether it be the same lot or another one?

A. Whether it be the same lot or another one.
 10 However, if on that \$1,000 sale there had been \$200 paid in, in that event the salesman would have received a commission and the only commission that could then come out of any new sale would be after the \$1,000 sale had been credited. In other words, if the new sale was \$1,500 the man would only get credit for having made a sale of \$500.

Q. He would get a commission on \$500? A. He
 20 would get a commission on \$500.

Q. The excess? A. Yes, sir.

By Mr. Parsons:

Q. Now, out of the twenty per cent down payment, Mr. Walker, which was received the salesman would have received how much commission, if I am starting with a brand new sale? A. He would receive eight per cent immediately, and if his sales amounted to \$25,000 he would get nine
 30 per cent of it. If he reached \$50,000 he would get ten per cent of it.

Q. Out of that twenty per cent, Mr. Walker, was there a certain amount spent for advertising?

Mr. Kremer: Objected to.

The Court: Well, he has said he had nothing to do with that.

Mr. Parsons: What I was trying to do was to show that upon the renewal of this
 40 deposit, if a credit was to be given upon

Samuel D. Walker—Direct

the whole deposit, where the company would be getting off, that is all.

The Court: Well, I don't know that that is of any importance.

Mr. Parsons: All right. I withdraw the question. 10

Q. Now, in reference, Mr. Walker, as you have stated—if an account represents twenty per cent that had been paid in and a customer was interested again in a new sale, will you just state again upon what amount the salesman would receive a commission? A. He would receive his commission on the increase in the account, and that was based by his reviving that account and by his putting in additional money that brought the account up in good standing, and it was based on the acceptance of the company, as those transactions were considered outside of the ordinary course of events. 20

Q. Mr. Walker, are you acquainted with the contract of Mrs. Katz? A. Yes, I am.

Q. After that contract was entered into and after Mr. Ely left your employ did you hear from Mrs. Katz? 30

Mr. Kremer: Objected to.

Mr. Parsons: Strike it out then.

Q. Did you authorize the contract?

The Court: Well, he is going to ask you whether you authorized the kind of contract that the agent Mr. Brown says he entered into with Mrs. Katz.

A. I did not. 40

Samuel D. Walker—Direct

Mr. Parsons: What they call a conditional contract.

10 Q. I show you Exhibit C for Identification, which is entered into with Emma C. Katz, a contract bearing date December 13, 1926, and ask you if you authorized that contract? A. I did not.

Q. And the conditions therein contained? A. No, sir.

By the Court:

Q. Is that in accordance with the customary practice that agents were allowed to make, or salesmen, rather? A. It is not, no, sir.

20 Mr. Parsons: I would like to have this marked in evidence.

The Court: It may be marked.

(Paper marked Exhibit D-4.)

By Mr. Parsons:

30 Q. Mr. Walker, what were the customary payments outside of the twenty per cent initial payment which were to be made in carrying on a contract? A. Two and a half per cent of the unpaid balance per month.

By the Court:

Q. Each month? A. Yes.

Mr. Kremer: I don't know what bearing that can have on this case. If the twenty per cent were paid in that finished the sale as far as the salesmen's commissions are concerned.

40 The Court: No, I don't think that is so.

Samuel D. Walker—Cross

Mr. Kremer: As I understand this written contract between Morrisey & Walker and the salesman it says that he shall be entitled to his commission when his contract is signed and twenty per cent paid in.

The Court: Well, who is to judge the kind of contract to be signed? If a purchaser didn't go on and complete the payment I don't think the salesman would be precluded from recovery. He is attacking this Katz contract on the ground that it was made without authority and therefore they have no valid contract. 10

Q. I also show you this contract, which is now marked Exhibit D-4, and ask you if this contract provides for the payment of the two and a half per cent per month on the balance. A. It does not. 20

Q. Did you ever authorize or did the Shark River Hills Company to your knowledge authorize such a contract to be entered into? A. No, sir.

Q. Is there any definite time mentioned in there that payment shall ever be made for this lot? A. No, sir. 30

Mr. Kremer: The contract speaks for itself, I think, on that subject.

The Court: Well, counsel is simply unable to read the contract himself. He is asking his client to do so, that is all.

CROSS-EXAMINATION by Mr. Kremer:

Q. Now, Mr. Walker, this property of Mrs. Katz was sold to her under the terms of this contract? A. Yes, sir. 40

Samuel D. Walker—Cross

Q. And she is still making payments under the contract? A. I believe so.

Q. Your company is accepting them? A. I believe so.

10 Q. You heard her say this morning that she was making payments, did you not? A. Yes.

Q. And you have never rescinded the contract in any way? A. No, sir.

Q. You have taken the benefits of it? A. Yes.

Q. Well, you have taken the moneys that she has been paying in, and it is dated December 13, 1926?

By the Court:

20 Q. I assume that that would indicate that you really ratified that contract, by continuing to take the money? It sounds like a pretty big sale to me, \$10,000. I suppose that is the reason you don't want to give it up? A. We don't want to give it up, and we have had negotiations, I believe, with Mrs. Katz since that have been satisfactory.

Q. So you really ratified what the agent did? A. Yes.

By Mr. Kremer:

30 Q. Mrs. Katz was a good customer? A. Yes.

Q. You told Mr. Parsons that you required two and a half per cent to be paid at what periods? A. Monthly.

Q. And that was your regular contract of purchase? A. Yes.

40 Q. Now, isn't it a fact that when you had customers who were good customers that you often altered the terms to suit the needs of the customer? A. On occasions we did, yes, sir.

Samuel D. Walker—Cross

Q. Your terms of contract arrangements were elastic, were they not? A. Somewhat, where it was constructive to change the conditions.

Q. If a salesman brought in a customer and that customer came in to you and said "Now, it is not quite convenient for me to pay twenty per cent; I am going to pay fifteen per cent," or ten, or twelve, you accepted this contract if you thought the purchasers warranted it, didn't you? A. Subject to conditions. 10

Q. And you often changed the ordinary contract conditions that you liked to impose to suit the convenience of purchasers and to get business, didn't you? A. Not often, but occasionally.

Q. What do you mean by occasionally? A. I mean out of perhaps a million dollars worth of business in a year maybe five or six or ten thousand dollars would be changed, not any more than that. You would have very little difference. 20

Q. But you did that on occasions? A. On rare occasions, yes.

Q. In order not to let the business get away? A. And where we knew the circumstances of the particular case. 30

Q. And where you did that with your own consent, changed the terms of contracts to suit the convenience of purchasers, did you then shut the agent out of commission? A. The agent was then entitled to his commission under the same terms as he was working. In other words, he got paid his commission when the usual terms of that contract were complied with.

Q. But you want to shut the agent out of his commission on this Katz transaction because he 40

Samuel D. Walker—Cross

didn't get the requisite amount that you say he was required to get? A. At the time, yes.

Q. Although you have taken the contract and accepted the benefits of it? A. That salesman has been paid his commission on that contract.

10 Q. But you don't want it to count in part of his total as to his prize money? A. Because it was not consummated within the period of time as designated in this contest.

Q. If he didn't consummate this contract to your satisfaction why did you pay him his commissions? A. Because the memorandum was made up by Mr. Ely and I didn't know the circumstances of this contract until sometime late
20 in December or the first of January, that this money had been paid.

Q. Then you mean to tell us that if you had known this Katz contract was in the form it was then, that you would have gone on and carried out as you have? A. I wouldn't have to give the agent any commission.

Q. If he was entitled to commission? A. He would not have been paid and there would have been no such contract entered into with Mrs. Katz.

30 Q. I ask you if you would have done that, entered into it in regard to the agent's commissions. A. I would not have paid it.

Q. I didn't ask you that. Assuming that you did enter into it, as in fact you did, accepted payments under it as you have done, do you mean to tell us that you would not have paid the agent his commission? A. I would have complied with the sales contract.

40 Q. In regard to the sales contract, you say that

Samuel D. Walker—Cross

you would not have entered into it that way at all? A. No, sir.

Q. You knew there was a \$750 check made by Brown in that transaction? A. I heard that later.

Q. You accepted the check? A. I can't answer. I think it was transferred to the Shark River Hills Company. 10

Q. It was transferred to you? A. No, sir.

Q. You had it banked? A. Not to me personally; the Shark River Hills Company.

Q. Was it given into your possession? A. I don't think I ever saw the check till it came back from the bank.

Q. You deny that? A. I say yes, to the best of my knowledge. 20

Q. Now, Mr. Parsons asked you if you had any knowledge, over and above the commissions to be paid to your agents, of any prize money to be paid by Morrisey & Walker, and you said not to your knowledge; is that right? A. I believe I said yes. There is a bonus in our contract.

Q. But I mean as to prize money. A. Yes, I know of prize money.

Q. Oh, you do know of prize money? A. Yes. 30

Q. You knew you had paid the prize money the year before, didn't you? A. Shark River Hills Company.

Q. Didn't Morrisey & Walker pay it? A. No, sir.

Q. Didn't you put it up, the Morrisey & Walker Association, and then get yourselves reimbursed by the Shark River Hills Company? A. I should say no. 40

Samuel D. Walker—Cross

Q. You would say no? Now, how do you know? Now, isn't it a fact that the prizes in 1925 were paid by checks of Morrisey & Walker, and then later in your dealings with your principal, the Shark River Hills Company, you got them to
10 reimburse you for the prizes you paid to your salesmen? A. I would say no. My thought at the time was it was simply a case of Morrisey & Walker advancing the money for the Shark River Hills Company, which was quite a good customer.

Q. In any event you know prizes were paid to your salesmen? A. By Shark River Hills Company.

Q. And you knew that they were paid in 1925?
20 A. By Shark River Hills Company.

Q. And just what you mean by the Shark River Hills Company paying them, you paid the salesmen and then you got the money back from the Shark River Hills Company? A. No, I would say that we didn't.

Q. You didn't make known to the salesmen that you were going to get the money back from the Shark River Hills Company, did you? A. They
30 knew it was the Shark River Hills Company that was paying the bonus.

Q. You didn't tell them that, did you? A. Yes, I did, and they knew it.

Q. There has been some reference here to a meeting at 320 Cookman Avenue in the spring of 1926. You were present at that meeting? A.
Many meetings.

Q. Well, were you present at a meeting in the
40 latter part of May with Mr. Ely— A. We held them every week of the month.

Samuel D. Walker—Cross

Q. You were present at a meeting with Mr. Ely and some of the team captains, were you not? A. Yes.

Q. And that was in the latter part of May? A. I would say yes.

Q. You called the team captains together? A. Yes. 10

Q. And didn't you outline to them there the proposition that if their teams sold over \$200,000 worth of business you would pay them a prize of \$1,000? A. I would say yes.

Q. You did do that? A. Or that they would get a prize from the Shark River Hills Company.

Q. Did you tell them they were going to get it from the Shark River Hills Company? A. Yes. 20

Q. You are positive of that? A. Yes, sir.

Q. At least you told them they were going to get a prize? A. Going to get a prize.

Q. Then you went on to a dinner? A. Yes.

Q. At night or shortly after that when there was a banquet at the Berkeley-Carteret? A. I have no recollection of the occasion but it sounds very likely.

Q. You don't recall the dinner at all? A. Not particularly. We had banquets, dinners and so forth. 30

Q. Do you remember repeating to the salesmen gathered at that dinner the promise that if their teams sold over \$200,000 worth the captains would make a \$1,000 prize? A. I don't remember that particular dinner.

Q. But if you did say it you are sure that you told them the Shark River Hills Company would pay it? A. Yes. 40

Samuel D. Walker—Cross

By the Court:

Q. So as a matter of fact you as the sales agent for the Shark River Hills Company were making the offer in behalf of the company, were you? A. Yes, sir.

10 Q. Not in the interest of Morrisey & Walker? A. No, sir; it was a special prize that I got the company to put up.

By Mr. Kremer:

Q. The commissions were paid by Morrisey & Walker, weren't they? A. To the salesmen, yes.

Q. They were paid by your checks? A. Yes.

20 Q. But you say these other prize moneys were paid by someone else's check? A. This was one special prize put up by the company.

Q. And isn't it a fact that you told these men about this agreement without telling them where the money was to come from? A. No, that is not so.

30 Q. Well, then you admit that that agreement was made at that time and that promise held out to these men? A. That the Shark River Hills Company would pay them a prize under stipulated conditions.

Q. Now did you consult with Mr. Parsons at the time of the institution of this suit by Mr. Brown? A. Yes, sir.

Q. You went over with Mr. Parsons the facts of this case? A. Yes, sir.

Q. And you gave him the information from which he prepared the answer in this case? A. That our auditors presented.

40 Q. Well, if it is a fact that this agreement was entered into as you say now, why did you deny

Samuel D. Walker—Cross

that in the pleadings set up here in the answer?

A. I believe the denial is related to whether Morrisey & Walker were to put up that prize.

Q. Well, the complaint charged that both defendants were to make such an offer and you denied that. Now if they did agree to do it why did you deny it in the answer filed? A. Probably an oversight on the part of the lawyer, possibly. 10

Q. His fault, eh? A. I would say yes. I am denying that for him.

Mr. Parsons: I would like to state, because it may seem unfair to the jury, we denied it because the statute of frauds raised that very issue. That is why it was denied. 20

Mr. Kremer: Well, I only know it was denied, and the reason they now admit; but the purpose was to deny it.

The Court: Go on.

Q. Now, Mr. Walker, you say, as I understand you, that when a new contract was entered into, if the dead account was less than twenty per cent—if less than twenty per cent had been paid in on what you refer to as a dead account, then you let your agent take a new commission on another purchase? A. If he brought in additional money. 30

Q. But if the twenty per cent had been in before, then he got it as a matter of course? A. That was true during the early part of the year but it was not true prior to this last drive.

Q. What did you do in the last drive? A. In the last drive we undertook to revive a lot of business that was on the books in the way of dead 40

Samuel D. Walker—Cross

accounts and so forth, and our business was expected to come mostly out of our old customers. We had discovered sometime prior to that that this transfer privilege had been abused; and we had a meeting with Mr. Ely at which he was
10 instructed that we would not transfer any account unless there was forty per cent left remaining on the old account, and that was the stipulation under which he was to work at that time, because of abuses that had been going on within the organization in this twenty per cent privilege.

Q. Then that changed the terms of your original contract, didn't it? A. No, that was outside. There was never any contract agreement to accept
20 any transfers. It was supposed to be only in emergency and a constructive piece of business and was originally intended to assist buyers in getting locations as they wanted them.

Q. Then when Mr. Macdonald made this audit he didn't have before him in all cases the information as to whether the purchaser had paid in twenty per cent on the original sale or had paid in less, did he? A. He had the books.

Q. But he wouldn't be able to tell, would he,
30 without knowing whether twenty per cent had been paid in in the original instance or less, how much credit the agent was entitled to on the old sale? A. Yes, according to the books he had the information and he had his instructions from myself.

Q. But that information was always before him, was it, whether twenty per cent had been paid on the old account or not? A. Yes, it should.

40 Q. It should be there? A. Yes.

Samuel D. Walker—Cross

Q. But in case it was not there then Mr. Macdonald would not have accurate information from which to determine whether the agent had received a proper credit on the new sale, would he? A. It would have to be a mistake in the sales and the records of the company. 10

Q. Now Mr. Brown came to see you about his commission checks about the 15th of December, didn't he? A. Yes.

Q. And he got some of his commission check? A. Yes.

Q. You told him to come back the next week and you would give him the balance after the books had been— A. The commission that Morrisey & Walker owed him. 20

Q. You told him when the books had been audited you would give him the rest? A. Yes.

Q. You had the books audited? A. They were in the course of being audited when he came back the second time.

Q. But this sales account had been gone over? A. That hadn't been completely gone over.

Q. Sure about that? A. Yes.

Q. But didn't you give him a check on his account? A. On the sales office business was all in, in accordance with the terms of our working agreement. 30

Q. And you gave him commission on \$212,750? A. On the statement made up by Mr. Ely that—

Q. Yes or no. A. Yes.

Q. And you told him to come back in another week and you would give him his prize? A. If he was entitled to it.

Q. And you didn't say anything about that 40

Samuel D. Walker—Cross

money coming from the Shark River Hills Company or anybody else, did you? Yes or no. A. Just give me that question again.

10 Q. You told him then when you gave him his check for the last part of his commission if he would come back in a week you would give him his thousand dollars but you didn't mention about it coming from Morrissey & Walker or the Shark River Hills Company, did you? A. I think I told him his prize—I think he understood where it came from.

Q. Then you asked Mr. Brown to sign up for the future, didn't you? A. For the next year.

Q. You were perfectly satisfied with his work?

20 A. At that time I thought I had reason to be.

Q. And he had been working for you two or three years before and you had known him all that time? A. Yes.

Q. And you wanted to keep him in your employ? A. If he conducted himself properly.

Q. And so far as you knew or believed he had? A. Up until the time that I had other figures presented I believed so.

30 Q. And you got his resignation shortly after that, didn't you? A. Sometime after that.

Q. And it was after that then that you refused to give him his check for \$1,000? A. No.

40 Q. Because he left your employ? A. It was before that. And Mr. Brown made the proposition to me that if I would give him that check of the Shark River Hills Company that he would be more interested in continuing in my employ, and I had good reasons under those circumstances to give him the check.

Samuel D. Walker—Cross

Q. But he left your employ and that was the reason really that you withheld that check; is that right? A. That is not so. I refrained from passing that check on to him when Mr. Macdonald—because of the audit of Mr. Macdonald for the Shark River Hills Company. 10

Q. And you withheld that check, didn't you, because he left? A. No, I didn't.

Q. Do you know Monroe C. Hawes? A. Yes, I do.

Q. Didn't you tell Monroe C. Hawes substantially that same thing? A. No, that is not so.

Q. Didn't you tell Mr. Monroe C. Hawes, of Manasquan, that you were going to get Ely and that you had nothing against any of the rest of these boys, including Brown, but you were out to get Ely and you were not going to pay any of these prizes? A. No, I didn't. 20

Q. These boys left and went with Ely, didn't they, to go into a new enterprise? A. They did.

Q. And that enterprise is a competitor of yours in a sense? A. Yes.

Q. Asbury Gables? A. Yes.

Q. Isn't it that, just because of their engaging with that enterprise, that you withheld all those checks and then brought suit against them? A. No, it is not. 30

By Mr. Parsons:

Q. I show you the account of Emma C. Katz on this account and ask you if \$2,000 has been paid on it yet today so a salesman is entitled to a commission. A. Not on account of the principal, no. 40

George Slater—Direct

Q. About \$1,500 today and not twenty per cent?

A. Not yet.

By Mr. Kremer:

Q. Did you ever make the transfers on the book
10 in that Katz matter?

Mr. Parsons: No, they haven't. They were not authorized.

Mr. Kremer: Just a moment. Let him answer.

A. I couldn't tell you without referring to the books.

Q. But those transfers if made on the books
20 might bring the initial payment up to \$2,000, might they not? A. Might possibly at this time.

GEORGE SLATER, sworn for defendant.

Direct-examination by Mr. Parsons:

Q. Mr. Slater, where do you live? A. Nutley,
New Jersey.

30 Q. Do you know William Brown? A. Yes, sir.

Q. Did you purchase any lots of the Shark River Hills Company? A. Yes, I did.

Q. And when did you purchase them? A. I think it was in 1925.

Q. Did you go ahead with the contract?

Mr. Kremer: I object to that, if it was 1925. I don't know what bearing it has.

40 Mr. Parsons: That is just what I am going to show, that in 1926 Brown put

George Slater—Cross

through a sale for this man that he had never seen.

Mr. Kremer: Very well. I withdraw the objection.

Q. Did Mr. Brown come to see you in 1926? A. 10
No, sir.

Q. Did you receive word or did you hear that a sale had been put through for you in 1926? A.
Yes, I got a contract.

Q. You got a contract? A. The contract was signed.

Q. Sent to you? A. Yes, sir.

Q. Did you ever sign the contract? A. No, sir.

20

CROSS-EXAMINATION by Mr. Kremer:

Q. What did you buy, Mr. Slater? A. I bought two lots in Shark River Hills, \$450 for the two lots.

Q. And when did you deal with the salesman in regard to the purchase? A. Why, I bought those two lots in May, Decoration Day.

Q. What year? A. I think it was 1925.

Q. Well, can you be sure of the year? A. Well, he can tell me, probably. 30

Q. Well, you don't know then what year it was, do you? A. It was 1925, I think. I am not sure.

Q. It might have been 1926, eh? A. No, no; it wasn't 1926.

Q. It wasn't 1926? A. No, sir.

Q. Who was the salesman who sold you? A. Mr. Brown.

Q. And how much money did you pay down?

A. I paid—in the first case I bought one lot and 40

George Slater—Cross

I paid twenty per cent. The next time I bought the other lot and I paid my percentage down.

Q. Why didn't you sign your contract? A. I signed that contract.

10 By the Court:

Q. He is talking about another. Now he said he had nothing to do with that; that was the following year? A. Yes, sir.

Q. In other words, you hadn't negotiated for that purchase at all? A. No, sir.

Q. Excepting the previous year two lots? A. I agreed to pay them and paid it at a certain time.

20 By Mr. Kremer:

Q. Mr. Slater, after you bought these lots—where were they located? A. They were located, I think, on Riverside Drive, they call it.

Q. The road near the water? A. No, they were above—from the high top they was about—from that they was down about two blocks, probably.

Q. And then after you bought them they erected a bulkhead front, didn't they? A. Yes, they did.

30 Q. And you paid on your lots? A. I paid on my lots.

Q. And they changed your lots? A. No, they didn't change my lots.

Q. And wasn't that why Mr. Brown sent you the second contract, that he gave you some other lots instead of the ones you originally contracted for? A. He wanted the contract but I wouldn't take it.

40 Q. Wouldn't take the second lots? A. No, sir.

George Slater—Re-direct
Howard Opdyke—Direct

RE-DIRECT EXAMINATION by Mr. Parsons:

Q. The books show that you purchased the first lots in May, 1925; is that right? A. Yes, sir; and Decoration Day I bought the other one. 10

Q. That is right, exactly right; May 30th.

HOWARD OPDYKE, recalled for defendant.

Direct-examination by Mr. Parsons:

Q. Mr. Opdyke, directing your attention to the one sale, and one sale only, which was the Dackerman sale, do you know who was the salesman that first interested Dackerman? A. Mr. Logan. 20

Mr. Kremer: Objected to unless he states how he knows.

Q. How do you know? A. Mr. Logan told me so.

Mr. Kremer: I object to that.

The Court: Is Logan here? 30

Q. Did Mr. Logan bring the customer to you?

A. He sent me to the customer.

Q. He sent you to the customer? A. Yes.

By the Court:

Q. That is, it was as a result of something he said to you now; so you went to Dackerman? A. Yes, sir; a lady in Elizabeth.

Q. There the sale was closed? A. Yes, sir. 40

Howard Opdyke—Cross

By Mr. Parsons:

Q. And did you close the sale with Dackerman?

A. Yes, sir.

10 Mr. Kremer: I object to that, if the Court please.

The Court: Why?

Mr. Kremer: Well, that is hearsay.

The Court: No, he closed the contract himself with Mrs. Dackerman.

CROSS-EXAMINATION by Mr. Kremer:

Q. Were you present at that transaction? A.
20 No more than we were at the conversation between Logan and this man.

The Court: Is there any question that there was a contract of sale made for the purchase of the bungalow?

Mr. Parsons: They are the ones that are putting that in and claiming that Brown made the sale.

Mr. Kremer: Yes, we have got this man's handwriting to the same.

30 Q. You closed with the contract, didn't you?

A. As far as closing the contract, yes, sir.

Q. Closing is closing, isn't it? A. No, sir, it is not in as far as I am concerned personally; as far as receiving the commission or the salesman receiving the commission.

Q. But what I mean is this. You took care of the closing even though some salesman got the credit for it? A. The salesmen always trade cus-
40 tomers. The lady was called my customer.

Q. And you kept the account of the regular

Howard Opdyke—Re-direct, Re-cross

salesman that made that particular sale? A. Yes, sir.

Q. Now I show you the fact that in your handwriting you entered up that G. G. Brown was the salesman in the Dackerman case. A. That was what I was instructed to do by Mr. Ely. That has nothing to do with the contract whatever. 10

Q. Don't volunteer anything. Just answer questions. You want this jury to understand that you changed, although you were employed by Morrissey & Walker to look out for their interests, you changed the truth in the matter and put down what was false just because Mr. Ely told you to do it? A. That is only a piece of paper, a name written on a piece of paper. 20

Q. It is only a scrap of paper? A. Yes, that is about what you might say.

RE-DIRECT EXAMINATION by Mr. Parsons:

Q. Have you got your original records there?

A. Not the contracts, but I have my record here which the commissions—who the men were supposed to earn the commission, and so forth. 30

Q. Have you the record of the Dackerman sale there? A. Yes, the contract and all.

Q. Will you refer to that?

RE-CROSS EXAMINATION by Mr. Kremer:

Q. I want to ask about that. When did you make up that record? A. This record?

Q. Yes. A. This is a book of mine since 1924, or about 1923, probably.

Q. For what purpose is it kept? A. For my 40

Thomas C. Ely—Direct

own purposes, to see what commissions I collected and what ones is paid by the customer. Dackerman, Logan was the salesman.

10 Q. When did you make that entry? A. This entry has been in here since 1926. The date I put down last night when I went home, to make sure of it. It was October 6th when the contract was signed. I told you yesterday I couldn't recall the date exactly, because I didn't put down the date of each individual contract, but I have the year here.

Defendant rests.

20

PLAINTIFF'S TESTIMONY IN REBUTTAL

THOMAS C. ELY, recalled for plaintiff.

Direct-examination by Mr. Kremer:

Q. Now, Mr. Ely, you told us yesterday you were the general sales manager in 1926? A. Yes, sir.

30 Q. There has been some testimony here by Mr. Macdonald, in regard to accounts in which credits were given to salesmen where no deduction—where it was alleged by Mr. Macdonald to be a dead account and there was no deduction made from the original account. Now will you state to the Court and jury what the practice was in that regard? A. Why, in the fall of 1926 we had had for a year—we started it with the intention of
40 getting business from old customers—when an

Thomas C. Ely—Direct

account was canceled in 1924, 1923 or 1925, as I understood it, those accounts were charged to profit and loss. Perhaps they had paid \$350 for a lot and that lot had been sold to someone else for \$700. The salesman perhaps had to make ten calls in the city, either Jersey City or Newark, or naturally had so arranged or something to get the people down to revive them in the case, because there was some good reason why the customer did not go through with his contract. It was dissatisfaction with the location, he had had some misrepresentation on the part of the salesman, the wife had bought without the husband's knowledge, or we used to get all kinds of excuses. So that in all fairness to the salesman we paid him full commission on a new sale. However, if the same salesman sold the old customer in the same year he was only to get the increase. I want you to get that straight. It was old accounts. 10 20

Q. I want the jury to get that correctly now.

A. It was old accounts that had been canceled, charged to profit and loss. They didn't buy back the same lots, they bought new lots, at much higher prices. 30

Q. What would happen to the commission? A. They got the commission in full if it was a different salesman.

Q. If it was a different salesman? A. If it was the same lots it would be quite a different proposition.

Q. As to these cases in which there was a dead account and a different salesman sold different lots to that customer who had a dead account, did you or did you not allow full credit for the full purchase price? A. Absolutely. 40

Thomas C. Ely—Direct

Q. Then is it a fact that in these cases that Mr. Macdonald has referred to, where there was a different salesman and he said a dead account was not deducted, should it have been deducted? A. No.

10 Q. Should the salesman Brown receive credit for those sales? A. Absolutely.

Q. Now what was the fact in regard to transfers? A. If an account was alive, for instance, if a man bought a \$500 lot in 1924 and he was dissatisfied with it, and the salesman induced him to buy \$2,000 worth of lots, he was paid on the increase only, that is, \$1,500.

20 Q. And what did you do in regard to credits for the property originally sold? A. Well, that was simply canceled and transferred to the new account, all of it.

The Court: Remember he has gone over a good deal of this on his direct.

Mr. Kremer: I will shorten it then.

Q. The agent got credit for the increase? A. That is all.

30 Q. Now you heard Mr. Walker testify a few minutes ago. At the meeting which was held at 320 Cookman Avenue, where this proposition of the prize was first made known, did Mr. Walker say whether or not the money would be paid by the Shark River Hills Company? A. No, he did not.

Q. Did he say who would pay it? A. Just said it would be paid.

40 Q. And did you make known to the salesmen —to Brown—whether he would get his money

Thomas C. Ely—Direct
Motion for the Direction of a Verdict

from Morrisey & Walker or from Shark River Hills? A. No, I didn't.

Q. And at the meeting at the Berkeley-Carteret did Mr. Walker then say whether or not the money would be paid by the Shark River Hills Company or Morrisey & Walker? A. No, they were always paid by Morrisey & Walker anyway. 10

Q. In the previous year who paid the prize money? A. Morrisey & Walker.

Q. Do you know that of your own knowledge? A. I absolutely do.

Q. Did you see the checks? A. I did. I made out the statements myself.

Q. They were Morrisey & Walker's checks? A. Yes. 20

No cross-examination.

Both sides rest.

MOTION FOR DIRECTION

Mr. Parsons: If the Court please, I now wish to move for the direction of a verdict in favor of the defendant Morrisey & Walker upon the grounds on which I made the motion for a nonsuit, namely: 30

1. That this is a suit for compensation for the sale of real estate; that it now appears affirmatively in the case by an offer of a deed in evidence that a portion of the real estate which the plaintiff is claiming commission upon for the compensation for sale, is real estate owned by this 40

Motion for the Direction of a Verdict

defendant, and that there has been no endeavor or any attempt to prove, nor is there a scintilla of evidence before the Court showing that the Statute of Frauds has been complied with.

10 2. I wish to move for the direction of a verdict upon the ground upon which the motion for non-suit was made, basing it upon the additional evidence in the case, both of Mr. Schock, one of the directors of the Shark River Hills Company, and of Mr. Walker, corroborating the fact which was shown in the plaintiff's own case, that there was no corporate authority on the part of this defendant corporation to make any such offer. On the
20 contrary, the only testimony of any kind whatsoever in the case at the present time is that the offer in this case was to be made by the Shark River Hills Company for the sale of their lots and their lands alone.

3. I now further move for the direction of a verdict on the ground that now that the defendant's case is in it appears affirmatively, as I understand the law, for the Court to decide, that
30 the plaintiff has not consummated sales in the amount of \$200,000. The testimony is before the Court—there has been no endeavor to contradict it—in the first place of the Katz sale. The sales arrangement, which was in writing, between Morrisey & Walker and the salesman provides that no sale is termed consummated until twenty per cent is paid in cash. Mrs. Katz has testified, the public accountants have testified, that even at the
40 present time twenty per cent has not been paid in cash. Therefore that sale should go off.

Motion for the Direction of a Verdict

There is definite testimony that there has been a duplication of sales in the amount of \$6,400. This added to the \$10,000—and there is no evidence to contradict it; it is from the books that there is this duplication—brings the amount below the \$200,000. And I submit this is a question of law for the Court to determine and not a question for the jury to pass upon. 10

There is in evidence in this case a written contract between the salesmen. This written contract is explicit and precise and provides that no sale is consummated until twenty per cent of the purchase price is paid. And there is definite testimony before the Court, uncontradicted testimony, that more than enough sales were lacking in this amount to bring it below that sum. Therefore on those three grounds I move for a direction. 20

The Court: I incline to the view in this case that this motion should be denied for the reason that I am unable to follow counsel that the staff of salesmen are to be regarded as agents making sales of land within the purview of the Statute of Frauds. I rather incline to the view that the question is rather whether or not these men were not really employees of the defendant Morrisey & Walker Company, and that their compensation was based upon the amount of sales made by them under the terms of the contract plus the rate indicated therein, and therefore that their relation was not that of an owner of land dealing with a real estate agent, as contemplated by the provision of the statute. 30 40

Motion for the Direction of a Verdict

I am further of the opinion that in regard to the prize offered, which is really the basis of attempted recovery in this suit, it is subject to such contradictory testimony that the Court cannot accept as a finality that offered by the
10 defendant alone, because the issues of fact are clear. While an allegation is made that no maximum sales of \$200,000 were made by the plaintiff in this particular suit, nevertheless the allegations of the defense are denied with regard to such maximum sale; and I think, therefore, it becomes a controverted question of fact for the determination of the jury and not a question of law for the Court.

20 With regard to the question raised as to whether or not the offer was made by the defendant Morrisey & Walker Company or merely as an agent for the Shark River Hills Company, I incline to the view that it is an issue of fact whether that offer was made as an original assumption of responsibility for its payment on the part of the Morrisey & Walker Company or
30 merely as agent for the Shark River Hills Company. In other words, I am inclined to submit that question to the jury to determine. If they find that the offer was made by the Morrisey & Walker Company, not as an assumption of original responsibility for its payment by the defendant, but merely as agent, then of course the jury would have to say that there could be no recovery thereof, if they find it due at all under the rules the Court will give them.

40 If they find as a fact that the offer was made by the defendant as agent for the Shark River

Charge of the Court

Hills Company, then necessarily there can be no recovery thereof.

In other words, on the three questions raised, I decline to rule in favor of the defendant company because I am of the opinion that they are not questions of law but questions of fact for the jury. You may have an exception. 10

(Objection noted for defendant as ground of appeal.)

CHARGE OF THE COURT.

20

Ladies and gentlemen of the jury: This case perhaps is not as complicated as it would seem by reason of the time that has been consumed and the various items of evidence and the exhibits that have been offered would seem to indicate. As I see the case the issues are rather simple. Nevertheless, in dividing it into two subjects, as I shall, of course you necessarily are expected to examine all of the evidence that has been offered to you, plus the exhibits which have been admitted as relevant and material. 30

Now I may say to you at the outset that I had occasion to rule on a number of motions made by counsel for the defendant company, that is to say, the company that is now left in the case. As, for example, I have ruled that the Shark River Hills Company should be eliminated from the case at the close of the plaintiff's testimony and evidence, for the reason that nothing had then 40

Charge of the Court

been shown and the burden was upon the plaintiff to show that that company, namely, the Shark River Hills Company, participated in such a way as to make it liable in the offer or contract which forms the basis of this suit; likewise other motions made at the close of the plaintiff's case on different legal grounds which counsel for the defendant Morrisey and Walker Company suggested; also, I may say, the motion made after the entire case was in, in each instance was ruled upon by me not because I had any opinion to express on the facts but merely because of my conception of the rules of law applicable. And therefore you will understand in disposing of those motions adversely to the defendant company it is in no way to prejudice or be an indication to you that you are to decide this case against the defendant merely because of the ruling of the Court. And therefore I may add that the criticism of counsel for the plaintiff in the circumstances as to the number of motions made by counsel for the defendant company is not to prejudice you unfairly in comprehensively examining all of the evidence in the case and observing the rules of law that the Court will give you in rendering a verdict.

Now as a matter of fact it would seem that the case might conveniently be divided into two parts: first, the inquiry as to whether or not a contract of the nature claimed by the plaintiff was actually made by the defendant. That is the first inquiry that will arise in your deliberations, as I see the case, and that you will have to pass upon.

Charge of the Court

The plaintiff here claims that the defendant company entered into an agreement with him whereby, if he organized a staff of six or seven men also in the employ of the defendant company, as he was, as salesmen and through their activity succeeded in negotiating and selling lots of the Shark River Company, plus land belonging to the defendant Morrisey & Walker Company, in the sale of which lands the latter company was either directly interested or as sales agent under a general contract with the Shark River Hills Company—I say if such a contract was made whereby lands or lots to the value of \$200,000 were sold through the direct efforts of the plaintiff and his associates to whom reference has been made, then that he was to receive \$1,000 as prize money. I say that your inquiry first will be to ascertain whether any such contract was made.

Now the primary rule will be that the plaintiff carries the burden of satisfying you as to that fact; because before you can hold the defendant company you must find as a fact, under the greater weight of credible legal evidence, that the minds of the company, through its representative in this case it happens to have been Mr. Walker—and the plaintiff met on the proposition that if sales to the maximum amount indicated were made then that the defendant company would pay the plaintiff \$1,000.

Now I charge you that such a contract could have been made in the law. There was nothing illegal about it. It was in the nature of a bonus, it may be said, as an inducement to create

Charge of the Court

renewed activity or extra activity in the sale of the lots in question in which the defendant company was directly interested as general sales agent. So I repeat, there was nothing illegal about the contract. The question is whether it
10 was made. And therefore the plaintiff carries the burden of satisfying you that such a contract was made.

Now in the second place and as a corollary to that you naturally inquire, if such a contract was made, by whom it was made. Was it made by the Morrisey & Walker Company, through Mr. Walker, who was secretary and treasurer thereof,
20 for the advantage and benefit of the Morrisey & Walker Company? In other words, was it an original undertaking of the Morrisey & Walker Company or was it merely an undertaking by that company as the agent for the Shark River Hills Company? Because if after all it should appear that the Morrisey & Walker Company through Mr. Walker, or indeed, Mr. Walker as an individual, was merely announcing to the plaintiff and his associates that the prize was being offered by
30 the Shark River Hills Company, then of course you could not hold this defendant. But if you find after an examination of all of the testimony that that was an original undertaking on the part of the Morrisey & Walker Company, and you find it to have been made and the terms complied with by the plaintiff, then of course there could be a recovery.

So that I say the initial inquiry will be as to
40 whether the contract was made as claimed by the

Charge of the Court

plaintiff, whether he has carried the burden of so satisfying you; and in the second place as to whether it was made by the Morrissey & Walker Company in its own behalf or merely as general agent and spokesman, or Walker was merely speaking for the Shark River Hills corporation and not for the Morrissey & Walker Company. If you should decide that phase of the case in favor of the plaintiff, then of course the second question arises, and that is whether the plaintiff complied with the terms of the contract; because if he did not, he cannot recover, no matter who made the contract. And to entitle him to recover the amount of money involved as a bonus, or claimed so to be, he must satisfy you again under the greater weight of credible legal evidence that he and his team sold \$200,000 worth of lots as contemplated by the alleged agreement.

Now that is disputed and rather seriously disputed, I may say, on the part of the defendant. Witnesses in its behalf, including Mr. Walker, insist that as a matter of fact the plaintiff and his team have not sold the maximum amount of lots required; and they indicate to you, or at least claim, that in the account as a whole will be found duplications of sales, contracts alleged but never consummated, certain phases of agency activity on the part of the plaintiff and his team which had no relation to valid sales at all. And therefore it becomes your duty to examine the account as it has been presented here or as covered by the evidence, whether of a written or oral character, to ascertain whether there was a valid maximum sale of \$200,000 of lots required

Charge of the Court

and essential before there could be any recovery of prize money.

10 If you find that a contract as alleged by the plaintiff was made but there was not the maximum sale of the character indicated or claimed as a part of the contract, then of course there can be no recovery. And again I say the plaintiff carries the burden of so satisfying you by credible legal evidence that the terms of this contract were met by him and its purpose carried out.

20 Consequently I am inclined to think that the two simple issues are sufficiently emphasized to indicate to you just what ground your deliberations will cover and what you have to decide. Was the contract made as alleged? Was it made by the Morrisey & Walker Company for itself or merely as agent of the Shark River Hills corporation? If it was made and by the Morrisey & Walker Company, through one of its officers, for its own benefit, then did the plaintiff and his team comply with the terms thereof with regard to maximum sales of a valid character?

30 Of course it may well be that when you come to examine some of these sales, such as the Katz sale, if you find as a fact that the Morrisey & Walker Company ratified that sale, even though its terms were contrary to the general sales contract existing between the plaintiff and that company, I nevertheless am of the opinion, and I so charge, that the Morrisey & Walker Company would not be permitted to take advantage of the
40 Katz contract, even though irregularly made, and then deny plaintiff his commissions; because they

Charge of the Court

cannot take a benefit on something in its behalf by its agent or employee and then deny compensation to that agent or employee for his work in securing it. That is the simple proposition of law that I think is applicable to that situation.

10

However, you will not stop with the Katz contract, of course, because there are other criticisms of the account and you will have to go through it, ladies and gentlemen, in order to ascertain whether the maximum sales were made as claimed. I am not entirely clear, and ought so to indicate to you, whether or not under the terms of the contract the maximum sale was to include that ten per cent bonus under the salesman's contract with Morrisey & Walker. It seems not to have been debated or argued by counsel. And therefore I am going to assume that the ten per cent bonus was to be included in the sales in order to ascertain the maximum. The claim is made here by the plaintiff, as a matter of fact, that \$212,000 worth of lots were sold, but as I apprehend, included was the bonus of ten per cent. But however that may be, you may find when you come to examine the situation that that bears no relation at all to the terms of the contract which have been referred to as the prize money contract; and I am leaving that to you to discover as a fact with regard thereto. The ten per cent bonus, of course, was in the nature of a commission and apparently was paid, and as I understand the testimony, as I now recall it, the commission was paid. But whether it was paid on \$212,000 is a subject of examination by you. I understand, in listening to the argument of counsel for the

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Charge of the Court

defendant company, that that is questioned. But it will be of interest to ascertain whether the Morrissey & Walker Company paid commissions under the sales contract to the plaintiff and his team on the basis of \$212,000 as total sales. Of course
10 that would tend to indicate, if they did pay any such commissions, that such sales had been made and therefore that the maximum had been exceeded. But however that may be, you will understand the issue.

The case is left with you with the injunction that you first ascertain whether the contract was made, its nature, who made it or in whose behalf
20 it was made; and then, if you resolve those questions in favor of the plaintiff and against the defendant company, then whether the terms thereof were complied with by the plaintiff. Of course if you find that this contract was made not by Morrissey & Walker as an original undertaking but merely as agent for the Shark River Hills corporation, then your verdict would be in favor of the defendant, necessarily. But if you find that the Morrissey & Walker Company made the
30 contract in its own behalf as an original undertaking and that the terms thereof were performed and complied with by the plaintiff, then of course there can be a recovery. Bear in mind that the plaintiff carries the burden of satisfying you of the issues affirmed by him with regard to the alleged making of the contract, with whom it was made and whether or not he and his team complied with the terms thereof.

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Charge of the Court

I am requested to charge that if Mr. Walker, as representing his company at that time, was really speaking as the agent of the Shark River Hills Company rather than his own company, that therefore it was his duty to bring home to the plaintiff and his team that fact. I so charge you, because I am leaving it to the jury to say whether under all of the evidence in the case Walker was acting for his own company in an original undertaking or whether at the time he was acting as agent for the Shark River Hills Company; and it would make no difference whether the plaintiff knew that or not, for the reason that it is conceivable and we frequently have the situation where a person such as the plaintiff here may be acting or dealing with an agent without knowing it, and upon discovery, of course, he can sue the undisclosed principal. And therefore the rule is that if you deal with a person thinking he is a principal there is no question you can sue him; but upon the discovery of his agency then you suspend your operation and sue the disclosed principal whom you discovered then for the first time.

With reference to that Katz sale of course claim is made by the defendant that twenty per cent has not yet been paid by Mrs. Katz, and therefore the agent would not be entitled to his commission. Of course I do not mean to withdraw from your consideration all the features of that Katz transaction. So you will bear that in mind.

Defendant's Exceptions

DEFENDANT'S EXCEPTIONS

10 Mr. Parsons: The defendant prays an exception to that portion of the Court's charge wherein the Court stated that it was the duty of the jury to determine whether the minds of Walker and the plaintiff met; defendant claiming that it was the duty of the plaintiff to prove that it was the act of the corporation and that the corporate authority should have been shown, either that Walker is the authorized agent of the corporation to do it or that it was done by a duly ratified act of the Morrissey & Walker Company.

20 2. I further pray an exception to that portion of the Court's charge wherein the Court stated that if the company ratified the Katz sale then it would not be permitted to take advantage of it; the defendant contending that the correction of the Court to the jury of this portion of the charge did not embrace as wide a statement as originally made to the jury.

30 3. The defendant further excepts to that portion of the Court's charge wherein the Court stated to the jury that if there was testimony that the defendant had paid to the plaintiff the sum of \$212,000, or commissions upon that sum, that that was an indication that he was entitled to a bonus; the contention being that under the testimony the jury would be entitled to the benefit of the testimony of both the accountant and Mr. Walker that such sum was paid before any audit of the accounts was made.

40 (After the jury returned with a verdict it was further instructed by the Court as follows:)

Verdict

I am inclined to think, ladies and gentlemen, that the plaintiff would be entitled to interest on that amount, and the amount is alleged to have been due on December 5, 1926, as I recall. In the circumstances I think you had better figure the interest. 10

A Juror: Your Honor, we discussed that. We did not know whether we could or not, as there was only a thousand dollars—

The Court: I guess I had better leave it alone. They should have asked—properly speaking, there should have been an amendment asked for by the plaintiff and he has not done it.

Another Juror: We were in favor of interest but we did not have anything to make that on. 20

The Court: Counsel discussed it with me and insisted that interest should be allowed. I think I will allow the amendment to the plaintiff anyway, translating his request to me into an amendment for interest, and allowing interest on it from December 15, 1926, to date. You may go back and do it. If there is any error in that, I had better have it that way than the other way.

(The jury retire and again return.) 30

The Court: Now before this verdict is received—Judge Kremer, I have allowed this jury to go back and consider the question of interest, and you must amend your complaint to cover it, because you insisted that you were entitled to recover the interest. You did not amend your complaint. Now I will allow you an order and you may send me an amendment providing for that interest. 40

(The jury return a verdict for \$1,097.40.)

EXHIBIT P-1.**SALESMAN'S AGREEMENT**

EMPLOYMENT AGREEMENT, Between Shark River Hills Company, Inc., Morrisey & Walker, Inc., Body Corporate, hereinafter referred to as principal:
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AND W. Middletown Brown of the address Asbury Park, N. J. hereinafter referred to as salesman.

Whereas, the principal above mentioned desires to employ the salesman above mentioned,

20 And whereas said employment is of mutual advantage and consideration each to the other,

Now, THEREFORE in consideration of the premises and all the mutual covenants herein in their entirety, the parties do hereby agree as follows, viz:

1. Salesman is employed by the principal for the term of from April 1st, 1926 to November 1st,
30 1926, to sell property on the Shark River Hills Company Tract at Asbury Park, New Jersey, or such other property as the principal may designate.

2. The compensation for the salesman for making sales is as follows, viz:

A commission of 8 per cent on all sales made
40 and consummated by said salesman and if the

Exhibit P-1

total sales during the life of this contract exceed the sum of \$25,000 then the commission will be 9 per cent on all sales made during contract period, and should the total sales during the life of this contract equal or exceed a total sum of \$50,000.00 then the commission will be 10 per cent on all sales, made during the contract period, and such additional 1 per cent or 2 per cent as the same may be will be settled at the close of contract period. 10

An additional bonus will also be paid if the salesman makes and consummates sales exceeding the total of \$50,000.00 within the contract period, which bonus will be \$100.00 for each \$10,000.00 of sales, over and above a total sale of \$50,000.00. 20

3. A commission is not considered earned or due until 20 per cent of the purchase price has been paid to the principal, and contract signed by buyer. Statements of commissions will be made monthly and settlement made monthly.

4. The salesman agrees to devote his entire time to work herein mentioned, and not to act as agent, salesman or broker for any other person or property and have no other employment and in consideration of the aforesaid, and of the further valuable consideration of securing connections with the principal and receiving the opportunity of learning their system and practice with them, and having information regarding their clientele, the salesman also agrees not to engage in the business of broker, salesman or agent for himself or 30 40

Exhibit P-1

anyone else in selling real estate or to be employed for such purpose either directly or indirectly for the period of one year after November 1, 1926, within a radius to five miles of the
10 Keansburg office of Morrissey & Walker, Inc., of Keansburg, New Jersey, and the Asbury Park Office of the Principal.

By engaging in the said real estate business within a radius of five miles of the said Keansburg Office and the said Asbury Park Office, it is understood that this not only means operating from an established office in the said territory but
20 selling to customers within said territory or making sales of any land or property within said territory regardless of where the customers may be.

5. All sale contracts to be subjected to acceptance by officers of principal.

6. Salesman is to secure at his own expense a salesman license from the New Jersey Real Estate Commission as salesman for the Shark River
30 Hills Company, Inc., Body Corporate, and should the salesman fail to renew the said license or should the same be revoked, then this contract is at once terminated. Salesman is also to secure automobile liability policy on any automobile used by salesman in performance of his work, said policy to be written to protect Morrissey & Walker, Inc. which is satisfactory to the principal for the sum of \$5,000.00, which is to be secured at the
40 expense of the salesman. Salesman is to abide

Exhibit P-1

by all rules of the New Jersey Real Estate Commission and all laws of the State of New Jersey and to conduct himself in a polite and proper manner and abide by all rules of the principal.

7. The principal shall not be responsible for any expenses of any sort, kind or description incurred by the salesman unless there is an agreement in writing contrary to this proviso, it being understood that the salesman is to bear all of his expenses unless the principal expressly stipulates in writing to the contrary. 10

8. Violation by salesman of any of the provisions herein to be sufficient cause for dismissal, but such dismissal not to release the salesman of any of the obligations hereof nor liability for the violation thereof. It is understood that at the termination of this contract, either by expiration of time or dismissal that the salesman will turn over all receipts, books, literature, etc., to the principal and these shall be delivered to the office of the principal as all of said property is recognized as belonging to the principal. 20

9. It is understood that should this contract be terminated by the principal dismissing the salesman or should the salesman violate any of the agreements herein, then in that case the right to any bonus of any kind or nature will be forfeited and the right to secure the additional 1 per cent or 2 per cent above set forth will also be forfeited and the commission in such case shall only be considered 8 per cent and any money that may 30 40

Exhibit P-1

be claimed to be due to the salesman in event of such dismissal or termination hereof, may be held by the principal at its option in order to determine whether the same shall be offset by any claim for damage due the principal from the agent by reason of the violation of the conditions hereof. In case of misrepresentation by salesman and the Shark River Hills Company returns buyer's money paid, salesman shall return any commission paid to him on such sale or sales.

Dated April 18, 1926.

SHARK RIVER HILLS COMPANY, INC.
MORRISEY & WALKER, INC., Agents
by Thomas C. Ely

Salesman Walter M. Brown (L. S.)

Note: Salesman will be given an opportunity to secure contracts for the erection of new buildings and to sell erected buildings, for account of the Morrisey & Walker Construction Company, Inc. at a commission of 5 per cent.

EXHIBIT P-2.

COMMISSION STATEMENT

MORRISEY & WALKER, INC.,
Asbury Park, N. J.

Shark River Hills

Salesman W. M. Brown December 15, 1926 10

Purchaser	Lot	Block	Sale Price	Amt Pd commission	Com- mis- sion due	
Lund, E.	73-74	43A	1250 00	4%	50 00	
Purdy, E. W.	37	24	350 00	8%	28 00	
Staegor, J.	21-2-3	39	1800 00	8%	144 00	
Katz, E.	24 to 27	46	10000 00	8%	800 00	20
Palmer, E. R.	20	13C	550	8%	44 00	
Feehan, G.	1236-7	D	600 00	8%	48 00	
					<hr/>	
					\$1114 00	
Received on account					250 00	
					<hr/>	
					\$ 864 00	
Total gross for year 1926			\$100,000.00			
10% of teams business			10,250.00			
					<hr/>	
					\$110,250.00 @2%	2250 00
\$100.00 for each 10,000.00 over \$50,000.00					600 00	
					<hr/>	
Commission Due					\$3714 00	

This statement is correct and I hereby acknowledge receipt of payment as stated above.

(Signed) WALTER M. BROWN 40

EXHIBIT P-3.

THIS AGREEMENT, made this Sixteenth day of June, A. D. Nineteen Hundred and twenty-three.

BY AND BETWEEN SHARK RIVER HILLS COMPANY,
body corporate of New Jersey, party of the first
10 part,

and MORRISEY & WALKER, INC., body corporate
of the State of New Jersey, party of the second
part,

WITNESSETH, WHEREAS the party of the first
part is the owner of a large tract of land known
as Shark River Hills, in the township of Neptune,
Monmouth County, New Jersey, which it desires
to develop and sell on the market, and the party
20 of the second part is engaged in the business of
selling real estate under such developments, and
the party of the first part desires that the party
of the second part undertake the selling of the
said property and marketing the same, which the
party of the second part is willing to do.

NOW THEREFORE in consideration of one dollar
each to the other paid, and of the aforesaid, and
of the mutual covenants herein to be performed
30 by the respective parties hereto the parties hereto
do hereby agree as follows: viz:

1. It is agreed that the party of the first part
does hereby constitute the party of the second
part as its exclusive selling agent for said prop-
erty for the period from July 1, 1923, to July 1,
1926, unless extended for a further term by mu-
tual agreement.

40 2. The party of the second part agrees to take
charge of the said tract of land, render their judg-

Exhibit P-3

ment and experience in laying the same out in blocks and lots and supervise the mapping of same which is to be done by the party of the first part, and to work out the plans and scheme for advertising the property and to attend to the execution of same and the party of the first part is to pay the expenses of advertising as hereinafter provided. 10

3. The party of the second part is to furnish the selling organization and all salesmen and pay for the same and are to receive as their compensation for selling said property and for their entire work in connection with said property the sum of twenty per cent of the gross sales made upon said tract during the term of this contract, to be paid and settled for monthly and half of all moneys paid in on each sale is to go to the party of the second part until the 20% on that sale has been paid, and also to receive one-half of all forfeited deposits, same not to exceed 20% of any individual sale. The party of the second part are to have the authority to sign contracts for sales of lots as agents for the party of the first part, and upon payment in full of the purchase price of each lot the party of the first part will deliver a warranty deed to the purchaser for lots, said deeds and contracts to contain the restrictions as agreed upon between the parties hereto. 20 30

4. The party of the first part agree to rent and furnish an office in the best business location in Asbury Park at their expense and at their expense to furnish office equipment, stenographer 40

Exhibit P-3

and also furnish automobiles to get from office to property and also transportation.

5. The party of the first part is also to furnish an office on the property, which may be a model
10 bungalow. And also to furnish office in Newark in case one is desired, providing the same shall not exceed \$25.00 per month.

6. The party of the first part is to spend not over \$15,000.00 for advertising each year, which is to be expended by the party of the second part for billboards, publicity, circulars, and advertising novelties and such other methods as may be approved of by the party of the second part.
20

7. The party of the first part is to build a good gravelled road through the entire property for the "key road" or "selling road" same to be constructed at once, and are to lay out side streets so as to be passable.

8. The party of the first part is to construct a bridge at place heretofore designated by them and to lay water mains through the property, as and when required, and to do all work necessary to
30 put the property into physical condition to be put upon the market and to build a small community building for canoe club, with dancing pavillion and bathing pier to be erected at a cost, not to exceed \$4,000.

9. It is agreed that the selling prices of Section D. are to be determined by the party of the second part, but such prices are not to average less than
40 \$150 per lot (25 by 100) figured on the yearly sales, and the terms of sale are to be 10% down;

Exhibit P-3

10% in thirty days, and 2½% monthly, together with interest on contract, and 5% discount for cash. The prices on all other lots are to be fixed jointly by the parties hereto by mutual agreement.

10

IN WITNESS WHEREOF the parties hereto have caused these presents to be executed by the properly authorized officers respectively and their respective corporate seals to be hereto affixed, the day and year first above written.

SHARK RIVER HILLS COMPANY,
By Frank Durand,
Vice-president. 20

MORRISEY & WALKER, INC.,
By Charles W. Morrisey.

Attest:
Geo. W. Pittenger,
Secretary.

Attest:
Samuel D. Walker,
Secretary. 30

40

Exhibit P-3

In consideration of One Dollar and other considerations, it is hereby mutually agreed by and between the parties to the within contract, that the term of said contract shall be extended one year, namely, to July 1st, 1927.

10

Dated May 12th, 1925.

SHARK RIVER HILLS COMPANY,
By Joseph McDermott,
President.

Attest:

Geo. W. Pittinger,

Secy.

20 (Seal)

In consideration of One Dollar and other considerations, it is hereby mutually agreed by and between the parties to the within contract that the term of said contract shall be extended from July 1st, 1927 to January 1st, 1929.

Dated: November 16th, 1926.

30

MORRISEY & WALKER, INC.,
By Charles W. Morrisey,
Pres.

Attest:

Samuel D. Walker,

Secty.

(Seal)

40

Exhibit P-3

Endorsed on back:

AGREEMENT.

BETWEEN

SHARK RIVER HILLS COMPANY
Body corporate

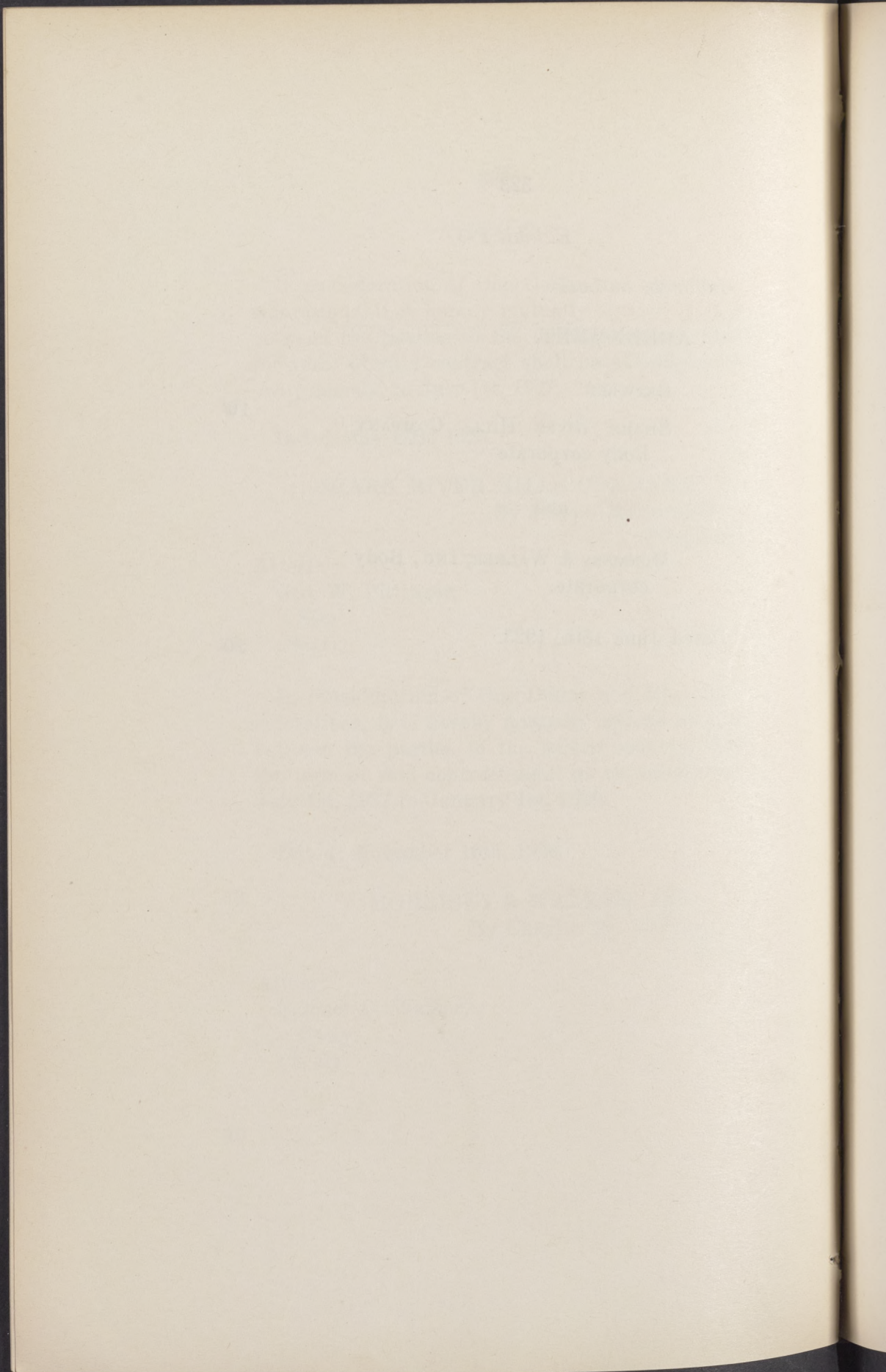
10

and

MORRISEY & WALKER, INC., Body
corporate.

Dated June 16th, 1923.

20



New Jersey Court of Errors and Appeals

WALTER M. BROWN,

Plaintiff-Respondent,

vs.

MORRISEY & WALKER, INC., body
corporate,

Defendant-Appellant.

Action at Law

On Appeal
from Supreme
Court

BRIEF OF THE APPELLANT.

STATEMENT.

This is an appeal from a judgment rendered in the Monmouth Circuit of the Supreme Court in favor of Brown and against Morrisey & Walker.

In April, 1926, Brown became a real estate salesman for Morrisey & Walker, who were sales agents for Shark River Hills and also extensive owners of land in their own names. The relation of the salesman was created by a written contract signed by both parties, which contract duly laid down the regulations governing the rights of the respective parties.

Brown then alleged that in May, 1926, Morrisey & Walker, by verbal agreement, offered to pay him an additional commission or bonus of

\$1,000, if he, Brown, would head a team of salesmen and he and his salesmen should effect sales totaling \$200,000. Brown claimed that he effected such sales. The defendant asserted that he did not.

The written contract creating the relation of salesman provided specifically that a sale should only be considered consummated, so far as a salesman should have a right to his commission, when 20% of the purchase price had been paid. Brown offered proof of numerous sales, many of which admittedly did not comply with the provisions of the agreement. Brown also offered proof that Morrissey & Walker in turn were sales managers of the Shark River Hills Company under a written contract, and that, further, they had received their commissions from the Shark River Hills Company upon the sales made by him and his associates.

In addition to this, Brown offered evidence of sales of land made by himself and his associates which belonged to Morrissey & Walker solely, and added these sales into the aggregate to entitle him to his commission.

From the judgment rendered against the defendant this appeal is taken.

The grounds of appeal filed in this case are eleven in number. These can be separated into three classifications as follows:

- (a) The admission of illegal and irrelevant evidence.
- (b) The oral contract upon which Brown relied was in contravention of the Statute of Frauds and therefore entirely void.

- (c) The Court erroneously charged the jury that if Morrisey & Walker had ratified any sales, then Brown would be entitled to claim credit for such sales.

The evidence given in the case is voluminous and extensive. No attempt will be made to digest this evidence. Very briefly, the appellant submits that the judgment was erroneous because the evidence admitted concerning the relations between the appellant and the Shark River Hills Company was illegal, improper and highly prejudicial; because there was no binding legal contract between the parties whatsoever; and because the Court erroneously submitted the question of ratification to the jury.

ARGUMENT.

I.

The Trial Court erred in admitting testimony concerning transactions between the defendant, Morrisey & Walker, and the Shark River Hills Company.

Brown, to show that he was entitled to the extra commission of \$1,000 endeavored to prove that he had consummated sales of \$200,000 worth of real estate. Defendant insisted that he had not. Most of the testimony at the trial was that given upon this point. The defendant pointed out sale after sale which Brown claimed as a credit to himself which had not been completed in accordance with the provisions of the Salesman Contract.

This testimony is set forth at pages 92 to 98, pages 131 to 167, and pages 223 to 230.

The total amount of sales which were defective for which Brown claimed credit was computed by a public accountant as follows:

“Q. And can you give us the total amount of sales of those defects? A. \$41,250.” (S. C. p. 330, ll. 8-10.)

This point had been fully covered in the opening. The testimony developed this point and showed that whereas the Salesman's Contract provided that no sale could be consummated or commission earned thereon until 20% of the purchase price had been paid in, Brown, as a practice, had listed sales upon which a much smaller sum had been paid in and even at the time of the trial, upon many of these sales, the 20% had not yet been paid in.

Brown, to offset this testimony of defective sales, then attempted to prove that the defendant Morrisey & Walker had collected, under its agreement, commission upon these very sales from the Shark River Hills Company. Two questions were asked, each followed by a general line of proof to the effect that Morrisey & Walker had received commissions upon these sales from the Shark River Hills Company. These questions were:

“Q. Can you tell us whether or not Morrisey & Walker received from the Shark River Hills Company their commission on the sale of the land by Brown and his team?” (S. C. p. 42.)

“Q. In 1926 can you tell us whether or not the Shark River Hills Company paid the Morrisey & Walker Company any commission for sales in Shark River Hills?” (S. C. p. 119.)

To both of these questions objections were entered and exceptions taken to the admission of the testimony.

It is to be remembered, that the plaintiff in his dealings with Morrissey & Walker was governed by a written contract. Morrissey & Walker in its turn, in its dealings with the Shark River Hills Company was also governed by a written contract.

Brown's contract appears at page 312. The period of the contract runs from April 1, 1926, to November 1, 1926. A graduated scale of commission is set forth in this contract. There then appears this clause:

“A commission is not considered earned or due until 20% of the purchase price has been paid to the principal and contract signed by the buyer.”

The contract between Morrissey & Walker and Shark River Hills Company appears at page 318. The term of their contract is from April 1, 1923, to July 1, 1926, unless further extended. The terms of the sale are to be 10% down, 10% in thirty days and monthly payments thereafter. Morrissey & Walker is to receive one-half of the down payments until 20% of the total sale price has been paid them.

Under the terms of this agreement between Morrissey & Walker and the Shark River Hills Company, it is obvious that Morrissey & Walker could rightfully claim commissions upon the sale of lands where Brown and other salesmen would have absolutely no claim whatsoever. Brown could make no claim nor could any of his salesmen, for commissions until 20% of the purchase

price had been paid in. Morrisey & Walker were entitled, under their agreement, to one-half of the down payment of 10% and of the installment payments until they received their total commission.

There could be absolutely no relevancy whatsoever between the payment of commission to Morrisey & Walker and Brown's right to commissions. Entirely different contracts regulated the rights of the parties. Different facts must appear as between the respective parties. A sum total of \$41,000 of defective sales was a large amount. This fact, if taken as true, prohibited Brown from pressing his claim in this suit. To permit the jury to learn that Morrisey & Walker, the defendant, under an entirely different contract which imposed upon them entirely different obligations, had collected commissions upon the disputed sales, could not but leave an erroneous impression with the jury that these sales had been approved.

There was no obligation upon Brown whatsoever after he had collected his 20% to perfect a sale. Morrisey & Walker, however, were obligated upon the collection of 10% to proceed in the collection of the balance. Morrisey & Walker were entitled to their payments when 10% was in, Brown only when 20% was in.

It is obvious and self-evident, from an inspection of these two contracts, that Brown was governed in his claim for commission by entirely different regulations than Morrisey & Walker. The contract between Morrisey & Walker and Shark River Hills Company could have no bearing upon the contract between Brown and Morrisey & Walker. To permit testimony that Morrisey & Walker had received commission was to

open a vast new field of evidence. During the summer over one thousand sales were effected. To properly explain the testimony that Morrisey & Walker had received their commission it would be necessary to go into each one of these sales.

Admission of testimony that Morrisey & Walker had received their commission was distinctly prejudicial to the defendant, who claimed that Brown had not become entitled to his commission. To permit testimony that Morrisey & Walker had received their commission naturally lead the jury to believe that all these sales were consummated by Brown. A reading of the testimony shows that such was not the fact.

It may generally be said that the relevancy of testimony is governed by a logical connection between the testimony offered and the facts to be proved. To permit any testimony to be offered as to relations between Shark River Hills and Morrisey & Walker there must be some logical connection between the acts of these two parties which would bear upon the rights of Brown. There must be some logical connection between a payment to Morrisey & Walker by the Shark River Hills Company and a payment due Brown from Morrisey & Walker.

Brown, however, was governed by an entirely different contract. His rights were entirely different. An entirely different set of rules and regulations applied to his rights than to Morrisey & Walker's rights.

In 10 *R. C. L.* 926, it is said:

“Evidence, however, must relate to and be connected with the transaction it is offered to elucidate and this connection must

be immediate and not remote or far fetched
 * * * This rule excludes all evidence
 of collateral facts or those which are in-
 capable of affording any reasonable pre-
 sumption or inference as to the principal
 fact or matter in dispute; and the reason
 is subject to well recognized exceptions
*that such evidence tends to draw away the
 minds of the jurors from the point in is-
 sue, and to excite prejudice and mislead
 them."*

This statement is directly applicable to the question raised in the instant case. There can be no doubt that the admission of proof that Morrissey & Walker had received commissions from Shark River Hills Company instantly caused the jury to forget that the one issue in the case for them to decide was Brown's actual performance of his contract. When this proof was admitted, so far as the jury were concerned, the complexion of the whole matter changed. The reasoning naturally to be followed was that Morrissey & Walker, who had been paid, should, therefore, pay their salesmen. There could be no opportunity for the defendant to explain the payment by the Shark River Hills Company, and the many reasons why this payment was made. It distracted the jury from the one essential issue in the case; had Brown consummated the aggregate amount of sales in accordance with the terms of his written contract?

A somewhat similar issue was presented to the Supreme Court in *Temperance Hall Association v. Giles*, 33 N. J. Law, 260. Mr. Justice Depue, in discussing the propriety of admitting evidence of a thousand apertures fully and cogently explains this rule of relevancy.

“It is not easy to draw the line, and define, with accuracy, where probability ceases and speculation begins. The rule is everywhere stated, in general terms, that the evidence must be confined to the issue. *This rule excludes all evidence of collateral facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute.*

* * * The reason for excluding all evidence of this character is that it would lead to the trial of a multitude of distinct issues, involving a profitless waste of the time of the Court, and tending to distract the attention of the jury from the real point in issue, without possessing the slightest force as proof of the matters of fact involved.

The evidence excluded furnishes a forcible illustration of the necessity of the rule, to the trial of causes before juries. The offer was to show that ten thousand persons passed these premises in each year since the hall was erected, without accident. *The admission of this evidence would carry with it the right to cross-examine as to the circumstances under which each individual of the multitude passed, and the degree of caution and circumspection used by each;* and, also, the right to introduce evidence of the dangers encountered, and by the exercise of superior vigilance, avoided, by each one of these individuals, together with evidence that some one or more of them had met with accidents at the place; in turn opening the way for evidence as to the degree of care exercised by such as had not been so fortunate as to escape; and when the parties, wearied in their endeavors to exhaust this vast field of investigation, rested the cause, the judge would have been compelled to direct the

jury to determine whether or not the area was a nuisance, from the character of the footway, the situation of the area with reference to it, and the means taken to guard against accident from its proximity to the sidewalk."

So, in the instant case, to permit testimony that Morrisey & Walker had received their commission, would then entitle Morrisey & Walker to show under each separate sale what were the conditions which caused the Shark River Hills Company to pay the commission to them. It may very well be that in some instances Morrisey & Walker guaranteed the amounts; in other instances endorsed personal notes; in other instances, through separate collection agencies, brought the accounts up to the point where the commissions became due. The reasons why Morrisey & Walker may have become entitled to their commission are so manifold and numerous that to simply relate them here would show the complex issue which would have been raised before the trial Court. There would then have been presented before this jury, not the original issue laid down by the pleadings, but an additional issue whether Morrisey & Walker had become entitled to their commission, and whether these commissions were rightfully retained by Morrisey & Walker. The very tenets of relevancy, it is most respectfully submitted, were violated by the admission of this evidence.

In *March v. Newark Heating Machine Co.*, 57 Law, 36, a similar issue was before the Court.

It appeared that the plaintiff based his action upon a contract and that one Murray had another contract with the defendants. An attempt was

made to introduce evidence of Murray's agreement with defendants. The Supreme Court, speaking through Justice Lippincott, said:

“It is to be observed that this alleged agreement between the defendants and Murray does appear in the evidence, yet it was entirely irrelevant to the issue between the plaintiff and the defendants, and the Trial Court was right in excluding so much of it as was rejected. It would have been justified in excluding all that passed between the defendants and Murray as irrelevant to the question directly in issue—that is, whether the defendants had entered into an engagement of contract with the plaintiff for the machines in question. *The action was based upon the existence of this contract, and what Murray may have stated to the defendants, or what his agreement may have been with them, were matters entirely foreign to the issue, and especially so when it was not within the power or offer of the defendants to connect such evidence with the plaintiff.*

Besides, it will be noticed that these alleged declarations of Murray to the defendants and his alleged agreement with them was later in event than the contract which is the subject of this action. They were in no wise connected with the contract. They were not the subject of inquiry as a part of the transaction sued on, and were not of a group of facts and circumstances, in whole or in part, constituting or negating the fact of the existence of the contract.

In order to be relevant, the evidence must be such that it directly touches upon the issue which the parties have made by the pleadings. Such evidence does not assist in the determination of that issue as

irrelevant. Platner v. Platner, 98 N. Y. 95; *Best Prin. Ec.* (Cham.), 257; *Greenl. Evid.* (14th ed.), Sec. 51."

The similarity of this last case and the question now under argument is striking. The trial court and the jury were solely concerned with the performance by Brown of his contract in accordance with the terms of his agreement. Whether Morrissey or the Shark River Hills Company had performed their mutual contract was far afield from the issues.

That such evidence was prejudicial; that it was irrelevant and remote from the issues of the case, would seem to be self-evident.

II.

The oral agreement alleged to exist between Brown and Morrissey & Walker was in contravention of the Statute of Frauds and therefore void and unenforceable.

The first question which arises under this point is: what was Brown to do? The testimony was as follows:

"A. They were offered a prize of \$1,000 if they and their team did \$200,000 worth of business.

Q. On what property was that? A. That was Shark River Hills Manor, Shark River Hills, itself, and what bungalows they sold, was to apply towards that business. (S. C. p. 29, ll. 7-19.)

* * * * *
Q. You know yourself, of your own knowledge, do you not, that Shark River Hills Manor, the land which you mention,

was owned by Morrisey & Walker? A. Yes. (S. C. p. 49, ll. 5-9.)

* * * * *

Q. Now, will you check up and see if those totals are correct? A. Right.

Q. Making a total on the Shark River Hills Manor of \$31,350? A. That is right." (S. C. p. 86, l. 40; S. C. p. 87, l. 5.)

From this testimony it is apparent that the oral contract purported to be an agreement whereby Morrisey & Walker should pay Brown \$1,000 if he should effect sales, not only of lands of the Shark River Hills Company, but also of Morrisey & Walker, aggregating the total sum of \$200,000.

Brown endeavored to substantiate his completion of his contract and offered proof that among his sales he had sold \$31,000 worth of lots belonging to Morrisey & Walker.

An analysis of this purported oral contract shows that whether the sum of \$1,000 is called a prize, bonus or commission, it nevertheless was an agreement to pay a stated sum of \$1,000 for a stated amount of sales of \$200,000 and that these sales were to be of real estate and a portion of this real estate belonged to the defendant, who, it is claimed, made the offer. According to the plaintiff the agreement did not cover lands, only of the Shark River Hills Company, but also included lands directly owned by the defendant.

It is respectfully submitted that this agreement is void under the Statute of Frauds. A reading of the salesman's agreement shows, as does the testimony, that the sole compensation to be received by the plaintiff was commissions upon the sale of land. In the written salesman's agreement, his commissions are set forth substantially. He

now brings suit for an additional commission and claims that this agreement was made orally and is binding.

The Statute of Frauds has proved, through its operation, the wisdom of the legislative fiat. This case in itself shows the necessity for such a statute. Admittedly, if a total of all the sales had been made Brown was still short of the required amount. To avail himself of the amount he then introduced a complicated theory of total commissions, split commissions and increased percentages. All of this was categorically denied by the defendant.

Sound public policy has dictated this statute. This case exemplifies the need of such a statute.

The fact that Brown was a salesman of Morrisey & Walker and also that he headed other salesmen can have no bearing upon the essential fact that any right to any remuneration for the effecting of sales of real estate belonging to the defendant must have been reduced to writing in accordance with the statute. Brown's right to the commission is based upon sales of his associates and upon his own personal sales, sales made by him or by those whom he aided. Call it remuneration, prize, bonus, commission, compensation, wages, salary or any other name, the fact still remains that the amount which Brown demanded in this suit was a payment made to him for the effecting of sales of real estate, a portion of which, at least, belonged to the defendant, whom he was suing. This agreement was not in writing, and therefore Brown is entitled, it is most respectfully submitted, to no compensation whatsoever.

This point was strenuously urged before the Court both in objections to evidence which was admitted over exception (S. C., p. 28, l. 20), and in a motion for a direction of a verdict (S. C., p. 310).

This Court has already considered a similar state of facts to the present case.

In *Malinowski v. Lincoln Developing Co.*, 103 Law 394, the plaintiff brought suit for commission as a salesman of the defendant Developing Company. He urged that because he was not a broker or real estate agent but was an employee working exclusively for the principal, the statute of frauds did not apply.

Mr. Justice Parker, speaking for this Court, said:

“We regard this as a distinction without a difference. The word ‘commission’ as used in our statute connotes a broker, for the statute says: ‘No broker or real estate agent selling or exchanging land for or on account of the owner, shall be entitled to any commission for the sale or exchange of real estate unless the authority * * * is in writing’ * * * The trial judge considered that the reasoning and decision in *Stout v. Humphrey*, 69 N. J. L. 436, were applicable to the present case, and in this view we concur. The precise distinction there sought to be made was that the plaintiff was not in business as a real estate man, but as a lawyer, and that the transaction was an isolated one. But this court expressly approved the language of the trial judge in that case, that ‘the statute both in its letter and manifest policy, is aimed at any person who acts as broker or real estate agent in the very

transaction in question out of which the claim to compensation arises.' The present case is at the other extreme; for not only was this plaintiff not regularly engaged in other business, *but he was in real estate alone, and in that exclusively for the benefit of the defendant. But, as his claim is based on results achieved, i. e. is for commissions, he is within the purview of the statute * * ** and this was right; *for the very mischiefs at which the statute was aimed would be encouraged by the recognition of fine spun distinctions between 'brokers' and 'salesmen' or 'employees' working on commission, exclusively or otherwise.'*

So, in the present case, whether Brown was an employee, salesman or sales agent, or called himself by any other name, he nevertheless was engaged in the sale of real estate owned by the defendant for the defendant's account.

He claims that he has earned a commission, and whether this is called by the name of bonus, prize or commission, likewise it is the same, for the sale of this real estate. Brown cannot escape, because his claim for compensation is based not alone upon the sale of lands owned by the defendant, but also upon sales of land owned by a third party. The contract, by his own testimony, and by the entire proof offered in the case, was an entire and indivisible contract. He was to receive the sum of \$1,000 if he effected sales totalling an entire sum of \$200,000. According to his testimony, these sales could be lands belonging to the defendant or to a third party. The contract was entire and indivisible.

Mr. Justice Pitney in the Supreme Court in the case of *Kent v. Phoenix Art Metal Co.*, 69

N. J. Law, 532, held that the compensation in such a case could not be divided. He says:

“Where the consideration is entire and incapable of severance then it must be wholly good or wholly bad. If the agreement be entire and not in writing and a part of it relate to a matter which, by the statute of frauds, should be promised in writing, such part being void, avoids the whole contract. * * * The supposed consideration for the subsequent promise was the performance of an entire service of which a material and inseparable part was of a kind that, by the express terms of the statute did not entitle the plaintiff to compensation in the absence of a written agreement.”

This is directly applicable to the present case. The contract is entire. A portion of it necessarily is void, because not in writing. This vitiates the entire agreement. It might be added that the plaintiff has throughout called the compensation for which he is suing “a bonus.” This cannot help him.

In *Leimbach v. Regner*, 70 N. J. L. 608, an attempt to sue upon a *quantam meruit* was termed by Justice Garretson “A mere attempt in this case to evade the statute.” Because the contract in question was for a payment of compensation for sale of aggregate amount of lands in which were included lands of the owner who was sued; it is respectfully submitted that not being in writing it was void and unenforceable.

III.

The Trial Court erred in its charge.

The trial court charged the jury that there may have been a ratification by the defendant of some of the defective sales of land, and if the jury found such ratification then such sales should be credited to the plaintiff. This portion of the charge to which exception was taken, is found at page 306 and is as follows:

“Of course it may well be that when you come to examine some of these sales, such as the Katz sale, if you find as a fact that Morrissey & Walker Company ratified that sale, even though its terms were contrary to the general sales contract existing between the plaintiff and that company, I nevertheless am of the opinion, and I so charge, that the Morrissey & Walker Company would not be permitted to take advantage of the Katz contract even though irregularly made, and then deny plaintiff his commissions; because they cannot take a benefit on something in its behalf by its agent or employee and then deny compensation to that agent or employee for his work in securing it. That is the simple proposition of law that I think is applicable to that situation.”

As a general proposition of law, the Court correctly charged the principle of ratification. It is to be borne in mind, however, that in the present case the rights of Brown are governed by a written contract. Section 3 of this contract provides as follows:

“The amount is not considered earned or due until 20% of the purchase price has been paid to the principal and contract signed by the buyer” (S. C., p. 313, l. 26).

While the sales negotiated by Brown may have been kept in full force and alive by payments, Brown's right to a commission upon the sale did not mature until 20% of the purchase price had been paid in. Even at the time of the trial, which was two years after, the Katz sale and other sales had not been consummated by the payment of 20% of the purchase price.

The relation between the three parties involved in the transaction, as has already been pointed out heretofore, was entirely diverse and different.

Morrissey & Walker, under its contract with the Shark River Hills Company, was entitled to take the benefit of any sales made when 10% of the purchase price had been paid in. Brown, however, was entitled to no commission, nor was the sale considered consummated until 20% had been paid in. There was not the slightest scintilla of evidence offered by Brown throughout the entire case to prove a change or modification of his written contract, which, it was admitted, governed his right to commission upon sales. The principle of ratification submitted by the trial court in its effect changed the written contract between the parties. From this charge, the jury were entitled to find that if Morrissey & Walker accepted under their written contract, from their principal, the benefit of a sale made by Brown, that then, although this contract varied from Brown's contract, Brown was entitled to his commission. This, in effect, permitted the jury to write a new contract between Brown and Morrissey & Walker.

The question of ratification nowhere entered into the case. It may very well be that the salesman may have received 5% on a sale and then through a series of years Morrissey & Walker could have collected the payments until the sale had become a consummated sale. Until that sale, however, had been consummated by the payment of 20% of the purchase price the salesman would not be entitled to any commission upon it. It is absolutely true that long before this time Morrissey & Walker under their contract would have been entitled to the commission.

The salesman, however, entered into this contract and signed it. He knew that he could not obtain his commission until a certain definite amount had been received, namely, 20%. To allow the salesman to recover his commission because Morrissey & Walker had enforced the contract and received theirs before the 20% was paid in, would permit an entirely different relation to be created between the parties. No citation of authority is needed to support the statement that this Court has decided, where brokers have accepted a contract that they were entitled to commission upon the passing of the deed, no commission is forthcoming until the deed is actually delivered. And so, in the instant case, there is a definite written agreement between the plaintiff and defendant that no sale is consummated until 20% has been received upon the purchase price. Necessarily, under such an agreement, all sales made by the plaintiff would have to be carried along until this 20% was paid in. To hold otherwise would be to create an injurious and inequitable situation.

Morrisey & Walker were entitled to $\frac{1}{2}$ of the proceeds of a sale when 10% of the sale was paid in. Under the Court's charge, if Morrisey & Walker received 5% of the sale it then ratified the entire sale. Then, under Brown's agreement he would be entitled to a commission of 10% in addition to the bonus in this case.

Therefore, as a natural result of the Court's charge it would follow that Brown would receive more commission upon the sale than Morrisey & Walker had themselves received, a commission double that which Morrisey & Walker were paid. Such a proposition falls of its own weight, but this is the logical result of the Court's charge. Its charge was extremely prejudicial to the defendant, in that, as has already been pointed out, there had been over \$40,000 of the sales which had never been consummated. Morrisey & Walker may very well have received their first payment upon these sales. Their acceptance of this payment, however, in no wise constituted a ratification of Brown's acts, or an admission that he had earned his percentage. Morrisey & Walker were entitled to their commission when 10% had been collected. Brown was not entitled to his until 20% had been collected. To say that Morrisey & Walker by accepting the benefits of these sales became obligated to Brown would be to create an entirely new situation between the parties. The true situation is that until 20% called for by Brown's contract had been collected by Morrisey & Walker, Brown was entitled to no commission, nor could there be any ratification of any sales made by Brown.

CONCLUSION.**IV.**

1. Because evidence concerning the payment of commissions between Morrissey & Walker and Shark River Hills was admitted, which evidence was irrelevant and highly prejudicial to the defendant;

2. Because the contract upon which Brown sued was an oral contract dealing with compensation for the sale of lands of the defendant, together with other lands, and so void by reason of the Statute of Frauds and

3. Because the trial court erroneously charged the jury that if the defendant had received compensation from the Shark River Hills Company for sales made by Brown that it then ratified his sales and in its turn became obligated to pay Brown, it is respectfully submitted that the judgment below should be reversed, set aside and for nothing holden.

Respectfully submitted,

QUINN, PARSONS & DOREMUS,
*Attorneys for and of Counsel with
the Defendant-Appellant.*

NEW JERSEY COURT OF ERRORS AND APPEALS

<p>WALTER M. BROWN, Plaintiff-Respondent, vs. MORRISEY & WALKER, Inc., body corporate, Defendant-Appellant.</p>
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Action at Law.
On Appeal from
Supreme Court.

10

BRIEF FOR PLAINTIFF-RESPONDENT

This is an appeal from a judgment at the Monmouth Circuit, May Term 1928, in which the plaintiff secured a judgment of \$1097.40 against the defendant, Morrisey & Walker, Inc. The judgment was affirmed by the Supreme Court on a rule to show cause sued out by the defendant.

20

PREFATORY

The facts upon which the plaintiff's suit was based were briefly these:

Plaintiff was engaged as a real estate salesman by Morrisey & Walker, developers, under a contract dated April 18, 1926. He was engaged to sell the property being developed by Morrisey & Walker at Shark River Hills and owned by the Shark River Hills Company, "or such other property as the principal may designate." (Schedule A, State of Case, p. 4). Plaintiff claimed that after this agreement was entered into and sometime in the latter part of May, 1926, or the early part of June, 1926, Samuel Walker, the vice-president of Morrisey & Walker, called together several of the salesmen who were working on the sale of Shark River Hills property. They met in the office of Morrisey & Walker at

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Asbury Park, New Jersey, and there, in the presence of the plaintiff and several other salesmen, including Thomas Ely, the general sales manager for Morrisey & Walker, Mr. Walker set forth a plan to stimulate sales. He stated that teams of seven men would be formed and that each team would have a captain. He further promised that if a team sold, during the year 1926, an aggregate of \$200,000.00 worth of property, the captain of that team, in addition to the commissions to which he was entitled under his contract, was to receive a prize of \$1,000.00. This was agreed to by the plaintiff, and the promise of Walker was reiterated at a dinner given at the Berkeley-Carteret Hotel to salesmen.

Defendant says in its brief that "the proof was uncontradicted that the defendant, Morrisey & Walker, *did not* make an agreement to pay the plaintiff this amount of money." It is difficult to conceive that the writer of the brief carefully examined the testimony and the state of the case because it shows that three witnesses swore to the making of such an agreement. They were Thomas Ely, the sales manager for Morrisey & Walker, Walter M. Brown, the plaintiff, and Edward R. Luke, another salesman. (Case, p. 24, 122, 180). Certainly, the testimony of these three witnesses was sufficient if the jury believed them to support a finding that the agreement which the plaintiff contended for was actually made.

There were many other details important in showing how the total sales of the team were to be computed. Ely, sales manager, who was in complete control of the salesmen and in active charge of the sales campaign and was the agent of Morrisey & Walker, the defendant, in dealing with the plaintiff and other salesmen, testified in detail concerning these arrangements. The defendant in its brief complains that Ely "turns upon his own employers."

Rather, it should be said that Ely's story is all the more worthy of credence for the reason that he was actually an employe or official of Morrisey & Walker at the time the whole transaction took place and that his testimony, for that reason, should be resolved most strongly against the defendant. The jury at the trial no doubt reposed confidence in Ely's statements, particularly on account of the fact that he was the company's representative who made the contractual arrangements with the plaintiff out of which this suit arose. 10

Ely stated that the total sales for the purpose of ascertaining whether the team captain was entitled to his prize, were computed as follows: The total sales actually made by the team captain himself were contained in the computation; all sales made by the members of the team were included; and also upon the gross sales made by the team there was added 10% for the benefit of the team captain. If these three totals aggregated \$200,000.00 or more, then the team captain was entitled to his prize. Once each month the books of the company were checked by the manager, Mr. Ely, and statements were accurately kept showing the sales made by each team. At the end of the season, a statement was made up, known as the "master statement," which showed the gross sales of a team during the year then closing. This statement was offered in evidence (State of Case, p. 317, Ex. P-2); and was explained by Mr. Ely. It showed that the plaintiff, Brown, had sold \$100,000.00 gross sales for 1926. It also contained the following item "10% of team's business \$10,250.00." This indicated that the team's business was \$102,500.00. Plaintiff's own business was \$100,000.00. According to the method of computation employed by the parties, therefore, the plaintiff was entitled to commissions on \$212,750.00. This was made up as follows: Sales by plaintiff, \$100,000.00; sales by 20 30 40

plaintiff's team-mates, \$102,500.00; 10% commission on sales by team-mates, \$10,250.00. As a matter of fact, the plaintiff actually received his commissions on sales to this amount. Exhibit P-2 shows that there were commissions due him amounting to \$3,714.00. These were in accordance with his written contract. Mr. Ely testified that the company's auditors, shortly after December 15th, checked over the books of the company and upon being satisfied of their correctness, the plaintiff was paid his commissions. Plaintiff thereupon became entitled also to the prize, if the agreement for the prize existed, as plaintiff contended.

A further fact in this connection which was shown at the trial and which would tend directly to establish the correctness of the books and the plaintiff's right to recover, was the statement by Mr. Ely and the admission by Mr. Walker (State of Case, p. 43, 276) that Morrisey & Walker actually obtained their commissions from the Shark River Hills Company on the sales which, at the trial, they disputed, insofar as the plaintiff was concerned. The commissions due to Morrisey & Walker and paid to their principal by the Shark River Hills Company were the first commissions paid. They obtained the money due them and out of this money were supposed to pay the salesmen working for them. Their commission was 20%. That they received it from the Shark River Hills Company on sales made by the plaintiff and his team was not disputed at the trial.

The testimony above referred to in brief summarizes the case presented by the plaintiff and presents a complete answer to the two objections raised by the defendant's brief. In other words, there was credible evidence tending to prove (1) that an agreement was made with the plaintiff entitling him to a prize in the event that his team and himself consummated \$200,000.00 worth of sales, or more, ac-

ording to the methods of computation approved by the company; (2) there was credible legal evidence tending to show that according to the company's own books the sales of the plaintiff and his team according to the rules regulating the computation did in fact exceed \$200,000.00.

This was the entire burden carried by the plaintiff and it is respectfully urged that he successfully sustained it.

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ARGUMENT

The Trial Court did not err in Admitting Testimony Concerning the Payment of Commissions to the Defendant by the Shark River Hills Company.

The defendant in its answer under "First Defense" claimed:

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"Plaintiff did not consummate bona fide sales, but, on the other hand, with the connivance of the other salesman, made certain fake sales." (S. C. p. 9)

The questions excepted to by the defendants were:

"Q. Can you tell us whether or not Morrissey & Walker received from the Shark River Hills Company their commission on the sale of the land by Brown and his team?" (S. C. 42)

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"Q. In 1926 can you tell us whether or not the Shark River Hills Company paid the Morrissey & Walker Company any commissions for sales in Shark River Hills?" (S. C. 119)

It is to be remembered that the defendants set 40

out in their answer, and contended throughout the trial, that the plaintiff had propounded false sales, thereby representing to them that his team had sold enough land to be entitled to the prize. It is respectfully urged that the above questions were proper in order for the plaintiff to offset the defendants' claim that the sales were not bona fide. The importance of the above questions and the answers of the witness thereto is that it shows that so far as Morrisey & Walker were concerned, they regarded the plaintiff's team as having sold over \$200,000.00 worth of land because they obtained their own commissions from their principal, the Shark River Hills Company, based on these sales. To say the very least, this evidence tended to have a corroborating effect in showing that Morrisey & Walker, as well as their principal, regarded the sales as bona fide.

It may be stated as a general principal that whatever evidence, to the ordinary reasoning mind, is logically probative of a fact in issue, is admissible. If it forms a link in the chain of testimony, or tends in any degree to establish a fact in controversy, it should be received.

In 10 R. C. L. 926, it is said:

"The law does not require a necessary connection, which would practically exclude all presumptive evidence, but such as is reasonable, and not latent and conjectural. While there is no question that in strict propriety the parties should confine their evidence to the matters in issue, and that proof wholly foreign to such matters is inadmissible, yet to sustain an objection to evidence merely on the ground that it is irrelevant, it ought to appear so beyond all doubt, for it is the settled rule in all cases where the competency of evidence is

doubtful, to admit it to go to the jury, leaving them to determine as to the weight to which it should be entitled.

“Evidence tending to prove a fact must be submitted to the jury, however slight it may be. *It is competent, relevant and admissible, though it may not be such as of itself to establish a fact, if it is such that the jury may, in connection with it and other facts properly alleged, make a finding respecting some issue material to the cause.* Obviously, the court, in admitting testimony, does not conclusively adjudge that the evidence establishing the competency is sufficient fully to prove the requisite fact. It simply declares that there is some evidence tending to make the testimony competent. 10

“Any legal evidence from which a jury may legitimately deduce the fact in issue is admissible, if, when taken with other evidence in the case, its relevancy appears.....*It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.* It would be a narrow rule, and not conducive to the ends of justice to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact.” 20 30

At no time during the trial did the defendant attempt to show that it had refunded any commissions paid to it by the Shark River Hills Company. Counsel for defendant in their brief assume that “there could be no opportunity for the defendant to explain the payment by the Shark River Hills Company, and the many reasons why this payment was made.” It is respectfully submitted that, inasmuch 40

as the good faith of some of the plaintiff's sales was one of the issues, the defendant would have been entitled to show that its principal had demanded a refund of the commissions because of the falsity of these sales.

10 Counsel for appellants cite *Marsh v. Newark Heating & Machine Co.* (Supreme Court 1894) 57 N. J. L. 36, as presenting a similar issue, but that case is readily distinguishable from the case *subjudice*. There, the sole issue was whether the defendants had entered into an engagement with the plaintiff for the manufacture of certain machines. The defendants denied making any contract with the plaintiff, but claimed they had agreed with one Murray for the manufacture of the machines. The court properly rejected the contract between defendants and Murray as it was obviously irrelevant to the question concerning a contract between the parties
20 to the action. On page 41, the court says:

30 "It (the trial court) would have been justified in excluding all that passed between the defendants and Murray as irrelevant *to the question directly in issue—that is, whether the defendants had entered into an engagement of contract with the plaintiff for the machines in question.* The action was based upon the existence of this contract, and what Murray may have stated to the defendants, or what his agreement may have been with them, were matters entirely foreign to the issue, *and specially so when it was not within the power or offer of the defendants to connect such evidence with the plaintiff.*"

40 The above excerpt from the opinion of the court negatives any analogy between that case and the case at bar. On the other hand, in the present case,

the question before the court, under the pleadings set out by the defendant, did not concern the existence of any contract between the parties, but whether the plaintiff had properly performed his part of the unilateral agreement. If the defendant received commissions from its principal in respect to lands sold by the plaintiff's team, it is respectfully urged, that fact would be highly probative in showing that there had been no false sales of this land by members of the plaintiff's team.

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Counsel for appellant, in their brief, quote from *Marsh v. Newark Heating & Machine Company*, *supra*:

"In order to be relevant the evidence must be such that it directly touches upon the issue which the parties have made by their pleadings. Such evidence as does not assist in the determination of that issue is irrelevant. *Platner v. Platner*, 98 N. Y. 95; *Best Prin. Ev.* (Chan.) 257; *Greenl. Evid.* (14th ed.) Sec. 51."

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It is submitted that the above language supports the contention of the plaintiff. The defendant, by its pleadings, compelled the plaintiff to prove that the sales made by his team were made in good faith. It seems difficult to conceive how the plaintiff could prove, outside of his own testimony, the truth of any sale the defendant wished to dispute without showing that the defendant in its relation to third persons regarded the sale as consummated.

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In *Fishman v. Consumers Brewing Co.* (Supreme Court 1909) 78 N. J. L. 300, it is said:

"Relevancy of testimony, as defined by Stephen, is 'that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with

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other facts, proves or renders possible the past, present or future existence or non-existence of the other.' Steph. Dig. Ev. Art. 1."

10 The above language is applicable to the instant case. That the defendant had been paid its commission together with the fact that plaintiff had received his commission for the sale of the lots, from the defendant (Exhibit P. 2, S. C. 317), it is submitted, was proper evidence for the determination of the jury as to the bona fides of the sales.

It is admitted that the language (which appellant quotes) of the court in *Temperance Hall Association v. Giles* (Supreme Court 1869) 33 N. J. L. 260, is applicable to the facts of that case, i.e., exclusion of evidence showing safety by previous absence of accident. However, part of the opinion, which counsel for appellant quote in their brief, states:

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"It is not easy to draw the line, and define, with accuracy, where probability ceases and speculation begins. The rule is everywhere stated, in general terms that the evidence must be confined to the issue. This rule excludes all evidence of collateral facts which are incapable of affording any *reasonable presumption or inference* as to the principal fact or matter in dispute."

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It is respectfully submitted that applying the above language to the present case, the fact that the defendant received its commission for the sale of the lots raises more than a reasonable presumption on inference that the sales made by the plaintiff's team were not false.

40 A closer analogy than that of *Temperance Hall Association v. Giles*, supra, is *Alcott v. Public Service Corporation* (Court of Errors and Appeals 1909) 78

N. J. L. 482, where evidence of a similar accident at the same place some few days before was proper as supporting the plaintiff's evidence as to the condition of defendant's switch at the time of the accident.

The case of *Continental Match Company v. Swett* (Supreme Court 1898) 61 N. J. L. 457, involved a principal similar to the one in the instant case. There, the defense to a suit brought by an artisan for breach of a contract of employment was the incompetency of the plaintiff. The court sanctioned the admission of proof of work done for third persons by the plaintiff as serving to show his skill and knowledge in the line of like work in which he had been employed by the defendant. 10

In *Gomm v. Gomm* (Court of Errors and Appeals, 1907) 75 N. J. L. 660, in an action by a mother against her son for board alleged to have been furnished under an express contract, the court held that evidence that the defendant had paid a bill for coal in the house in which he and his mother lived, as tending to show that there was no express contract, but that the defendant was head of the household, and not the mother. 20

See also *Crosby v. Wells* (Court of Errors and Appeals 1906) 73 N. J. L. 790.

It is respectfully submitted that the above cited authorities and especially the case of *Continental Match Company v. Swett*, supra, clearly indicate that the trial court did not err in allowing the evidence to go to the jury. 30

II.

The Oral Agreement between Brown and Morrissey & Walker was not in Contravention of the Statute of Frauds.

It was unquestionably proven at the trial that the plaintiff possessed a written contract with the 40

defendant, which provided for the payment to the plaintiff of a commission of 8% on sales made by the plaintiff as a salesman (Case, p. 312, Ex. P-1). It was further shown that a subsequent oral agreement was made, and there was ample testimony upon which the jury could base such a finding. Most of this testimony was elicited from the witness, Thomas Ely, who was sales manager of the company:

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"Q. Now, Mr. Ely, after the contract was entered into and Mr. Brown went to work, was any other arrangement made with him?

"A. Yes, sir.

"Q. When did it take place?

"A. Around the latter part of May, 1926.

"Q. Was that before or after this contract was entered into?

"A. After." (Case, p. 24)

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"Q. Where was it made?

"A. It was made in our office at 320 Cookman Ave. and confirmed at a salesmen's dinner at the Berkeley-Carteret Hotel by Mr. Walker." (Case, p. 25).

"Q. Will you state what was said?

"A. We were to divide our selling organization into five teams. Mr. Brown was appointed a captain and was allowed to have seven men in addition to his own efforts. He was to receive, or rather to get credit for all the business that his team did; also what bungalows were sold that year for the Morrisey & Walker Construction Co." (Case, p. 26).

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"Q. Just a moment before you get to the dinner. Will you state what was said and what the conversation was at your office?

"A. Well, they were made captains.

"Q. Yes, and what else was done?

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"A. They were offered a prize of \$1000.00

if they and their team did \$200,000.00 worth of business." (Case, p. 28)

"Q. Who said that?

"A. Mr. Walker.

"Q. Was Mr. Brown present?

"A. Yes, sir.

"Q. What did Mr. Brown say?

"A. He accepted it." (Case, p. 29).

"Q. Now was anything said at either of those meetings you have just referred to about how the \$200,000.00 was to be made up for which the team captain was to receive credit? 10

"A. Yes.

"Q. What was the arrangement?

"A. That he was to get all the business that his team did, his own personal business in the Hills and in the Manor, on what bungalows were sold; also what business his team did, 10% of that was to be added to his own personal business in the form of what you call a gross commission. 20

"Q. Very well. Now, do you know of your own knowledge whether or not Mr. Brown's team with himself went over the top and sold \$200,000.00 or more that year?

"A. Yes." (Case, p. 31).

"Q. How do you know it?

"A. Why they were taken from the records of the statements that were rendered by Morrisey & Walker to the Shark River Hills Co. at the end of the year. All the captains were present at that time and they approved their business." (Case, p. 32). 30

Ely explained the meaning of the master statement which was offered in evidence as Exhibit P-2 (Case, p. 35). He was questioned at length about it: 40

“Q. For what purpose was Mr. Brown’s signature obtained?

“A. Why, someone must have paid him his money.” (Case, p. 35).

10 The above question and answer are important as showing that the plaintiff obtained the commissions called for under his contracts on the basis of the figures on which he rested in the suit. If the statement known as Exhibit P-2 entitled him to his commissions, it would follow that he was entitled to his prize of \$1,000.00 on the basis of the same statement, if there was an agreement to pay him a prize.

Mr. Ely explained the master statement further (Case, p. 37):

20 “A. Then for the year 1926—this was the winding up of the year—he had a total gross business of \$100,000.00. 10% on his team’s business which is \$10,250.00, making a total of \$110,250.

“Q. What was the total sales as shown by your agreement by Brown and his team?

“A. Apparently his team had \$102,500.00 and the \$100,000.00 himself, plus 10% added to his own personal business from his team.

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By the Court:

“Q. Making a total of what?

“A. Well, it would be \$212,750.00.”

40 It is respectfully urged that the above quoted excerpts clearly prove all that it was the duty of the plaintiff to prove; namely, that there was an agreement to pay him a prize provided his team “went over the top” and sold \$200,000.00 worth of land;

and also that the team did pass the \$200,000.00 mark in accordance with the rules of the sales campaign.

There are some other features of the testimony which the plaintiff believes should be considered. It was clearly shown that the defendant, Morrisey & Walker, received its commission from the Shark River Hills Company on the sale of lands by Brown and his team. Mr. Ely when questioned about this testified as follows:

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“Q. Can you tell us whether or not Morrisey & Walker received from the Shark River Hills Company their commission on the sale of the land by Brown and his team?”

(Then followed objection by counsel; after which the question was repeated.)

“Q. Do you know whether they received commission?”

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“A. Yes.

By the Court:

“Q. On the land sold by Brown and his team?”

“A. Yes.” (Case, p. 42).

The importance of the above testimony is that it shows that so far as Morrisey & Walker was concerned they regarded Brown's team as having sold over \$200,000.00 worth of land because they obtained their own commissions from their principal based on these sales.

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It may also be worth while to note that the same arrangement as to prizes had existed in previous years. Mr. Ely so testified:

“Q. Had this agreement in regard to teams

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and prizes ever been in effect in previous years?

"A. Yes, sir.

"Q. And was in effect in 1925?

"A. Yes." (Case, p. 45).

10 There was some controversy at the trial as to whether the prize money was to be paid by Morrissey & Walker or by the Shark River Hills Company. Mr. Ely testified that it was to be paid by Morrissey & Walker. This was developed on cross-examination by the defendant's attorney:

"Q. Mr. Ely, you testified that a prize of \$1,000.00 was offered; is that correct?

"A. Yes, sir.

"Q. Who did Mr. Walker tell you was going to pay that prize?

20 "A. To the man that did over——

"Q. No, who was going to pay the money? Who was going to furnish the money?

"A. Why, Morrissey & Walker offered it themselves." (Case, p. 47).

30 There was also some debate as to whether sales made after May 15, 1926, were the only ones to be counted in computing the total or whether the entire year was to count. The testimony of Edward R. Luke, a salesman who was present when the oral agreements were made, cleared this matter up. Luke testified as follows (Case, p. 181):

"A. Well, my recollection of it is that the contract was taken in 1926. All business during 1926 was applied on the bonus and premium.

40 By the Court:

“Q. Even though the conversation occurred in May, 1926?

“A. Yes, we were working under that.

“Q. You were working under that year’s business?

“A. Yes.

“Q. In other words, when did it start?

“A. January 1st.” (Case, p. 182).

The defendant contends that this contract was void because not in writing, and that it was within the meaning of the statute of frauds a contract for the sale of lands. At the trial the defendant moved for a non-suit upon this ground (Case, p. 187), but the trial court denied the motion. It is respectfully submitted that the action of the trial court in denying a non-suit was entirely proper upon the facts. Judge Lawrence said (Case, p. 188):

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“I think it has no relation to the statute of frauds which you seek to invoke.”

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It is uncontradicted that the salesman’s contract was in writing and that all the terms relating to his commission and the other facts concerning his employment were set down in the contract. After the contract was made, the defendant, in order to stimulate its own business, sought out the plaintiff, and in effect, put the following proposition to him:

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“You have a contract with us. You agreed to sell lots for us, and we agreed to pay you a stated commission upon all lots that you sell. This will be paid to you whether you sell few or whether you sell many lots. We now suggest to you that if you and the seven men who will assist you in sales can in the aggregate do over \$200,000.00 worth of business, we will

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pay you in addition to the amount we have already agreed to pay you, a prize of \$1000.00."

10 This was not an agreement for the sale of lands, within the meaning of the statute of frauds, which must be strictly construed. No commission was arranged for. The statute of frauds requires that the commission on the dollar shall be stated and that a written authority referring to the specific property in question shall be had by the person claiming the right to a commission. There is nothing in the statute to preclude principal and agent from making any other agreements having to do with their relationship, simply because they have entered into an agreement in writing pursuant to the statute. For instance, a property owner might, by writing, authorize an agent to sell lands and might, in addition, employ the agent at a stated salary per week. 20 The agreement to pay the stated salary would not have to be in writing, and if the person employed could establish by credible testimony, the existence of an oral agreement to pay the salary, he might recover. Such an illustration is analogous to the present case. The agreement to pay the prize claimed was an independent undertaking on the part of the defendant. There was ample testimony of the existence of this undertaking and the trial court was correct in ruling that it was not an agreement within the statute of 30 frauds.

Defendant has cited in its brief the case of *Malinowski v. Lincoln Developing Co.*, 103 N. J. L. 394, but it is respectfully urged here that that case is not prejudicial to the position of the plaintiff-respondent in the instant case. In the *Malinowski* case, the plaintiff claimed commissions as salesman and sales agent without having a writing, and also claimed compensation as manager of other salesmen 40 who were employed under his management. Mr.

Justice Parker, who delivered the opinion of the Court of Errors and Appeals, said:

“The suit was for the unpaid balance of compensation claimed to be due for effecting sales of various pieces of real estate belonging to the defendant. Plaintiff entered the employment of defendant on December 12th, 1924, under an oral contract which provided that plaintiff was to make sales of divers parcels of real estate, partly building lots, partly houses and lots, owned by defendant, at a commission of twenty-five per cent. for unimproved property and five per cent. for improved property. Later, the arrangement was changed so that plaintiff became ‘sales manager,’ with authority to employ agents, and was entitled to a commission on sales made by them. The suit was partly for commissions as ‘salesman’ or ‘sales agent’ under the first contract, and partly for compensation as manager under the second. The court gave the latter phase of the case to the jury, but instructed them that plaintiff was not entitled to recover any unpaid money claimed under the original contract because that contract was not in writing and recovery was barred by the tenth section of the statute of frauds.”

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This observation of Mr. Justice Parker is entirely in accord with what the plaintiff-respondent is suggesting in the instant case. Admittedly, a contract for the sale of lands upon which the agent claims commissions must of necessity be in writing. Mr. Justice Parker, however, held that the sales manager might recover compensation on sales made by agents employed by him without having a writing. That is exactly the situation here, and the case of

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Malinowski v. Lincoln Developing Co., supra, supports the theory upon which plaintiff's case was brought and the ruling of Circuit Judge Lawrence.

III.

The Charge of the Trial Court was Correct.

10 The trial court charged the jury that if it found that the defendant had ratified any defective sales of land, these sales should be credited to the plaintiff. Exception was taken by the defendant to that portion of the charge which was as follows:

20 "Of course, it may well be that when you come to examine some of these sales, such as the Katz sale, if you find as a fact that the Morrisey & Walker Company ratified that sale, even though its terms were contrary to the general sales contract existing between the plaintiff and that company, I, nevertheless, am of the opinion, and I so charge, that the Morrisey & Walker Company would not be permitted to take advantage of the Katz contract, even though irregularly made, and then deny plaintiff his commissions; because they cannot take a benefit on something in its behalf by its agent or employe and then deny compensation to that agent or employe for his work in securing it. That is the simple proposition of law that I think is applicable to that situation."

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40 It clearly appears from the testimony of Mr. Walker, secretary and treasurer of the Morrisey & Walker Company, that the above charge was applicable to the facts of the case. Mr. Walker admitted that the company had received and was re-

ceiving benefits from the sale, and that the sale had been ratified by the company. (S. C. p. 275) :

“Q. Now, Mr. Walker, this property of Mrs. Katz was sold to her under the terms of this contract? (Exhibit D-4)

“A. Yes, sir.

“Q. And she is still making payments under the contract?

“A. I believe so.

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“Q. You heard her say this morning that she was making payments, did you not?

“A. Yes.

“Q. And you never rescinded the contract in any way?

“A. No, sir.

“Q. You have taken benefits of it?

“A. Yes.”

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* * * * *

By the Court:

“Q. I assume that that would indicate that you really ratified that contract, by continuing to take the money? It sounds like a pretty big sale to me, \$10,000. I suppose that is the reason you don't want to give it up?

“A. We don't want to give it up, and we have had negotiations, I believe, with Mrs. Katz since that that have been satisfactory.

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“Q. So you really ratified what the agent did?

“A. Yes.”

The Salesman's Agreement with the Company (Exhibit P-1, p. 312) provided as follows:

“3. A commission is not considered earned or due until 20% of the purchase price has 40

been paid to the principal and contract signed by the buyer."

It was shown, however, that these terms were subject to alteration to meet the various contingencies which arose, and that in the practise of the company, credits were allowed despite what the contract said. Mr. Walker admitted this. (S. C. p. 276):

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"Q. Now, isn't it a fact that when you had customers who were good customers that you often altered the terms to suit the needs of the customers?

"A. On occasion we did, yes, sir.

"Q. Your terms of contract arrangements were elastic, were they not?

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"A. Somewhat, where it was constructive to change the conditions."

It is respectfully submitted that this testimony would do away with any suggestion that the plaintiff's right to a commission upon all sales did not mature until 20% of the purchase price had been paid in. Moreover, the fact that Brown received his commission from the Morrisey & Walker Company (Exhibit P-2, p. 317) clearly indicates that the latter considered the sale consummated as far as Brown was concerned.

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Respectfully submitted,

WARD KREMER,

Attorney for Plaintiff-Respondent

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