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SUMMONS.

(Served July 23, 1925.)

THE STATE OF NEW JERSEY TO BLACKWOOD ESTATES:

(Seal)

You are summoned to answer the annexed complaint of Claude A. Lane in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this twenty-second day of July, nineteen hundred and twenty-five.

EDWARD J. KELLEHER,
Clerk.

WILBERT V. PIKE,
Attorney.

COMPLAINT.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

CLAUDE A. LANE,
Plaintiff,
v.
BLACKWOOD ESTATES,
Defendant.

Complaint.
Action at Law.

The plaintiff, Claude A. Lane, of Blackwood, in the Township of Gloucester, County of Camden and State of New Jersey, says that:

1. On or about March 10, 1924, the plaintiff and defendant entered into an agreement in writing, dated March 10, 1924, a true copy of which is annexed hereto and made a part hereof, marked Exhibit "A."

2. In and by said agreement (Exhibit "A") the plaintiff was given the right for a period of two years from the date thereof to sell an entire section of lots owned by the defendant, in its sub-division at Blackwood, Camden County, New Jersey, and plaintiff was to receive a commission of 35 per cent on the sales price for all sales made and approved by the defendant.

3. The plaintiff began the performance of the duties imposed upon him by the aforesaid agreement on or about March 10, 1924, and performed the same in a manner acceptable to the defendant until the breach thereof by the defendant as hereinafter set forth.

4. On or about January 26, 1925, the defendant committed a breach of the aforesaid agreement by sending to the plaintiff a notice in writing, a true copy of which is hereto annexed and made a part hereof, marked Exhibit "B," wherein and whereby the defendant notified the plaintiff that it had elected to cancel said contract, the said cancellation to take effect February 26, 1925.

5. On February 26, 1925, the plaintiff had sold two hundred and seventy-four (274) lots, pursuant to said contract, and there remained twelve hundred and eighty-one (1281) lots which plaintiff had a right to sell under the terms and conditions set forth in said agreement, Exhibit "A," for the price of $300,000.00, upon which plaintiff is entitled to commissions at the rate of 35 per cent of the sale price, aggregating $105,000.00.

6. Defendant has not paid to plaintiff said commissions, nor any part thereof, nor have the same been paid by defendant to anyone for and on plaintiff's behalf.

The plaintiff demands as damages $105,000.00.

WILBERT V. PIKE
Attorney for Plaintiff.

New Jersey State Library

EXHIBIT "A."

AGREEMENT made this 10th day of March, in the year of our Lord, one thousand nine hundred and twenty-four, BY AND BETWEEN BLACKWOOD ESTATES, a corporation of the State of New Jersey, of the first part, and CLAUDE A. LANE, of Philadelphia, Pennsylvania, of the second part, WITNESSETH:—

WHEREAS, the party of the first part is the owner of a tract of land at Blackwood, Camden County, New Jersey, which it has sub-divided and is selling and,

WHEREAS, the party of the second part desires to sell lots in said sub-division and to hire agents to work for and sell for him;

NOW, THEREFORE, IN CONSIDERATION of the premises and One Dollar, each to the other in hand paid, receipt of which is hereby acknowledged, it is agreed as follows:—

THE PARTY OF THE FIRST PART AGREES;

1. The party of the second part shall for a period of two years from the date hereof have the right to sell and to employ sub-agents to sell lots owned by the party of the first part in its sub-division at Blackwood, Camden County, New Jersey, as aforesaid:

2. To pay the party of the second part 35% commission on the sales price for all sales made and approved, the payment to be made in the following manner:—

(a) 75 per cent of the initial payment as soon as sale is made and approved;

(b) 75 per cent of all subsequent payments on account thereof on or before the 15th of the month following date of payment or payments until said 35% is paid in full.

3. To give assistance on the said tract to the party of the second part and his agents in closing sales, without making any charge to the party of the second part or his agents for said assistance.

4. To give free title policy on all lots sold in sections up to and including section 37. Said title policy to be issued by the Land Title & Guaranty Company of Camden, New Jersey.

5. To keep grass and weeds on said tract cut and mowed.

6. Not to make any contract with any other person or corporation giving such person or corporation a right to organize a sales force and employ sub-agents.

THE PARTY OF THE SECOND PART AGREES THAT:—

7. His sub-agents are to be his agents exclusively and not agents of the party of the first part.

8. He shall maintain an office in Philadelphia for himself and his sub-agents, and shall pay all the expenses thereof, as well as all expenses of advertising, selling and transportation of himself and his sub-agents.

9. Any literature of advertising matter used by the party of the second part shall, before use, be subject to the approval of the party of the first part.

10. He will sell all lots at list price as determined by the party of the first part, and said list price may be changed by the party of the first part after ten days written notice of any such change to the party of the second part. Any and all sales made by the party of the second part shall conform to and be in the terms of the contract form hereto attached and made a part hereof and subject to the approval of the party of the first part.

11. He will give his exclusive time to the sale of said lots and handle the lots of the party of the first part in said sub-division exclusively.

12. He will not sell or permit his agents to sell said lots without first obtaining a license from the Real Estate Board of the State of New Jersey, and he will pay for all license fees of himself and his agents.

13. It is mutually understood and agreed that the party of the first part reserves the right for itself and its agents to sell to any prospects who are not prospective buyers of the party of the second part and his agents. A prospective buyer of the party of the second part to be considered one who has been personally interviewed by the party of the second part or his agents within sixty days next preceding the date of purchase.

14. It is further mutually understood and agreed that no sale shall be for less than two lots, and that if by November 1, 1924, the sales made by the party of the second part and his agents have not exceeded 140, the party of the first part may cancel this contract by thirty days notice in writing to the party of the second part to that effect.

15. It is further mutually understood and agreed that all moneys collected must be paid to BLACKWOOD ESTATES, and that the sub-agents of the party of the second part shall have no right to make collections and that the party of the second part shall be responsible for all collections made by him and his agents.

IN WITNESS WHEREOF, the parties have hereunto duly executed this agreement on the day first above written.

BLACKWOOD ESTATES
by R. A. Russell
President
ATTEST:
Edgar A. Yelton
Secretary
Claude A. Lane (LS)

EXHIBIT "B."

Blackwood Estates
Blackwood, N. J., January 26, 1925.

Mr. Claude A. Lane,
414-415 Washington Square Bldg., Philadelphia, Pa.

Dear Sir:—

Owing to your failure to comply with the terms set forth in paragraph 14, of your agreement with Blackwood Estates dated March 10th, 1924,, relative to the sale of lots in said Blackwood Estates, you are hereby notified that Blackwood Estates hereby elects to cancel said contract, same to take effect February 26, 1925.

BLACKWOOD ESTATES

This is to certify that the above notice was served upon Mr. Claude A. Lane by the undersigned on Monday, January 26, 1925.

Ralph A. Russell
President.

Edgar A. Yelton
Secretary.

NOTICE TO STRIKE COMPLAINT.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

CLAUDE A. LANE, *Plaintiff*, v. BLACKWOOD ESTATES, *Defendant*.	Action at Law. Notice to Strike Complaint.

To Wilbert V. Pike, Attorney for the above Plaintiff:

Sir:

Take notice, that on Monday the 24th day of August, 1925, the above named defendant, Blackwood Estates, will move before Honorable Frank S. Katzenbach, one of the Justices of the New Jersey Supreme Court, at the Court House, City and County of Camden and State of New Jersey, at the hour of ten (10) o'clock A. M., eastern daylight saving time, or as soon thereafter as counsel can be heard, for an order striking out the complaint of the above named plaintiff, heretofore filed in this cause, for the following reason:

1. The said complaint sets forth no valid legal cause of action against the above named defendant, for the reason that the said complaint on its face shows that the plaintiff failed to comply with the

terms of the contract between the plaintiff and defendant, as set forth in Exhibit A, in that the plaintiff had not on November 1st, 1924, and on January 26th, 1925, made one hundred forty sales as required by the provisions of the aforesaid contract theretofore made by and between aforesaid plaintiff and defendant on the 10th day of March, 1924, copy of which is annexed to the said complaint and marked Exhibit A.

Respectfully,
RIGGINS & DAVIS,
Attorneys for Defendant.

[ENDORSED]

Service of the within notice is hereby acknowledged this August 10th, 1925.
Wilbert V. Pike,
Atty. for Pltff.

RULE.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

CLAUDE A. LANE, *Plaintiff,* v. BLACKWOOD ESTATES, *Defendant.*	Action at Law. Rule.

This matter coming on to be heard before this Court on Monday the 24th day of August, 1925, in the presence of Ralph S. Croskey, Esq., of the Philadelphia bar, appearing for Wilbert P. Pike, attorney for the plaintiff, and Frank W. Davis, Esq., of Riggins & Davis, attorneys for the defendant, on motion to strike complaint heretofore filed in the above entitled cause and argument having been heard thereon;

It is therefore, on this 24th day of August, 1925, ordered that the complaint heretofore filed in the above cause be and the same is hereby stricken out for the reason that said complaint on its face shows no cause of action against the above named defendant, and it is further ordered that the plaintiff have leave to file and serve upon the defendant an amended complaint within twenty days from the 24th day of August, 1925.

FRANK S. KATZENBACH,
Justice Supreme Court.

AMENDED COMPLAINT.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

CLAUDE A. LANE, *Plaintiff,* v. BLACKWOOD ESTATES, *Defendant.*	Action at Law. Amended Complaint.

The plaintiff, Claude A. Lane, of Blackwood, in the Township of Gloucester, County of Camden and State of New Jersey, says that:

1. On or about March 10, 1924, the plaintiff and defendant entered into an agreement in writing, dated March 10th, 1924, a true copy of which is annexed hereto and made a part hereof, marked Exhibit "A."

2. In and by said agreement, Exhibit "A," the plaintiff was given the right for a period of two years from the date thereof to sell an entire section of lots owned by the defendant, in its sub-division at Blackwood, Camden County, New Jersey, and plaintiff was to receive a commission of thirty-five per cent on the sales price for all sales made and approved by the defendant.

3. The plaintiff began the performance of the duties imposed upon him by the aforesaid agreement on or about March 10th, 1924, and performed the same in a manner acceptable to the defendant until the breach thereof by the defendant as hereinafter set forth.

4. On November 1st, 1924, the plaintiff had sold two hundred and twenty lots, pursuant to said contract, and the defendant then had the option to cancel said contract by thirty days' notice in writing to the plaintiff to that effect, but the defendant did not exercise said option in accordance with said contract, and did not notify the plaintiff that said contract was cancelled by thirty days' notice in writing to that effect as provided by the terms thereof.

5. Between November 1st, 1924, and January 26th, 1925, the said plaintiff sold fifty-four lots pursuant to said contract, which said sales were made in accordance therewith and in a manner acceptable to the defendant and each one thereof was accepted by the defendant, and the plaintiff avers that by the acceptance thereof the defendant waived whatever right it had on November 1st, 1924, to cancel said contract by thirty days' notice in writing to that effect, due to the fact that on November 1st, 1924, sales made by the plaintiff and his agents, did not exceed one hundred and forty.

6. On or about January 26th, 1925, the defendant committed a breach of the aforesaid agreement by sending to the plaintiff a notice in writing, a true copy of which is hereto annexed and made a part hereof, marked Exhibit "B," wherein and whereby

the defendant notified the plaintiff that it had elected to cancel said contract, the said cancellation to take effect February 26th, 1925.

7. On February 26th, 1925, the plaintiff had sold two hundred and seventy-four lots, pursuant to said contract, and there remained twelve hundred and eighty-one lots which plaintiff had a right to sell under the terms and conditions set forth in said agreement, Exhibit "A," for the price of three hundred thousand dollars, upon which plaintiff is entitled to commission at the rate of thirty-five per cent. of the sales price, aggregating one hundred and five thousand dollars.

8. Defendant has not paid to plaintiff said commission nor any part thereof, nor have the same been paid by defendant to anyone for and on plaintiff's behalf.

9. Plaintiff demands as damages $105,000.

WILBERT V. PIKE
Attorney for Plaintiff.

EXHIBIT "A."

AGREEMENT made this 10th day of March, in the year of our Lord, one thousand nine hundred and twenty-four, BY AND BETWEEN BLACKWOOD ESTATES, a corporation of the State of New Jersey, of the first part, and CLAUDE A. LANE, of Philadelphia, Pennsylvania, of the second part, WITNESSETH:—

WHEREAS, the party of the first part is the owner of a tract of land at Blackwood, Camden County, New Jersey, which it has sub-divided and is selling and,

WHEREAS, the party of the second part desires to sell lots in said sub-division and to hire agents to work for and sell for him;

NOW, THEREFORE, IN CONSIDERATION of the premises and One Dollar, each to the other in hand paid, receipt of which is hereby acknowledged, it is agreed as follows:—

THE PARTY OF THE FIRST PART AGREES;

1. The party of the second part shall for a period of two years from the date hereof, have the right to sell and to employ sub-agents to sell lots owned by the party of the first part in its sub-division at Blackwood, Camden County, New Jersey, as aforesaid:

2. To pay the party of the second part 35% commission on the sales price for all sales made and approved, the payment to be made in the following manner:—

(a) 75 per cent of the initial payment as soon as sale is made and approved;

(b) 75 per cent of all subsequent payments on account thereof on or before the 15th of the month following date of payment or payments until said 35% is paid in full.

3. To give assistance on the said tract to the party of the second part and his agents in closing sales, without making any charge to the party of the second part or his agents for said assistance.

4. To give free title policy on all lots sold in sections up to and including section 37. Said title policy to be issued by the Land Title & Guaranty Company of Camden, New Jersey.

5. To keep grass and weeds on said tract cut and mowed.

6. Not to make any contract with any other person or corporation giving such person or corporation a right to organize a sales force and employ sub-agents.

THE PARTY OF THE SECOND PART AGREES THAT:—

7. His sub-agents are to be his agents exclusively and not agents of the party of the first part.

8. He shall maintain an office in Philadelphia for himself and his sub-agents, and shall pay all the expenses thereof, as well as all expenses of advertising, selling and transportation of himself and his sub-agents.

9. Any literature of advertising matter used by the party of the second part shall, before use, be subject to the approval of the party of the first part.

10. He will sell all lots at list price as determined by the party of the first part, and said list price may be changed by the party of the first part after ten days written notice of any such change to the party of the second part. Any and all sales made by the party of the second part shall conform to and be in the terms of the contract form hereto attached and made a part hereof and subject to the approval of the party of the first part.

11. He will give his exclusive time to the sale of said lots and handle the lots of the party of the first part in said sub-division exclusively.

12. He will not sell or permit his agents to sell said lots without first obtaining a license from the Real Estate Board of the State of New Jersey, and he will pay for all license fees of himself and his agents.

13. It is mutually understood and agreed that the party of the first part reserves the right for itself and its agents to sell to any prospects who are not prospective buyers of the party of the second part and his agents. A prospective buyer of the party of the second part to be considered one who has been personally interviewed by the party of the second part or his agents within sixty days next preceding the date of purchase.

14. It is further mutually understood and agreed that no sale shall be for less than two lots, and that if by November 1, 1924, the sales made by the party of the second part and his agents have not exceeded 140, the party of the first part may cancel this contract by thirty days notice in writing to the party of the second part to that effect.

15. It is further mutually understood and agreed that all moneys collected must be paid to BLACKWOOD ESTATES, and that the sub-agents of the party of the second part shall have no right to make collections and that the party of the second part shall be responsible for all collections made by him and his agents.

IN WITNESS WHEREOF, the parties have hereunto duly executed this agreement on the day first above written.

BLACKWOOD ESTATES
by R. A. Russell
President

ATTEST:
Edgar A. Yelton
Secretary

Claude A. Lane (LS)

EXHIBIT "B."

Blackwood Estates
Blackwood, N. J., January 26, 1925.

Mr. Claude A. Lane,
414-415 Washington Square Bldg., Philadelphia, Pa.

Dear Sir:—

Owing to your failure to comply with the terms set forth in paragraph 14, of your agreement with Blackwood Estates dated March 10th, 1925, relative to the sale of lots in said Blackwood Estates, you are hereby notified that Blackwood Estates hereby elects to cancel said contract, same to take effect February 26, 1925.

BLACKWOOD ESTATES

This is to certify that the above notice was served upon Mr. Claude A. Lane by the undersigned on Monday, January 26, 1925.

Ralph A. Russell
President.

Edgar A. Yelton
Secretary.

NOTICE TO STRIKE AMENDED COMPLAINT.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

CLAUDE A. LANE, *Plaintiff,* v. BLACKWOOD ESTATES, *Defendant.*	Action at Law. Notice to Strike Amended Complaint.

To Wilbert V. Pike, Esq., Attorney for above named Plaintiff:

Take notice that on Monday, the 28th day of September, 1925, the above named defendant, Blackwood Estates, will move before Honorable Frank S. Katzenbach, one of the Justices of the New Jersey Supreme Court, at the Court House in the City and County of Camden, State of New Jersey, at the hour of 11.00 A. M., eastern daylight saving time, or as soon thereafter as counsel can be heard, for an order striking out the amended complaint of the above named plaintiff heretofore filed in this cause, for the following reasons:

1. The said amended complaint sets forth no valid legal cause of action against the above named defendant for the reason that the amended complaint on its face shows that the plaintiff failed to comply

with the terms of the contract made by and between the plaintiff and the said defendant as set forth in Exhibit "A" in that the plaintiff had not, on November 1, 1924, or on January 26, 1925, made 140 sales as required by the provisions of the aforesaid contract theretofore made by and between the parties thereto on the 10th day of March, 1924.

2. The said amended complaint sets forth no valid legal cause of action against the above named defendant for the reason that the amended complaint sets forth no evidence sufficient to support the legal conclusion that the defendant waived its right to cancel the contract between the plaintiff and defendant by reason of failing to exercise its right on the first day such right could have been exercised.

3. The said amended complaint sets forth no valid legal cause of action against the above named defendant for the reason that the amended complaint shows no breach of the contract to have been committed by the defendant.

4. The said amended complaint sets forth no valid legal cause of action against the above named defendant for the reason that the amended complaint does not show that the plaintiff suffered any damage, and does not show any moneys to be due from the defendant to the plaintiff.

Respectfully yours,

Attorneys for Defendant.

[Endorsed]

Due and legal service of the within notice is hereby acknowledged this 17th day of September, 1925.

Wilbert V. Pike,
Attorney for Plaintiff.

RULE.

NEW JERSEY SUPREME COURT.
Camden County.

Claude A. Lane, *Plaintiff*,
v.
Blackwood Estates, *Defendant*.
} Action at Law. Rule.

This matter, coming on to be heard before this court on Monday, the 28th day of September, on motion of the Blackwood Estates, the above named defendant, for a rule striking the amended complaint heretofore filed in the above cause, and the Court having heard argument thereon from Riggins & Davis, attorneys for the above named defendant, and Wilbert V. Pike, attorney for the above named plaintiff, and the Court being of the opinion that the said amended complaint sets forth a question of fact and not a question of law as to whether or not the defendant waived certain provisions of the contract made and executed by and between the plaintiff and the defendant, a copy of which contract is set forth in the said amended complaint and marked Schedule A thereof, and the Court further being of the opinion that the other grounds set forth in defendant's notice of motion to strike said amended complaint furnish no legal reasons for granting the rule sought by the defendant;

It is, therefore, on this 7th day of October, 1925, on motion of Wilbert V. Pike, Esq., attorney for the above named plaintiff, Ordered that the motion to strike the said amended complaint be and the same is hereby denied.

Frank S. Katzenbach,
Supreme Court Justice.

ANSWER TO AMENDED COMPLAINT.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

CLAUDE A. LANE, *Plaintiff,* v. BLACKWOOD ESTATES, *Defendant.*	Action at Law. Answer to Amended Complaint.

The defendant, a corporation of the State of New Jersey, by way of answer to the amended complaint of the above named plaintiff, says that:

1. It admits the contents of paragraph one.

2. It admits the contents of paragraph two.

3. It admits that the plaintiff on or about the date set forth in paragraph three begun performance of his duties as set forth in the agreement referred to in said paragraph, but denies the remainder of the said paragraph.

4. It admits that the plaintiff had, on November 1, 1924, sold 220 lots approximately, more or less, and admits that it did not elect to cancel the contract of the plaintiff on said date, but other than these admissions the defendant denies the contents of the said paragraph four.

5. It denies the contents of paragraph five.

6. It admits the serving upon the plaintiff the notice referred to in paragraph six, but denies the other allegations contained in said paragraph six.

7. It denies the allegations of paragraph seven.

8. It admits that it has not paid to the plaintiff any commissions as alleged to be due in paragraph seven of the said amended complaint and as referred to in paragraph eight of the said amended complaint, but denies that the said commissions or any portion thereof are or is due to the plaintiff.

FIRST SEPARATE DEFENSE.

1. The plaintiff had not, on November 1, 1924, made 140 sales as required by the provisions of the contract, a copy of which is annexed to the amended complaint of the plaintiff.

2. The plaintiff, on January 26, 1925, had not made 140 sales.

3. The plaintiff, on February 26, 1925, had not made 140 sales.

4. By reason of the premises set forth in paragraphs 1, 2 and 3 of this first separate defense, the plaintiff himself breached the terms of the agreement heretofore referred to.

SECOND SEPARATE DEFENSE.

1. The amended complaint of the plaintiff sets forth no valid legal cause of action against the above named defendant for the reason that the amended complaint shows no breach of the contract to have been committed by the defendant.

THIRD SEPARATE DEFENSE.

1. The defendant committed no breach of the contract made between the plaintiff and the defendant for the reason that the amended complaint shows no facts sufficient to support the legal conclusion that the defendant waived its right to cancel the contract between plaintiff and defendant by reason of its failure to exercise its right on the 1st of November, 1924

FOURTH SEPARATE DEFENSE.

1. The plaintiff has not suffered any damage and the amended complaint of the plaintiff does not show any moneys to be due from defendant to plaintiff.

Attorneys for Defendant.

REPLY.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

CLAUDE A. LANE, *Plaintiff*,
v.
BLACKWOOD ESTATES, *Defendant*.

Action at Law.
Reply.

The plaintiff, by way of reply to the answer to amended complaint of the above named defendant, says that:

1. He admits paragraph one of the first separate defense.

2. He admits paragraph two of the first separate defense.

3. He admits paragraph three of the first separate defense.

4. He denies paragraph four of the first separate defense.

5. He denies paragraph one of the second separate defense.

6. He denies paragraph one of the third separate defense.

7. He denies paragraph one of the fourth separate defense.

WILBERT V. PIKE
Attorney for Plaintiff.

[ENDORSED]

We hereby consent to the filing of the within reply out of time.
Riggins & Davis,
Attys. for Def't.

AMENDED ANSWER.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

CLAUDE A. LANE, *Plaintiff,* v. BLACKWOOD ESTATES, a corporation, *Defendant.*	Action at Law. Amended Answer.

The defendant amends its answer heretofore filed in the above cause by adding the following:

FOURTH SEPARATE DEFENSE.

The plaintiff is not entitled to recover upon the contract in the above entitled cause for the reason that prior to January 26, 1925, he was not devoting all his time and using his best efforts in the sale of the lots owned by the Blackwood Estates, as he was required to do under the terms of paragraph 11 of the contract by and between plaintiff and defendant which is annexed to the complaint heretofore filed in the above cause.

FIFTH SEPARATE DEFENSE.

The plaintiff is not entitled to recover in the above entitled cause for the reason that he violated the terms of paragraph 12 of the contract which is annexed to the complaint heretofore filed in the above cause in that prior to January 26, 1925, he was, in the course of his duties imposed upon him by virtue of the aforesaid agreement between plaintiff and defendant, paying money to persons not lawfully entitled to receive the same, and was permitting agents to sell without obtaining a license therefore, committed a breach of the terms and provisions of paragraphs 1 and 2 of the Laws of 1921, as contained in the Pamphlet Laws of 1921, page 370, etc.

Attorneys for Defendant.

TESTIMONY.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY CIRCUIT.

CLAUDE A. LANE, *Plaintiff*,
v.
BLACKWOOD ESTATES, *Defendant*.
Action at Law

February 8, 1926.

APPEARANCES:
For the plaintiff, RALPH S. CROSKEY, ESQ., and WILBERT V. PIKE, ESQ.
For the defendant, RIGGINS & DAVIS, ESQS.

Before DONGES, J., and a jury.

Mr. Davis: If the Court please, for the purpose of the record, before counsel opens to the jury, I wish to move to strike his complaint, the amended complaint. This is merely for the purpose of the record, because Justice Katzenbach has refused to

do so, but in order to preserve my rights I move to strike the complaint on the ground that the amended complaint sets forth no valid and legal cause of action against the defendant for the reason that it shows on its face that the plaintiff failed to comply with the terms of the contract annexed to the complaint, in that the defendant had not on November 1, 1924, or at any time thereafter, and at no time since has complied with the terms, and for the further reason that the statement set forth in the amended complaint as to alleged waiver is supported by no facts which as a matter of law would warrant the legal conclusion that the provisions of the contract had been waived by the defendant; and also for the further reason that the complaint shows no breach of the contract committed by the defendant, and for the further reason that the measure of damages as alleged in the complaint is not a proper measure of damages, and therefore the amended complaint should be stricken.

The Court: I understand this was passed upon by Justice Katzenbach?

Mr. Davis: Yes, it has been.

The Court: And he declined to strike it?

Mr. Davis: Yes, he said he would leave it up to the trial Court to pass upon after the proof had been put in.

The Court: The motion is denied; now, go ahead and open.

Mr. Croskey opens the case for the plaintiff to the jury as follows:

With the permission of your Honor, ladies and gentlement of the jury: This a case where Mr. Claude A. Lane, the gentleman sitting here, is bringing suit against the Blackwood Estates, a corporation. On March 10, 1924, the Blackwood Estates, the defendant, employed this gentleman to sell for it some lots, the Blackwood Estates having a tract of land in this county which had been cut up into building lots, and which it wanted to sell to the public. That contract, of course, will be shown to you. The contract provided, among other things, that Mr. Lane was to be paid a commission of thirty-five per cent of the sales price, and it also provided that Mr. Lane was to make a hundred and forty sales—a sale in this contract, ladies and gentlemen, meaning two lots—by November 1, 1924. Now, November first came around and Mr. Lane had not made the hundred and forty sales. We will prove to you that at that time he realized as well as the corporation realized that he had not made that number of sales, and he made some mention of the fact to both the president and secretary of the corporation, and they told him "No

---

Mr. Davis: I object to that; that is not set up in the complaint; the complaint merely alleges that by reason of the fact that they permitted him to remain, that fact alone, the defendants waived the terms of the contract, and I think counsel should be restricted to that.

The Court: Well, he may go ahead and make his opening. Go ahead.

Mr. Croskey: (Continuing) "No, we are not even concerned about that; we are not even considering your contract of November 1st." Mr. Lane brought to them some fifty more sales; they were accepted, approved, contracts were entered into by the corporation with the various prospective purchasers and deposit moneys in connection with the sales paid over on the contracts. Nothing was said, nothing was done; the corporation permitted Mr. Lane to go on in expending moneys, building up his sales force, sending out men and women to get prospective customers, allowed him to continue from November 1st well into January, and almost at the end of January, namely, on January 26th, out of a clear sky, without any warning, without any notice of any kind or nature whatsoever, they sent him a letter in which they said because he had not then made a hundred and forty sales they were going to arbitrarily just cancel the contract.

Mr. Davis: If the Court please, I object to this argument of counsel to the jury. I think his opening should be restricted to the facts he seeks to prove without any adjectives interpersed with it.

Mr. Croskey: If the Court please, if I have gone afield, I withdraw that statement. They sent him a letter in which they cancelled the contract, to be effective on February 26th, and of course after February 26th Mr. Lane could make no further sales.

Now, after proving to you these facts, we will show you one other fact, or one other series of facts, namely, that on February 26th that tract had a value to Mr. Lane, and when we have proved to you its value to him, we will ask you for a verdict in our favor, because the defendant, we hope to be able to

show you, had taken from Mr. Lane the value which existed in that contract for him. When we have shown you these facts, we will ask for a verdict in our favor in the amount of the value of the contract as it was to Mr. Lane.

Mr. Davis: If the Court please, I move for a non-suit on counsel's opening, for this reason: In opening, counsel says—your Honor can pass on this, because this has not been passed on by Justice Katzenbach; all he passed upon was the motion to strike the complaint—I move for a non-suit on the ground that the opening of the plaintiff's counsel shows that the plaintiff himself was in default and has at no time complied with the terms of this contract. That which counsel for the plaintiff offered to the jury as establishing a waiver of the contract is not alleged in the complaint, therefore is not germane to the issue, and the measure of damages which he alleges in the complaint is not the measure of damage which the claimants really sue for in this case. This complaint has been up before the Supreme Court twice; the complaint as it originally was, was stricken; an amended complaint was allowed to stand because counsel had inserted therein a statement that by reason of their permitting him to remain it raised a question for the trial Court to pass upon upon proper motion when it was brought to his attention. Now, the opening of counsel having of course been foreign to the issue as brought forth by the pleadings, I therefore move for a non-suit upon the grounds stated.

The Court: The motion is denied.

(Exception noted for the defendant.)

(Mr. Davis opened the case for the defendant to the jury.)

During the course of the opening to the jury Mr. Davis said: "We will show you, if the defendant goes to its proof, that the reason the defendant did not cancel the contract when it first had the right to do it was because this plaintiff owed two of the principal stockholders of the company, Mr. Russell and Mr. Yelton personally the money which they had ——"

Mr. Croskey: Just a minute, if the Court please; as the defense here is solely predicated upon the one ground that we did not comply with that contract by making a hundred and forty sales, I think, sir, we should be confined within that issue.

Mr. Davis: Oh, I don't think so, if the Court please; that does not raise an issue outside of the pleadings.

The Court: No, but I suppose you are limited to what you set up, however, Mr. Davis.

Mr. Davis: I move to amend, if the Court please. They contend that we breached the contract by this notice, and we therefore are, of course, limited in our defense as to why we cancelled the contract, to the notice and that letter, but we are not precluded by that letter from showing why we did not exercise it on November 1st, and that is what I was opening about, why we did not exercise it on November 1st.

The Court: Well, do you set up that because you did not exercise it on November 1st for some reason that it did not amount to a waiver?

Mr. Davis: I say that the facts as set forth in the complaint don't show a waiver. Now, after that I am entitled, I believe, to show why we did not exercise it on November 1st, if we are required to show that.

The Court: Well, you either did or did not exercise it, and your reason I suppose is immaterial. We are dealing now with a corporation as such; now, it either did or did not waive, and the fact that this plaintiff may have been indebted personally to some officer of the corporation is immaterial.

Mr. Davis: Well, then, I propose to show as follows, that the plaintiff, Claude A. Lane, wanted to borrow some money from the corporation——

Mr. Croskey: If the Court please, can we make this at side bar? I do not know the practice here, but I do not see why that should be brought out before the jury unless it is material to the issue.

The Court: If it is,—I don't know whether it is or not; the motion now as I understand is to amend.

Mr. Davis: Yes, that is, if your Honor rules that what I am proposing to offer is not competent.

The Cortu: Well, I do not think that anything that you offer that rests on any personal debts is material.

Mr. Davis: I grant you that, if the Court please, standing alone. Now, this that I propose to offer puts a different aspect on it. The plaintiff wanted to borrow some money from the corporation——

Mr. Croskey: If the Court please, I again object to the making of this offer in open Court.

The Court: Well, I will hear it at side bar. (Court and counsel then adjourned to the Judge's room.)

Mr. Davis: We propose to show, if the Court please, that the Blackwood Estates cannot under its charter loan money; that Claude A. Lane, while working for the company, requested a loan from the corporation. The officers of the company told him that the corporation could not loan him money, and these two men, Mr. Yelton and Mr. Russell, ninety-five per cent stockholders and the principal directors of the company, said, "We will lend you money ourselves because the corporation cannot do it." It was to all intents and purposes a loan from the corporation, and that is one of the reasons I propose to show why the right was not exercised when it first could have been exercised.

The Court: (After argument) The amendment is that the plaintiff was indebted in November, 1924 or 1925, whenever the time was, to some of the officers of this corporation.

Mr. Davis: Yes, in a debt contracted while in the course of his employment, and to assist him in the course of his employment with the defendant.

The Court: (After argument) My inclination is to permit the amendment to raise this question, and then thresh it out. We have to deal with questions as they arise.

Mr. Croskey: Well, if the Court please, along that line I move to amend the allegation of damages, so that the same shall now read that the measure of the plaintiff's damages was the value of the contract, to wit, the sum of—I can't give your Honor just now the exact figures, but I will give them to the stenographer in a minute; the same will be the profits which Lane reasonably could have made had he been allowed to continue for the year for which he had no right to continue, rather than my allegation that he was entitled to all commissions he could have gotten on all unsold lots, because obviously that would be unfair; he would have to pay some money himself.

Mr. Davis: If the Court please, I object to that amendment for this reason: This matter was up before Justice Katzenbach once, and the complaint was stricken. After careful preparation, when they were granted about a month's time to file their amended complaint, they finally filed an amended complaint and the cause is now on for trial, been up twice, and there was a motion addressed to strike the amended complaint. They had all this time to carefully consider that, and I think it is unfair to permit an amendment at this time, after counsel has had all this opportunity. I served them notice of a motion to strike the amended complaint, that that measure of damages was objectionable.

The Court: (After further argument) The amendment may be made.

Mr. Davis then proceeded with his opening of the case for the defendant to the jury during the course of which he said, "We will show you further, if the Court please, when this contract was prepared there was a conversation which took place between Mr. Russell and this plaintiff, Claude A. Lane. At the time this contract was executed, this provision, the first of November, as an element came into question

Mr. Croskey: I object; the writing speaks as to what the parties intentions were.

The Court: Is there a writing on the subject?

Mr. Davis: Yes, the contract provides as to November 1st. Now, there seems to be a controversy as to the understanding as to the terms of that provision, and I propose to show what the understanding of the parties was concerning that provision as to its operative effect by a conversation between the parties at the time of the execution of this agreement.

The Court: That is not competent; under well established rules a written contract is presumed to be the agreement of the parties.

Mr. Davis: Yes, but where there is evidently an ambiguity——

The Court: With respect to what is the ambiguity?

Mr. Davis: There seems to be as to the terms of that provision, paragraph fourteen.

The Court: I think the Court has got to deal with that.

Mr. Davis: Then your Honor precludes me from opening as to that?

The Court: I think any controversy that took place prior to or at the time of the execution is incompetent.

(Exception noted for the defendant.)

(Mr. Davis then completed his opening to the jury.)

THE CASE FOR THE PLAINTIFF.

CLAUDE A. LANE, sworn.

By Mr. Croskey:

Q. Now, Mr. Lane, you are the plaintiff in this case, aren't you?
A. Yes, sir.
Q. And in 1924 and 1925 where did you live?
A. I lived at Blackwood, New Jersey.
Q. And your home is there?
A. It was there; I live in Morton, Pennsylvania.
Q. Now, you have moved and live in Morton, Pennsylvania?
A. Yes, Morton, Delaware County.
Q. I show you a paper——

The Court: The contract is agreed to?

Mr. Davis: The contract is admitted.

Mr. Croskey: I will offer it in evidence, if the Court please, and ask that it be marked by the stenographer for the purposes of identification plaintiff's Exhibit No. 1.

The Court: Well, isn't all this being offered in evidence, not for identification?

(Said paper is marked Exhibit P1)

Q. Now, Mr. Lane, will you tell us what you did with reference to the building up of a sales force under this contract? First of all, you were obliged to have an office in Philadelphia, weren't you?
A. Yes.
Q. Did you get such an office?
A. I did.
Q. And where did you establish it?
A. 7th and Chestnut Street, Washington Square building.
Q. And give us a description of that office—it had how many rooms?
A. Two rooms.

Mr. Davis: I object to this as immaterial.

The Court: How is it immaterial, Mr. Croskey?

Mr. Croskey: I wish to show, sir, exactly what this man did prior to November 1st, and then I wish to show what he did afterward.

The Court: I understand there is no controversy upon any point except that he did not make a hundred and forty sales.

Mr. Croskey: Well, we admit that he did not make a hundred and forty sales.

The Court: I say, that is the only question, as I understand it, in controversy; is that true, Mr. Davis?

Mr. Davis: That and the fact that we contend there were no damages; they are the only controversies.

The Court: I mean, you do not claim that in any other respect there was a failure on the part of this plaintiff to perform his contract except that he failed to make a hundred and forty sales?

Mr. Davis: Yes, before November 1st.

The Court: Yes, so I take it the balance of the facts are admitted as far as performance on the part of the plaintiff.

Mr. Croskey: I will withdraw that question, if the Court please. I also call your Honor's attention to the fact that on November 1, 1924, I believe it is admitted that the plaintiff had sold two hundred and twenty lots.

Mr. Davis: More or less.

Q. Mr. Lane, how many lots had you sold by November 1, 1924?

Mr. Davis: Just a minute; may I have the privilege of asking this gentleman a question?

By Mr. Davis:

Q. Did you keep records of your sales?
A. Yes.
Q. Where are they?
A. In the court room.

Mr. Croskey: Will you bring them up, please and give them to the witness? Is there anything else you want, Mr. Lane—is that all your records? Now, will you look over these records and answer my question, please.

The Witness: Yes, sir—what was your question?

(Question repeated as follows: "Q. Mr. Lane, how many lots had you sold by November 1, 1924?)"

A. I had sold, contracts issued, 220 lots.

Mr. Croskey: Now, do you want to verify that from the records?

Mr. Davis: No, he has given that testimony from his records.

By Mr. Croskey:

Q. Now, will you tell us what you did, Mr. Lane, with reference to a continuation of your operations under that contract after November 1, 1924? Now, in answering the question, after November 1, 1924, for instance, did you continue with your office?
A. Yes, sir.

Mr. Davis: If the Court please, I object, because it is immaterial what he did. The question is

whether or not, as I see it, we had a right to cancel this contract, and as I see it, it is a pure question of law; I don't think what he did has any bearing on the question.

The Court: The objection is overruled.

(Exception noted for the defendant.)

(Question and answer repeated.)

Q. And you had at that time how many salesmen?
A. I had I think twelve salesmen—eleven salesmen with New Jersey State licenses.
Q. Did you continue to retain them in your employ?
A. Yes, sir.
Q. Did you have any——

Mr. Davis: I object to these leading questions; let the witness testify.

Q. Did you or did you not have any sub-salesmen?

Mr. Davis: I object to that, if the Court please.

The Court: The objection is overruled.

A. Yes, I did.
Q. How many?
A. I had I suppose at that time——
Q. No, what you know you had.
A. I had at least twenty at that time.
Q. And by whom were they paid?
A. They were paid from my commissions.
Q. Yes; you paid them, didn't you?
A. Yes, sir.

Q. And the salesmen who had the licenses, they were paid upon a commission basis by you, weren't they?
A. Yes.
Q. The sub-salesmen, or the men who went out and got the business, were paid by salary, weren't they?
A. I will have to explain that, there were two ways; we had lady solicitors go out getting what we call leads; those were paid a salary and commission. The men that went out to those leads, part of them went out to get deposits; now, the salesmen that had a license would take the man that put the deposit up down to the ground and sell him.
Q. All right; now, will you tell us—be careful when you answer this question—tell us how much you paid the so-called sub-salesmen which came out of your pocket and which was not based upon sales that they made—in other words, that which was a net loss to you ?

Mr. Davis: I object to that, if the Court please; there is no testimony that these salesmen were employed exclusively on the operation of the defendant.

The Court: How is it material, Mr. Croskey?

Mr. Croskey: Well, I wish to show, sir, that by virtue of the fact that he had received no notice on November 1st of any cancellation he went ahead and paid out money out of his own pocket.

The Court: Well, how is that material?

Mr. Croskey: It is material, sir, I believe, to show that by virtue of the fact that the defendant had not

done something which they might have had a right to do, the position of the plaintiff has been materially altered to his pecuniary loss.

The Court: I will permit that.

(Exception noted for defendant.)

Q. Now, can you answer that question, sir?
A. Some six hundred and forty dollars.
Q. Some six hundred and forty dollars?
A. Yes.
Q. How did you arrive at that figure?
A. I took my day book, our weekly book, and figured it up.
Q. Have you that book here?
A. Yes, I have.
Q. Who kept that book, by-the-by?
A. Myself and a sales manager I had, Mr. Chapman.
Q. Did you figure up that sum from a reference to that book?
A. Yes, sir.

Mr. Davis: If the Court please, may I have an opportunity to ask this gentleman a question before he continues?

The Court: Yes.

By Mr. Davis:

Q. How much of this book was kept by you and how much by Chapman?
A. Most of it was kept by Chapman.
Q. Most of it was kept by Chapman?
A. Yes.

Mr. Davis: I object to the admission of that testimony and move it be stricken out, if the Court please, as to financial loss; if his testimony is based upon that book and he did not keep it, I move it be stricken out.

By the Court:

Q. Are you now testifying from your own knowledge?
A. Yes.

Mr. Davis: Just a minute, if the Court please.

By Mr. Davis:

Q. You are now testifying from the knowledge that you obtained from an inspection of that book, aren't you—yes or no, please?
A. No.
Q. Where did you get your knowledge outside of that book, then?
A. Knowledge because I was the boss of the office and knew everything that went on in the office.

By Mr. Croskey:

Q. Did you pay the bills?
A. Yes.

By Mr. Davis:

Q. Can you tell me now how much money you paid to these sub-salesmen between the first of November and November 15th?
A. In just a minute, yes.

Mr. Davis: Now, I object; you say you know from your own personal knowledge because you paid the bills; now, when I ask you that you say, "Just a minute," and reach for the book.

A. It has been two years now.

By Mr. Croskey:

Q. Well, can you tell us approximately from your own memory how much you spent?

Mr. Davis: Not approximately, if the Court please.

The Court: Wait a minute. Go ahead, Mr. Croskey, with your examination.

Q. Can you tell us approximately from your own memory how much money you spent?
A. Five hundred dollars.

Mr. Davis: Will your Honor allow me an exception to the introduction of that, an exception to the introduction as to the approximate amount of the loss he had? He had previously testified that his knowledge was based on this book.

The Court: Wait a minute; let me know what I am ruling on.

Mr. Davis: I move it be stricken out, because the witness has testified that his knowledge was derived from that book. He has not shown since that time that he has any knowledge as to the exact amount of this money; therefore when he is asked subsequently approximately how much he spent and said five hundred dollars, when he had previously said his knowledge was derived from that book——

The Court: The witness has said that he had personal knowledge how much money was expended. The motion is denied.

(Exception noted for the defendant.)

By Mr. Croskey:

Q. I believe you told us that you continued in your office at the Washington Square Building?
A. Yes.
Q. What was the rent of that office, and did you pay it for the months of November and December 1924, and the months of January and February, 1925?

Mr. Davis: If the Court please, just a minute; the necessary prerequisite, I submit, to the introduction of this testimony is whether or not this man had a lease on the premises here and was bound to pay this rent.

The Court: The objection is overruled.

(Exception noted for the defendant.)

Q. Did you pay rent, sir?
A. Yes.
Q. How much was it?
A. $85.00 a month.
Q. You paid it for four months?
A. And then some afterward.

Mr. Davis: I move that be stricken out.

The Court: Strike it out.

Mr. Croskey: That may be stricken out; we are only interested in these four months.

Q. Did you have any other employes other than the ones you have mentioned to whom you paid a salary at your office?

A. I had a stenographer.

Q. Did you have her during that entire period, namely, November and December, January and February?

A. Yes, sir.

Mr. Davis: If the Court please, if there is going to be any further testimony, in order to save the time of the Court, may I have a general exception to any testimony directed to the time after February 26th in the form that the questions are now being put? There is no duty in the first place or no obligation being shown upon the part of this witness to pay this money, and under our rules, a person, if he has suffered any damage, is obligated to mitigate it the most that he can, and there has been no testimony even that he was obligated to pay this money after February 26th.

The Court: What is the question?

(Question repeated.)

The Court: Your objection goes to so much of the period as is subsequent to February 26th?

Mr. Davis: Yes, if the Court please.

The Court: (To Mr. Croskey) Suppose you limit your question to February 26th.

Mr. Croskey: Yes, I shall eliminate the last two days, sir.

Q. The question now is between November 1, 1924, and February 26, 1925; if you understand the question you may answer it.

A. Yes.

Q. What did you pay to your stenographer?

A. Sixty dollars a month.

Q. Did you have any advertising expenses which were incurred during that period, November 1st to February 26th?

A. Yes.

Q. What were they?

A. I would have to look at my records.

Q. Will you look at your records and let us know?

By the Court:

Q. Did you keep a record?

A. Yes.

The Court: You may refer to any record which you personally kept.

A. Now, in figuring up my expenses, I figured the whole thing together.

By Mr. Croskey:

Q. We are only interested, under his Honor's ruling, from November 1st to February 26th.

A. I could tell you.
Q. How long will it take you?
A. Not long. Do you want the exact figure?

The Court: That is what you are asked.

Q. At my request, Mr. Lane, did you ever go over your books and calculate these figures before—did you yourself personally do that?
A. Yes, I did.
Q. Are those totals personally taken by you from your own books?
A. They are.
Q. Now can you answer the question?
A. Office force $192.00.
Q. No, advertising only.
A. Oh, advertising—I beg pardon—four hundred and nine dollars and sixty-five cents.
Q. Now, that is between November 1 and February 26th, is it?

Mr. Davis: If the Court please, I object to that unless he shows how much advertising he had, the amount of it, and whether or not those prices were reasonable and the ordinary, usual charges.

The Court: All right; go ahead, Mr. Croskey.

Mr. Davis: Will your Honor allow me an exception?

The Court: To what? There is nothing pending.

Mr. Davis: I move the previous testimony be stricken.

The Court: The objection is overruled.

Q. Between November 1, 1924, and February 26, 1925, did you secure any licenses for any of your agents under the laws of the State of New Jersey?
A. I did.
Q. Of whom?
A. A man by the name of Rubicam?
Q. Do you refer to Charles Rubicam?
A. Yes; that was in December.
Q. Did you get a license from him?
A. Yes.
Q. How much did that cost?
A. $5.50.
Q. Did you prepare any advertising for distribution to the public during that period—did you get any advertising scheme up?
A. Yes.
Q. What was that scheme?
A. To send out solicitors and get leads.
Q. Did you prepare any printed matter?
A. Cards for people to sign.
Q. Now, during that time, were you or were you not responsible for any collections on sales which previously had been made?

Mr. Davis: I object to that; the contract speaks for itself. That is calling for a conclusion of law.

(Question withdrawn.)

Q. Did you make any collections on behalf of the defendant during this period?
A. I did.
Q. On acount of sales previously made?
A. I did.

Q. Did you maintain a force—did you or did you not maintain a force for that purpose?

A. No.

Q. Why not?

A. The salesmen would do their own collecting.

Q. It was necessary, was it not, for you to transmit the funds, however, to the home office?

A. Yes.

Q. Now, Mr. Lane, druing that period, November 1 to February 26th, were you or were you not constantly employed in and about the work of the defendant under this particular contract?

A. I was.

Q. Were you working at it all the time?

A. Yes, sir.

Q. And the people employed by you were working at it all the time?

A. Well, they worked like salesmen work, you know.

By the Court:

Q. Comparatively speaking that is all the time, isn't it?

A. Yes.

By Mr. Croskey:

Q. Now, who paid the transportation charges of yourself and the salesmen from—For example, suppose you had a propect living in Pitman, New Jersey, who brought the prospect to the site?

A. We brought them to the site.

Q. And who paid the travelling expenses?

A. I did.

Q. Can you give us the amount of travelling expenses expended by you betewen November 1 and February 26th?

A. I would have to look it up, Mr. Croskey; I have it all.

Q. Did you figure it out at my request?

A. No, I did not.

Q. Well, it would not amount to an awful lot; we will let it go. How long will it take you to look it up?

A. I would have to go over the books from that time, it would take a couple of minutes.

Q. A couple of minutes? Then go ahead.

By Mr. Davis:

Q. Did you keep that book, Mr. Lane?

A. Did I? Yes, sir.

Q. Are these figures in your own handwriting?

A. Yes, sir.

Mr. Croskey: In order to save time, if the Court please, in the interim I believe the writing and service of this letter, dated January 26th, from the plaintiff is admitted, the letter of cancellation?

Mr. Davis: Yes.

Mr. Croskey: I ask that that be marked for identification Plaintiff's Exhibit 2 and also offer it in evidence.

(Said paper is marked Exhibit P2.)

Q. How much was it?

A. Bus fares and railroad fare, twelve dollars and sixty-six cents.

Q. Now, on November 1, 1924, did or did you not have any conversation with Mr. Russell in connection with this contract? First of all, who was Mr. Russell?

A. President of the Blackwood Estates.

Q. Now, on that day, did you have any conversation with him in connection with the right which the defendant had at that time to cancel the contract?

A. Just before November 1st, I did.

Q. Now, where were you at that time?

A. On Sunday we had been out to the Blackwood Estates; Mr. Russell brought——

Q. Now, just a minute; you say "We had been out"—who is "we?"

A. That is the salesmen and all of us.

Q. You are now taking us to the office of Blackwood Estates in Blackwood?

A. Yes.

Q. All right; now, what did Mr. Russell say to you and what did you say to him?

A. We were coming home, Mr. Russell was bringing my wife and I home in the evening.

Mr. Davis: Just answer the question, please.

The Witness: Well, it comes in a roundabout way.

The Court: Well, just answer the question.

The Witness: What was the question?

Q. What did Mr. Russell say to you and what did you say to him?

A. He said I need not worry in the least, there were perfectly satisfied for me to continue the contract.

Q. How did he come to say that to you, Mr. Lane?

A. My wife insisted that I ask him.

Q. Why?

Mr. Davis: If the Court please, I object to why.

Q. Did she say anything in Mr. Russell's presence which indicated her reason for insisting that you ask the question?

A. I don't think so.

Q. However, you did ask Mr. Russell?

A. I did.

Q. Now, just tell us how you asked him; what did you say to him?

A. What I said or what Mrs. Lane said?

Q. What you said to Mr. Russell.

A. I said to Mr. Russell that, "Mrs. Lane seems to be worried about the contract, and wants me to ask you if I do not make the quota what is going to happen?"

Q. What did Mr. Russell say?

Mr. Davis: I object to this line of examination; it is not within the purview of the pleadings. We are not put on notice that there was any such conversation. There was no conversation alleged in the complaint, merely the bare fact that by permitting him to remain we waived the terms of the contract; now, if there was any such statement as this, it should have been alleged and we put on notice. I respectfully object to the admission of it.

The Court: Yes, you do not say that there was any specific waiver, Mr. Croskey; you simply say that the defendant did not exercise the option, did not notify plaintiff that it was cancelled as provided

by the terms of the contract, and that by acceptance of the subsequent sales the defendant waived whatever right it had to cancel the contract. It don't say that there was any express waiver.

Mr. Croskey: I do not say, sir, that there was such a conversation as I am now attempting to prove. I offer this conversation simply to corroborate the fact that the acceptance of the sales in view of all the surrounding circumstances brought about a condition of affairs from which the Court——

The Court: You do not say that this conversation with Mr. Russell was in fact a waiver?

Mr. Croskey: Oh, no, no.

The Court: Very well.

Mr. Davis: Well, if it is admitted on that one ground alone, I withdraw my objection, and the previous admission of this conversation should be qualified under the admission of Mr. Croskey.

The Court: And you say that from all the previous circumstances a waiver is to be concluded?

Mr. Croskey: Yes, I offer the conversation to the Court and jury for what it is worth.

(Question repeated.)

A. He said, "You need not worry in the least, Mr. Lane; we are perfectly satisfied."

By the Court:

Q. Who was Mr. Russell?
A. The president of the Blackwood Estates.

By Mr. Croskey:

Q. Between November 1 and February 26th, did you make any sales in addition to the——
A. Not any sales.
Q. Did you sell any lots in addition to the 220 lots which you testified you had already sold?
A. Yes.
Q. Can you tell me how many?
A. Fifty-four.
Q. You secured those purchases, or your agents did?
A. Yes.
Q. Did they or did they not enter into agreements of sale with the defendant corporation?
A. They did.
Q. Was money paid under them?
A. Yes.
Q. And turned over to the defendant corporation?
A. Yes.
Q. Now, when these agreements had been entered into, made and turned over, were any remarks made by any of the officers of the defendant corporation about these contracts?

Mr. Davis: I object, if the Court please; the facts speak for themselves. There is no such proof alleged in the complaint. I submit, if the Court please, that the plaintiff ought to be held in strict proof here within the terms of his contract and the terms of the complaint; there is only one bare fact

alleged, that by permitting him to remain we waived the terms of the contract, and I think it should be restricted to that.

The Court: I suppose now the effort is to show a whole course of dealing, what was said and what was done, to lead to a certain conclusion, namely, that the contract was to go on.

Mr. Davis: Then I think, if the Court please, that those facts should have been alleged that way, that the complaint should have alleged that by a course of dealing, by conversation and by permitting him to remain it was waived. They say it is by permitting him to remain; they don't allege any course of dealings.

The Court: What is the question?

(Question repeated.)

The Court: There is an allegation in the fifth paragraph that by acceptance by the defendant of these contracts there was a waiver.

Mr. Davis: Yes, but that is a pure question of law and the facts speak for themselves. We admit we accepted the sales which he made; that is all there is to it.

The Court: Well, I suppose it might be alleged that the defendant not only had accepted the contracts, but also, through its officers and agents, expressed itself as desirous of continuing, or whatever the situation was. If you want to make that amendment you may, Mr. Croskey.

Mr. Croskey: No, sir, because the answer to the question will be no; in other words, in line with the complaint, sir, that they were received and accepted.

The Court: What is this precise question?

(Question repeated.)

The Court: He may answer it.

(Exception noted for defendant.)

A. Nothing except just what would be usually said when we delivered business.

Mr. Davis: I object to what would be usually said.

Mr. Croskey: Strike that out, yes.

The Court: Strike it out.

Q. They were received, weren't they?
A. Yes.
Q. The money was turned over?
A. Yes.
Q. Was there any objection made to you to the payment of money?
A. Not in the least.
Q. It was accepted?
A. Yes.
Q. Now, did you ever have a conversation on or after November 1, 1924, with Mr. Yelton with reference to this cancellation? By-the-bye, who was Mr. Yelton?
A. He was secretary and treasurer of the Blackwood Estates.

Q. Did you ever have any such conversation with him?

A. I did.

Q. When did it occur?

Mr. Davis: I object to this for the reason that it is not shown that Yelton had any authority to deal with this matter; he was secretary and treasurer. Further than that, the objection which was previously made to the admission of like testimony as to Mr. Russell—it is objected to for that reason, that there is no proof that any conversation with Mr. Yelton would have any power to bind the company.

The Court: The objection is overruled.

(Exception noted for the defendant.)

A. Do you want me to tell the circumstances?

The Court: No, just answer the question.

A. Sometime after November 1st, I would say, about the middle of the month.

Q. About the middle of the month—do you mean the middle of November?

A. The middle of November, yes.

Q. Where did it occur?

A. At Blackwood Estates office.

Q. Who was present?

A. I don't think there was anyone present, sure there was not.

Q. You mean by that no one beside you and Mr. Yelton?

A. Yes, Mr. Yelton and I.

Q. Now, tell us what he said to you and what you said to him?

A. I said, "Mr. Yelton, you have not made any expression on the cancelling of my contract." He said, "Mr. Lane, I haven't a word to say."

Q. Was there anything else said?

A. No.

Q. Now, Mr. Lane, tell us what was the gross sales price of all the lots, two hundred and seventy-four lots, which you sold for the Blackwood Estates?

A. In round figures or the exact amount?

Q. Exactly?

A. $82,847.00.

Q. $82,847.00?

A. Yes.

Q. Can you give us the figures which will show the gross sales price of all lots, of the fifty-four lots which were made after November 1st—do you have those handy?

A. After November 1st? No, I have not; I could get them for you.

Q. Your gross sales price however was eighty thousand——

A. It is on the piece of paper which you have.

Q. Is this it?

A. Yes, that is it.

(Witness was handed paper by examining counsel.)

A. Seventeen thousand——

Mr. Davis: Just a minute; was that memorandum made by you?

The Witness: Yes.

Q. Did you make that yourself?

A. Yes.

By Mr. Davis:

Q. From what place did you get these figures?
A. From my books.
Q. From what book in particular?
A. The sales book.
Q. Who kept that ?
A. I kept that.
Q. You kept that?
A. Yes.

By Mr. Croskey:

Q. What was the figure?
A. $17,309.00.

The Court: What does that represent?

Mr. Croskey: It represents gross sales price of lots sold after November 1st. Now, if the Court please, I call to your Honor's attention and ask your Honor to take judicial notice of the fact that thirty-five per cent of that figure would be $28,996.45.

Mr. Davis: This is rather unusual; I don't understand what Mr. Croskey proposes by that. There is no claim here for any moneys unpaid. I do not see how it has any relevancy.

The Court: I suppose it is just a fact; he is calling the Court's attention to a certain mathematical calculation, I suppose.

Mr. Davis: Yes, but there is no claim for that; they admit it has been paid.

The Court: No, I suppose that is just a fact in the case that if the sales amounted to eighty odd thousand dollars, thirty-five per cent would be twenty-eight thousand.

Q. Now, Mr. Lane, will you give us during the entire period in which you were working for the Blackwood Estates a statement of your total expenditures.

Mr. Davis: I object to that, if the Court please, as immaterial. This is a claim for profits to grow due from the time the contract was cancelled, and what his expenses were previous to that time, and what he made previous to that time I submit has no bearing on what he could have made after February 26, 1925.

The Court: What would be your idea, Mr. Davis, as to how figures might be adduced from which it would be concluded that the value of the contract is, except by experience? I suppose that if so much were received in commissions and it cost a given sum of money, it would be some evidence from which the jury might conclude what the percentage of the profits to the plaintiff is. (After further argument) It does not appear that there were any more lots of the defendant to be sold, but I think we will take this testimony on the theory that it will be shown that there were more and the plaintiff might have sold some more; if not, I will strike it out. He may answer it.

Q. Will you give us your total expenses during that period?
A. From November?
Q. No, the total expenses?

The Court: From the time you started until you quit with this defendant.

By Mr. Davis:

Q. How did you make these figures up?
A. Took them from from my records.
Q. Now, did you make all of this record yourself—did you keep all these books yourself that you are testifying to?
A. Practically all of them, yes.

By Mr. Croskey:

Q. Which ones didn't you keep?
A. My wife would make an entry once in a while, but I think I did most of them, I am sure very nearly all of them.

By Mr. Davis:

Q. Did you keep all the books yourself?
A. Yes, I did.
Q. Now, your books that you are testifying to with regard to your expenses, did you keep them or didn't you?
A. I did.
Q. You are certain of that?
A. Absolutely. $17,339.08.

By Mr. Croskey:

Q. How is that made up?
A. That is made up of all the office expenses and salesmen's commissions, totalling $17,339.08.

Mr. Croskey: I will call to your Honor's attention and ask your Honor to take judicial notice of the fact that the subtraction of the figure last mentioned as the total expenses from the figure mentioned as the total commissions which came due leaves a net of $11,657.37. I will also call to your Honor's attention and ask your Honor to take judicial notice of the fact that a division of that net figure by the total number of lots sold leaves an average net profit for lots sold of $42.54.

Q. Mr. Lane, how many lots did there remain to be sold when you were discharged?
A. Twelve hundred and eighty-one.
Q. Now, under this contract, it was possible for the Blackwood Estates itself to have made some sales out of that twelve hundred and eighty-one, wasn't it?
A. Yes.
Q. Of course, that was separate and independent from you; during the time when you worked for the Blackwood Estates, can you tell us how many lots they sold?
A. The only way I could tell, Mr. Yelton told me the number of lots we had left for sale beyond the ones that I sold.
Q. How much did they sell, did he tell you?

Mr. Davis: The witness did not say Mr. Yelton told him how many lots they had sold.

Q. Then tell us what you said; if I misunderstood you, I beg your pardon; what was it Mr. Yelton told you?
A. He wanted to sell me Blackwood Estates and told me the number of lots that had been sold, and

the number of lots there were to sell, and deducting the number that I sold, and the number that they had sold before I went there, I figured forty-one.

Q. Forty-one lots?

A. Yes.

Q. Mr. Lane, you have been a salesman for how long, sir?

A. Since I was twenty-one years old.

The Court: That still does not answer the question.

The Witness: Oh, I beg pardon, sir.

Q. How long have you been a salesman?

A. Twenty years.

Q. Have you had much connection with the sale of real estate?

Mr. Davis: I object to this as immaterial; I do not see how it is germane to the issue at all.

The Court: It may be; I think I will permit that; he may answer.

A. I have sold real estate in—well, since I went the Blackwood Estates, and before that in Chicago, and some in Los Angeles.

Q. Roughly speaking, but being conservative—don't over-estimate—can you give us some idea of the total amount of real estate you had sold?

A. I would have to guess at it.

Q. Well, be very conservative, then.

A. Before I went to Blackwood Estates?

Q. Yes.

A. Oh, I would say two hundred thousand dollars worth.

Q. And since then have you sold any?

A. Yes .

Q. Have you been in any other sales campaigns with the exception of this Blackwood Estates where it extended a full year?

A. Yes, that was real estate, you mean?

Q. Yes, real estate.

A. Not any particular one, different ones during the time.

Q. Now, from your experience as a real estate salesman, will you tell us whether or not the sale of real estate to use a colloquial expression that I can understand, has any season?

A. It has.

Q. What is that season?

A. Spring and fall.

Q. The off seasons then, naturally, would be summer and winter?

A. Vacation time, Christmas time.

Q. Can you tell us from your experience as a salesman what is the proportion in a drive, a concentrated drive, of sales made the first year in respect to sales made the second year?

Mr. Davis: If the Court please, I understood this witness to say that he did not engage in any other sales which had extended over the period of one year.

The Court: I think he did say that.

Mr. Davis: I object to the question then, if the Court please.

The Court: It seems to me it is objectionable; he is not qualified to express such an opinion.

(Question withdrawn.)

Q. From your general experience as a real estate man——Oh, I will withdraw that, too. Let me ask you this: Have you ever been in any real estate or other sales program so that you say you would be in a position to tell us whether or not the results of advertising and kindred matters bear fruit the first, second, third or whatever year it may happen to be?

A. Yes, sir.

Mr. Davis: I object to that and move the answer be stricken out. In the first place, the answer calls for a conclusion; that is a question for your Honor to pass on as to whether or not he is in a position to tell, not whether the witness knows he is in a position to tell; that is the way the question was framed.

The Court: He may answer the question.

A. Yes.

Q. Now, will you tell us, based upon the advertising which you had done previous to November 1st, based upon the fact that you have spent in advertising subsequent to November 1st $409.65, based upon the number of salesmen you had, the number of sub-salesmen—or, I believe they were referred to once as lead-getters that you had—based upon your office force, based upon what you had done in the previous year, can you tell us the reasonable, conservative, approximate amount of sales that it was probable you would make in the following year?

Mr. Davis: I object to that.

The Court: The objection is sustained.

Cross-examination.

By Mr. Davis:

Q. How many lots did you sell between the time the contract was signed and February 26, 1925?

A. Two hundred and seventy-four.

Q. Two hundred and seventy-four lots?

A. Yes.

Q. And of those lots you had sold how many before November 1st?

A. Two hundred and twenty.

Q. You had sold two hundred and twenty before November 1st?

A. Yes.

Q. Then between November 1st and February 26th you had sold fifty-four, is that correct?

A. Yes, sir.

Q. And during this time you had twelve salesmen and twenty sub-salesmen working for you, did you?

A. No, sir, not all the time.

Q. When did you begin to have twenty sub-salesmen?

A. I had them at the start of November, and right afterward.

Q. Oh, right after November 1st, you had twenty sub-salesmen, is that right?

A. Yes.

Q. And right after November 1st, 1924, you had twelve salesmen, is that right?

A. No, I stated in the first place eleven salesmen with licenses.

Q. Well, on October 1, 1924, how many salesmen did you have?

A. To be exact, I would say ten.

Q. Do you have your payroll here—do you have the book from which you can determine your expenses as to the payment of commissions here?

A. Yes.

Q. Does that show how many salesmen you had on November 1st?

A. Yes.

Q. Will you produce it, please.

(Witness produces book.)

A. You would have to take the number of sales made, see——

Q. I am asking you about the salesmen, not the sales.

A. I kept no record like that, see.

Q. Well, give me the names of the salesmen you had then on November 1st.

A. I can do that.

Q. On November 1st now.

A. On November 1st?

Q. Yes; now, just a minute; are you referring to any memorandum?

A. Referring to a list of salesmen.

Q. And from where did you get that memorandum?

A. From original cards that we took the record from when the salesman was employed.

Q. Where are those cards?

A. I think I have them in my grip.

Q. Well, just produce them, please.

A. I haven't them here.

Q. All right; how many salesmen did you have on November 1st? Give me their names, please. Just a minute, I object, if the Court please, to this witness using his memorandum; he says those cards are in existence, and they are made from cards; he has not

produced the cards, and I object to the witness refreshing his memory from that.

The Court: All right then, give them the best you can; if you can't remember them all, give them from memory.

A. Mr. Chapman and myself—this is November 1st that you want?

Q. November 1st.

A. Mr. Langnas, Mr. O'Brien, Mr. Chambers, Miss Isaacs.

Q. How about Mr. Wallington?

A. I am just in doubt whether Mr. Wallington was there at that time or not; I am in doubt whether he was there November 1st, he possibly was. That is the reason I did not give his name, because I was in doubt.

Q. You are including yourself in those salesmen, are you?

A. Yes, sir. That is all that I can remember.

Q. That is seven, including yourself.

A. That is all I can remember, Mr. Davis.

Q. Well, were you on this tract of land all the time from November 1st to February 26th?

A. At least every Sunday.

Q. At least every Sunday?

A. Yes.

Q. What would you be doing in the meantime, during the rest of the week?

A. Taking care of the office, sending out solicitors.

Q. Taking care of the office, and you counted your expense and overhead as a salesman in addition to what you claim to be your profits, don't you?

A. I don't just get that.

Q. In other words, you are claiming that you had

twelve salesmen in your employ from the 1st of November to February 26th, including yourself as one; now, how does the fact that you are included among these twelve salesmen affect your profits on these lots which you sold from the time the contract was started until February 26th?

A. How does it affect it? It affects it the same as with the people we had working as solicitors; people that they brought down to the property, I would make the sales for them if they did not have a license.

Q. You would charge for yourself a commission then, would you?

A. No, sir, except that I got what the salesman did not get, see? The salesman got so much commission; of course, I had to——

Q. How much did you pay your salesmen?

Mr. Croskey: I object to that; I do not think it is cross-examination; I don't think it is anybody's business.

The Court: No, Mr. Croskey, you attempted to show the amount of expenses; if that was competent, this is competent; it may be answered.

Q. How much per cent did you pay your salesmen, not your sub-salesmen, but your salesmen?

A. Twenty per cent.

Q. Didn't you pay them twenty-seven per cent?

A. I paid the superintendent twenty-seven per cent.

Q. Who was the superintendent?

A. Mr. Chapman.

Q. After he left who was the superintendent?

A. We had no superintendent then.

Q. How much did you pay Mr. Wallington?

A. Mr. Wallington made his own contracts; some of them were fifteen per cent.

Q. Answer the question; didn't you pay him twenty-seven per cent?

A. No, sir, certainly not.

Q. How much did you pay Langnas?

A. Twenty-seven per cent after Mr. Chapman left.

Q. Then Langnas was superintendent after Chapman left, wasn't he?

A. No, sir, he was no superintendent.

Q. But you only paid the superintendent twenty-seven per cent?

A. Now, to get that straight, if you will permit me, I will tell you how that happened. After Mr. Chapman left, Mr. Langnas——

Q. Now, just a minute, please.

Mr. Davis: I submit that the witness answer the question.

(Question and answer repeated.)

The Court: What is your answer to that?

A. What is my answer?

Q. Yes.

A. That Mr. Chapman was superintendent while he was there.

Mr. Davis: I submit the witness answer the question yes or no.

(Question repeated.)

A. That is right, yes, sir, I did.

Q. Now, how many salesmen did you have working on January 26th, the date of this notice?

A. That I couldn't say sure. Will you let me tell you why I can't say sure?

Q. No, I am not concerned with your reason; just answer the questions, please.

A. I can't answer it positively.

Q. Were you working on any other development then but Blackwood Estates during the time which had elapsed between November 1st, 1924, and February 26, 1925?

Mr. Croskey: I object to that solely on one ground, that I don't think he has a right to bring out his defense by way of cross-examination. I have no objection to that being brought in as a defense, but I don't think it should be brought in by way of cross-examination.

The Court: I think that may be answered.

A. No, sir.

Q. This was the only proposition you had on hand, was it?

A. Yes, sir.

Q. You say in the last twenty years you have worked on about $200,000.00 worth of developments?

A. I said I had sold—I am guessing at it, I couldn't say positive.

Q. You have sold about two hundred thousand dollars worth of real estate?

A. Probably, yes.

Q. And it is now twenty years—ten thousand dollars a year?

A. I did not work at it all the time.

Q. Well, you had told us that you had been working at selling real estate for twenty years.

A. I did not.

Q. Now, how much of the twenty years did you work at selling real estate?

A. I said I had been salesman for twenty years, not real estate.

Q. How long have you been selling real estate then?

A. I suppose I have sold real estate altogether five years.

Q. Five years?

A. Yes.

Q. Did you ever work on any other development before the Blackwood Estates?

A. Yes.

Q. What?

A. In Chicago.

Q. What was the name of it?

A. I worked for Mr. Briddigan's office.

Q. What was the name of the development you worked on?

A. To tell you the truth, I couldn't tell you; I could tell you where it was located.

Q. Where?

A. Western Avenue and 63rd Street.

Q. How big a development was it?

A. Quite a bit.

Q. Well, how big?

A. Well, I would say at least—he had through there at least— oh, seventy-five acres.

Q. He had seventy-five acres?

A. Yes.

Q. Sub-divided?

A. Yes.

Q. How long did you work at that?

A. I suppose for them six months.

Q. How much did you sell while you were there?

A. I would have to guess at that.

Q. Well, how near is your figure of $200,000.00 correct?

A. Well, taking the figure that I sold last year over a number of years, why, it should run more than that.

Q. Over a number of years, over five years?
A. Yes.
Q. When you say you sold, you mean through yourself directly or through——
A. Agents.
Q. Agents whom you employed, is that correct?
A. Whom I had charge of.
Q. Well, what job did you work on where you had charge of them but not control of them?
A. Most any place you work as a salesman, after you are there a certain length of time they make you what they call a superintendent and give you charge.
Q. How much of this two hundred thousand dollars was sold by you while you were superintendent?
A. I can't tell you; I would have to guess at it.
Q. Well, guess; you are guessing at the two hundred thousand, aren't you?
A. I would say not over fifty thousand dollars worth.
Q. While you had men under you, while you were superintending developments during the last five years, you only sold fifty thousand dollars worth, is that right?
A. No, that doesn't mean here, before.
Q. No, I didn't refer to here; you were boss, weren't you—you were not only the superintendent?
A. I was supposed to be.
Q. Well, you were the man that had the contract?
A. Yes.
Q. And you employed a superintendent, didn't you?
A. Yes.
Q. And you employed the other men that worked under the superintendent, didn't you?
A. Yes.
Q. How many jobs did you work on as superintendent?

A. Just the one, I think.
Q. You think—well, don't you know?
A. You know, if you have——
Q. Just answer the question, please.
A. I don't know, no, I couldn't say positive.
Q. How many developments have you worked on in the last five years or in the five years that you worked as a real estate salesman?
A. I have worked on, I suppose, three.
Q. Where were the three—one was in Chicago, was it?
A. Yes.
Q. Where were the other two?
A. Two in Chicago.
Q. Oh, there were two in Chicago?
A. Yes, one out in Cicero and the other at 63rd and Western Avenue.
Q. And they were two of the jobs that you worked on as superintendent in the last five years, during the five years you spent as a real estate salesman, aren't they?
A. No, not as superintendent, both of them; on the Briddigan job as superintendent and the other as salesman.
Q. You said you were on three jobs as superintendent, didn't you?
A. No, I did not understand your question, if you took that as the answer.
Q. Well, how many times were you superintendent?
A. Once.
Q. And you sold fifty thousand dollars worth there, did you?
A. I would say so.
Q. How many salesmen did you have under you?
A. Well, some days you might have ten, the next day you wouldn't have any; you can't tell.

Q. And on the seventy-five acre development in Chicago you had ten salesmen, is that right?

A. I don't know.

Q. Well, how many did you have approximately?

A. I would say five.

Q. Five on a seventy-five acre development?

A. That is all I had; Briddigan had a thousand.

Q. That was the job where you were on as superintendent?

A. Yes.

Q. And you had about a thousand salesmen?

A. I did not.

Q. Well, you were superintendent, weren't you?

A. Just of my bunch, that is all.

Q. How many were under you then?

A. Five.

Q. You had five regularly?

A. No, not regularly; you can't tell about salesmen; today they are here and tomorrow they are gone.

Q. You can't always tell about superintendents, can you?

A. No, you can't, right.

Q. How many development propositions have you been working on in any capacity during the five years you were engaged as a real estate salesman?

A. When I was in California I did not work——

Q. Answer the question, please.

A. Two.

Q. Two, Blackwood and Chicago?

A. No, outside of Blackwood.

Mr. Davis: Mr. Reporter, will you please repeat the previous question to the witness.

(Question repeated.)

A. Altogether I have worked on four.

Q. Four developments regardless of the capacity in which you were working, is that correct?

A. Yes, sir, right, sir.

Q. How many of those did you work as superintendent?

A. One as superintendent.

Q. In Chicago?

A. Yes.

Q. Now, among the four did you include the Blackwood Estates?

A. Yes, sir.

Q. And in that you were working as principal, weren't you—I mean as principal seller?

A. Yes.

Q. The other three you were working in what capacity?

A. The other two salesmen.

Q. Why, you only said you were working on four propositions, one in Chicago and three others. Now, you have eliminated Chicago and you have eliminated the Blackwood Estates; that leaves two, doesn't it?

A. Yes.

Q. All right; in what capacity were you working there?

A. Salesman.

Q. Now, was it two or three?

A. Two.

Q. How long were you working on each of those?

A. I suppose the full time—Blackwood Estates a little over a year, and Avalon a little over a year, the one at Cicero I suppose six or seven months.

Q. The one at 63rd and Western Avenue that you referred to, that was about six months, was it?

A. Yes.

Q. So we have then in the aggregate around three years and three or four months, approximately, is that correct?

A. Yes.

Q. On all four jobs?

A. Yes.

Q. Now, the jobs you refer to are Chicago, Blackwood Estates, Cicero and Avalon?

A. Yes.

Q. Now, Cicero was in Chicago, wasn't it?

A. Yes, a suburb.

Q. I thought you referred a minute ago to some work you did in Los Angeles as a real estate salesman?

A. Yes, I did.

Q. That was another operation you had forgotten, wasn't it?

A. No, I did not forget it; I sold real estate there as a free lance, not as working for any one, working for myself.

Q. How much did you sell while you were in Los Angeles?

A. I couldn't tell you.

Q. Did you prosper or did you fail to succeed?

A. I did; I stayed at the best hotel in town.

Q. How much did that hotel cost you a day?

A. It cost me at that time $4.75.

Q. Were you married?

A. Yes.

Q. Did you have your wife with you?

A. Part of the time.

Q. Did you have any children?

A. Yes.

Q. Did you have any children with you?

A. Yes.

Q. Did they stay at the hotel, too?

A. Yes, when I was there.

Q. And you stayed there how long?

A. In Los Angeles?

Q. Yes.

A. I was in Los Angeles altogether, I guess, I would say seven or eight years.

Q. And you were selling real estate all that time?

A. No.

Q. Well, during what portion of the time were you selling real estate?

A. I would sell real estate as a free lance; I was really out there with a life insurance company, that is why I went there—and when I didn't have anything to do in life insurance, I would sell real estate, pick up sales as a free lance and make them.

Q. That condition obtained throughout the seven or eight years, did it?

A. Well, I would say that condition was in the last four or five years.

Q. Well, then, as a matter of fact, you have been selling real estate for about eight or nine years instead of around four or five, haven't you?

A. I was trying to give you the exact amount of time, not spread over a number of years of time.

Q. All right; now, how many sales do you think you made during the three or four or five years you say while you were in Los Angeles?

A. About five years, yes.

Q. About how many sales did you make during those five years?

A. I have no idea.

Q. When were you in Los Angeles?

A. I left there in 1914.

Q. And you had been there for the preceding seven or eight years, had you?

A. Yes.

Q. At that time Los Angeles was booming considerably, wasn't it?

A. Well, Los Angeles always booms in the winter time; people come out there.

Q. At that particular time of this current century, Los Angeles was having quite a considerable boom, wasn't it?

A. Not that I know of.

Q. It wasn't around 1914 or shortly before that?

A. They always boom Los Angeles, if you call that advertising; they have big signs up.

By the Court:

Q. As a matter of fact, the Pacific coast was pretty bad at that time, wasn't it, relatively?

A. I thought so; that is the reason I left.

By Mr. Davis:

Q. How much did you sell, do you know, during those seven or eight years?

A. I couldn't say.

Q. Can't you give us any idea?

A. I could guess at it because I lived and lived good.

Q. Give us a guess?

A. I suppose real estate I sold would be seventy-five or a hundred thousand dollars worth, along with my other work.

Q. All right, you sold seventy-five to a hundred thousand dollars worth?

A. I am just guessing now.

Q. All your figures are a guess, aren't they?

A. On this they are, sure, because I don't know anything about it.

Q. That is the time you were in Los Angeles; then you sold fifty thousand dollars worth out in Chicago, didn't you?

A. Yes; that was a guess, too.

Q. All right; now, of your two hundred thousand dollarsy ou have got fifty thousand dollars left, haven't you? You sold eighty-four thousand dollars in your Blackwood Estates; you are a bit over your two hundred thousand dollars, aren't you?

A. When we talked about two hundred thousand dollars at first, it was guesswork, and we had not taken Blackwood Estates into consideration at all.

Q. How much did you sell down at Avalon?

A. I could tell you very shortly; I would say the last year personally ten thousand dollars worth.

Q. That is, personally; now, did you have any salesmen under you?

A. No, sir.

Q. You were working by yourself, were you?

A. As a salesman.

Q. And you sold ten thousand dollars worth down there? Now, how much did you sell out in Cicero?

A. According to your figures, the way you figure it——

Q. According to your figures, how much did you sell in Cicero?

A. I don't know, it has been so long ago without records, I would not have any idea.

Q. You don't know whether your two hundred thousand dollars is correct or is not—it is a guess, isn't it?

A. It is a guess, yes.

Q. It might be high and might be low?

A. It might be high and might be low.

Q. Now, how much net profit did you make on this Blackwood tract?

A. How much did I make?
Q. Yes.
A. $11,657.37.
Q. All right; now, just lay that aside for a minute; let's see how far we can go without it. What was the gross selling price of the lots that you sold between November 1, 1924, and February 26, 1925?
A. The gross selling price, $82,000.00.
Q. No, that is for the whole year; I am asking between November 1, 1924 and February, 1926?
A. Seventeen thousand dollars.
Q. $17,309.08, wasn't it?
A. I think so.
Q. Now, had you at any time threatened to quit?
A. Yes, sir.
Q. You had told the Blackwood Estates that you were going to quit, didn't you?
A. Not Blackwood Estates, no, sir.
Q. You had told officers of the Blackwood Estates that you were going to quit, hadn't you?
A. No, sir, not in that way.
Q. You had said to them, "I would like to quit right this minute," hadn't you? Hadn't you said that?
A. No, sir.
Q. Hadn't you said for ten cents you would quit?
A. I don't think that entered into the conversation.
Q. Did you or did you not ever say, around November 1, 1925, "For ten cents, I would quit?"
A. I possibly told Mr. Yelton that.
Q. Did you ever possibly tell Mr. Russell that?
A. I think that conversation happened when Mr. Russell came into my office.
Q. Well, yes or no—did you or did you not?
A. Now, the exact words I couldn't say; I don't remember.

Q. Well, you don't deny that you had, sometime around November 1st, said both to Mr. Russell and Mr. Yelton words indicating that you were of a mind to quit and wanted to quit?
A. No, I did not say that.
Q. And as a matter of fact, that is the reason that you asked Mr. Yelton and Mr. Russell about what was going to happen with regard to the cancellation of this contract—isn't that right?
A. No, sir.
Q. How much money have you paid Blackwood Estates between February 26, 1925, and the present time?

Mr. Croskey: I object to that if the Court please.

The Court: What is the materiality?

Mr. Davis: I offer this for this purpose: This man, if he had any rights under this contract and there was anything due from him to the company as a result of his contract with them, he had a right to retain that against any claim for damages due under this contract, if he had a claim under the contract, and I think it is evidential to show, to give rise to an inference that he had no rights under the contract, and the payment of these moneys was evidence of that.

The Court: You mean moneys that he paid of his own?

Mr. Davis: No, moneys which had been collected on these lots, moneys of other persons which had been paid to his office on account of the purchase price of these lots.

The Court: (After argument.) Well, he may answer the question; I will permit that.

A. I will have to figure that up; that is all in the books.

Q. You know you sent quite a considerable sum, didn't you?

A. Oh, yes.

By the Court:

Q. What were they, moneys collected by you on lots?

A. Yes, on sales contracts.

Q. And you made full returns?

A. Yes, absolutely.

By Mr. Davis:

Q. Now, Mr. Lane, did you ever deny or—— First, let me ask you this: How many times, if any, did you see either Mr. Yelton or Mr. Russell between the time of the service of this notice upon you dated January 26th and the day of the institution of this suit?

A. How many times did I see them?

Q. Yes, or either of them?

A. And the day this suit was started?

Q. Yes.

A. Oh, I saw them at least, I guess, once a week.

Q. Did you ever make any claim to them as to your alleged rights under this contract with reference to the cancellation of it by Blackwood Estates?

Mr. Croskey: I object to that; he made his demand by his suit; he does not have to go and tell the enemy all the data as to his fortifications.

The Court: No, but he may answer it.

A. I did.

Q. Whom did you tell?

A. I told them both.

Q. Was anybody present—no one was present?

A. I am just trying to think. Now, you ask me if I talked to them about the contract after they notified me?

Q. Yes.

A. No, I did not; I will correct that.

Q. And you had seen them about an average of once a week, hadn't you?

A. I would say so.

Q. And never said a thing to them about this, did you?

A. I said plenty before.

Mr. Davis: I move that be stricken out, if the Court please.

The Court: Strike it out.

Q. After this notice was served upon you, you saw them continuously, you say on an average of once a week between that time and the time you started suit—that is what your testimony was, wasn't it?

A. Yes, I believe so.

Q. And you never said anything to them about serving this notice upon you?

A. I did not.

Q. You never made any claim that they had no right to cancel it, did you?

A. Not after they served the notice, no, sir.

Q. You said nothing prior to the time notice was

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served upon you about their not having any right to cancel it any time they saw fit, did you?

A. I did.

Q. When?

A. The notice was served on the 26th of January; I guess it was about—— Mr. Croskey has a letter that I wrote Mr. Yelton about Mr. Wallington making sales.

Q. That was a letter where you notified Mr. Yelton there was some difficulty between you and Mr. Walington, wasn't it?

A. No, sir, that is the letter I notified him that Mr. Wallington was working for me and not the Blackwood Estates.

Q. Will you read that letter, please?

A. Out loud?

Q. No, just read it.

A. To myself, you mean?

Q. Yes; there is nothing in there claiming that the Blackwood Estates did not have a right to cancel this contract, is there?

A. The contract had never been spoken of then.

Q. I thought you just testified that you told them before November 1st that they didn't have the right to cancel the contract?

A. No, sir, I did not.

Mr. Davis: Mr. Reporter, will youjust read that?

The Court: You asked him January 26th; he said prior to January 26th there was some discussion.

Q. All right; before January 26th, between November 1, 1924, and February 26, 1925, had there been any conversation between you in which you denied the right of the Blackwood Estates to cancel this contract?

A. Yes.

Q. When did that conversation take place and in the presence of whom?

A. The next time I saw them after I wrote that letter; that was the next Sunday.

Q. What is the date of that letter?

A. The date of this is January 8th.

Q. January 8th?

A. Yes, sir.

Q. Do you know what day January 8th was?

A. No.

Q. Assuming January 8th to have been on Tuesday and you saw him the next Sunday—do you mean the Sunday immediately following the Tuesday which was the date of that letter, is that right?

A. Yes.

Q. Whom did you see?

A. I saw Mr. Yelton and Mr. Russell both.

Q. Where?

A. In the office of the Blackwood Estates.

Q. What was said about the right to cancel this contract, if anything?

A. What was said just about the contract?

Q. What was said, if anything, about the right in the Blackwood Estates to cancel this contract?

A. You mean what brought up the conversation on that or just what was said?

(Question repeated.)

The Court: What was said upon that particular subject is what you are asked.

A. I told them that they had no right to cancel the contract.

Q. But the conversation came up, did it?

A. Yes.
Q. And who brought up the question?
A. Mr. Russell, I believe.
Q. You said that they had no right to cancel the contract?
A. I did.
Q. Are you sure that conversation took place?
A. I am.

(At this point a recess was taken until 1.30 o'clock, P. M.)

Trial of the cause resumed at 1.30 o'clock, P. M., pursuant to adjournment, in the presence of counsel for the respective parties.

CLAUDE A. LANE, resumed.

By Mr. Davis:

Q. Now, Mr. Lane, you said you had twenty sub-agents, didn't you?
A. At least that many, yes.
Q. And where did the majority of those persons live, Pennsylvania or New Jersey?
A. Pennsylvania.
Q. How many of them had New Jersey real estate salesmen's licenses?
A. No sub-agents had any licenses; that is why we wouldn't let them sell.
Q. Are you familiar with the provisions of the license act of 1921?

A. I think I am.
Q. Section twelve of the contract was drawn in order to make you conform to that act, wasn't it?
A. I don't just get what you mean.
Q. Section 12 of the contract says—I will read it to you: "He will not sell or permit his agents to sell said lots without first obtaining a license from the New Jersey Real Estate Board of the State of New Jersey, and will pay all license fees for himself and his agents."
A. Yes.
Q. That was to make you comply with the terms of that act, wasn't it?
A. Yes.
Q. You say you are familiar with the terms of that act?
A. I am.
Q. Do you know that it says that a salesman is one who either sells directly or indirectly or negotiates a sale?
A. They were not negotiating the sales.
Q. Just a minute—do you know that?
A. Yes.
Q. And these persons, these sub-agents, would go out and get leads and bring them down to the tract and introduce them to you or some of the other men who were on the ground, is that right?
A. That is right.
Q. And for that they were paid by you twenty-five dollars a week?
A. No.
Q. That is what you said, wasn't it?
A. No, I beg your pardon, I did not.
Q. In your direct examination, didn't you say you paid these sub-agents twenty-five dollars a week?
A. I did not.
Q. What did you say?

A. I paid some of them fifteen, some of them eighteen.

Q. But you paid all of them something, didn't you?

A. Those were not sub-agents; those were solicitors getting leads that we paid salaries to. The sub-agents worked—— The salesmen went out, made the sale and split the commission with the sub-agent.

Q. These twenty people you referred to are what you call the sub-agents, weren't they?

A. Yes, they were not really agents; I just called them that.

Q. You did not distinguish between the salesmen, sub-agents and solicitors, did you, in your direct examination—yes or no, please?

A. Well, no, I guess not.

Q. And the twenty people you referred to as sub-agents were solicitors of sub-agents, weren't they?

A. No, they were just sub-agents, if you want to make the distinction.

Q. You said you did not distinguish between the sub-agents and the solicitors; you say they were both included in the twenty and now you say they were not; now, which is true?

A. You possibly did not understand my answer.

Q. I think my question was plain enough, Mr. Lane.

A. Well, I did not understand your question.

Q. You said there were twenty sub-agents?

A. Yes.

Q. Now, how many of those were sub-agents in line with your new definition of the sub-agents?

A. All of them.

Q. How many of them were solicitors?

A. None of them.

Q. Why then, in your direct examination, when

you were setting forth your expenses, did you not include your salary for these solicitors?

A. I did.

Q. That was the $640.00 item, wasn't it?

A. Yes.

Q. And when you gave that testimony, that was included in your sub-agents, wasn't it?

A. It might have been along at the same time; I did not aim it to be.

Q. Well, now, on your direct examination, you said nothing about solicitors, did you? You included them in your sub-agency, didn't you?

A. I don't remember.

Q. Well, you had twenty sub-agents then and how many solicitors?

A. I had part of the time, only a part of the time, yes.

Q. And they did not have licenses?

A. No.

Q. Can you give me the name of the twenty sub-agents you mean?

A. I can by referring to a list.

Q. All right, do that. Just a minute, Mr. Lane, may I ask you why you did not bring the cards showing the time when these salesmen were employed here instead of that list?

A. I intended to put a rubber band around them, laid them out to bring them, but forgot to put them in. I will get them if you want to see them.

Q. Well, if this case holds over, will you please produce them tomorrow?

A. I certainly will.

Q. Now, from that list, give me the names of the twenty sub-agents. By the way, were all these twenty working at the same time?

A. No.

Q. What was the largest number of sub-agents you had working at any one time?

A. I don't know.

Q. Well, how long were some of them in your employ?

A. Some of them were in from—well, along in July until we quit. Do you want the names of them?

Q. Well, I want you to answer that question first.

A. I beg your pardon.

Q. I asked you how long you had some of these sub-agents in your employ?

A. I will say from the 1st of July until the 1st of February.

Q. You had how many on during that period?

A. Oh, I don't know; here is the whole list of them here.

Q. I know, but that list does not say how long they were in your employ, does it?

A. Some of them would stay a week, some would try it one day, and some would stay all the time; I can't tell.

Q. Well, how many did you have all the time?

A. That I don't know.

Q. Don't you think that is rather material?

A. It may be; I don't know.

Q. You have the means to obtain that information in your control, don't you?

A. No, I have not; I have the means of telling the last time a sale was made that they had a commission in; otherwise I don't know; they might have stayed a month after that and not made anything.

Q. But you are not in a position to state definitely that between any given period you had any specific number of men at work, are you?

A. The exact number, no, I am not.

Q. And when you gave the figure twenty, that

means the aggregate number you had working for you between the date of this contract and the time when it was terminated?

A. No, when I gave the number twenty, I meant that I felt sure that I had twenty at that time.

Q. Do you mean to tell us that you had twenty working for you on February 26th?

A. No, I didn't have anybody.

Q. How long before February 26th had you not had any one?

A. When the Blackwood Estates notified my salesmen they were going to cancel my contract.

Q. Then you got rid of them?

A. They quit.

Q. When did they quit?

A. As soon as they notified me, then they commenced to tell them there was going to be a change.

Q. When did they quit?

A. Oh, the exact dates, I don't know.

Q. Well, how soon after January 26th?

A. Well, I would say the first time, they were out inside of a week; part of the force quit in that week.

Q. And that pertains both to your salesmen and your sub-salesmen, does it?

A. That pertains to everybody.

Q. Well, then, your testimony in direct examination as to having these people working for you until February 26th was not true, was it?

A. Yes, it was true.

Q. Well, they were not working for you, were they?

A. You understand, possibly, Mr. Davis, how salesmen work. They will tell you they are working when they are not working. They had been working for me, and they hated to quit because they expected to get a job from the Blackwood Estates.

Q. Mr. Lane, on your direct examination you said you suffered so much loss, that you had these people working for you until February 26th, didn't you?
A. Yes.
Q. Well, they were not, were they?
A. Well, that I don't know.
Q. You have just said they quit about a week afterward, didn't you?
A. They commenced quitting; they didn't all quit.
Q. Mr. Lane, about two or three questions ago, you said a week after the notice was dated and served, there was no one working for you—now, didn't you?
A. No, I did not.

Mr. Davis: Mr. Reporter, will you read that, please.

(The testimony of the witness in this respect was then read by the reporter.)

Q. You said that, didn't you?
A. Yes.
Q. Then you didn't have anybody working for you a week after the time the Blackwood Estates notified you to February 26th?
A. I didn't have anybody working the week before? Yes, I did.
Q. A week after that time.
A. Oh, I did, yes.
Q. Then your first answer was not correct, was it?
A. I think it was, the way I understand it.
Q. Now, you have said two different things; which is true?
A. I did not intend to.
Q. I did not ask you what you intended; I ask you which is true?

The Court: Suppose you propound the two things you assume to be conflicting.

Q. You said, Mr. Lane, you had no one working for you the week following the date of the notice of the Blackwood Estates to quit?
A. I didn't say that.
Q. It is in the record.
A. No, it is not.
Q. Give us the date when you had no one in your employ then.
A. February 26th.
Q. How many did you have in your employ on February 26th?
A. No one.
Q. When did you first begin to have no one?
A. When Blackwood Estates commenced notifying my salesmen there was going to be a change.
Q. All right; now, you can't give us, I understand you to say, the number of sub-agents that you had working for you at any particular time—is that correct?
A. I cannot, no, sir, and be truthful.
Q. And the twenty you gave us is the aggregate number you had between the date of this contract, March 10, 1924, and February 26, 1925, isn't it?
A. I will ask you what you mean by "aggregate number."
Q. Do you know the definition of "aggregate?"
A. Possibly I do not.
Q. It means "total," doesn't it?
A. I had more than that.
Q. Well, what does the twenty indicate?
A. As I explained to you, I thought I was putting twenty so I would be sure to have it absolutely right.
Q. I know, but what does it mean?

A. It means that I had at least that many.
Q. Working at what time?
A. Well, that I can't answer; they might be working and they might not. They were supposed to be working, and as far as I was concerned, yes, they were working, I will say, in August, September and October.
Q. That you had twenty sub-agents working for you, is that right?
A. Yes.
Q. And you can give us the names of those, can you, that were working during that time?
A. I think so.
Q. Well, let's see—give it to us.
A. Clifford Baker——
Q. Now, do you know when he started working for you?
A. May 19,1924.
Q. Do you know what the date of his last sale was?
A. Baker didn't make any sales.
Q. He didn't make any sales?
A. No, he was not allowed to.
Q. Do you know when he quit?
A. I could tell.
Q. All right, go ahead and give us the next one.
A. When he quit?
Q. Give us the next name.
A. Holden, Kleinman, Holdroyd, Wallace, Anderson, Cook, Collaty, Daniels, Joiner, Kurtz, Kappes, Madden, Veinard, Wynkopp, Tomlin, Addessa, Brelsford, Davis, McGinley, Phillips—I think that is all.
Q. That is fifteen, Mr. Lane.
A. Is that all? There might have been some more, but I am not sure.
Q. Now, aren't these the names of men that came

to you in answer to an advertisement put in the paper for salesmen?
A. Yes.
Q. You would give them a map and explain the proposition to them, wouldn't you?
A. Yes.
Q. And whether those men ever came to work, you don't know, do you, except for a few?
A. Yes, we do.
Q. Well, how many of them came to work?
A. All of them came to work.
Q. All of them?
A. Yes.
Q. How long did they work on the tract, do you know?
A. On the tract? Never.
Q. They never did?
A. No, we did not allow them to.
Q. Then whether or not they ever worked is something peculiarly within your own knowledge, and the defendants would have no knowledge of that, is that right?
A. That is right, yes. In some cases they wouldn't have knowledge, like Mr. Holden took prospects down and Mr. Yelton sold them for him.
Q. I thought you said they were not allowed to be on the tract?
A. No, not allowed to sell.
Q. They would take prospects down to the tract, wouldn't they?
A. Yes, they were allowed to do that.
Q. And if these men were working, whether or not any sales were made as a result of their efforts, if they actually were working for you, it would come to the knowledge of the defendants, wouldn't it, by taking prospects down there?

A. If they took any prospects down there, yes.

Q. Well, if they were doing anything at all, they would take prospects down, whether they sold them or not, wouldn't they?

A. No, not always.

Q. Now, from the lots that you sold there was $82,847.00 gross return, wasn't there, to the company?

A. I beg your pardon?

Q. The gross amount of the sales that you made or your men made were $82,847.00—that is correct, isn't it?

A. Yes.

Q. And of that you sold between November 1 and February 26th, $17,309.08 worth, is that right?

A. Let me have that list, Mr. Croskey, please. After November 1st?

Q. And between February 26, 1925?

A. $17,309.00 to be exact.

Q. The eight cents is off?

A. That is the expenses; I gave you the wrong figure; I am sorry.

Q. Well, what is the amount that you sold in the interim then?

A. Between November 1st and January 26th?

Q. February 26th.

A. I beg your pardon, February 26th—$17,309.00.

Q. Wasn't that just the amount that you gave us for your expenses?

A. No, there was eight cents.

Q. The amount was the same except for eight cents?

A. I believe so—let's see—no, $17,339.08 for the expenses.

Q. And did you in the expenses include the commissions which you paid to your salesmen?

A. Yes, sir.

Q. That included your office expenses, your advertising expenses and the salaries you paid to your solicitors and the commissions to your salesmen, is that correct?

A. Yes, sir.

Q. And the difference is what you made?

A. Yes, sir.

Q. The difference of sixty-four thousand and some odd hundred dollars—sixty-five thousand five hundred and some odd dollars?

A. Oh, no.

Q. Well, that is the way I understand your figures. You say your expenses were $17,339.08.

The Court: You are taking that from the gross, not from his commissions on the sales.

Q. Your commission was how much?

A. $28,000.00.

Q. And what?

A. $28,996.45.

Q. Now, you gave us, I think, this morning the names of the salesmen you had working for you, didn't you?

A. I tried to.

Q. Well, can you give all the twelve you said you had working for you?

A. I think I said eleven, I corrected that. I can give them to you, yes.

Q. You only gave us seven.

A. Yes, C. A. Lane, Chapman, Langnas, Chambers, Davis, Isaacs, O'Brien, Rubicam, Slepin, Welsh and Wallington.

Q. Now, what commission did you pay Chambers?

A. Chambers, twenty per cent.

Q. How much did you pay Chapman?
A. Twenty-seven.
Q. How much did you pay O'Brien?
A. Twenty and twenty-seven.
Q. When did you begin to pay him twenty-seven?
A. After Mr. Chapman quit.
Q. When did he quit?
A. Along about December 1st.
Q. December 1st—are you sure of that?
A. Yes.
Q. From December 1st on you were paying O'Brien twenty-seven?
A. I am not sure about the exact date, whether it was the first or second.
Q. On or about?
A. Yes.
Q. Now, how about Langnas—how much did you pay him?
A. Mr. Langnas came with Mr. Chapman; he had twenty-seven per cent all the time.
Q. Wallington?
A. Wallington started out with fifteen, and he cut his commissions down to ten.
Q. When did he come with you?
A. September 27.
Q. He started in at fifteen?
A. Yes.
Q. And cut it down to ten, did he, his commissions?
A. He started at fifteen.
Q. Then cut it down to ten?
A. His commissions were raised to twenty, but he gave the people who helped him sell ten per cent of his twenty.
Q. I am asking you now how much you paid him; you paid him how much when he started, fifteen per cent?

A. Fifteen per cent.
Q. For how long did you pay him fifteen per cent?
A. Until he got $5,000.00 worth of property.
Q. When was that, approximately?
A. I don't know.
Q. Approximately?
A. In the first month.
Q. In the first month?
A. Yes.
Q. So about October 1st you began paying him twenty per cent, is that right?
A. Along there.
Q. And you paid him twenty per cent from October on?
A. Yes.
Q. How about Rubicam—how much did you pay him?
A. I didn't pay him anything.
Q. He did not make any sales, did he?
A. He made some sales, but for Blackwood Estates, not for me, so he claimed.
Q. But you paid him no money?
A. I did not.
Q. And he made no sales for you then, did he?
A. Well, I don't know that; I can't answer it.
Q. According to your records, he made no sales for you?
A. According to my records he made no sales.
Q. Never mind; just answer the question, please; I don't want you to say anything beside what I ask you.
A. I beg pardon.
Q. How about Isaacs?
A. She made sales.
Q. How much did you pay her?
A. Twenty per cent.

Q. How about Davis?
A. I don't think Mr. Davis made a sale.
Q. How about Lane—how much did you pay him?
A. Lane got the remainder of what was left.
Q. Now, how about Slepin?
A. I think the sales that Slepin was interested in were split with Mr. Langnas, if I am not mistaken.
Q. What was your arrangement with him about how much commission he was to get?
A. Twenty per cent.
Q. How about Welsh?
A. Twenty per cent.
Q. The men to whom you were paying twenty-seven per cent made the bulk of the sales, didn't they?
A. No, sir.
Q. Didn't Chapman, O'Brien and Langnas make the bulk of the sales, excluding Wallington?
A. Now, you see you are getting wrong again. Mr. Chapman got twenty-seven per cent, and out of his twenty-seven per cent, which was allowed to him, that he had charge of, there was twenty per cent taken from that and given to the salesman.
Q. So that in order to determine how much the commissions were then you would have to take the time which elapsed between the date of this contract and the time that Chapman left, then take twenty-seven per cent of that, wouldn't you, and he would taken seven of that twenty-seven and distribute the twenty to whatever salesman made the sale?
A. I don't understand you.
Q. I understood you to say that Chapman got twenty-seven per cent?
A. You wouldn't let me explain that, see.
Q. Now, just a minute, please, if you will answer the question we will get along better.

A. I will.
Q. You paid Chapman twenty-seven per cent, didn't you?
A. Yes.
Q. Out of the twenty-seven per cent the man that made the sale got twenty?
A. If he——
Q. And Chapman got the other seven?
A. Yes.
Q. So in order to determine the exact amount of your commission expense account between the date of this contract and the date Chapman left, you would have to take the gross amount of sales made by you and then twenty-seven per cent of the thirty-five per cent, wouldn't you?
A. Right.
Q. All right; now, can you tell us what was the amount of your sales up to the time Chapman left?
A. No, I cannot; I can tell you up to November 1st.
Q. And he left when?
A. Around December 1st.
Q. Around December 1st; now, what was the amount of your sales in December or rather in November?
A. Up to November 1st?
Q. No, in November?
A. I don't know.
Q. You said that Mr. Wallington came with you in September and made five thousand dollars worth of sales; can you tell me how many sales he made in November?
A. I could by going over the records.
Q. You don't have those here, do you?
A. Yes.
Q. All right; is there any way from the records

you have here that you can tell us how much the aggregate amount of your sales were up until December 1st, assuming that that is the time that Chapman left?

A. What my sales were up to December 1st? Yes.

Q. All right; let's have that, please.

A. It will take some time.

Q. Well, I am afraid we will have to go through with it.

A. All right.

By the Court:

Q. Did Chapman get twenty-seven per cent of all commissions?

A. He had to pay out twenty of that.

Q. No, did he get twenty-seven per cent of all commissions?

A. No.

Q. He got twenty-seven per cent only on sales that he or his salesmen effected?

A. The salesmen he had charge of, yes.

By Mr. Davis:

Q. How many salesmen did he have charge of—he had charge of them all, didn't he?

A. No.

Q. What were the salesmen he did not have charge of?

A. Davis and Rubicam that had licenses.

Q. And Davis made no sales?

A. Right.

Q. And Rubicam made none?

A. Right.

Q. Therefore all the sales that were made, the

twenty-seven per cent went to Mr. Chapman and the salesmen under him, that is right, is it?

A. No.

Q. Well, you said he had charge of all salesmen except Davis and Rubicam and neither of them made any sales.

A. The people who worked for me, I made some sales for them.

Q. What do you mean by that?

A. The people that did not have licenses.

Q. You mean the solicitors?

A. Yes; not solicitors, no; you called them sub-agents, I believe.

Q. You were differentiating a few minutes ago between sub-agents and solicitors.

A. Yes, that is right.

Q. Now, who did you make the sales for, the sub-agents or solicitors?

A. Sub-agents.

Q. Well, what function did the solicitors play or perform?

A. They went out to get the leads.

Q. And then bring them down to the tract, wouldn't they?

A. Oh, no.

Q. Where would they bring them then?

A. Would not bring them any place; they would bring the names back to the office.

Q. And as a result of that, then what would happen?

A. A sub-agent would go out and try to get a deposit or take them down to the property or send them down.

Q. I see, and for that service, any negotiation relating to the sale of this property, the solicitors were paid that which you previously testified to—that is correct, isn't it?

A. Right.

Q. Now, referring back to your testimony as to that portion of the commissions which you got, if the people who were working for you for whom you made sales—— How many sub-agents were there, twenty?

A. No.

Q. Well, how many sub-agents were there?

A. I could name them for you.

Q. Can't you tell us off-hand, how many there were?

A. Exact? No, I would not swear to it.

Q. Well, did you make the sales for all the sub-agents?

A. I was, yes, at times willing to, and for the agents themselves.

Q. How many sales did you make?

A. How many sales did I make personally? I don't have any idea.

Q. Do you have any records that show how many you made?

A. No, I do not.

Q. Then you don't know whether you made one or two or six, do you?

A. Oh, yes, I know I made more than that.

Q. You made more than six?

A. Yes.

Q. Well, did you make ten?

A. That I couldn't say.

Q. Well, you made between six and ten, did you?

A. I would say more than ten.

Q. Well, how many then?

A. I don't know.

Q. About how many, twenty?

A. I don't know.

Q. But you are sure you made more than ten?

A. Well, I would think so, I am not sure, no.

Q. Well, you might have made six, mightn't you?

A. I might, yes, you are right.

Q. Do you have any idea of the aggregate value of the lots that you sold?

A. The aggregate value of the lots that I sold?

Q. Yes, the gross value?

A. $82,000.00.

Q. In return to the Blackwood Estates for the lots that you sold, how much was the total amount?

A. $82,000.00.

Q. Of the lots that you personally sold?

A. Oh, that I personally sold? I don't know, I didn't keep any account.

Q. Well, it was a considerably small portion of the total sales made between March 10th and November 1st or December 1st, isn't that right?

A. Yes and no.

Q. Well, what do you mean by "yes and no"—it was either a small portion or it wasn't; now, which was it?

A. I mean this, that I was out there every Sunday to help the salesmen to make this sale and that sale.

Q. Now, Mr. Lane, I am talking about the sales that you closed yourself, not the help that you gave your salesmen—you were obliged to do that.

A. Personally I never closed a sale myself unless I did it for somebody else.

Q. And then you paid commission, didn't you, you didn't get it?

A. Absolutely.

Q. Then out of the thirty-five per cent you got for the sales you made between March 10th and December 1st, you paid twenty-seven per cent out, didn't you?

A. No, sir, not all of it.

Q. Well, how much did you pay twenty-seven on, and how much did you pay twenty?

A. The people that were working under Mr. Chapman, he was the superintendent over them.

Q. And he had all the salesmen that made any sales other than you?

A. Yes.

Q. And you paid him twenty-seven per cent?

A. Yes.

Q. And how much did you pay to these people for whom you made sales, as you say, although you say you did not close any?

A. I closed them for the other people, yes, not for myself.

Q. All right, you did; how much did you pay them, then?

A. I paid them fifteen per cent and twenty per cent.

Q. Would the average, you say, be—— What would the average be?

A. Well, I will say—I think I only had one that I paid fifteen—I would say nineteen per cent.

Q. Nineteen per cent; all right. Now, did you say you could tell us the total amount of sales made by Chapman and the men under him between March 10th and December 1st?

A. Yes.

Q. All right, give us that total, please. Well, perhaps we can get at it a little bit quicker. You said you sold seventeen thousand three hundred and nine dollars worth between November 1st and the 26th of February, didn't you?

A. Yes.

Q. Or rather, your men sold—that was the number of sales, the amount of sales?

A. Yes.

Q. Now, what would you say would be a fair portion of that for November, for the month of November until December 1st, the time that Chapman left?

A. Well, I would say possibly half of it.

Q. Half? All right; well, let's take that then for the figure representing the sales for the month of November; it would be $8654.50.

By the Court:

Q. What percentage of the sixty-five thousand dollars worth of lots sold between March and November do you suppose Chapman and his men sold?

A. What percentage?

Q. Yes.

A. I would say ninety-five per cent.

Q. So that on ninety-five per cent of the business done between March and November, amounting to about sixty-five thousand dollars, you paid twenty-seven per cent commission?

A. Yes, sir.

Q. That was twenty-seven per cent of sixty-five thousand?

A. Sold, yes.

By Mr. Davis:

Q. And those figures would likewise obtain up until December 1st, wouldn't they?

A. I would think so, yes.

Q. All right; then the aggregate amount of sales up until December 1st were $74,961.00, and out of them would be coming to you seven per cent, from which would be deducted your expenses, is that right?

A. Office expenses, yes.

Q. Well, all expenses—or, rather, eight per cent; that is would be $5996.88, which would be the gross return to you as a result of the work under this contract between March 10th and December 1, 1924. Now, your office expenses, administration expenses during the life of this contract amounted to how much?

A. Three thousand and some dollars.

Q. Three thousand and some dollars?

A. Yes.

Q. And what percentage of that was incurred after December 1st and between February 26th?

A. After December 1st? I can't tell you.

Q. Well, it was practically negligible, wasn't it?

A. No.

Q. In other words, the bulk of your expenses were incurred before December 1st, is that not correct?

A. Yes, before December 1st.

Q. Would you say that $200.00 would represent a fair approximation of your expenses after December 1st and before February 26th?

A. $200.00? No, it would not.

Q. Well, can you tell us how much your expenses were?

A. I would say—— Now, you are counting what, rent?

Q. I am asking you what your expenses were between December 1st and February 26th?

The Court: Excluding commissions, he means.

Q. Excluding commissions?

A. I don't know; I can guess at it.

Q. Well, now, let's go on to something else; I will come back to that. Therefore we now have $8654.50 representing the total value or the gross return from the sales between December 1st and March 26th, which was the date when work stopped.

The Court: February 26th.

Mr. Davis: Yes, I beg pardon, February 26, 1925.

Q. Now, during that time, between December 1 and February 26th, what percentage of commission did you pay to your salesmen?

A. I paid them the same that I had been.

Q. Twenty-seven per cent, so that you would say that eight per cent of $8654.50 would represent your gross share of the commissions between December 1st and February 26, 1925, is that right?

A. I don't know.

Q. Well, your commission expense account was the same after December 1st and up to the time of the cessation of work as it had been between the date of the contract and December 1st, isn't that right?

A. That would be right.

Q. So eight per cent of $8654.50 would be your gross return between December and the date when the work stopped?

A. Yes, not all, because all the people did not get twenty-seven per cent. I said the same contracts that had been in force. Now, Miss Isaacs got twenty per cent; Mr. O'Brien had been getting twenty, and he got twenty-seven after that.

Q. Well, how many salesmen did you have working for you between December 1st and February 26th?

A. I can tell you the ones that made sales.

Q. All right, how many made sales?

A. I think four.

Q. Who were they?

A. Miss Isaacs, Mr. Langnas, Mr. O'Brien.

Q. And Wallington?

A. I don't know whether Mr. Wallington made any sales after December 1st or not. Possibly he did; I think he did.

Q. All right, they were the four, weren't they, that you referred to?

A. Yes.

Q. Now, Miss Isaacs was still making twenty, was she?

A. Yes.

Q. And O'Brien twenty-seven?

A. Yes.

Q. Langnas twenty-seven?

A. Yes.

Q. And Wallington how much, twenty?

A. Twenty.

Q. All right; now, suppose we strike an average there and say twenty-three and a half per cent is the average amount, that is fair, is it?

A. I would think so.

Q. Then twenty-three and a half from thirty-five —the balance would represent your gross return from the commission, is that right?

A. Yes.

Q. And eleven and a half per cent of $8654.50—$995.27. So that your gross share of the work done under this contract from March 10, 1924, until February 26, 1925, was $6992.15. Now, tell us what your expenses were during that period for advertising, solicitors' salary, office rent, literature, and expenses generally, miscellaneous expenses—what was the total amount of your expenses during that time?

A. Three thousand and some odd dollars.

Q. Well, three thousand some odd dollars, how many odd hundred?

A. Just a minute, I can tell you—$3603.10.

Q. So that $3389.05 represents your profit?

A. Under the contract.

Q. During the life of this contract?

A. Under the contract, yes, sir.

Q. Instead of eleven thousand some odd hundred dollars, it is $3389.05—that is right, isn't it?

A. No, that can't be right.

Q. Well, we just went into these figures in detail, and you just said $3389.05 was right; now, is it or isn't it? It is if those figures you have given us are right.

A. I didn't give them to you; you guessed at that.

Q. They were taken from the figures you testified to this morning. Well, are they right or aren't they?

A. Absolutely wrong.

Q. Well, where are they wrong?

A. I don't know, but they are.

Q. Mr. Lane, when did you negotiate for the purchase of the Marshall farm?

A. After Mr. Yelton told me he wanted——

Q. When did you begin to negotiate for the purchase of that farm?

A. I think along in possibly sometime in October or September.

The Court: 1924?

The Witness: Yes, 1924.

Q. And did you tell Mr. Yelton or Mr. Marshall anything about your attempting to buy that farm?

A. Mr. Russell, you mean.

Q. Just a minute—did you or did you not tell Mr. Russell or Mr. Yelton—did you tell them you were trying to buy that farm?

A. I don't think so.

Q. That was just on the other side of the road from the tract owned by the Blackwood Estates, wasn't it?

A. Pretty nearly.

Q. Well, the ends of the tracts overlap, don't they, on either side of the road?

A. Very close.

Q. They overlap, don't they?

A. I don't think so.

Q. The farms are immediately adjacent—they do, don't they?

A. I don't think so.

Q. I mean, if they were on the same side of the road, they would overlap about a hundred feet, don't they, the boundary line?

A. I think the Marshall farm runs a little further up on the Blackwood line.

Q. Yes, in other words, they overlap?

A. No.

The Court: He said not, Mr. Davis, several times.

The Witness: No, I don't think so.

Q. Well, they are so close you could throw a stone from one to the other, couldn't you, if you throw it across the road?

A. I think you are right.

Q. Did you ever tell these gentlemen or either of them shortly prior to November 1, 1924, that you were going to quit?

A. That I was going to quit?

Q. Yes.

A. I did not.

Q. Did you tell them after November 1, 1924, you were going to quit?

A. I did not.

Q. You were devoting all your time and using your best efforts in the development of this farm or this tract of land, weren't you?

A. I was.

Mr. Croskey: There are just one or two points I would like to clear up, if your Honor has no objection.

By Mr. Croskey:

Q. Mr. Lane, you told me this morning when I was examining you that your general overhead and office and salesmen's commission account, that is to say, the actual cash money that you paid on these various items, during that total period equaled $17,339.08; now, is that correct or not?

A. That is correct.

Q. And when Mr. Davis figured out that your net earnings under the contract were only $3389.05, he was figuring on the basis of your paying all the salesmen at least twenty-seven per cent?

Mr. Davis: If the Court please, I object to this; the witness had an opportunity to point out where these figures are wrong; I object to counsel testifying.

The Court: No, you did not ask him whether in fact he paid those things; you figured up for him what would be the result of certain payments.

Mr. Davis: He said that those payments were made.

The Court: No, he said he paid twenty-seven per cent to certain people, but he did not say he paid the

amount that you figured out. You asked him whether twenty-seven per cent of a certain sum would not amount to so much, and he said yes, apparently it would, and finally when you asked him whether or not your result of three thousand odd dollars represented his profits he said no, it did not.

Q. By the by, Mr. Lane, have you been in good health for the last ten or fifteen years?

Mr. Davis: I object to that as immaterial.

Mr. Croskey: I would like to know whether or not he was in such physical health that it would enable him to continue with the contract for another year.

Mr. Davis: I think that it immaterial, if the Court please; I object to that.

The Court: It is assumed, I suppose, that he was.

Mr. Croskey: If that assumption is made, I have no further questions, sir.

By Mr. Davis:

Q. Mr. Lane, we will have to go over these figures again, I guess.

Mr. Croskey: If the Court please, may I withdraw that question so we won't have to go over that again?

The Court: Yes.

Mr. Croskey: I withdraw every question I made in the latter part.

Mr. Davis. I think this is a matter——

The Court: Go ahead.

By Mr. Davis:

Q. Your aggregate sales amounted to $82,847.00, didn't they?
A. Yes.
Q. And thirty-five per cent of that amounted to $28,996.45, didn't it?
A. Yes, sir.
Q. Now, between March 10, 1924, and December 1, 1924, you were paying twenty-seven per cent to your salesmen, weren't you?

Mr. Croskey: I object; he is re-hashing the same proposition.

By the Court:

Q. Let's get it straight—did you pay twenty-seven per cent on all sales?
A. No.
Q. What percentage did you pay, if you know?
A. Your Honor, I couldn't tell; I don't know.
Q. Do you say it was ninety-five per cent?
A. I would say so, yes.
Q. And you did actually pay twenty-seven per cent then on ninety-five per cent of all sales?
A. Yes, I would swear to that.

By Mr. Davis:

Q. All right; then on ninety-five per cent of $28,996.45, out of that you paid—— Well, let's get at it in another way.

By the Court:

Q. So that you paid twenty-seven per cent on ninety-five per cent of $82,000.00 in sales, is that it?

A. He said up to December 1st; it would be a little more than that.

Q. How about to February 26th, that figure still applies, doesn't it?

A. I think it would, yes.

Mr. Croskey: If the Court please, may we have the actual figures from the books so we won't be guessing? The books are here, they are either right or wrong, and the jury can tell us whether they are right or wrong. I brought them here for that purpose, and he can tell us from the books.

Mr. Davis: I object to a speech, if the Court please.

The Court: Oh, I will hear counsel.

By Mr. Davis:

Q. Now, Mr. Lane, according to my figures, five per cent of $82,847.00 amounts to $4142.35. Now, in order not to have any difficulty about this, if you are not sure about these figures, I wish you would take a piece of paper and figure it out.

A. What is the amount?

Q. Five per cent of $82,847.00.

A. $4142.35.

Q. Yes; now, that is the percentage of sales upon which you did not pay the twenty-seven of your thirty-five per cent, isn't it?

Mr. Croskey: I object to that, and I ask that it be

taken from the books, the amount of commissions that he paid, to whom, when and the amounts.

The Court: The witness said that certain figures obtained; now, if they did not, let him say so. He said he paid twenty-seven per cent of the commission,—not of the commission, but twenty-seven per cent of the gross sales for ninety-five per cent of his gross sales. If that is so—is that true?

The Witness: I think it is, as near as I can tell.

The Court: All right.

Q. So that on the balance representing ninety-five per cent of the gross sales, which balance amounts to $78,704.65, you received thirty-five per cent of both these figures, the four thousand and seventy-eight thousand, you received thirty-five per cent and out of the smaller item you paid how much per cent?

A. Out of the five per cent, you mean?

Q. Yes, you said there was five per cent that you did not pay twenty-seven per cent of your thirty-five per cent; now, what percentage did you pay of that five per cent of sales that you didn't pay twenty-seven per cent on?

A. Well, as I explained, some of them got fifteen per cent, some got twenty.

Q. Well, that is the figure that we struck a happy medium, leaving it nineteen—twenty-three and a half; you paid some twenty, you said, some twenty-seven. You say you had four men working for you?

A. Yes.

Q. So twenty-three and a half per cent would be the medium on the sales of that five per cent?

A. Approximately.

Q. So you would get eleven and a half per cent on

$4142.35, and you would get eight per cent on $78,-704.65?

The Court: Well, he would get thirty-five per cent, wouldn't he, on $82,847.00, less twenty-seven per cent on $78,704.00?

Mr. Davis: Yes, and twenty-three and a half per cent on $4142.00.

Q. Now, Mr. Lane, will you take these figures; ninety-five per cent of the gross sales amounted to $78,704.65, didn't it? Now, of that amount, you paid twenty-seven per cent to your salesmen?

A. Yes.

Q. Leaving a balance of eight per cent of that seventy-eight thousand dollar item that you received, is that right?

A. Correct.

Q. Now, if you figure out eight per cent of $78,-704.65, that leaves $6696.37.

A. No, $6296.97 according to my figures.

Q. Eight per cent of $78,704.00?

A. And sixty-five cents, yes—$6296.39.

Q. All right; on the $4142.35 item, which was a five per cent matter, you received eleven and a half per cent, didn't you?

A. Yes, I believe we figured it out.

Q. Now, what is eleven and a half per cent of that amount? I make it $475.87—is that correct?

A. What was it you made it?

Q. 475.87.

A. Eleven per cent of——

Q. Eleven and a half per cent of $4142.35.

A. Eleven per cent would be five thousand one hundred——

Q. Multiply 11.5 times $4142.35 and give us the result.

A. Yes.

Q. Well, what do you make it?

A. $4556.00.

Q. No, you are wrong yet; it is $475.87. Am I wrong?

Mr. Pike: No, $476.37.

Q. All right, take that; your counsel figured it out—it is $476.37, we will take their figures, assuming them to be correct. That $476.37 and $6296.37 make $6772.74, doesn't it?

A. $6772.74.

Q. And you stated that your expenses for administration, including telephone, rent, advertising, mileage and miscellaneous expenses totaled $3603.10, didn't you?

A. Right.

Q. All right; now, subtract that from $6772.74 and tell us what the result is.

A. $3169.64.

Q. That is your net profit, isn't it?

A. According to the contract.

Q. That is your net profit, isn't it?

A. Yes, sir.

By Mr. Croskey:

Q. Do I understand you to say that that is the net profit you actually received?

A. It is according to the contract.

Q. Now, what did you actually receive in cash—was there any difference between this and the amount of money that you actually made as a matter of fact?

A. Yes.

Q. What is the difference?

Mr. Davis: I object; just a minute, if the Court please. The complaint is silent upon whether or not he has anything due to him; we assume he has been paid, he makes no claim for that; as to whether or not he has or has not been paid is entirely foreign to this issue.

The Court: That is not the question; the question seeks now to elicit an answer as to the figure he actually received as profit. He may answer the question.

Mr. Davis: All right; I will withdraw the question.

A. I actually received as profit on the land $11,657.37.

Q. Yes; now, why this difference—can you explain it?

A. We get a bonus on the sale of each lot.

Mr. Davis: I move that be stricken out, if the Court please. He is suing on this contract, and there is nothing alleged in this complaint about any bonus; that is entirely new, and I plead surprise and move it be stricken out. He is standing on the contract. I do not know anything about a bonus; that is the first time I ever heard about any such thing, and if there is, it should have been pleaded in the contract.

The Court (after argument): You have developed certain figures and he is asked to explain the difference between the figures which you arrived at, and which he acceded to as being the figures under the contract, and the figures which he gave as representing his actual profit. He may answer that.

(Exception noted for defendant.)

A. $11,657.37.

The Court: No, you are asked how it arose.

By Mr. Croskey:

Q. Yes, why the discrepancy?

A. We were allowed—taking the price of the lots, we were allowed to add $99.00 to the price of any sale, and if the price of the sale amounted to more, counting that $99.00, than there was on the sale—more than the Blackwood Estates had on their price list, we got thirty-five per cent of the sales price or what the land was sold for, minus the $99.00, and for the $99.00 I got $66.00.

Q. Then part of this commission was paid by paying a portion of the bonus to the salesmen?

A. Yes.

Q. Now, I want you to tell me the exact cash—I don't care anything about the percentage of this or the percentage of that—I want to know the cash that was paid by you according to your books to your salesmen during this whole period.

Mr. Davis: Now, just a minute, with your Honor's permission.

By Mr. Davis:

Q. Where did those figures come from?

A. From this book here.

By Mr. Croskey:

Q. What is that book?

A. That is the sales book.

Q. Just show Mr. Davis how it is kept.

Mr. Davis: Don't show it to me; let's show it to the Court and jury; put it in the testimony.

Q. All right; does this show all your sales?
A. Every sale.
Q. Does it show all salesmen's commissions that you paid?
A. Yes.
Q. Can the jury take this out and figure it up and see whether or not when you state you paid the salesmen that sum, whether or not you are telling the truth?
A. They could.
Q. Without any difficulty?
A. Well, it would be a hard job.
Q. They can add it up, can't they?
A. Yes.

Mr. Croskey: Then I offer it in evidence.

The Court: Is there any objection?

Mr. Davis: No, I have no objection.

By Mr. Davis:

Q. Did you make these entries all yourself?
A. Yes.
Q. And it shows all persons to whom commissions were paid?
A. Yes.

(Said book is marked Exhibit P4.)

By Mr. Croskey:

Q. Now, tell me the amount of cash that you paid out to your salesmen—you told me this morning.
A. $13,735.98.
Q. $13,735.98?
A. Yes.
Q. And what do your expenses amount to—you told us $3603.10.
A. That is right.
Q. And that makes $17,339.08 when added together, doesn't it?
A. I think it does, yes.
Q. Now, verify it, let's be positive.
A. $17,309.00? No.
Q. What do those two figures—add them together, put them down on paper now.
A. My pencil is out of commission.
Q. Here is another one. You say you paid the salesmen $13,735.98; now you say your expenses were $3603.10. Now, what total do you get, $17,339.08?
A. Exactly.

By Mr. Davis:

Q. Mr. Lane, did you tell your counsel when this complaint was drawn that you were getting a bonus?
A. I don't remember.
Q. You did not, did you?
A. I don't remember whether I did or not.
Q. Well, will you say you did or did not?

Mr. Pike: He says he doesn't remember.

A. I couldn't say and be sure.

NELLIE LANE, sworn.

By Mr. Croskey:

Q. Where do you live, Mrs. Lane?
A. Morton, Pennsylvania.
Q. You are the wife of the plaintiff in this case?
A. Yes, sir.
Q. Do you know anything about this transaction of the Blackwood Estates?
A. Why, yes, I do.
Q. Were you in court this morning—you were, weren't you?
A. Yes.
Q. And you heard your husband testify that you and he were together sometime around November 1, 1924, when you had a conversation with one of the officers of the defendant corporation?
A. Yes.
Q. Now, will you tell us about that conversation from your recollection—where were you, who was there and what did you all say?
A. Well, I was out to Blackwood Estates with Mr. Lane on Sunday before November 1st. I had been asking Mr. Lane to find out——

Mr. Davis: I object.

The Court: No.

Q. Just what was said?
A. Mr. Russell brought Mr. Lane and myself home —we lived in Blackwood—to our home in his car, he brought us home, and Mr. Lane said to Mr. Russell, "Mother has been worrying about the contract," because I knew he had not made his quota in the number of sales which he was to make for the year which ended November 1st, and I had been urging him to ask Mr. Lane——

Mr. Davis: I object.

The Court: No, you are asked what took place that day, not anything else.

A. He said to Mr. Russell, "Mother has been asking me to find out about the contract," so he asked Mr. Russell, and Mr. Russell said, "Mrs. Lane, you have no need to worry about that, because we haven't any thought of cancelling Mr. Lane's contract."
Q. Now, were you present with your husband when you had another conversation with either Mr. Russell or Mr. Yelton with reference to this?
A. No, not my husband wasn't with me.
Q. Well, were you with either of these two officials when you yourself had a like conversation?
A. Yes, I was with Mr. Russell, also Mr. Yelton.
Q. When and where?
A. With Mr. Russell the following week after we came home in the car, and my husband was talking with him; he met me down in the post office in Blackwood.

Mr. Davis: I object to that, the witness is not a party to the contract and any statement made by any officers of this corporation is objectionable as testimony. It is not yet shown who made the statement—I suppose that will come out.

The Court: She said Mr. Russell.

Mr. Davis: Very well, I won't press that part of the objection I was going to make, but I will this,

that it is inadmissible because it was not made to the other party to the contract.

The Court: It may be good if made against interest. (After further argument.) I suppose we are dealing here with a whole course of conduct, whether or not from the whole course of conduct there was in fact a waiver of these provisions. Now, I should suppose those who were acting for the corporation can make statements with regard to that. I think I shall permit that; you may answer the question.

Q. Now, tell us about that conversation.
A. Please tell me the question again.

(Question repeated.)

The Court: Go ahead and complete your answer.

A. I had not finished telling what Mr. Russell said to me in the post office. He said, "Mrs. Lane, we don't want you to worry about Mr. Lane's contract being cancelled, because we have no intentions of cancelling his contract, because we think Mr. Lane is a good man, he is honest and a hard worker, but," he said, "there has been some things against him; this is the end of his contract, and we have had quite a bit of rainy weather, and he has not had much of a chance," he said, "to show what he can do, but we are sure he could have made his quota if he had not had the weather against him," and I thanked him, and that was all that was said.

Q. That was Mr. Russell?
A. That was Mr. Russell.
Q. Did you ever have occasion to speak to Mr. Yelton about the same time?

A. Why, yes, Mr. Yelton, after he had served the notice on Mr. Lane that his contract would be cancelled, he came up to our house several times in regard to business about the Blackwood Estates, and one evening he came up three times in one evening, because there had been a little difficulty with one of the salesmen, to see Mr. Lane.

Mr. Davis: I would like to have the date of these conversations, if the Court please.

The Witness: I can't just remember that.

The Court: You say it was after the notice was given?

The Witness: Yes, I think the salesman was Mr. Wallington that the controversy was over, and Mr. Yelton came up to the house, and the last trip he made, Mr. Lane—he did not find him home, he was out on some business—the last trip he made, he was talking to me in the stairway of the apartment where we lived, and he was saying what an honest man Mr. Lane was, that he would not want to beat Mr. Lane out of five cents. I said, "Well, then, Mr. Yelton, why did you give my husband such a dirty trick as to cancel his contract and do what you have done?" He said, "Simply because he wrote me such a letter about Mr. Wallington; I wouldn't stand for that from anybody." I said, "That is child's play; you have taken everything that Mr. Lane has, caused him to lose everything by it."

Q. Is that the letter you had in mind—you said he wrote a letter—or I should say, a copy of the letter?
A. I know this is the letter, because I did the typing on it; I wrote the letter.

Mr. Croskey: The letter has already been shown to the previous witness and to Mr. Davis. I ask that it be marked for identification Plaintiff's Exhibit 5 and offered in evidence.

Mr. Davis: I object to the offer; in the first place it is in the nature of a self-serving declaration. It is a letter written by this plaintiff himself to the defendant and has no bearing on the issue, if your Honor will read it.

The Court: No, I don't think it can be made evidential. It was used for the purpose, I think, of refreshing the witness' recollection as to a date only.

(Exception noted for the plaintiff.)

Cross-examination.

By Mr. Davis:

Q. Do you know when these conversations took place, Mrs. Lane, the first one, concerning the cancellation of this contract or rather the rescission of this contract, call it what you may, in which you say that Mr. Russell, I think it was who said, stated to your husband that he was perfectly satisfactory and they were not going to cancel the contract.

A. Why, that of Mr. Russell in the car was the Sunday before the first of November.

Q. And the next conversation you referred to was in the post office?

A. Yes, sir, in Blackwood.

Q. And when was that with reference to November 1st?

A. Well, that was the following Sunday that Mr. Russell talked to us in the car, and I don't remember

what day of the week it was, but I was surprised to meet Mr. Russell in the post office, because he usually——

Q. That would be the Sunday after November 1st, wouldn't it?

A. The week after—the Sunday preceding November 1st, and I met Mr. Russell following that Sunday, if that explains it.

Q. And the next conversation you had was the one that you have just referred to?

A. With Mr. Yelton.

Q. The other two were with Mr. Russell, were they?

A. Yes, sir.

Q. Do you know whether or not on November 1st, Blackwood Estates knew that Mr. Lane was contemplating the purchase of this Marshall farm?

A. I didn't just get that question; I didn't understand it.

(Question repeated.)

A. No, sir, I do not.

Q. Do you know when they first knew of it?

A. No, sir, I do not.

Mr. Croskey: Now, if the Court please, this morning I stated to your Honor when you made the amendment I would like to furnish the necessary figures as to the averment of the plaintiff of the value of his contract; I said I would give it to the stenographer. As I figure them now, sir, they amount to—my averment would be that the plaintiff could have sold in the following year three times the number of lots which he sold in the year in which he did work,

and on the basis of the net profit to him per lot being $42.54, the value of the contract was $31,967.81, and I ask that that be included in the amendment.

The Court: And that that is the amount for which you bring suit?

Mr. Croskey: And that that is the amount, on that basis. Now, if the Court please, that is the plaintiff's case.

Mr. Davis: If the Court please, this comes at a rather late time, but I will ask at this time if your Honor will be gracious enough to allow me an exception as to that amendment to the complaint this morning; I failed to do it at the time; if I may have the advantage of it at this time I would appreciate it.

The Court: If counsel has no objection, the Court hasn't.

Mr. Croskey: No, I have no objection.

Mr. Davis: Now, if the Court please, I wish to move to amend the answer of the defendant in view of the facts developed by the plaintiff's case as follows: "Fifth separate defense. Plaintiff is not entitled to recover upon the contract in the above entitled cause for the reason that prior to January 26, 1925, he was not devoting all his time and using his best efforts in the sale of lots owned by Blackwood Estates as he was required to do under the terms of paragraph eleven of the contract made by and between the plaintiff and defendant which is annexed to the complaint heretofore filed in the above cause."

The Court: Do you have any objection to that?

Mr. Croskey: I have, sir, based on this ground: I believe it to be the general law that when one puts down in writing, naming his reason for doing any given act, the expression of one negatives another reason. You will notice that the letter of cancellation here gives a definite certain reason; that reason has been stated, it has been stated in writing and it has been served on the plaintiff, and by that and by that only the defendant is bound.

The Court: That may be his reason for breaking the contract. I think I shall permit the amendment.

(Exception noted for the plaintiff.)

Mr. Davis: I have still another amendment, if the Court please, to be known as the sixth separate defense: "Plaintiff is not entitled to recover in the above entitled cause for the reason that he violated the terms of paragraph twelve of the contract which is annexed to the complaint heretofore filed in the above cause in that prior to January 26, 1925, he was, in the course of his duties imposed upon him by virtue of the aforesaid agreement made by and between the plaintiff and defendant, paying moneys to persons not lawfully entitled to receive the same, and was permitting agents to sell or negotiate the sale of lands within the State of New Jersey without having first procured a license therefor, and thereby committed a breach of the terms and provisions of paragraph one and two of the laws of 1921 as contained in pamphlet laws of 1921, page 370 and so forth.

The Court: The amendment may be made.

PLAINTIFF RESTS.

THE CASE FOR THE DEFENDANT.

EDGAR A. YELTON, sworn.

By Mr. Davis:

Q. Now, Mr. Yelton, do you have the records of the Blackwood Estates with you?
A. Yes.
Q. Did you keep them?
A. Yes, sir.
Q. Can you tell from the records how many lots Lane sold under the terms of his contract?
A. Lots or sales?
Q. How many lots he sold.
A. Yes, sir, 195 lots to November 1st.
Q. 195 to November 1st?
A. Yes, seventy-six sales.
Q. How many lots did he sell after November 1st and before February 26th?
A. Subsequent to November 1st and to February 25th, which was the last sale, twenty-five sales of three lots, or, I mean to say, seventy-five lots, twenty-five sales.
Q. That makes a total of 101 sales he made?
A. 101.
Q. From the date of the contract to February 26th?
A. Yes.
Q. Now, did you prior to or about November 1st have any conversation with this plaintiff concerning the termination of the contract?
A. Prior to November 1st.
Q. Well, about how long prior to November 1st was the conversation?
A. Just a few days.

Q. Where did the conversation take place?
A. At the office.
Q. Blackwood Estates?
A. Blackwood Estates office.
Q. In Blackwood?
A. In Blackwood.
Q. What was said at the conversation, if anything, relative to the termination of the contract?
A. He said for ten cents he would quit, he wanted to quit.
Q. What did you say to him?
A. I told him to go ahead, that was mutual, he was not satisfactory.
Q. Did he say anything further at that time about quitting?
A. He said for ten cents he would quit; if he had a place to take his men, he would quit right now. I said, "Go ahead." He said he was going to quit; I said, "All right."
Q. What, if anything, had that to do with your action conecrning this contract on November 1st?
A. Well, it kept us really from serving the notice, because it was our intention to serve it.

Mr. Croskey: Oh, now, if the Court please, just a minute, that is our old friend intention again. I move that be stricken out.

The Court: Strike out the last part of the answer.

(Question repeated.)

Mr. Croskey: I object to that; what did he do, I should like to have.

The Court: Yes, I don't suppose it matters what effect it had; the question is what they did, what they

said and what they did, not what may have been in the mind of some person not acted on.

Mr. Davis: Well, if the Court please, I think that is pertinent; if this was said and in reliance upon that they withheld serving the notice which they were going to do in anticipation that he was going to quit and save them the trouble of serving notice, I think this is——

The Court (after further argument): No, it has got to stand for itself.

Mr. Davis: All right, I won't pursue it any further then.

By the Court:

Q. He didn't quit, as a matter of fact, did he?
A. No, sir, he continued.

By Mr. Davis:

Q. In January, what did you learn in reference to Mr. Lane's prosecution of his business under this contract?

Mr. Croskey: I object to that; it would be mere hearsay evidence from others.

The Court: I do not think it is competent what he may have learned.

Mr. Davis: Well, I can prove it by other witnesses, so it is not material anyway.

Q. Mr. Yelton, did you know, did anything come

to your attention of your own personal knowledge some time in January of 1925 with reference to the prosecution of the work by Lane concerning the farm adjacent to your property?

Mr. Croskey: I object to that.

The Court: What has that to do with the contract?

Mr. Davis: He is suing on the contract, if the Court please.

The Court: I know, but why should he not buy a farm?

Mr. Davis (after argument): Very well, may I ask Mr. Yelton to step down for a minute, and then I will make this matter evidential.

(Witness withdrawn.)

CHARLES E. WALLINGTON, sworn.

By Mr. Davis:

Q. Now, Mr. Wallington, what is your profession?
A. At present I am specializing in practicing before the Interstate Commerce Commission.
Q. Are you a member of the bar of any state?
A. I am a member of the bar of the State of Ohio.
Q. Residing now where?
A. At Grenloch, New Jersey, where I have been residing since a year ago last November, having come East——

The Court: Well, just answer the question.

Q. You know Mr. Lane, do you?
A. I do.
Q. Did you ever have any business relationship with him in any manner pertaining to his contract here in suit between Blackwood Estates and him?
A. I have.
Q. In what capacity—what was your relationship with Mr. Lane pertaining to this contract?
A. That will require a slight explanation, I think.

The Court: Well, what was it, is what you are asked.

A. As a salesman.
Q. And when did your work begin, do you remember?
A. Well, up until December, 1925——
Q. 1924, you mean?
A. Or 1924, yes, I had understood I was working for Mr. Chapman, but it was in December that Mr. Lane informed me that Mr. Chapman was his employe, and therefore I was working for him.
Q. When did you start working, as you then thought, for Mr. Chapman, approximately?
A. The latter part of September, 1924.
Q. And when did Chapman disappear from the scene?

Mr. Croskey: Now, just a minute, if the Court please; I don't thinnk that is quite fair; that insinuates that Mr. Chapman was not altogether straight.

The Court: When did you cease to work for Chapman, or when did he cease to work for Lane?

A. Well, the last time I saw Chapman in Mr. Lane's office was on or about the 20th day of December, 1924.
Q. And he had been working for Lane up to that time, had he?
A. There were no changes; I could see no difference in the conduct of either Mr. Lane or Mr. Chapman about the office up to that time.
Q. It was at that time that Mr. Lane informed you that you were working for him, is that right?

Mr. Croskey: I object to that as leading.

The Court: I think I will permit it.

Q. Is that correct?
A. Yes.
Q. Have you seen Chapman since?
A. I have not.
Q. Now, will you please tell the Court and jury what conversations took place between you and Mr. Lane in or about the early part of January, 1925, pertaining to the sale proposed by you of a portion of the property of the Blackwood Estates?
A. Prior to January, in the sale of the lots of the Blackwood Estates, I was given to understand——

Mr. Croskey: I object to that; please answer the question.

The Witness: I was given to understand by Mr.——

The Court: Wait, do you understand the question?

The Witness: Yes.

The Court: Answer the question then.

Mr. Davis: I will withdraw that question, if the Court please.

The Witness: It needs a little explanation, if the Court please.

The Court: You just answer the question.

Q. Now, Mr. Wallington, do you know a man by the name of Pappano?

A. I do.

Q. Had you had any negotiations with him in reference to the sale of some of these lots?

A. I had.

Q. About when did you begin negotiations with him?

A. Along about January 6, 1925.

Q. Did you go to Mr. Lane with any proposition about selling to Mr. Pappano some of these lots?

A. I did.

Q. What was the proposition you made to him?

A. I stated to Mr. Lane that Mr. Pappano was an architect and a contractor, that he was not interested in lots for residence purposes, but he was interested in some lots for building purposes, but only those lots fronting on the Black Horse Pike, and that I had called up Mr. Yelton—I lived at Blackwood at that time—I called up Mr. Yelton before coming to the office to get Mr. Yelton to name a price on those lots, because the lots were not on the market as far as Mr Lane's office was concerned, and that Mr. Yelton did name me a price, and that I thought that the price was a little higher than would interest Mr. Pappano. I stated to Mr. Lane at the time that Mr.

Pappano was considered in his section as an influential man, and it was my opinion that if we got Mr. Pappano to purchase lots in Blackwood Estates, on Black Horse Pike, that it would only open the door or ought to open the door to new business, and for that reason I suggested to Mr. Lane, considering the price that Mr. Yelton had named, that we forego the question of commissions. Thereupon Mr. Lane said that he would have to confer with Mr. Yelton. I then stated to Mr. Lane that I had left my plot with Mr. Pappano the evening before with the understanding that I would call him on the telephone the next morning and call off the price of such lots as I might have been able to get opened up by Mr. Yelton, that he might consider, and that I expected to give Mr. Pappano my answer that morning. Mr. Lane stated that he would have to see Mr. Yelton first. Well, I said, "Then, Mr. Lane, just how soon do you think you can give me an answer so I can call up Mr. Pappano?" "Well," he said, "I don't know." "Why," I said, "then how do you feel about foregoing the commission?" "I wouldn't do any such thing," he said, "why don't you hold Pappano off, because I will have this arrangement on the Marshall property closed within a few days, and we will get Pappano interested in those lots?" "Well," I said to Mr. Lane, "I understood, Mr. Lane, we were going to sell out Blackwood Estates first before we were interesting ourselves in this Marshall property," and he said, "No," he said, "I expect to have that matter closed within the next two or three days." So I then told Mr. Lane that I thought I was through; as a matter of fact, I told him I was through, shook hands with him, we both grinned and I left. At the same time, I says, "It is any man's right to quit, isn't it, when he wants to?" He said, "Yes." I said, "I guess we are through then."

Q. When was that, about?

A. That was—now, I am not positive, but this conversation took place sometime between the 6th of January and the 9th, thereabout.

Q. Of 1925?

A. Yes.

Q. Now, was the corporation Blackwood Estates interested or concerned in any way in the purchase of this Marshall farm?

Mr. Croskey: If you know.

Mr. Davis: According to what Lane had told you.

A. No, Blackwood Estates was not, and Mr. Lane had previously requested me to prepare a skeleton agreement looking to the purchase of the Marshall property by another party whose name I cannot remember, but who had recently sold out his interest in a bus line operating on the Black Horse Pike, and when that had been consummated, according to Mr. Lane, it was to be worked out at the same time. Then Mr. Lane was to engage himself to this gentleman whose name, as I said before, I cannot at this time state, to plot and sell this Marshall property.

Q. Now, did you commmunicate that information to any one?

A. Communicated with the Blackwood Estates.

Mr. Croskey: Unless done in Mr. Lane's presence, I am going to object to it.

The Court (after argument): No, I think I shall allow him to state whether he did in fact communicate this to the Blackwood Estates.

(Exception noted for the plaintiff.)

A. Following my conversation——

Q. No, did you?

A. I did.

Q. To whom of Blackwood Estates did you communicate it?

A. To Mr. Yelton.

Q. And when, about, was this communication made?

A. That was, as I said before, sometime between January 6th and January 9th; the exact date I can't remember.

Q. That is immediately following your conversation with Lane?

A. Yes.

Q. Did you tell any one else of the Blackwood Estates?

A. No, sir, not at that time.

Q. Well, did you later and before January 26th tell any one?

A. The following day Mr. Yelton asked me to come over to their office, where I——

The Court: No, that is not what you are asked—did you tell anybody else?

A. Yes, Mr. Russell and Mr. Yelton; the following day I repeated the story.

Q. And did you communicate that to anyone else? I will withdraw that question.

Cross-examination.

By Mr. Croskey:

Q. You are a member of the bar of Ohio, do I understand?

A. Admitted in 1918.

Q. A member of the Supreme Court Bar of Ohio?
A. Yes.
Q. Where was your residence in Ohio?
A. Toledo.
Q. How long did you practice there?
A. From December, 1918, until September, 1924.
Q. How old were you when you were admitted?

Mr. Davis: I object to that.

The Court: He may answer.

Mr. Croskey: Don't forget the date when he was admitted, please.

Mr. Davis: Is that a statement, may I ask the Court, to the jury, or is it a question? If not, I move it be stricken out.

The Court: I suppose counsel ought not to make comments.

Mr. Croskey: Then I will not make them, sir; I beg your Honor's pardon.

The Court: Go ahead, the question may be answered.

Q. How old were you when you were admitted?
A. Well, let me see,—thirty-three years old.
Q. Thirty-three; you were admitted in 1918, December?
A. Yes.
Q. You had just come out of the law school then?
A. Following my bachelor of law degree, yes.
Q. Oh, by the by, you are also a member of the Interstate Commission, aren't you?

A. No, I am not a member.
Q. No, but you practice there?
A. I practice there.
Q. I mean of the bar, to practice before the Interstate Commerce Commission?
A. Yes.
Q. Where is your office now?
A. 312 South Broad Street, Philadelphia.
Q. And you represent shippers or carriers?
A. Either.
Q. Can you name some of the carriers whom you represent?
A. I have not represented carriers, but I hold myself out to represent carriers.
Q. Now, that necessitates your going to Washington quite often to try cases, doesn't it?
A. Yes, it does, that is, when occasion arises.
Q. How often does that necessitate your going to Washington?
A. Well, I was in Washington to a year ago; February and March and April and a portion of June of 1925, and the first of July, 1925, I was engaged by Campbell Soup Company to give my time to them for a period which terminated the early part of this month, and I have just recently resumed my office in Philadelphia.
Q. Now, you go to Washington to try cases based on both formal and informal complaints, don't you?
A. As occasion arises.
Q. How many cases have you tried on informal complaints?

Mr. Davis: I object to that.

The Court: How is this competent?

Mr. Croskey: Why, if the Court please, you don't

try cases on informal complaints, and you don't go to Washington to try cases before the Interstate Commerce Commission. I think I have represented as many shippers as anybody in the City of Philadelphia, and they come to Philadelphia.

The Witness: Well, if you want——

The Court: How is it competent?

Mr. Croskey: I think it attacks his credibility, sir.

The Witness: If the Court please, let me state——

The Court: Just a minute; you are a witness.

The Witness: He is testifying as to what he does.

The Court: Just a minute; I told you to keep quiet and you will. I don't think this is competent.

Q. Now, I think you said something like this, if my memory serves me correctly, that there were some lots on the Black Horse Pike that were not open for sale as far as Mr. Lane's contract was concerned —is that right?

A. I never saw Mr. Lane's contract.

Q. No, but did I misunderstand you when I thought I heard you say that some lots were not open for sale?

A. I said as far as my information or my instructions from Mr. Lane and Mr. Chapman, those lots were not open to them to sell.

Q. Now, if I were to show you a map, would you point out the lots that were not open for sale?

A. At that time?

Q. Yes.

A. I could not recall what lots were open or what lots were closed at that time.

Q. Of course not, but I mean, just give me an approximate, general idea.

A. I could not do that, sir.

Q. And were there or were there not any lots open for sale?

A. There were lots open, but as to whether they were for sale or not is another thing.

Q. Do you mean to say that the title to these particular lots was still in the Blackwood Estates?

A. I would not be able to say that.

Q. Well, then, what did you mean by being not open for sale?

A. My understanding was at the time that Mr. Russell and Mr. Yelton were reserving those for reasons of their own, those lots fronting on the Black Horse Pike.

Q. They were not for sale, however?

A. As far as Mr. Lane and Mr. Chapman were concerned, no.

Q. You say you were a member of the bar of the State of Ohio?

A. I am.

Q. I am going to read you a paragraph of the contract in this case; it is paragraph one and reads as follows: "The party of the second part"—meaning Mr. Lane—"shall for a period of two years from the date hereof have the right to sell and to employ sub-agents to sell lots owned by the party of the first part in its sub-division at Blackwood, Camden County, New Jersey." Did that paragraph indicate to you that Mr. Lane was to have a right to sell all the lots in that block?

Mr. Davis: I object to that.

The Court: The objection is sustained.

Mr. Croskey: If the Court please, he is a lawyer; perhaps he can give us the benefit of his knowledge.

The Court: It is not a matter that requires expert opinion.

Q. However, the fact was, these lots were not for sale and could not be sold by Lane—that is a fact, isn't it?

A. That was my understanding.

Q. And that was in January, 1925?

A. Yes, sir.

(At this point a recess was taken until Tuesday morning, February 9, 1926, at 11 o'clock, A. M.)

Camden, New Jersey, February 9, 1926.

Trial of the cause resumed at 11 o'clock, A. M., pursuant to adjournment, in the presence of counsel for the respective parties.

EDGAR A. YELTON, recalled.

(The last question and answer of the witness was repeated by the reporter.)

Mr. Davis: I will reframe that.

Q. Mr. Yelton, did anything come to your attention in January of 1925, concerning the activities of Mr. Lane with regard to the prosecution of any work or any other enterprise other than the development of the land of the Blackwood Estates?

Mr. Croskey: If the Court please, I just want to get the record straight. I remember, sir, that Mr. Davis made a motion to amend, and to include as another separate defense the defense that the plaintiff had not devoted his entire time to the work of the defendant corporation; but in view of the fact that the notification or letter or whatever we may term it cancelling the contract sets forth the specific reason, I object to an answer to this question and move that the questions propounded to the witness yesterday pertaining to this Marshall tract be stricken from the record.

The Court (after argument): I shall permit the question and deny the motion to strike out.

The Court: The objection is sustained.

Mr. Croskey: If the Court please, he is a lawyer; perhaps he can give us the benefit of his knowledge.

The Court: It is not a matter that requires expert opinion.

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Mr. Davis: I will reframe that.

Q. Mr. Yelton, did anything come to your attention in January of 1925, concerning the activities of Mr. Lane with regard to the prosecution of any work or any other enterprise other than the development of the land of the Blackwood Estates?

Mr. Croskey: If the Court please, I just want to get the record straight. I remember, sir, that Mr. Davis made a motion to amend, and to include as another separate defense the defense that the plaintiff had not devoted his entire time to the work of the defendant corporation; but in view of the fact that the notification or letter or whatever we may term it cancelling the contract sets forth the specific reason, I object to an answer to this question and move that the questions propounded to the witness yesterday pertaining to this Marshall tract be stricken from the record.

The Court (after argument): I shall permit the question and deny the motion to strike out.

(Exception noted for the plaintiff.)

A. Yes, sir.
Q. What was the information that came to your knowledge?
A. From Mr. Wallington.
Q. What was the information?
A. That Mr. Lane——

Mr. Croskey: Now, just a minute; are you going to recite a conversation you had with Mr. Wallington? I imagine that is the only way you got the information, and I will have to object.

The Court: The objection is good.

Q. State your conversation with Mr. Wallington.

The Court: I overruled the question; I sustained the objection.

Mr. Davis: I did not understand your Honor's ruling; I thought your ruling was as to the form of the question.

The Court: No, I do not think this witness can state what was said to him by another person. Now, it does appear by the testimony of Wallington that he had a conversation with the plaintiff which was communicated to this witness; I suppose this witness may tell what he did as far as it affects the plaintiff in consequence of the information that he received.

Q. Now, Mr. Yelton, what, if anything, did you do as a consequence of the information received by you from Mr. Wallington?
A. Went to our attorney for advice as to the procedure.

Q. Who was your attorney at that time?
A. Mr. Riggins, John A. Riggins.
Q. And as a result of that conference with Mr. Riggins, what, if anything, was done?
A. He advised us to——

The Court: Wait; you were asked what was done—what did you do, not what he told you, but what did you do?

A. Executed a cancellation notice.
Q. Under the provisions of paragraph fourteen?
A. Yes, sir.
Q. Now, Mr. Yelton, did you ever have any conversations with Mrs. Lane pertaining to the cancellation of this contract?
A. Not to my knowledge.
Q. Well, did you or didn't you?
A. I did not.
Q. Did you have a conversation with Mr. Lane pertaining to the cancellation of this contract either immediately prior to November 1, 1924, or after November 1, 1924, and before January 26, 1925?
A. I don't know whether I understand the question enough to answer it.
Q. Well, I will take it in parts then. At or immediately prior to November 1, 1924, did you have any conversation or conversations with Mr. Lane pertaining to the cancellation of this contract?
A. The word 'cancellation''——
Q. To the service of the notice?
A. No, sir, not to the service of the notice.
Q. Well, when I say "cancellation" I mean the termination of the rights of the parties to that contract—did you have any conversation with him about that?

A. He said he would quit, if that is what you mean. May I answer your question as I want? He said he would quit.

Q. Well, that was part of the conversation, wasn't it?

A. Yes.

Q. And when did that conversation take place?

A. About the 20th of October or shortly afterward.

Q. Before November 1st?

A. Before November 1st.

Q. Did you following that conversation have another conversation with the plaintiff in which reference was made by either of you to the termination of the rights of the parties under the contract?

A. Just a few days prior to that, yes, sir.

Q. A few days prior to the one you just testified to?

A. Yes.

Q. Where did that conversation take place?

A. At the office.

Q. Was any one present?

A. Mr. Russell.

Q. And who else?

A. That is all.

Q. Mr. Lane?

A. Yes, sir.

Q. And the conversation you first testified to, who, if any one, was present beside you and Mr. Lane?

A. No one.

Q. And what was said, if anything, at the conversation about which you are now testifying which preceded the one of or about October 20th pertaining to the termination of the rights of the parties under this contract?

A. Almost the same words; he threatened to quit, he was going to quit, said, "I am going to quit." We

told him he was not satisfactory, told him to go ahead and quit, he was not satisfactory.

Q. Mr. Yelton, do you have any records kept by you which show the number of sales made or the lots sold by the Blackwood Estates between the date of this contract and November 1st?

A. Yes, sir.

Q. And between November 1st and February 26th?

A. Yes, sir, to both questions.

Q. Do you have those records with you?

A. Yes, sir.

Q. Have you at my request made an investigation of those records?

A. Yes, sir.

Q. And are you prepared to state the number of lots as appears from the records which the Blackwood Estates sold between March 10, 1924, and November 1st, 1924?

A. Yes, sir.

Q. How many did the Blackwood Estates sell?

A. To November 1st, fifty-five lots.

Q. And what was the sale price of these lots?

A. $11,645.00.

Q. And between November 1st and February 26, 1925, how many lots did the Blackwood Estates sell?

A. Nineteen lots.

Q. And the value?

A. Aggregating $7815.00; the total value, $19,460.00.

Q. Now, Mr. Yelton, I believe you testified yesterday that from your records it appeared that Mr. Lane had sold a hundred and one lots; am I correct in that?

A. A hundred and one sales.

Q. Well, how many lots did he sell?

A. Two hundred and seventy to February 26th.

Q. To February 26th?
A. Yes.
Q. And do you have the gross selling price of those lots?
A. No, sir, that is for the auditor, Mr. Smith; we have an auditor who can furnish those figures.

Cross-examination.

By Mr. Croskey:

Q. Mr. Yelton, after a sale had been made of a lot or several lots, the agreement of sale, of course, was lodged with you, wasn't it, with the company?
A. Yes, sir—you mean the contract book?
Q. Yes, the contract, the agreement of sale?
A. Yes.
Q. And the company has all those contracts?
A. Yes, sir.
Q. Do you have them with you today?
A. No, sir, I have not.
Q. You did not bring them with you?
A. No, sir.
Q. Can you tell me to whom those seventy-four sales were made that you say were made by the Blackwood Estates?
A. Yes, sir—do you want their names? I will give you their names if you want them.
Q. All right, will you give them to me, please.
A. Yes, sir. Edward Gans——
Q. May I suggest, Mr. Yelton, to expedite this, just give the last name, if satisfactory.
A. Is that satisfactory?
Q. Yes—how many lots did Gans buy?
A. Two. Two lots to Parsons, two lots to Walker, three lots to another Parsons, three to Rosswell,

seven lots to Smith, five to Tucker, four to Melnik, four to Stitzell, four to McLoon, four to Larkin, five to Adams, four to Lee, two to Happ, one to Fisher, two to Happ, one to Richardson. That is to November 1st. Now, then, subsequent, two to Marshall, two to Happ, four to Gamils, two to Happ, three to Pergiovani, two to Smith, two to Happ, two to Miller. There you are. Do you want the dates?
Q. It is not necessary; if you want to give them, I have no objection.
A. All right.
Q. A few days prior to October 20, you say you had a conversation with Mr. Lane alone?
A. Yes, sir—no, about the 20th; I can't tell you the exact date.
Q. Well, I say about the 20th, not exactly, but a couple of days prior to the 20th you had a conversation with Mr. Lane alone?
A. Yes.
Q. And at that time, if I remember what you said, he said he was going to quit, and you said, "Go ahead?"
A. "Satisfactory."
Q. "Unsatisfactory"——
A. Oh, yes, I see what you mean, yes.
Q. His service was unsatisfactory?
A. Yes.
Q. And you were perfectly willing for him to quit?
A. Yes.
Q. Now, did he quit?
A. Apparently, no.
Q. Did he make any sales after that?
A. Yes.
Q. And turned the contracts over to you?
A. Yes, sir.
Mr. Davis: If the Court please, that is admitted in the pleadings; I think it is unnecessary testimony.

Q. When November 1, 1924, came around, you had knowledge that he made this statement which you say he made, didn't you?
A. Yes.
Q. You knew on November 24 exactly what had occurred according to your version of that transaction?

The Court: November 24th?

Mr. Croskey: November 1st—I beg pardon.

A. Yes, sir.
Q. You had remembered your contract?
A. Yes.
Q. By the by, who prepared that contract?

Mr. Davis: I object to that.

Mr. Croskey: I think it is most pertinent, sir, in case there is any portion of it which is capable of a two-way construction.

The Court: I don't think there is any ambiguity in the contract.

A. Mr. Riggins prepared the contract.

Mr. Croskey: You are willing to admit that the contract was prepared by the defendant?

Mr. Davis: Oh, no, no.

Mr. Croskey: Well, Mr. Riggins is the defendant.

Mr. Davis: No.

Mr. Croskey: He is the attorney for the defendant.

Mr. Davis: No, the firm of Riggins & Davis is attorney for the defendant.

The Court: Well, I suppose there is nothing now pending. It is agreed that Mr. Riggins prepared the agreement of these parties.

Mr. Davis: But I would like to qualify that with this statement: He was acting as attorney for all parties in the matter. Mr. Lane was there, and the contract was prepared following a conference between the people and was dictated immediately in the presence of everybody and then signed.

Q. Then a few days after that conversation about which you have just told us, you and Mr. Russell and Mr. Lane got together, didn't you?
A. Mr. Russell was present.
Q. Yes, and you all had that same conversation all over again—Lane was going to quit, and you were satisfied?
A. Satisfied for him to quit.
Q. Satisfied?
A. Yes.
Q. Down deep in your heart did you wish he would?
A. Yes.
Q. You would have been tickled to death?
A. Yes.
Q. Now, on November 1st, 1924, he had not made a hundred and forty sales, had he?
A. He had not.
Q. And you had the whole situation right in the palm of your hand, didn't you?

A. Positively.
Q. But you didn't do anything.

Mr. Davis: If the Court please, that is admitted.

The Court: I suppose it is cross-examination.

Q. You are quite certain, and there is no possibility of there being any error in your mind when you say that Mr. Lane sold two hundred and seventy-four lots, is that right?
A. That is subject to a slight correction; I think that is correct, it is about right; there might be a slight correction.
A. I think that is rather important, Mr. Lane has made a very strong claim here; he said four more lots than you have.
A. Do you want me to account for it?
Q. Let's see whether we are right or not. Do your records show he sold 270 lots?
A. My records show 270 lots, and there might be a slight variation on account of a person making a deposit and then falling down. I don't think that is very important.
Q. I see; now, is there any chance of there being that same slight variation as regards the number of lots that the Blackwood Estates sold during that time?
A. No, sir, there is not.
Q. Those sales were good sales, no question about that?
A. Yes.
Q. Now, let's look over the sales Mr. Lane made, if you will. If you will just turn to your records, and be good enough to help me out a little here—your records will show sales made by Mr. Lane month by

month, won't they—I mean, the lots sold by Lane month by month, won't they?
A. I am ready.
Q. Well, will your records show that?
A. These are taken from the records, not month by month; I have the dates down here, the name, the number of lots, the total sales.
Q. Just give it then as you can. By-the-by, who made up this sheet that you have in front of you now?
A. I did .
Q. And you made up that from original records?
A. Yes.
Q. Do you have your original records here?
A. And I was with the expert, and he will bring his books here when they are wanted; these are mine.
Q. Do you have your own books here?
A. I have my own books here, yes.
Q. Well, are they the corporation books?
A. My own; the corporation books are the ones in the hands of my expert; these are for my own benefit.
Q. Where are these main corporation books now at this moment?
A. In the hands of our auditor.
Q. In court?
A. Yes.
Q. You did not bring them here?

Mr. Davis: Oh, they will be here.

The Court: Just a moment, Mr. Davis.

Mr. Croskey: I just want to know where they are, sir.

Q. Are they in the room here now?

A. No, sir.

Q. Well, we will do the best we can with that sheet then; I am sorry you don't have the original records. Now, according to that sheet, right, wrong, medium or indifferent, how many lots were sold by Mr. Lane during——

Mr. Davis: I object to the comment of counsel and move that the question be stricken out.

The Court: Let me hear the question.

(Question repeated.)

The Court: Yes, I suppose the comment is objectionable.

Mr. Croskey: With your Honor's permission I will take that out, and I will withdraw the question.

Q. According to the sheet you have in your hand, how many lots were sold by Mr. Lane in March of 1924?

A. Fourteen.

Q. And in April of 1924?

A. Two.

Q. And in May of 1924?

A. Now, that takes some adding, because I have them, the dates, and number of lots; that would take adding each time, and if you wish to add them I will give them to you independently.

The Court: Well, you can add them.

A. You want me to add them? All right. I would have had this prepared had I known you wanted

them that way. Let's see, May? That is slow work. Look at this sheet; see, here are the dates and they are the names and here are the number of salesmen and here are the number of lots. This is only for expediency.

Q. I see; this is May?

A. Yes.

Q. How would it do if you put that over there like that?

A. I find sixteen.

Q. Sixteen in May?

A. Yes.

Q. Now, tell us about June, will you please?

Mr. Davis: Are these the number of sales or number of lots?

Mr. Croskey: The number of lots, sir.

A. Thirty-two in June; two in July, thirty-two in August, thirty-two in September, sixty-five in October.

Q. Now, November goes right down here to this line, doesn't it—is that right?

A. Yes, sir, thirty-nine in November, six in December, ten in January.

Q. How about February?

A. Twenty in February.

Q. Any in March?

A. No, sir, totaling two hundred and seventy.

Q. Do your records show—do you have any records with you which do show the total commissions allowed to Mr. Lane by you?

A. They are in the expert's books.

Q. I want to show you a letter, Mr. Yelton, dated September 26, 1924, on the stationery of the Black-

wood Estates, not addressed to any one in particular, and at the bottom of it, just in typewriting, "Blackwood Estates, secretary and treasurer," then it has in ink a signature; whose signature is that?

A. Mine.

Q. Did you ever withdraw from Mr. Lane the right to sell any of these lots?

Mr. Davis: I object to that as incompetent, irrelevant and immaterial; there is no allegation made——

The Court: How is this material?

Mr. Croskey: Well, sir, he is countering or defending on the ground that there were other reasons for the action that he took when he sent us this letter; he is trying to put us in a position where we were guilty of many, many breaches. Now, if that is fair for the goose, why isn't it fair for the gander?

The Court: You have not alleged it; they have set it up by way of answer, and you do not allege that the contract was breached by the defendant except on January 26th.

Mr. Croskey: That is perfectly true, but yesterday a witness on the stand brought out in his examination that such a thing had been done, namely, that some lots had been withdrawn by the Blackwood Estates from sale. I did not bring that out.

The Court: I think he may answer that question.

(Exception noted for the defendant.)

Q. Were any lots withdrawn from sale?

A. In a way, for special——

The Court: Well, they either were or they were not—now, which was it?

A. Not entirely.

Q. Oh, they were not entirely—Mr. Lane could have sold them?

A. With our permission.

Q. Yes, with your permission; well, as a matter of fact under the contract he had to get your permission to sell any of them, didn't he?

A. No, sir.

Mr. Davis: I object to that; the contract speaks for itself.

Q. So he could have sold these lots with your permission, eh?

A. May I explain?

Q. Certainly, if you wish to.

A. With our permission he could have sold these lots.

Q. He could?

A. Yes.

Q. Will you be good enough to read to the jury the last paragraph of that letter.

A. "Owing to direct information we have received this day regarding probable very early and favorable action of joint meeting of the freeholders of all counties from Camden to Atlantic shore in reference to very early and satisfactory action regarding the Black Horse Boulevard, we have withdrawn from the sale all lots fronting on the Black Horse Boulevard."

Q. Withdrawn from sale all the lots on the Black

Horse Boulevard, eh—they were going to make improvements to that boulevard, were they?

A. They were never listed.

Q. They were never listed?

A. They were not on his price list, but we gave him the privilege to sell them.

Q. This contract gave him the right to sell all Blackwood Estates?

A. It did not.

Q. Well, just take that paper.

A. According to the price list——

Mr. Davis: I object to counsel arguing with the witness.

The Court: Yes, don't argue with the witness.

Q. There is Black Horse Boulevard, isn't it—isn't that a map that shows Black Horse Boulevard?

A. Yes.

Q. And aren't these the lots that were withdrawn from sale along the Black Horse Boulevard?

A. Those are the ones, right there.

Q. And these are your choicest lots, aren't they?

A. Yes, those are the choicest lots.

Q. And Mr. Lane could not sell them?

A. He understod that, except by special permission.

Q. Except by special dispensation, he could not sell them, and this letter taking away from him the right to sell them is dated September 26, 1924, isn't that right?

A. As I told you, except——

Q. Isn't that right then?

A. Yes, I will put it that way.

Q. On September 26, 1924, he was deprived of his right to sell the choicest lots on that whole tract?

Mr. Croskey: I offer this map in evidence and offer the letter in evidence.

Mr. Davis: I object to the map; there has been no proof of the map.

Mr. Croskey: I will withdraw the offer of the map; everybody knows where the Blackwood property is.

Mr. Davis: Oh, I move that be stricken out. Let counsel confine his acts and conduct to questioning the witness.

The Court: Counsel will not make any remarks.

Q. Now, you had no conversation with Mrs. Lane in reference to the cancellation of this contract?

A. No, sir.

Q. You are positive of that?

A. I so stated.

Q. You were in court yesterday?

A. Yes.

Q. And you saw Mrs. Lane go on the witness stand?

A. I certainly did.

Q. She took an oath when she went on the witness stand?

A. She did.

Q. And she said she had had a conversation with you?

A. I can't help that.

Q. Well, then, the answer is that she was just mistaken?

Mr. Davis: I object to that, if the Court please; that is for the jury.

The Court: Yes, I suppose it is not competent to ask the witness to pass upon the accuracy of another witness' testimony.

Q. And you had no conversation with Mr Lane along that line—you are very positive of that?
A. When?
Q. Concerning the cancellation of the contract subsequent to October, 1924, later than October, 1924?
A. Well, we never mentioned about cancelling the contract. He was going to quit, and we were expecting him to quit all the time.
Q. And you were anxious for him to quit?
A. Absolutely, would rather he would quit than have to quit him.

By Mr. Davis:

Q. Mr. Yelton, with reference to these lots on the Black Horse Pike, were these lots ever listed on any price list that you gave to the plaintiff?

Mr. Croskey: Just a minute, if the Court please, the written contract tells us whether we can or whether we cannot sell those lots.

The Court: (After argument.) I think this question may be answered.

A. Please repeat the question so I can answer intelligently.

(Question repeated.)

A. No, sir.
Q. And I assume then that that means from the first to the last, is that correct?

A. Yes, sir.
Q. Had you and Mr. Lane ever had any conversation about these lots about the time of the execution of this agreement, about the lots on the Black Horse Pike?

Mr. Croskey: I object to that; I think that contract embodies the agreement of the parties.

Mr. Davis: If the Court please, it appears to me that there is a latent ambiguity in this matter.

The Court: (After argument.) I don't think there is any ambiguity in the contract. I understand that an ambiguity is something stated but stated so imperfectly as to leave doubt as to what is meant. If in this contract something was omitted, that is not an ambiguity.

Q. Mr. Yelton, did Mr. Lane ever say anything to you with reference to any right he might have had to sell these lots on the Black Horse Pike?

(Objected to.)

The Court: When?

Mr. Davis: Following the date of this agreement.

The Court: Now, state your objection.

Mr. Croskey: The first reason being it is leading, the second reason being it is another way of skinning the same cat.

The Court: The objection is overruled.

Q. Answer the question, please.
A. I want to understand it more fully.

(Question repeated.)

A. Yes, we talked over that many a time. Do you want me to explain?

Mr. Croskey: No.

The Witness: Can't I explain?

Mr. Davis: Answer this question first, please: Did he ever claim that he had an absolute right to sell these lots?

Mr. Croskey: If the Court please, must he lead, sir? Can't the witness state the conversation?

The Court: I do not suppose it makes any difference whether he claimed it or not, if he had it.

(Question withdrawn.)

Q. Mr. Yelton, do you remember approximately the date of the first conversation you had with the plaintiff regarding these lots on the Black Horse Pike following the date of the agreement, approximately, as nearly as you can state?
A. Following the agreement?
Q. Yes.
A. May I commence at the agreement?
Q. Begin please, following the date of the execution of the agreement or following the eexcution of the agreement.
A. I can't give you the exact date, but he was told that he should only sell front lots when he got a

proper customer, who would be most likely to put up a building, a business block, and then he would submit it to us, and if we thought it was a proper party, all right, to go ahead and sell them, but we did not want them listed so every agent he had could promiscuously sell them at their pleasure—that was our reason—but we permitted him to sell when he brought the right kind of customers, and he did sell some.
Q. He understood that, did he?
A. Yes, and never objected.
Q. Is that the way that the business of Mr. Lane under the terms of this contract was conducted by him with reference to these lots until the termination of it?

Mr. Croskey: If you know.

Mr. Davis: Naturally if he knows; if he don't know, he couldn't answer.

The Court: He might guess.

Q. Well, he had charge of it for the company—he is certainly the one most likely to know.

Mr. Croskey: If you know.

A. What is the question, please?

(Question repeated.)

A. That means knowing that he was——

The Court: No, knowing what Mr. Lane did about it.

Mr. Davis: In other words, perhaps I can frame the question in a more intelligible way.

The Witness: I would like to be fully informed; I want to answer it truthfully.

Q. Do you know whether or not between the date or during the whole time that Mr. Lane was working for the Blackwood Estates that he pursued his rights under that contract with reference to these Black Horse Pike lots in accordance with the agreement or understanding as you have testified he made at a date following the execution of the agreement?

A. It seemed to be satisfactory to him.

Q. Did he or did he not?

A. He did.

Mr. Croskey: What?

The Witness: Follow the agreement.

Mr. Davis: He answered the question; you will have a right to cross-examine him in a minute.

The Court: Well, I confess I do not understand the question or answer. You asked him whether Mr. Lane did certain things with respect to his rights and asked him to draw a conclusion.

Mr. Davis: It was rather difficult thing to frame the question and get the answer.

The Court: Yes, I think the facts will have to speak for themselves.

The Witness: I can answer it my own way.

The Court: Just a minute.

Q. Mr. Yelton, what did Mr. Lane do during the course of his contract with reference to selling of Black Horse Pike lots?

A. Go out there usually on Sundays and wait for his men to bring people for us with their machines, and take them out around the tract and interest them in the tract.

Q. What did he do with reference to the Black Horse Pike lots?

A. He would come to us and say that, "I have a customer for some front lots, and he is a good man, a business man and will build." We said, "All right, then," we gave him a price, otherwise he did not bring his customers for them, because he knew they were not to be sold like the other lots.

The Court: I take it that was prior to September when you wrote this letter withdrawing the lots entirely?

The Witness: Yes.

The Court: Then the course of practice between you and Lane changed?

The Witness: Just the same.

Q. Did Mr. Lane ever have anything to say to you concerning this letter of September 26?

A. I don't remember of his ever saying a word about it, because we conversed a good many times about front lots, and we both knew that they were not on the market for anybody and to be on the list, but we would quietly sell them to select people.

Q. I mean, after September 26th, that letter that was introduced in evidence?

A. I don't remember of any conversation about it at all after that date; it really would not have been necessary.

RALPH A. RUSSELL, sworn.

By Mr. Davis:

Q. Mr. Russell, what is your full name, please?
A. Ralph A. Russell.
Q. And you live where?
A. At Magnolia, New Jersey.
Q. And you are an officer of the Blackwood Estates?
A. I am.
Q. What officer?
A. President.
Q. Do you know the plaintiff?
A. I do.
Q. You have heard Mrs. Lane's testimony yesterday in which she stated that you had said, made certain statements to her in the postoffice with reference to the cancellation by the Blackwood Estates of the contract with the plaintiff—you heard that testimony, didn't you?
A. I did.
Q. Did you have a conversation with her at that time?
A. I did.
Q. Did you say anything to her pertaining to the cancellation or non-cancellation of this contract with the plaintiff?
A. I did not.
Q. Did you ever have any conversation with this plaintiff immediately prior to November 1, 1924?
A. With Mr. Lane, you mean?
Q. Yes.
A. I did.
Q. Will you tell us about when your first conversation was had, as nearly as you can state.

A. It was about the middle of October.
Q. Was any one present beside you and Mr. Lane?
A. No, sir.
Q. In the course of the conversation, was any reference made by either you or Lane to the continuance of this contract or the non-continuance of the contract?

Mr. Croskey: Will the witness please state, sir, what he said to Mr. Lane and what Mr. Lane said to him and we will draw our own conclusions.

The Court: I think that is the better form, Mr. Davis, what was said between them.

Q. What was said, if anything, between you pertaining to the continuance or non-continuance of this contract?
A. Mr. Lane brought up the subject.

Mr. Croskey: No, Mr. Lane said, please.

The Court: Just tell what he said, as nearly as you can remember.

A. Mr. Lane said that he was disgusted and was going to quit.
Q. And you said to him, what, if anything, in reply?
A. I said, "Mr. Lane, we are perfectly willing that you do quit."
Q. Was anything else said by either of you?
A. Nothing more.
Q. I beg pardon?
A. Nothing more that I can think of, remember.
Q. Did you have any other conversation with Lane pertaining to this contract?

A. I overheard a conversation between Mr. Lane and Mr. Yelton at the office.

Q. And when was that with reference to November 1st?

A. I think it was about, along about the 20th of October.

Q. And can you repeat what you heard of the conversation between Mr. Yelton and Mr. Russell? First, however, let me ask you this—where did this conversation take place?

A. At our office on the tract.

Q. Where, at Blackwood?

A. At Blackwood.

Q. All right; what did you hear?

A. I overheard Mr. Lane make a remark; he said, "I would quit this thing for ten cents."

Q. What was said by Mr. Yelton in reply to him?

A. Mr. Yelton said, "Very well." Mr. Lane said, "Then I am going to quit."

Q. Did you have any subsequent conversations with Lane about this cancellation of the contract?

A. Never mentioned it to him.

Q. I beg pardon?

A. I never mentioned it to him.

Q. In or about the middle of January, 1925, did you obtain any knowledge of the activity of the plaintiff pertaining to the purchase of any other real estate in the neighborhood of your development?

A. I did.

Q. And you heard Mr. Wallington's testimony yesterday, did you?

A. I did.

Q. And that is what you heard, is it?

Mr. Croskey: I object; of course he heard it; he was here in the court room.

Mr. Davis: Oh, no, my question was not directed to what he heard in the court room. I will withdraw the question.

Q. Mr. Russell, as a result of what you learned, what did you do, if anything?

A. Got in touch with our attorney and sent a notice of cancellation of the contract to Mr. Lane.

Q. From the date—pardon me; I will withdraw that. Have you seen Lane at all between the date when that notice became effective and within a recent time?

A. A few times, I have seen him.

Q. Can you recall when or about when was the last time you saw him with reference to the date of the summons in this case, which is dated July 2, 1925?

A. I have seen him at our office since then.

Q. Since July?

A. Yes.

Q. Well, my question is directed to whether or not you had seen him at all, and if so, approximately how many times, between February 26, 1925, and July 2, 1925?

A. Probably six times.

Q. You had seen him several times; now, at any time had anything been said to you by him about serving this notice upon him cancelling this contract?

A. It had never been mentioned.

Q. Never mentioned it to him?

A. Never mentioned it.

Q. And what was the first notice that you had following the service of this notice that he claimed you had deprived him of some right he had under the contract?

A. Information came to me through our attorney.

Q. And what was that, this summons and complaint served upon you?

A. It was a notice of a summons and complaint which requested us to call upon him.

Q. All right; never mind. Did you ever state to the plaintiff that his services were perfectly satisfactory and you wanted him to continue on with the work, you were not going to cancel the contract?

A. I did not.

No cross-examination.

CHARLES E. WALLINGTON, recalled.

By Mr. Davis:

Q. Mr. Wallington, do you know when—strike that out. I think it appeared in the testimony yesterday that it was about December 22nd, I think, from your testimony that Chapman left, wasn't it?

A. On or about December 20th was my testimony yesterday, 1925—or 1924, I beg your pardon.

Q. Can you tell me what happened to the sales force, if anything, after Chapman left?

A. Why, it seemed to become quite generally disorganized.

Q. Did that condition following the date when Chapman left continue until the termination of the contract?

Mr. Croskey: If the Court please, I object to this. I suppose this is another breach we have made of the contract; it is not averred; the allegata and probata do not agree.

The Court: How is it material?

Mr. Davis: It is no breach; the only thing, the plaintiff claims that he would have made as much in the year following if it gets that far, as he had the year before. I think this is competent, that the sales force was disorganized, that Chapman was the man behind the guns, and he left.

The Court: Well, you have shown that. Let me hear the question.

(Question repeated.)

The Court: I think that calls for a conclusion anyhow. He may tell what took place and let us determine whether it continued.

Q. What have you to say, Mr. Wallington, concerning—well, I won't press that; that is all; cross-examine.

No cross-examination.

JULIUS I. LANGNAS, sworn.

By Mr. Davis:

Q. Mr. Langnas, where do you live?

A. 5510 West Harmer Street, Philadelphia.

Q. And you are the Mr. Langnas who was one of the salesmen for Mr. Lane on this development of the Blackwood Estates?

A. Yes.

Q. When did you start to work for him, do you remember approximately?
A. August 24.
Q. And you worked for him until when?
A. Until December.
Q. Now, you heard some testimony here yesterday about a bonus, didn't you?
A. Yes, sir.
Q. As I understood the testimony, Mr. Lane stated that the salesmen did not obtain any portion of that bonus. Did you or did you not receive a part of this bonus?
A. I did.
Q. How much?
A. In some cases one-third.
Q. Ever more than that?
A. One-half.
Q. One-half to one-third?
A. Yes.

Mr. Croskey: If the Court please, my recollection may be faulty, but I am quite certain the notes of testimony show that Mr. Lane said the bonus was split in threes, one to the agent, one to himself and one to Blackwood; that is my recollection of the testimony.

Mr. Davis: I may be in error, if the Court please; I said it was my impression.

Mr. Croskey: It is not material; we won't fight about it; I don't think it enters into the case.

Cross-examination.

By Mr. Croskey:

Q. You are the man who succeeded Mr. Lane, are you, Mr. Langnas?
A. Yes, to a certain extent.
Q. What do you mean by that?

Mr. Davis: This is not cross-examination, if the Court please.

The Court: I suppose the interest of a witness may always be shown.

Mr. Davis: If that is the purpose of it, I withdraw the objection.

Mr. Croskey: It is the purpose of it.

Q. How do you mean, to a certain extent?
A. When I say to a certain extent, I mean it could have been better under different circumstances.
Q. I am afraid I misunderstand you. As a matter of fact, you are the man now as things stand today who is standing in the shoes worn by Mr. Lane when he was working under this contract? I don't say you are under the same contract, but you are now selling Blackwood Estates?
A. Yes.
Q. You are the sales manager?
A. No, sir.
Q. Then what are you?
A. A broker.
Q. Well, you still sell Blackwood Estates, don't you?

A. Yes.
Q. You sell every lot you can, don't you?
A. Yes.
Q. And you have an office for that purpose in Philadelphia?
A. In Philadelphia.
Q. Just as Mr. Lane did?
A. Yes.

Mr. Davis: I object to that, because that latter question is rather comment on the part of counsel; it assumes a whole lot of things under the terms of this contract. just as Mr. Lane did.

The Court: I suppose that refers to having an office in Philadelphia only.

Mr. Davis: I don't know what the purpose of the comment was.

Mr. Croskey: I just want to show that this was the man that was selling Blackwood Estates and naturally he was interested in Blackwood Estates' favor.

Q. Do you have charge of all salesmen?
A. No, sir.
Q. Do you have any salesmen under you?
A. Not at the present time.
Q. Well, had you at any time?

Mr. Davis: I object.

Q. This is not the season, is it?
A. Not exactly.
Q. No, spring and fall are the seasons—last fall you had salesmen under you?

A. A few.

By Mr. Davis:

Q. You have no contract with the Blackwood Estates, do you?
A. No, sir.
Q. You are simply selling lots for them as you would for any one else?
A. By all means.

Ralph A. Russell, recalled.

By Mr. Davis:

Q. Mr. Russell, when did you inaugurate this bonus system?
A. To the best of my recollection about the first of July.
Q. Of what year?
A. 1924.
Q. Is it in force now?
A. No.

Mr. Croskey: Oh, if the Court please, what has this to do with the case? We are trying the case of Lane v. Blackwood Estates, sir.

The Court: Well, it may stand. Go ahead, Mr. Davis.

Q. Is it in force now?
A. No.
Q. When did it cease to be in force, approximately?

A. Along about the time Mr. Lane severed his relationship with us.
Q. About that time?
A. Yes.

Cross-examination.

By Mr. Croskey:

Q. Oh, Mr. Lane quit you, did he?
A. Well, under pressure, yes.
Q. Yes, he just walked right out on you—that was a sort of mean thing to do, wasn't it?
A. Are you asking me that question?
Q. Please, sir——

Mr. Davis: I object to that, if the Court please.

The Court: The objection is sutained.

DEFENDANT RESTS.

PLAINTIFF'S REBUTTAL.

CLAUDE A. LANE, recalled.

By Mr. Croskey:

Q. Now, Mr. Lane, very briefly tell us about this Marshall transaction.
A. Tell what led up to it and all the way through?
Q. Well, you have been accused of monkeying with this Marshall tract; now, tell us what happened.

Mr. Davis: I object to that.

Mr. Croskey: That is withdrawn; tell us about the Marshall transaction.

Mr. Davis: I object to that question, if the Court please, it is too broad.

Mr. Croskey: The question is withdrawn.

Q. You heard the testimony on behalf of the defendant with reference to you telling some of your salesmen not to push Blackwood Estates but to hold these prospective buyers off with the hope that they would buy some lots in a tract owned by a man named Marshall—you heard that, did you?
A. Yes.
Q. What was this Marshall tract—it was right near Blackwood Estates, wasn't it?
A. Yes, right on Marshall Avenue and Blackwood Pike.
Q. Did you ever make any effort to buy the Marshall tract?
A. I did.
Q. And did you tell these people about it?
A. I didn't tell them about it, no; I told all my salesmen about it.
Q. Now, why did you make an effort to buy the Marshall tract?

Mr. Davis: I object to his intentions; they have nothing to do with this matter.

(Question withdrawn.)

Q. At or about that time, did or did you not have in fact any negotiations with Messrs. Russell and

Yelton with reference to the purchase of Blackwood Estates?

Mr. Davis: I object to that.

The Court: The objection is overruled.

A. Yes.
Q. What connection, if any, did that have with this prospective purchase of the Marshall tract?

Mr. Davis: I object to the form of the question.

The Court: The objection is overruled.

(Exception noted for the defendant.)

A. The man who was going to purchase the Blackwood Estates was going to purchase the Marshall tract in conjunction.
Q. Now, as a matter of fact, both Mr. Yelton and Mr. Russell gave you the figures didn't they?

Mr. Davis: I object to these leading questions, if the Court please.

The Court: He may answer it.

Q. Did they or did they not give you the figures?
A. Mr. Yelton gave me the figures.

Mr. Davis: Of what?

The Witness: Of the Blackwood Estates.

Q. Did or did he not give you these figures in his own handwriting?

A. He did.
Q. Have you them here?
A. I have.
Q. What were they—I just want what he wrote himself, not what you wrote, see.
A. There it is. (Indicating paper.)
Q. Now, what does it all mean—tell us about it.

Mr. Davis: I object to that; it speaks for itself, if the Court please.

Q. What were you to do——

The Court: Answer the question.

A. It means that——

Mr. Davis: I object.

The Court: You are asked what you were to do.

The Witness: I did not get the question.

The Court: You were asked what you were to do in connection with Blackwood Estates as a result of these negotiations.

The Witness: I was to sell them, find a purchaser.

Q. You mean for the whole tract?
A. Yes, for the whole tract.
Q. What was the price going to be?
A. The price was going to be $45,000.00 plus mortgages on the property at that time.
Q. Which amounted to what?
A. Which amounted, all told, around—I think it was $73,000.00.

Q. Do those figures show you?

A. No, Mr. Yelton does not show the price, shows the mortgages they had.

Q. What were those mortgages?

A. They had a mortgage on the Bullock property, the house and ground of $3030.00.

Q. Were there any other mortgages?

A. No, that was all.

Q. And you were to buy subject to that mortgage?

A. Yes.

Q. Now, what did the Marshall tract have to do with this contemplated sale?

A. The Marshall tract faces right on Blackwood Lake.

Q. Yes, how did it—how did you bring it up in connection with the sale of Blackwood Estates?

A. The man that was going to buy Blackwood Estates wanted something on the lake front, too, so he would have a water frontage.

Q. Well, did he want to buy them separately or together or what?

Mr. Davis: If the Court please, this is objected to for this reason——

The Court: Mr. Davis, you interjected this to show this man was not playing fair with his principal. I suppose he is entitled to explain how and under what circumstances the Marshall tract figured in his conversations and negotiations.

Mr. Davis: My objection is based upon this, if the Court please: This testimony is negotiations with other people, not with Mr. Yelton and Mr. Russell, with the Blackwood Estates.

The Court: Yes, but the witness says that it grew out of a conversation had with Russell and Yelton as to the sale of the Blackwood Estates in connection with other land, and that in order to accomplish the sale of the Blackwood Estates tract the other land was necesary for the purchaser. (After further argument.) His testimony on this point is that he was attempting at the suggestion and with the knowledge of Russell and Yelton, to sell all of the Blackwood Estates tract, that he never told them that his purchaser wanted other land, he never told them that he was figuring on the Marshall land, but did tell his salesmen that in connection with the sale of the Blackwood Estates the prospective purchaser of the Blackwood Estates wanted other land, and he was attempting to get other land in order to accomplish the whole sale. That may be part of the explanation, if true, of what he said to the witness Wallington, which seems to have been the mare's nest that started the whole trouble. He said this was part of the scheme to accomplish what his principals wanted; he said, "My parties were not content to buy Blackwood Estates alone; they wanted something more and I was trying to satisfy them; I was trying to sell the Blackwood Estates and trying to satisfy my purchaser by getting them other land which they wanted in connection with it, and," he says, "that is my explanation of the conversation between Wallington and myself." It seems to me that is perfectly competent.

Mr. Davis: Well, if your Honor inclines to that opinion I won't press it any further, but please allow me an exception.

(Question repeated.)

A. He wanted to buy them together.
Q. Did the transaction ever go through?
A. It did not.

Cross-examination.

By Mr. Davis:

Q. You never told Blackwood Estates in the deal that you were attempting to negotiate that the question of the acquisition of another farm was a necessary element, did you?
A. I did not.
Q. As a matter of fact, you were only attempting to sell the interest of Mr. Yelton, weren't you?
A. And Mr. Russell.
Q. Did Mr. Russell authorize you to sell his stock?
A. Mr. Russell——
Q. Yes or no.
A. Yes.
Q. When?
A. Now, I will have to explain how it happened.
Q. I don't want any explanation; I want to know when he authorized you to sell that stock?
A. About, I guess, the next Sunday after Mr. Yelton wanted to sell his.
Q. When was that?
A. That was along sometime in October or the first of November.
Q. What price did Mr. Russell tell you to offer his stock at? Now, just a minute, please; don't you have the figures in your mind?
A. I have them right here.
Q. Don't you have the figures in your mind?
A. No, I have not.
Q. That paper you have there, where did you get that from?

A. This one?
Q. Yes, the paper that you are about to refer to.
A. I took that; Mr. Yelton gave me their financial statement, gave me the financial statement and I copied it on this paper.
Q. Now, Mr. Yelton gave you these figures?
A. He did.
Q. For Mr. Russell?
A. For the sale of the Blackwood Estates.
Q. Answer the question please—for the sale of Mr. Russell's stock ?
A. I would say yes.
Q. Well, you would say yes.—yes or no.
A. Yes.
Q. How many shares were you authorized to offer for sale?
A. Ninety-seven and a half, I think it was.
Q. Ninety-seven and a half shares?
A. Just a minute; I will make that sure. Ninety-five shares.
Q. Ninty-five shares at how much a share?
A. No set amount per share.
Q. But forty-five thousand for the ninety-five shares—is that right—you were authorized to offer ninety-five shares for forty-five thousand dollars, were you?
A. I was authorized to sell the remaining parts of the Blackwood Estates and its assets.
Q. Just a minute; when you sell a corporation you sell the stock in order to sell the corporation; how many shares of stock were you authorized to sell?
A. Mr. Yelton's and Mr. Russell's stock.
Q. How many shares of stock?
A. Ninety-five.
Q. Ninety-five shares of stock; you were authorized to offer it for forty-five thousand dollars, is that right?

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A. No.
Q. Well, what is right then?
A. Forty-five thousand dollars and assume the mortgages on the property.
Q. Ninety-five shares, forty-five thousand dollars —well, naturally, you had to assume the mortgages?
A. Yes.
Q. Did you ever have any conversation with Mr. Russell about his stock?
A. I did.
Q. When?
A. About the next Sunday after I talked to Mr. Yelton.
Q. And how many shares of stock did he tell you to sell for him?
A. He didn't tell me to sell any shares of stock.
Q. Did he tell you how many shares he had?
A. He and Mr. Yelton had an equal interest.
Q. Did he tell you how many shares of stock he had?
A. I don't know whether he said the number of shares of stock or not; Mr. Yelton told me.
Q. Mr. Yelton told you what?
A. The number of shares he and Mr. Russell owned.
Q. How many did he say?
A. He said ninety-five.
Q. Did Mr. Yelton say how many he owned?
A. Yes.
Q. How many?
A. Forty-seven and a half.
Q. They each owned forty-seven and a half shares?
A. That is right.
Q. Did he say about anybody else owning any?
A. Yes, Mr. Tom Irish owned five shares.
Q. He owned how many, five?

A. Five.
Q. Now, you are quite positive that you had a conversation with Mr. Russell in which he authorized you to sell his shares of stock?
A. He said he didn't want to sell, but he would.
Q. Just a minute—did he or not have such a conversation?
A. He did.
Q. And he authorized you to sell his stock, did he?
A. His interest in the Blackwood Estates.
Q. Did he authorize you to sell the stock?
A. The stock was not mentioned.
Q. By no one?
A. By no one.
Q. How did you come to get information about the ninety-five shares then?
A. That was in looking over the statement, which showed that Mr. Yelton's interest was forty-seven and a half per cent and Mr. Russell's forty-seven and a half.
Q. Well, that is not the question; answer the question that I propounded. Repeat the question, Mr. Reporter.

(Question repeated.)

Q. I am not asking you to give the per cent of the interest of each one represented by stock, but I wanted to know—you said that they had ninety-five shares of stock together.
A. I didn't say that.
Q. Well, do you know how many shares of stock they had?
A. The word "stock" was not mentioned.
Q. It was not mentioned?
A. No.

Q. I understood you originally to say in the first part of your cross-examination that they together owned ninety-five shares of stock.

A. Well, I knew that——

Q. Did you say that or didn't you?

A. I possibly did, yes.

Q. You said it?

A. I possibly said it.

Q. That they had ninety-five shares of stock?

A. I possibly said that.

Q. Well, did you or did you not?

A. The records will show it; I don't just remember; I think I did.

Q. Now, where did you get the information that they together owned ninety-five shares of stock?

A. I had the information that they owned ninety-five per cent; I suppose that is where I got the information about the stock.

Q. You assumed then that the——

A. Being a company——

Q. That there were only a hundred shares of stock issued then,

A. Right.

Q. The word "stock" was never mentioned?

A. It possibly was.

Q. I thought you said before that it had never been mentioned. Wait a minute, please, don't refer to those papers.

The Court: I think what the witness said was he was not told to sell the stock, he was told to sell the interest.

Mr. Davis: Quite true, if the Court please, but he at first stated that they had ninety-five shares of stock, and then he said the stock was not mentioned, then he said that it was.

The Court: Well, go ahead, Mr. Davis, if it is important, let's get along.

Q. Where did you get the information about the stock—did you just assume there were a hundred shares issued?

A. I don't remember where I got that.

Q. How much was asked for the Marshall farm?

A. One thousand dollars an acre.

Q. How many acres comprised the farm?

A. Twenty-seven, I believe.

Q. Who were the people you were negotiating with?

A. Shall I tell that?

Mr. Croskey: Yes, I have no objection.

A. Mr. Matt Garwin of Williamstown.

Mr. Croskey: Pennsylvania or New Jersey?

The Witness: New Jersey.

Q. Was he the only one?

A. He was the principal, he and his brother and another friend of his; but Mat was the man I was talking to, he was the man that had the money in the bank, the cash to buy it.

Q. And when did you finally receive information that they were not going to do anything about the purchase of the Marshall farm?

A. I beg pardon?

(Question repeated.)

A. When Mr. Yelton refused to sign this contract, a copy of it.

Mr. Davis: I move that the answer be stricken out, if the Court please; I asked him when he learned these people were not going to do anything about the purchase of the Marshall farm.

The Court: Well, he said at that time.

Mr. Davis: That is not an answer to the question.

The Court: Can you give the date?

The Witness: No, I cannot, your Honor.

Q. These people were willing to go through with the deal, were they?
A. Absolutely.
Q. Provided Mr. Yelton signed the contract?
A. Provided Mr. Yelton and Mr. Russell signed it.
Q. I thought you said when Mr. Yelton refused to sign it?
A. Mr. Yelton was the man I gave the contract to, and the man who brought it back to me; he said they would not sign it, the deal was off.
Q. Then you mean when Mr. Yelton and Mr. Russell refused to sign it, not Mr. Yelton. Who drew this contract?
A. Mr. Wallington, I think, dictated it to my wife, Mrs. Lane, in my office.
Q. Is this uncompleted option that which they refused to sign?
A. That is it.

Mr. Davis: I offer that in evidence, if the Court please.

The Court: Let it be marked.

(Said paper is marked Exhibit D1)

PLAINTIFF RESTS.

DEFENDANT'S REBUTTAL.

RALPH A. RUSSELL, recalled.

By Mr. Davis:

Q. Mr. Russell, you heard the testimony of the plaintiff who was just on the stand, didn't you?
A. I did.
Q. Did you or did you not ever authorize him to sell your interest in the Blackwood Estates?
A. I did not.
Q. Did you ever authorize him or anyone else to sell your stock in the Blackwood Estates?
A. I did not.
Q. How many shares of stock did you own?
A. Four hundred and seventy-five.
Q. The witness is shown that which purports to be an option, undated and marked Exhibit D1, and is asked if the witness has seen that before?

Mr. Croskey: No one ever said he had, Mr. Davis.

A. I never saw it or heard of it.
Q. Has your interest in the Blackwood Estates ever been for sale?
A. It never has.
Q. Or your stock?
A. Or my stock.

Cross-examination.

By Mr. Croskey:

Q. You said you had how many shares, sir?
A. Four hundred and seventy-five.
Q. How many shares has Mr. Yelton?
A. Four hundred and seventy-five.
Q. How many shares are there outstanding?
A. Fifty.
Q. Who has those shares?
A. Mr. Thomas Irish.
Q. Now, therefore ,you have as a matter of fact a forty-seven and a half per cent interest?
A. Between us, Mr. Yelton and myself, we own a forty-seven and a half per cent interest.

The Court: No, you each own forty-seven and a half per cent.

The Witness: Yes, ninety-five per cent, correct.

Q. Yes, just what Mr. Lane said; he called it shares, but as a matter of fact, it happens to be per cent?
A. Yes.
Q. Did you ever authorize Mr. Yelton to deal with Mr. Lane pertaining to the sale of your stock?

Mr. Davis: I object to that; Mr. Yelton is a free agent, an American citizen; he can sell anything he wants to.

Mr. Croskey: This witness is asked——

Mr. Davis: Oh, as to his stock? I beg your pardon; I didn't understand.

A. I did not.

Edgar A. Yelton, recalled.

By Mr. Davis:

Q. Mr. Yelton, you have heard the testimony of the plaintiff, didn't you?
A. I did.
Q. Did you ever authorize him to sell your stock or your interest in the company?
A. No, sir; I offered him personally, but not to sell.
Q. You offered it to Mr. Lane personally?
A. My own personal shares.
Q. Did Mr. Russell ever authorize you to offer his interest for sale?
A. No, sir, he never did.
Q. Did Mr. Lane ever tell you or ask you whether or not some one other than he could buy your shares?
A. I don't quite understand.
Q. Did he ever deal with you about the purchase of your shares by some one other than himself?
A. No, sir.
Q. Did he ever mention those persons that he mentioned on the stand, whom he said were contemplating purchasing?
A. No, he never mentioned Mr. Garwin's name to me at all.
Q. Did he ever tell you that he was dealing with any one concerning the purchase of the Blackwood Estates?
A. No, sir.
Q. With any one other than himself?
A. No, sir.
Q. You own how many shares?
A. I own four hundred and seventy-five.

Q. The witness is shown Exhibit D1 and asked if he has seen that before?

A. Yes, sir.

Q. Who gave that to you?

A. Mr. Lane gave it to me.

Q. Did you refuse to sign that?

A. Yes, sir.

Q. Why?

A. Because I told him my property was not to be listed—my shares were not to be listed for sale to anybody; I was offering them to him personally, but they were not to be listed with anybody, my own personal shares or no one else's, forty-five thousand dollars, and assume all obligations for my own shares.

Q. And he came to you with this counter proposition, is that right?

A. For me to try to get Mr. Russell to sell his, and Mr. Russell wouldn't do it; I was not authorized——

By the Court:

Q. Did you take it up with Mr. Russell?

A. I showed it to Mr. Russell, and asked him if he would sign it, and he said, "No, I don't want to sell."

Q. Did you show it to Mr. Russell?

A. Yes, sir, and I told Mr. Lane it was off.

Cross-examination.

By Mr. Croskey:

Q. You are sure you showed that to Mr. Russell, are you?

A. I showed it to him, yes, but he just kind of

glanced at it and said, "No, my stock is not for sale." I don't think the man even read it through, because he was very——

Q. He didn't even read it through?

A. No, sir, I don't believe he read it clear through.

Q. Now, you were willing, though, that Mr. Lane should personally buy your interest in the corporation?

A. I answered the question once.

Q. Do you refuse to answer that question?

A. Well, I will answer it again; yes, I was willing for him to buy my shares.

Q. Don't refuse to answer my questions, please, or his Honor will strike out all your direct testimony.

Mr. Davis: I object to that.

The Court: Just a minute, please; I will make the rulings.

Q. You were, however, willing that Mr. Lane himself should buy your interest as you have said?

A. Yes.

Q. You gave Mr. Lane these figures—that is in your handwriting, isn't it?

A. Yes, sir.

Q. And you discussed the whole matter with him?

A. As to my shares.

Q. You acquainted him with all the details of Blackwood Estates as far as your shares were concerned?

A. As far as my shares were concerned.

Q. Wasn't the idea of that so that if he did care to personally purchase your shares he would know upon what basis to treat with you? You were treating, dealing, weren't you?

A. I was simply offering him my interest, is all.
Q. Offering him your interest?
A. Yes.
Q. You were telling him all the details so he would know what to offer to you, is that right?
A. Naturally.
Q. Yes. Now, you have been in the real estate business a little while, haven't you?
A. A little while.
Q. Did you ever hear of a man acting as broker going around and telling some one else who his principal was?

Mr. Davis: I object; the witness said he was offering it for sale personally to Mr. Lane. There is no testimony on the part of this witness that there was any other person than Mr. Lane in the deal.

The Court: How is this question material? (After argument.)

Mr. Croskey: Well, I will withdraw the question, sir. That is all.

CHARLES E. WALLINGTON, recalled.

By Mr. Davis:

Q. Now, Mr. Wallington, at the time that Lane got you to draw this memorandum agreement about the purchase of the Marshall farm, did he say anything to you about any pending deal with the Blackwood Estates, and if so, what?

Mr. Croskey: Now, just a minute, if you please—which agreement?

The Witness: That assumes that I drew the memorandum agreement.

Mr. Croskey: What agreement do you refer to, in connection with the purchase of the Marshall farm, this agreement here?

Mr. Davis: Obviously not.

Mr. Croskey: Well, that is the only agreement which the testimony shows that this gentleman drew. What agreement do you refer to?

Mr. Davis: The agreement he referred to yesterday in his testimony, which I understood him to say he drew for Mr. Lane for the purchase of the Marshall farm.

Mr. Croskey: I did not so understand him to testify. I object that this is not sur-rebuttal.

The Court: How is it—what is it designed to contradict?

Mr. Davis: He is going to contradict the testimony of this plaintiff who testified in rebuttal; in other words, in explanation of the testimony of this witness yesterday in defense, the plaintiff takes the stand in rebuttal and offers an explanation of it. Now, I come back with an offer of sur-rebuttal to show that the explanation of the plaintiff is not correct.

The Court: Let me hear the question. I am in a fog on this question.

Mr. Davis: Well, I will withdraw that question.

Q. Mr. Wallington, did you or did you not yesterday state that you had prepared an agreement for Mr. Lane at Mr. Lane's request looking toward the purchase of the Marshall farm?

(Objected to as not sur-rebuttal.)

The Court: I think I will permit him to answer.

A. I think I stated that——
Q. Well, did you prepare such an agreement?
A. I assisted in the preparation of one.
Q. Who participated beside you?
A. Mr. Lane.
Q. You and Mr. Lane together drew it, is that correct?
A. Yes.
Q. Now, at that time,—which was when?
A. Along the latter part of December, 1924.
Q. Was there anything said by Lane pertaining to the Blackwood Estates or the sale of the Blackwood Estates or any part of the Blackwood Estates, and if so what?

Mr. Croskey: I object; here is a confidential relation between——

Mr. Davis: Well, the plaintiff testified that he had told his salesmen.

Mr. Croskey: Yes, about the contemplated sale of Blackwood; this question relates to Marshall.

Mr. Davis: No, this relates to Blackwood.

(Question repeated.)

(Objection withdrawn.)

A. He had previously stated to me, that is, previous to the Marshall matter, that Mr. Russell and Mr. Yelton had rejected his offer, and that was before this agreement was signed looking toward the purchase of the Marshall farm.
Q. At the time this agreement was prepared was any mention made of the Blackwood Estates being involved as a necessary prat of the purchase of the Marshall farm?
A. No, sir.

No cross-examination.

BOTH SIDES REST.

Mr. Davis: Now, if the Court please, I move for a direction in favor of the defendant on the following grounds: First, that as a matter of law there was no waiver of this contract, of the right to give the notice which is alleged by the ameneded complaint of the plaintiff to have been a breach of the contract between the plaintiff and the defendant, and that the right was continuing and had not been waived. Following that, if that is denied, I move for a direction on the ground that there is not sufficient testimony to permit it to go to the jury on the question of waiver. I also move for a direction in favor of the defendant on the ground that the plaintiff had committed a breach by his own testimony of the terms of the agreement comprising paragraph twelve, in that he did not obtain the lawful license

required by the statnte of 1921 which obviously paragraph twelve was drawn to cover, and by reason of that fact he has committed a breach of the agreement and therefore cannot recover. I move for a direction in favor of the defendant for the further reason that he has committed a breach of the agreement by violating paragraph eleven of the agreement in that he, by his own testimony, has not given his exclusive time to the sale of the lots. I move further that a verdict be directed for the defendant on the ground that there is no testimony in the case on the question of damages sufficient to go to the jury.

The Court: (After argument.) The defendant moves for a direction; the first ground is that there was a continuing right in the defendant to dispense with the plaintiff's services at any time under the terms of the contract. The plaintiff's position is here on this argument that there is a question of fact raised as to whether or not the defendant did not waive the right to cancel the contract and discharge the plaintiff. I shall adopt this view and leave it as a matter of fact to the jury to say whether or not there has been a waiver. On the second point, I think it is a question of fact as to whether or not plaintiff did in fact comply with the terms of his contract or whether he broke it either by permitting salesmen who were not duly authorized to negotiate to make the sales and whether or not, on the other point raised, he gave all of his time and attention within the meaning of the contract to the business of the defendant. On the fourth point, I think there is testimony from which the jury may assess damages if they find for the plaintiff, so the motion will be denied.

(Exception noted for the defendant.

CHARGE OF THE COURT.

DONGES, J.

The plaintiff sues to recover money damages for the alleged loss sustained by him by reason of the breaking by the defendant of a contract between the plaintiff and the defendant; so that the first question that you are called upon to determine is, did the defendant without right break the contract by discharging the plaintiff and thus deprive him of earnings under that contract which otherwise he would have received?

The contract between the parties is in writing and each is bound by the terms unless they were changed by the agreement of the parties afterward, and in the respects here at issue, I recall no testimony of any changes agreed to by the parties in the terms of the contract, so that we take the contract as a basis for consideration. It is undoubtedly true and it is admitted by the plaintiff that one of the terms of the contract, namely, these sales or one hundred and forty sales of real estate of the defendant had not been accomplished by the plaintiff on November 1, 1924, as required by the terms of the contract, and it is agreed that on that date the defendant was privileged if it chose to cancel the contract, terminate it and make an end of the agreement between the defendant and the plaintiff. It is admitted that on that date no steps were taken by the defendant to terminate the contract, although it undoubtedly had a right on that day to do it under the uncontradicted testimony in this case. The defendant's witnesses say that plaintiff had theretofore announced his intention to stop work under

the contract, to quit, to leave the employment of the defendant. If that be true, if you conclude that it is a fact that the plaintiff did make an unqualified statement of his intention to quit, that is a circumstance for you to consider in connection with all the other testimony in the case. But the plaintiff says that while there was some discussion in more or less heat between some of the officers of the defendant company and himself in which he may have said that he was ready to quit, or would quit or whatever it was, as a matter of fact, he did not quit; the plaintiff says that, as a matter of fact, by the acquiescence of the defendant he continued in its service under the terms of the contract as he had theretofore. The plaintiff says that the defendant, having this undoubted right on the first day of November to terminate this contract by giving thirty days' notice, failed to give that notice, and by its conduct, as well as by express words of the officers of the defendant, continued the contract and waived any right to cancel and terminate the contract by reason of the failure of the plaintiff to make a hundred and forty sales.

That is a question of fact for you to consider and determine, from all of the facts and circumstances, from everything that has been said between the parties and everything done by the parties, whether or not as a matter of fact, having the undoubted right on the first day of November to terminate this contract, defendant did waive that right and agree to a continuation of the contract, so that that provision was, as between the plaintiff and the defendant, set aside and waived. That is a question of fact for you to determine. If you find that it was waived, then of course defendant could not, after having once waived it and continued the contract, assert that as a reason for breaking the contract or terminating it. In other words, if there was once a waiver, it was waived; if it was not waived, then it was effective; if it was waived it was ineffective, and that is a question of fact for you to determine.

The defendant says that not only did it not waive that provision, but that the plaintiff broke his contract in at least two other particulars, and they are questions of fact for you to determine, because, of course, each of these parties was bound to keep this contract. The defendant says that the plaintiff broke his contract by having persons not authorized to make sales act as real estate salesmen in violation of the statute. The statute says that a real estate salesman, within the meaning of this act, is any person who for compensation, valuable consideration or commission, is employed, either directly or indirectly by a licensed real estate broker to sell or offer to sell, to buy or offer to buy, or to negotiate the purchase, sale or exchange of real estate, or to lease or rent or offer to lease or rent any real estate for others as a vocation—to do those things as a vocation. Now, if the contract was broken in this regard, then of course the defendant had a right to call it at an end.

Likewise, if the plaintiff was not in fact devoting himself with that degree of good faith and diligence which persons who make a contract have a right to expect from the other person, then they would have a right to call the contract at an end and discharge the plaintiff. In that connection you will recall all the facts and circumstances, that there is testimony —and I think it is practically uncontradicted—that there were negotiations between the plaintiff and some members of the defendant corporation, those

who appear to have been in control and direct charge of its business, for the purchase and sale respectively of the interests of the officers of this corporation; and I think it may be assumed that they were dealing and had a right to deal not then as a principal and agent, not then as a person who was an employer and employe, but when the employe was in a position where he was dealing with his employer for something which the employer had to sell and which the employe wanted to buy, that they were dealing then each as a principal, and each was dealing at arm's length, and he was not obliged to disclose to the person with whom he was dealing for his own account everything that he may have had in his mind; because we know that in ordinary affairs if he was dealing as an agent, as a salesman, as sales-manager, or whatever he may have been under this contract, then he was obliged to deal in absolute good faith with his employer; sound business policy as well as law and morals require that. But you will consider how far a person who is on his own account negotiating a sale or purchase for himself from his employer is obliged to tell his employer everything that he may have in his mind with respect to the property that he is trying to buy, and how far a purchaser on his own account is obliged to tell the other party everything that is in his mind and everything that he contemplates, and an entirely different situation may be raised, whether he was dealing for himself in trying to effect a purchase, or whether he was selling to strangers the things which his employer had to sell. That is just a circumstance for you to consider if it is in the case, but it is a question of fact.

First, was defendant's right to terminate this agreement waived? If it was not, then of course defendant had a right to terminate it by giving notice. If it was waived, then you consider whether or not the plaintiff broke his contract so that the defendant was privileged to call the contract at an end. If the plaintiff broke his contract, then the defendant did not have to go on with it, he could stop it. If you find all of these questions or any one of them in favor of the defendant, then your verdict will be for the defendant; if you find them in favor of the plaintiff, then you would find that the defendant, without lawful right, broke the contract, discharged the plaintiff from his occupation, and you would consider how much, if anything, under the testimony in this case the plaintiff lost by reason of the unlawful breaking of this contract by the defendant and his discharge from its service.

This contract had a definite term to run; it was drawn for two years unless cancelled by this thirty-day notice upon the failure of the plaintiff to make a hundred and forty sales, so that it would expire by its own terms, if nothing else intervened, on the 10th day of March, 1926, and that would be the limit within which the plaintiff would have any profit under this contract. Now, how much would he have made as profit for himself under this contract if it had not been unlawfully broken, if you find that it was, is a question that you have to determine. On the question of damages, if you reach that point, you will have to consider in that connection the experience under this contract. There is some testimony that a bonus was given not called for by the contract; as far as the testimony appears, it might have been stopped at any time by the defendant company; in other words, there is no contract requiring that that bonus shall be given, so that you consider that fact, consider how much it would prob-

ably cost the plaintiff to operate his business, how many lots would under the testimony probably have been sold, how much he probably would have made if the contract had not been unlawfully broken, and that would be the extent of the damage, to be measured, of course, by the testimony.

So that your first question is, was this contract properly terminated by the defendant, either because it had this right to terminate it or because of some conduct upon the part of the plaintiff which was a breach of the contract, which was a failure on his part to observe the terms of the contract? Then if you find that the defendant had a right to terminate it, your verdict would be for the defendant. If you find that the plaintiff is entitled to recover, it will be such sum as you find measures under the testimony the probable reasonable loss to the plaintiff by reason of the unlawful conduct of the defendant. You may retire.

Mr. Croskey: May I send out a calculation of once, twice, or three times the amount?

The Court: If it is objected to, no.

DEFENDANT'S EXCEPTIONS.

Mr. Davis: If the Court please, I would like to have an exception to the Court's charge where the Court referred to the fact that the testimony was uncontradicted that Lane and the officers of the corporation had negotiated for the sale of their respective interests.

(Exception noted.)

Mr. Davis: And a further exception that the Court in its charge instructed the jury that the plaintiff Lane was not obliged to disclose to the company or its officers, as the Court expressed it, everything in his mind.

The Court: When he was dealing with them at arm's length in negotiation.

Mr. Davis: Yes, and a further exception to the Court's charge in that the Court instructed the jury to the effect that unless the defendant had given as a reason for severing the relationship between the parties the breach either of the provision of the contract pertaining to the necessity for obtaining real estate salesmen's licenses, and the devotion by the plaintiff of all of his time to the business and the manifestation of good faith in the business, that the plaintiff was entitled to recover.

The Court: I don't think I said that, I don't think I said anything that could be construed to that effect. What I said was that the defendant had a

right to terminate the contract either because of the failure to make a hundred and forty sales or because of the failure of the plaintiff to perform the contract in either of the two respects mentioned, namely, that salesmen were used which were not licensed, and that the plaintiff was not devoting his time and was not acting in good faith toward his employer, and either of those, I said would defeat a recovery, or intended to say that. All right, you may take Mr. Davis' exception.

EXHIBIT P1.

AGREEMENT made this 10th day of March, in the year of our Lord, one thousand nine hundred and twenty-four, BY AND BETWEEN BLACKWOOD ESTATES, a corporation of the State of New Jersey, of the first part, and CLAUDE A. LANE, of Philadelphia, Pennsylvania, of the second part, WITNESSETH:

WHEREAS, the party of the first part is the owner of a tract of land at Blackwood, Camden County, New Jersey, which it has sub-divided and is selling; and,

WHEREAS, the party of the second part desires to sell lots in said sub-division and to hire agents to work for and sell for him;

NOW, THEREFORE, IN CONSIDERATION of the premises and one dollar, each to the other in hand paid, receipt of which is hereby acknowledged, it is agreed as follows:

THE PARTY OF THE FIRST PART AGREES;

1. The party of the second part shall for a period of two years from the date hereof have the right to

sell and to employ sub-agents to sell lots owned by the party of the first part in its sub-division at Blackwood, Camden County, New Jersey, as aforesaid;

2. To pay the party of the second part 35% commission on the sales price for all sales made and approved, the payment to be made in the following manner:

(a) 75 per cent of the initial payment as soon as sale is made and approved;

(b) 75 per cent of all subsequent payments on account thereof on or before the 15th of the month following date of payment or payments until said 35% is paid in full.

3. To give assistance on the said tract to the party of the second part and his agents in closing sales, without making any charge to the party of the second part or his agents for said assistance.

4. To give free title policy on all lots sold in sections up to and including section 37. Said title policy to be issued by the Land Title & Guaranty Company of Camden, New Jersey.

5. To keep grass and weeds on said tract cut and mowed.

6. Not to make any contract with any other person or corporation giving such person or corporation a right to organize a sales force and employ sub-agents.

THE PARTY OF THE SECOND PART AGREES THAT:

7. His sub-agents are to be his agents exclusively and not agents of the party of the first part.

8. He shall maintain an office in Philadelphia for himself and his sub-agents, and shall pay all the expenses thereof, as well as all expenses of advertising, selling and transportation of himself and his sub-agents.

9. Any literature of advertising matter used by the party of the second part shall, before use, be subject to the approval of the party of the first part.

10. He will sell all lots at list price as determined by the party of the first part, and said list price may be changed by the party of the first part after ten days written notice of any such change to the party of the second part. Any and all sales made by the party of the second part shall conform to and be in the terms of the contract form hereto attached and made a part hereof and subject to the approval of the party of the first part.

11. He will give his exclusive time to the sale of said lots and handle the lots of the party of the first part in said sub-division exclusively.

12. He will not sell or permit his agents to sell said lots without first obtaining a license from the real estate board of the State of New Jersey, and he will pay for all license fees of himself and his agents.

13. It is mutually understood and agreed that the party of the first part reserves the right for itself and its agents to sell to any prospects who are not prospective buyers of the party of the second part and his agents. A prospective buyer of the party of the second part to be considered one who has been personally interviewed by the party of the second part or his agents within sixty days next preceding the date of purchase.

14. It is further mutually understood and agreed that no sale shall be for less than two lots, and that if by November 1, 1924 the sales made by the party of the second part and his agents have not exceeded 140, the party of the first part may cancel this contract by thirty days notice in writing to the party of the second part to that effect.

15. It is further mutually understood and agreed that all moneys collected must be paid to BLACK-

WOOD ESTATES, and that the sub-agents of the party of the second part shall have no right to make collections and that the party of the second part shall be responsible for all collections made by him and his agents.

IN WITNESS WHEREOF, the parties have hereunto duly executed this agreement on the day first above written.

BLACKWOOD ESTATES,
By R. A. RUSSELL,
President.

Attest:
EDGAR A. YELTON,
Secretary.

CLAUDE A. LANE, (L.S.)

[Endorsed]
AGREEMENT BY AND
BETWEEN
BLACKWOOD ESTATES
and
CLAUDE LANE
Dated March 10th, 1924.

EXHIBIT P2.

R. A. Russell, President
E. A. Yelton, Sales Manager
BLACKWOOD ESTATES.
Bell Phone, 39-R-3

Blackwood, N. J., January 26, 1925
Carbon copy.

Mr. Claude A. Lane,
414-415 Washington Square Bldg. Philadelphia, Pa.
Dear Sir:—

Owing to your failure to comply with the terms set forth in paragraph 14, of your agreement with Blackwood Estates dated March 10th, 1924, relative to the sale of lots in said Blackwood Estates, you are hereby notified that Blackwood Estates hereby elects to cancel said contract, same to take effect February 26th, 1925.

BLACKWOOD ESTATES
Ralph A. Russell,
President.
Edgar A. Yelton,
Secretary.
(SEAL)

This is to certify that
the above notice was served
upon Mr. Claude A. Lane by
the undersigned on Monday,
January 26, 1925.
.....

EXHIBIT D1.

C. A. Lane
Sales Manager

Property Located In
Camden County, N. J.

Sales Department
BLACKWOOD ESTATES, Inc.
Washington Square Building
Philadelphia, Pa.
Rooms 414-415

December ...., 1924.

Mr. Claude A. Lane,
Blackwood, N. J.
Dear Sir:—

This is to confirm our agreement whereby we agree to sell, within ..... days from date, our respective holdings and interests in Blackwood Estates, Incorporated, for the joint aggregate sum of .... ($.....) Dollars, or such other sum as we may agree upon, which, in any event, will be acceptable to us jointly if paid .....% in cash, and the balance in bankable, fully secured, notes in ..... equal consecutive installments; that should you sell our interests for us, or find, within such period, a person ready, able and willing to purchase the same, we agree jointly to pay you, for your commission, the sum of ..... ($.....) Dollars, which shall be paid as follows: .....% in cash, and the balance in ..... equal ..... installments.

This offer is irrevocable during the period named, and is given in consideration of the efforts you are to put forth to find a purchaser.

....
....
Witnesses

POSTEA.

(Filed Feb. 25, 1926.)

NEW JERSEY SUPREME COURT.

CLAUDE A. LANE, *Plaintiff*,
v.
BLACKWOOD ESTATES, *Defendant*.

Action at Law.
On Postea.

This case was tried before Judge Ralph W. E. Donges with a jury at the Camden County Circuit, on February 8th, and 9th, 1926.

The jury rendered a general verdict against the defendant Blackwood Estates and in favor of the plaintiff Claude A. Lane for seventy-five hundred dollars ($7500.00.)

RALPH W. E. DONGES,
Judge.

A true copy
EDWARD J. KELLEHER,
Clerk.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT

CLAUDE A. LANE, *Plaintiff*,
v.
BLACKWOOD ESTATES, *Defendant*.

Action at Law.
On Postea.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of seven thousand five hundred dollars, besides costs to be taxed nisi.

Entered February 25, 1926.

On motion of

WILBERT V. PIKE,
Attorney.

A true copy
EDWARD J. KELLEHER,
Clerk.

JUDGMENT.

NEW JERSEY SUPREME COURT.

CLAUDE A. LANE, *Plaintiff,* v. BLACKWOOD ESTATES, *Defendant.*	Action at Law. On Postea. Wilbert V. Pike, Attorney.

Judgment entered this twenty-fifth day of February, A. D. nineteen hundred and twenty-six in favor of plaintiff and against the defendant for the sum of seven thousand five hundred dollars damages and $7500.00 costs.

WM. S. GUMMERE,
C. J.

A true copy
EDWARD J. KELLEHER,
Clerk.

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

CLAUDE A. LANE, *Plaintiff-Respondent,* v. BLACKWOOD ESTATES, *Defendant-Appellant.*	Action at Law. Notice and Grounds of Appeal.

To Wilbert V. Pike, Esq., Attorney for plaintiff-respondent :

Take notice that Blackwood Estates, the defendant, in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the Supreme Court erred in giving judgment to the plaintiff instead of the defendant in that;

2. Because the Supreme Court refused to strike out the amended complaint of the plaintiff, which motion was based upon the reasons stated in the notice of the motion to strike the said amended complaint.

3. Because the trial Judge refused to strike the amended complaint as moved by the defendant at the opening at the trial of the cause.

4. Because the trial Judge refused to grant a nonsuit following the opening to the jury by the counsel for the plaintiff, as was moved by the defendant following the opening of the plaintiff.

5. Because the trial Judge after opening of the case, permitted the plaintiff to amend his complaint in such manner as to seek to recover the value of the contract to the plaintiff instead of endeavoring to recover for commissions on unsold lots which latter measure of damages, was pleaded in the amended complaint.

6. Because the trial Judge refused to permit the defendant to open to the jury, with respect to conversations which took place prior to and at the time of the execution of the contract which was the basis of the action, concerning the construction of the parties as to the effect of paragraph 14 thereof.

7. Because the trial judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following question:

"Q. Now, will you tell us what you did, Mr. Lane, with reference to a continuation of your operations under that contract after November 1, 1924? Now, in answering the question, after November 1, 1924, for instance, did you continue with your office?"

8. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following question:

"Q. All right; now, will you tell us—be careful when you answer this question—tell us how much you paid the so-called sub-salesmen which came out of your pocket and which was not based upon sales that they made—in other words, that which was a net loss to you?"

9. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following question:

"Q. Well, can you tell us approximately from your own memory how much you spent?"

10. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following question:

"Q. What was the rent of that office, and did you pay it for the months of November and December, 1924, and the months of January and February, 1925?"

11. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following question:

"Q. Now, when these agreements had been entered into, made and turned over, were any remarks made by any of the officers of the defendant corporation about these contracts?"

12. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following questions:

"Q. When did it occur?" (Referring to a previous question as to a conversation between plaintiff and Yelton, an officer of defendant.)

13. Because the trial Judge over objection of the

defendant, permitted the plaintiff to testify on direct examination to the following question:

"Q. Yes; now, why this difference—can you explain it?"

14. Because the trial Judge refused to direct a verdict for the defendant and against the plaintiff at the conclusion at the trial of the cause, the said motion for said direction being based upon the grounds stated in said motion.

15. Because the trial Judge erred in charging the jury as follows:

"In that connection you will recall all the facts and circumstances, that there is testimony—and I think it is practically uncontradicted—that there were negotiations between the plaintiff and some members of the defendant corporation, those who appear to have been in control and direct charge of its business, for the purchase and sale respectively of the interests of the officers of this corporation."

16. Because the trial judge erred in charging the jury as follows:

"And I think it may be assumed that they were dealing and had a right to deal not then as a principal and agent, not then as a person who was an employer and employee, but when the employee was in a position where he was dealing with his employer for something which the employer had to sell and which the employee wanted to buy, that they were dealing then each as a principal, and each was dealing at arm's length, and he was not obligated to disclose to the person with whom he was dealing for his own

account everything that he may have had in his mind; because we know that in ordinary affairs if he was dealing as an agent, as a salesman, as sales-manager, or whatever he may have been under this contract, then he was obliged to deal in absolute good faith with his employer; sound business policy as well as law and morals require that. But you will consider how far a person who is on his own account negotiating a sale or purchase for himself from his employer is obliged to tell his employer everything that he may have in his mind with respect to the property that he is trying to buy, and how far a purchaser on his own account is obliged to tell the other party everything that is in his mind and everything that he contemplates, and an entirely different situation may be raised, whether he was dealing for himself in trying to effect a purchase, or whether he was selling to strangers the things which his employer had to sell. That is just a circumstance for you to consider if it is in the case, but it is a question of fact."

17. Because the trial Judge erred in charging the jury as follows:

"The defendant says the plaintiff broke his contract by having persons not authorized to make sales act as real estate salesmen in violation of the statute. The statute says that a real estate salesman, within the meaning of this act, is any person who for compensation, valuable consideration or commission, is employed, either directly or indirectly by a licensed real estate broker to sell or offer to sell, to buy or offer to buy, or to negotiate the purchase, sale or exchange of real estate, or to lease or rent or offer

to lease or rent any real estate for others as a vocation—to do those things as a vocation. Now, if the contract was broken in this regard, then, of course, the defendant had a right to call it at an end."

18. Because the trial Judge erred in charging the jury as follows:

"First, was defendant's right to terminate this agreement waived? If it was not, then, of course, defendant had a right to terminate it by giving notice. If it was waived, then you consider whether or not the plaintiff broke his contract so that the defendant was privileged to call the contract at an end. If the plaintiff broke his contract, then the defendant did not have to go on with it, he could stop it."

RIGGINS & DAVIS,
Attorneys of Defendant-Appellant.

Due and legal service of the within notice and grounds of appeal, is hereby acknowledged this day of February, 1927.

WILBERT V. PIKE,
Attorney for Plaintiff-Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CLAUDE A. LANE,
Plaintiff-Respondent,
v.
BLACKWOOD ESTATES,
Defendant-Appellant.

ON APPEAL FROM THE NEW JERSEY SUPREME COURT.

BRIEF OF BLACKWOOD ESTATES, DEFENDANT-APPELLANT.

STATEMENT OF FACTS.

On March 10, 1924, an agreement was made between the Blackwood Estates and Claude A. Lane, plaintiff-respondent, whereby Claude A. Lane was employed by Blackwood Estates for a period of two years as sales agent of the said Blackwood Estates to sell the lots in the sub-division of the said Blackwood Estates in Camden County, New Jersey. In the contract among other things, Claude A. Lane agreed to give his exclusive time to the sale of the lots and to handle the lots of the Blackwood Estates in said sub-division exclusively and that he would not sell or permit his agents to sell the said lots

without obtaining licenses from the Real Estate Board of the State of New Jersey and it was further provided in the said contract that no sale should be for less than two lots and that if by November 1, 1924, the sales made by Claude A. Lane and his agents did not exceed one hundred and forty, the Blackwood Estates might cancel the contract by thirty days notice in writing to Claude A. Lane to that effect.

On November 1, 1924, Claude A. Lane had not complied with the terms of the contract with the respect to the making of one hundred and forty sales but the Blackwood Estates did not exercise its right to cancel the contract at such time by giving the thirty days notice in writing, stipulated by the terms of the contract, but permitted Claude A. Lane to remain and to make sales, which sales the Blackwood Estates accepted.

On January 26, 1925, or a period of nearly three months after the Blackwood Estates first had the right to cancel the contract, the said Blackwood Estates caused a notice in writing to be served upon Claude A. Lane, notifying him that by reason of his failure to comply with the terms of the contract with the respect to making 140 sales the said contract was cancelled, the said cancellation to take effect February 26, 1925. Subsequently on the 22nd day of July, 1925, Claude A. Lane instituted an action in the Supreme Court of the State of New Jersey against the Blackwood Estates and the said summons and the complaint thereto annexed were served upon the Blackwood Estates, defendant-appellant, on July 23, 1925. The said action was instituted to recover damages from Blackwood Estates because of an alleged wrongful cancellation by the Blackwood Estates of the contract theretofore subsisting between Claude A. Lane and Blackwood Estates. On the 24th day of

August, 1925, Honorable Frank S. Katzenbach, one of the Justices of the Supreme Court, entered a rule striking out the complaint of the said Claude A. Lane and giving the said Claude A. Lane leave to file and serve upon Blackwood Estates an amended complaint.

The amended complaint which was later duly filed and served upon Blackwood Estates was exactly the same as the original complaint except that in the amended complaint the plaintiff averred that between November 1, 1924, and the date when the notice of cancellation of the contract was served upon him, the said plaintiff-respondent had sold fifty-four lots pursuant to the contract in a manner acceptable to the said Blackwood Estates, each one of which was accepted by the Blackwood Estates and that by reason of the acceptance thereof the said Blackwood Estates waived whatever right it had on November 1, 1924, to cancel the said contract by giving the thirty days notice in writing to that effect.

Subsequently a motion was made to strike the amended complaint and on October 7th, 1925, the motion was denied by a rule entered by Honorable Frank S. Katzenbach, one of the Justices of the New Jersey Supreme Court.

The case was duly brought to issue and brought on for trial in the Camden County Circuit of the New Jersey Supreme Court before Circuit Court Judge Ralph W. E. Donges and jury on February 8, 1926, and on February 9, 1926, the jury returned a verdict in favor of the plaintiff and against the defendant in the amount of $7,500.00. Judgment was entered in the New Jersey Supreme Court on the said verdict on February 25, 1926, in favor of the plaintiff and against the defendant in said amount together with costs.

From the judgment so entered on the said verdict Blackwood Estates appeals to this Court.

GROUNDS OF APPEAL.

1. Because the Supreme Court erred in giving judgment to the plaintiff instead of the defendant in that;

2. Because the Supreme Court refused to strike out the amended complaint of the plaintiff, which motion was based upon the reasons stated in the notice of the motion to strike the said amended complaint.

3. Because the trial Judge refused to strike the amended complaint as moved by the defendant at the opening at the trial of the cause.

4. Because the trial Judge refused to grant a nonsuit following the opening to the jury by the counsel for the plaintiff, as was moved by the defendant following the opening of the plaintiff.

5. Because the trial Judge after opening of the case, permitted the plaintiff to amend his complaint in such manner as to seek to recover the value of the contract to the plaintiff instead of endeavoring to recover for commissions on unsold lots which latter measure of damages, was pleaded in the amended complaint.

6. Because the trial Judge refused to permit the defendant to open to the jury, with respect to con-

versations which took place prior to and at the time of the execution of the contract which was the basis of the action, concerning the construction of the parties as to the effect of paragraph 14 thereof.

7. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following question:

> "Q. Now, will you tell us what you did, Mr. Lane, with reference to a continuation of your operations under that contract after November 1, 1924? Now, in answering the question, after November 1, 1924, for instance, did you continue with your office?"

8. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following question:

> "Q. All right now, will you tell us—be careful when you answer this question—tell us how much you paid the so-called sub-salesmen which came out of your pocket and which was not based upon sales that they made—in other words, that which was a net loss to you?"

9. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following question:

> "Q. Well, can you tell us approximately from your own memory how much you spent?"

10. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following question:

> "Q. What was the rent of that office, and did you pay it for the months of November and De-

cember, 1924, and the months of January and February, 1925?''

11. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following question:

''Q. Now, when these agreements had been entered into, made and turned over, were any remarks made by any of the officers of the defendant corporation about these contracts?''

12. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following questions:

''Q. When did it occur?'' (Referring to a previous question as to a conversation between plaintiff and Yelton, an officer of defendant.)

13. Because the trial Judge over objection of the defendant, permitted the plaintiff to testify on direct examination to the following question:

''Q. Yes; now, why this difference—can you explain it?''

14. Because the trial Judge refused to direct a verdict for the defendant and against the plaintiff at the conclusion of the trial of the cause, the said motion for said direction being based upon the grounds stated in said motion.

15. Because the trial Judge erred in charging the jury as follows:

''In that connection you will recall all the facts and circumstances, that there is testimony —and I think it is practically uncontradicted— that there were negotiations between the plaintiff and some members of the defendant corporation, those who appear to have been in control and direct charge of its business, for the purchase and sale respectively of the interests of the officers of this corporation.''

16. Because the trial Judge erred in charging the jury as follows:

''And I think it may be assumed that they were dealing and had a right to deal not then as a principal and agent, not then as a person who was an employer and employe, but when the employe was in a position where he was dealing with his employer for something which the employer had to sell and which the employe wanted to buy, that they were dealing then each as a principal, and each was dealing at arm's length, and he was not obligated to disclose to the person with whom he was dealing for his own account everything that he may have had in his mind; because we know that in ordinary affairs if he was dealing as an agent, as a salesman, as sales-manager, or whatever he may have been under this contract, then he was obliged to deal in absolute good faith with his employer; sound business policy as well as law and morals require that. But you will consider how far a person who is on his own account negotiating a sale or purchase for himself from his employer is obliged to tell his employer everything that he may have in his mind with respect to the property that he is trying to buy, and how far a purchaser on his own account is obliged to tell the other party everything that is in his mind and everything that he contemplates, and an entirely different situation may be raised, whether he was dealing for himself in trying to effect a purchase, or whether he was selling to strangers

the things which his employer had to sell. That is just a circumstance for you to consider if it is in the case, but it is a question of fact.''

17. Because the trial Judge erred in charging the jury as follows:

''The defendant says the plaintiff broke his contract by having persons not authorized to make sales act as real estate salesmen in violation of the statute. The statute says that a real estate salesman, within the meaning of this act, is any person who for compensation, valuable consideration or commission, is employed, either directly or indirectly by a licensed real estate broker to sell or offer to sell, to buy or offer to buy, or to negotiate the purchase, sale or exchange of real estate, or to lease or rent or offer to lease or rent any real estate for others as a vocation—to do those things as a vocation. Now, if the contract was broken in this regard, then, of course, the defendant had a right to call it at an end.''

18. Because the trial Judge erred in charging the jury as follows:

''First, was defendant's right to terminate this agreement waived? If it was not, then, of course, defendant had a right to terminate it by giving notice. If it was waived, then you consider whether or not the plaintiff broke his contract so that the defendant was privileged to call the contract at an end. If the plaintiff broke his contract, then the defendant did not have to go on with it, he could stop it.''

ARGUMENT.

One of the grounds of appeal, which is numbered 1, is a summation of the grounds of appeal numbered 2 to 18, respectively, and therefore requires no comment or argument.

The second ground of appeal deals with the refusal of the Supreme Court to strike the amended complaint of the plaintiff. A motion was made to strike the said amended complaint on the grounds set forth in the notice of the said motion. (S. C., p. 18 to 19.)

It is respectfully urged that the amended complaint (S. C., p. 11 to 13) should have been struck out. The plaintiff in paragraph 5 of the amended complaint (S. C., p. 12) alleges that Blackwood Estates by accepting sales made by Claude A. Lane after November 1, 1924, which was the date when the contract between the parties could first have been legally cancelled, and permitting him to remain in its employ, waived whatever right it had to cancel the contract and that therefore (paragraph 6 of the amended complaint, S. C., p. 12 to 13) the Blackwood Estates breached its contract with Claude A. Lane, by giving the notice recited in the said paragraph 6 of the said amended complaint.

The defendant-appellant further urges that the averment as to the plaintiff's alleged measure of damages as set forth in paragraph 7 of the amended complaint (S. C., p. 13) was not the true measure of damages.

The defendant-appellant respectfully urges that the question as to whether or not the Blackwood Estates by accepting sales made by Claude A. Lane and by permitting him to remain from November 1, 1924, to January 26, 1925, had waived its right to termi-

nate the contract by reason of the failure of Claude A. Lane to make the necessary number of sales prior to November 1, 1924, was a question of law and not a question of fact and that as a matter of law, the fact that the Blackwood Estates did accept such sales and did permit the plaintiff-respondent to remain, did not as a matter of law constitute a waiver of its right to cancel the contract by reason of the failure of Claude A. Lane to make the required number of sales and that the Court erred in refusing to strike the amended complaint on that ground.

It is further respectfully submitted that the amended complaint should have been stricken out for the reason that the plaintiff-respondent in paragraph 7 of his amended complaint (S. C., p. 13) had pleaded an incorrect rule of law as to the measure of his alleged damage. The correct rule with respect to the measure of damage being the value of the contract to the plaintiff or that which the plaintiff might reasonably have expected to have made under the contract in the portion of the term of the contract still remaining after the effectuation of the notice of cancellation dated January 26, 1925.

It is conceded that as a general principle the question of waiver is usually a question of fact and therefore, of course, it follows that the question of waiver would generally be a jury question but it is urged that where, as on a motion of this kind, the facts are not in dispute the general principles governing questions of law and fact respectively apply and the effect of the Blackwood Estates not having exercised its right when it could first have done so under the contract and permitting the plaintiff-respondent to remain in its employ for a period of three months after such time and accepting sales made by him in such period became and was a question of law and not a question of fact and it therefore

follows that the Court erred in ruling that the said questions were questions of fact and not of law; it is respectfully submitted, the Court further erred in not holding that as a matter of law under the admitted facts the defendant-appellant had not waived its right to cancel the contract and that therefore its cancellation of the contract was a just and legal exercise of its rights under the contract and therefore had committed no breach of the contract and that the plaintiff had no cause of action by reason of the service of the said notice of cancellation.

The next of the grounds of appeal is that numbered 3 which has to do with the refusal of the trial Judge to strike the amended complaint as moved by the defendant at the opening of the trial of the cause. (S. C., p. 28 to 29.)

No exception was taken to the refusal of the trial Judge to strike the amended complaint. The reason for this was that counsel for the defendant-appellant erroneously was under the impression that the correct practice in a case where a motion had been made addressed to the pleadings before one of the Justices of the Supreme Court, which motion had been denied was to merely renew the said motion before the trial Court and if the trial Court denied the motion, the refusal of the Justice of the Supreme Court to strike the pleadings to which the motion had been addressed could be made the basis of an appeal. Counsel for the defendant-appellant, of course, was mistaken and understands the correct practice to be to except to the ruling of the trial Court on such motions and to make such exception a ground of appeal.

It is fully realized that unless an exception is taken during the trial of the case the appellate courts will not take cognizance of objections which are not followed by exceptions but, however, the appellate courts have power to consider an objection where

there has not been an exception because such power is inherent in the appellate courts and the defendant-appellant respectfully requests the Court to exercise this inherent power in view of the circumstances in this case and to consider the argument of the defendant-appellant with respect to the ruling of the Supreme Court Justice on the motion to strike the amended complaint as being argument under the trial Court's refusal to strike the amended complaint as though an exception had been taken to trial Court's refusal to strike. (*Renault v. National Life Insurance Company,* 2 Misc. Reports, page 237.)

The next of the grounds of appeal is that numbered 4, which deals with the refusal of the trial Court to grant a non-suit following the opening to the jury by counsel of the plaintiff. (S. C., p. 32 to 33.) The statement of the case of the plaintiff is contained in State of the Case, page 30 to 32.

This motion for a non-suit brings up again practically the identical question involved in the motion to strike the amended complaint and it is respectfully urged that the trial Court erred in refusing to non-suit the plaintiff on his opening. The opening of counsel for the plaintiff recited the execution of the contract between the plaintiff-respondent and defendant-appellant, which contract was afterwards offered in evidence and marked Exhibit "P1" (S. C., p. 214 to 217); the commission of 35% of the sales price to be paid to Claude A. Lane; that Claude A. Lane was required by the contract to make 140 sales by November 1, 1924; that on November 1, 1924, Claude A. Lane had not made 140 sales; that the president and secretary of the corporation around November 1, 1924, informed Claude A. Lane that the corporation was not concerned about his failure to make the required number of sales; that Claude A. Lane made some fifty odd additional sales

after November 1, 1924, which were accepted and approved by Blackwood Estates; that the notice of cancellation was served upon Claude A. Lane on January 26, 1925, to be effective on February 26, 1925. The clause of the contract with respect to the serving of the notice of cancellation is paragraph 14 (S. C., 216, line 29 to 35) and is as follows:

> "It is further mutually understood and agreed that no sale shall be for less than two lots, and that if by November 1, 1924, the sales made by the party of the second part and his agents have not exceeded 140, the party of the first part may cancel this contract by thirty days notice in writing to the party of the second part to that effect."

It will therefore be seen that as we have said above the motion to non-suit brought up for consideration practically the identical question raised on the motion to strike the amended complaint and it is here again submitted that the trial Court should have granted the motion of the defendant-appellant because the only part of the opening of the plaintiff which was not alleged in his amended complaint was that portion of the statement of counsel for the plaintiff which refers to an alleged statement made to the plaintiff by two officers of the defendant corporation to the effect that the corporation was not concerned about the failure of Claude A. Lane to make the required number of sales as provided by the contract, and as was said by counsel for the defendant in addressing the Court in the motion to non-suit, that portion of the opening of counsel for the plaintiff was not germane to the issue framed by the pleadings and therefore should not have been considered by the Court in disposing of the motion so that therefore the trial Court in considering the motion had

only to dispose of the effect upon the defendant's right to cancel the contract on November 1, 1924, of its having permitted the plaintiff to remain in its employ for the period from November 1, 1924, to January 26, 1925, and its having accepted sales made by the plaintiff during that period and we here again respectfully urge as a matter of law that the non-action of the defendant-appellant on November 1, 1924, did not as a matter of law constitute a waiver of its right to cancel the contract at any time thereafter and that as a matter of law its right to cancel the contract on November 1, 1924, because of the failure of the plaintiff-respondent to make the required number of sales was a continuing right which could be exercised at any time thereafter. As a matter of fact it was shown during the trial that not only at the time when the notice was given but at the time the notice became effective on February 26, 1925, the plaintiff-respondent had not even then made the required number of sales. On November 1, 1924, he had made seventy-six sales and between November 1 and February 25th, which was the date of his last sale, plaintiff-respondent made twenty-five sales or a total of one hundred and one sales from the time of the execution of the contract until its termination on February 26, 1925, which was one month after the date of the notice of cancellation, which was January 26, 1925. (S. C., p. 136, l. 29 to 34.)

It is respectfully submitted that the making of 140 sales by the plaintiff-respondent was a condition precedent to his right to continue in the employ of the defendant-appellant pursuant to the terms of the said contract and since there was no allegation of an express waiver and since the opening of counsel with respect to the alleged statements made by officers of the defendant-appellant was not germane to the issue in that there was no allegation in the

complaint of any express waiver, the plaintiff-respondent had no cause of action, because under the well established principles, where a provision in a contract is a condition precedent its performance is essential to the creation of a right and its performance must precede an action to enforce the said right. The question as to whether or not a condition is one precedent or subsequent depends upon the intention of the parties as applied to the subject matter of the contract. In this case the complaint as amended does not aver general performance of conditions precedent as may be done under the terms and provisions of the Practice Act but the answer of the defendant-appellant clearly sets up this failure on the part of the plaintiff-respondent in negation of his alleged right of action; thus clearly bringing to issue the question as to the effect upon his alleged cause of action of the failure on the part of the plaintiff-respondent to make the required number of sales, but even if it be held that this condition was one subsequent and not precedent, performance must have been shown in order to entitle the plaintiff-respondent to maintain his action and since there was nothing germane to the issue in the opening of counsel for the plaintiff-respondent, it is again most respectfully urged that the non-suit should have been granted because as a matter of law the facts as shown in the plaintiff's opening aside from his statement as to alleged conversations with officers of the defendant-appellant, did not as a matter of law establish a waiver on the part of the defendant-appellant of its right to cancel the contract and that since such right was a continuing right not having been waived, the service of the notice was not a violation of the rights of the plaintiff-respendent. (*Board of Education v. Richmond &c. Co.*, 92 N. J. Law, page 496).

It is respectfully submitted in concluding the argument with respect to this ground of appeal that the motion of the defendant-appellant to non-suit the plaintiff upon the opening of his counsel should have been granted and that it was error for the trial Court to refuse to grant the said motion. (*Crawford v. Winterbottom,* 88 New Jersey Law, page 588.)

The next ground of appeal is that numbered 5, which deals with the permission granted to the plaintiff-respondent by the trial Court to amend his amended complaint after the opening of the case in such a manner as to seek to recover the value of the contract of the plaintiff instead of seeking to recover for commission on unsold lots which latter measure of damages was that which was pleaded in the amended complaint. This ground of appeal is abandoned.

The next of the grounds of appeal is that which is numbered 6 and this ground of appeal deals with the refusal of the trial Court to permit the defendant to open to the jury with the respect to conversations which took place prior to and at the time of the execution of the contract concerning the construction placed by the parties upon Paragraph 14 of the contract. This ground of appeal is abandoned.

The next of the grounds of appeal is that numbered 7, which deals with the admission of certain testimony on the part of the plaintiff over objection of the defendant. This ground of appeal is abandoned.

The next ground of appeal is that numbered 8, and which deals with the exception taken to the ruling of the trial Court in permitting the plaintiff to testify over the objection of the defendant in response to a question, which question is as follows:

> "Q. All right; now, will you tell us—be careful when you answer this question—tell us how much you paid the so-called sub-salesman which came out of your pocket and which was not based upon sales that they made—in other words, that which was a net loss to you?"

It is submitted that this admission of this testimony was error for the reason that unless it were shown that these salesmen or sub-salesmen were employed exclusively on the operation of the defendant-appellant, whatever moneys may or may not have been expended by the plaintiff by way of compensation for these employes of his was not that which could be properly charged against the defendant by way of damages and even though the question otherwise might have been admissible it is respectfully submitted that it was objectionable upon the above mentioned ground alone. The defendant-appellant respectfully submits that this action of the trial Court was legal error.

The next ground of appeal is that numbered 9, and deals with the action of the trial Court in permitting the plaintiff to testify over objection by the defendant to a question propounded to him by his counsel on direct examination. This ground of appeal is abandoned.

The next ground of appeal is that numbered 10, which deals with the admission by the trial Court over objection by the defendant of testimony of the plaintiff on direct examination. This ground of appeal is abandoned.

The next ground of appeal is that numbered 11, which deals with the admission by the trial Court over objection by the defendant of testimony of the plaintiff on direct examination. This ground of appeal is abandoned.

The next ground of appeal is that which is numbered 12 and which deals with the admission by the

trial Court over objection of the defendant of certain testimony of the plaintiff on direct examination in reply to the following question:

"Q. When did it occur?"

This question referred to a previous question as to an alleged conversation by the plaintiff with the secretary and treasurer of the defendant corporation. (S. C. p. 59, l. 31 to p. 60, l. 1 to 4.) This question was objected to for the reason stated in the objection (S. C. p. 60, l. 6 to 13) and there also was incorporated in said objection the reasons for an objection which had just been previously made to the admission of certain other testimony. (S. C. p. 55, l. 21 to p. 56, l. 3.)

It is respectfully submitted that the trial Court erred in permitting this testimony, because as was said in the objection, the sole issue under the pleadings was as to whether or not Blackwood Estates by failing to give the notice required by the contract on November 1, 1924, and by permitting the plaintiff-respondent to remain in its employ and by accepting sales made by him from November 1, 1924, until the time of the taking effect of the notice of cancellation on February 26, 1925, had waived its right to cancel the contract because of the failure of the plaintiff to make one hundred and forty sales, and certainly proof of an express waiver was entirely beyond the confines of the issue and was therefore not germane to the issue and was inadmissible.

It is most respectfully and earnestly urged that the admission of this testimony was legal error and was most prejudicial to the rights of the defendant. The principle governing the admission of testimony as the facts beyond the pleadings in a case of this character are so well known and established as to require no citation of authority. Certainly no testimony could have been more prejudicial to the defendant than was this testimony, especially in view of the previous testimony as to alleged conversations between the plaintiff and the president of the Blackwood Estates, Mr. Russell, which was objected to and which objection was withdrawn when counsel for the plaintiff stated that the purpose of the testimony was not to establish an express waiver. (S. C. p. 55, l. 21 to p. 56, l. 33.)

The next ground of appeal is that numbered 13, which deals with the admission by the trial Court over objection by the defendant of testimony of the plaintiff on direct examination. This ground of appeal is abandoned.

The next of the grounds of appeal is numbered 14 and deals with the refusal of the trial Court to direct a verdict for the defendant and against the plaintiff at the conclusion of the trial of the cause. The said motion for said direction being based upon the following grounds:

1. That as a matter of law there was no waiver of the contract; that the right to cancel the contract was a continuing one and had not been waived.

2. There was not sufficient testimony to direct the case to go to the jury on the question of waiver.

3. The plaintiff had committed a breach of the contract by his own testimony as to the terms of the contract comprising paragraph 12, in that he had not obtained a license required by the statute of 1921, commonly known as the Real Estate License Act and that he therefore had committed a breach of the contract and it therefore followed that he could not recover.

4. That the plaintiff had not given his entire time exclusively to the sale of the lands of the defendant and so therefore was not entitled to recover.

5. That there was not sufficient testimony to go to the jury on the question of the amount of damages.

We will take up in order the points made in the motion to direct the verdict for the defendant and against the plaintiff.

The points 1 and 2 in the motion to direct a verdict for the defendant are allied and will be discussed together.

The questions involved in the first and second point raised in the motion to direct a verdict have been discussed in the foregoing portions of this brief and particularly in the argument as to grounds of appeal numbered 2, 3, and 4, respectively, and which are unnecessary to be here repeated *in extenso* but the Court is respectfully requested to consider what has been said before with respect to this point in the consideration of point 1 and 2 made in the motion to direct a verdict for the defendant but it may be said at this point and in this connection that after the conclusion of the testimony the case was absolutely devoid of any proof other than that the Blackwood Estates did not give the notice of cancellation when it first might have done so and that it permitted the plaintiff-respondent to remain in its employ; permitted him to make sales between the time when the contract might first have been cancelled and the time when the notice finally was given, which sales were accepted by the defendant-appellant. There was testimony, it is true, introduced as to conversations between the plaintiff and two officers of the defendant corporation, the gist of which was to effect an express waiver of the right to

give the notice but as has been previously said this testimony was not admitted to establish an express waiver but the offer was to show a course of dealing between the parties. As we have said before in discussing in detail the admission of testimony with respect to these conversations, counsel for the plaintiff expressly stated that the purpose of the offer of such proof was not to establish an express waiver. Since this be true it therefore follows that there was no proof in the case dealing with the question of waiver other than the mere facts that the defendant permitted the plaintiff to remain after the time when it might first have given the notice and accepted sales made by the plaintiff from that time until the time the notice was given and as has been previously argued these facts in themselves were not sufficient as a matter of law to establish a waiver and the effect of said non-action on the part of the defendant upon its right to give notice was a question of law for the Court and not a question of fact for the jury and therefore the Court should have directed a verdict for the defendant and against the plaintiff on the theory that there had been no waiver by the defendant of its right to give the notice and therefore the giving of the notice was not a violation of the rights of the plaintiff.

During the course of trial the defendant moved and was granted the right to amend its answer to the amended complaint of the plaintiff. (S. C. p. 134, l. 25 to p. 135, l. 36.) The additional defenses which were set up by this amendment are set forth on the pages of the State of the Case just given and are also set forth in the State of the Case, page 26, line 20 to page 27, line 30. In general the fifth separate defense, which was the first amendment to the answer, set up the defense that the plaintiff was not entitled to recover because of the fact that he was

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not devoting all his time and using his best efforts in the sale of lots owned by Blackwood Estates as he was required to do under Paragraph 11 of the contract. The second amendment, which is known as the sixth separate defense, denied that the plaintiff was entitled to recover because of the fact that he had violated the terms of Paragraph 12 of the contract, which paragraph required him to procure licenses for his salesmen before he would permit them to sell or negotiate the sale of any of the lands of the defendant.

The next point raised by the motion to direct a verdict for the defendant was that the plaintiff had committed a breach of Paragraph 12 of the contract in that he had not obtained the necessary licenses required by the Statute 1921, page 370, which statute provides for the licensing of real estate salesmen and brokers and that because of his failure he was not entitled to maintain an action against the defendant inasmuch as he had not in this respect performed conditions precedent to the right to maintain an action against the defendant. In this connection the Court's attention is directed to the testimony of the plaintiff. (S. C. p. 69, l. 30 to p. 74, l. 7 and S. C. p. 90, l. 24 to p. 93, l. 20 and S. C. p. 98, l. 8 to p. 99, l. 30.) On page 93, line 14 to 19, the following questions and answers were made and given:

"Q. Well, you had twenty sub-agents then and how many solicitors?"

"A. I had part of the time, only a part of the time, yes."

"Q. And they did not have licenses?"

"A. No."

and on State of the Case, page 99, line 23 to line 30,

the following questions and answers were made and given with respect to the said sub-agents:

"A. That is right, yes. In some cases they wouldn't have knowledge, like Mr. Holden took prospects down and Mr. Yelton sold them for him."

"Q. I thought you said they were not allowed to be on the tract?"

"A. No, not allowed to sell."

"Q. They would take prospects down to the tract, wouldn't they?

"A. Yes, they were allowed to do that."

From the foregoing it can quite readily be seen that plaintiff by his own testimony failed to comply with paragraph 12 of the contract. This provision of the contract was inserted to guard against a violation of the provisions of the Act of the Legislature of the State of New Jersey, Pamphlet Law 1921, page 370, &c. The plaintiff admitted that he was familiar with the terms of that statute and that he knew that Section 12 of the contract was drawn to require him to comply with the terms of that statute. (S. C. p. 90, l. 20 to p. 91, l. 28.)

It is respectfully submitted that the Court in holding that it was a question of fact as to whether or not the plaintiff did in fact comply with the terms of his contract or whether he broke it by permitting salesmen who were not duly authorized to negotiate to make the sale was error. The plaintiff himself had testified as above pointed out that these men were employed by him to interest prospective buyers in the lots of the defendant and that they took the prospects down to the tract where the sales were consummated by duly licensed salesmen. These prospect runners did not have licenses and were paid by the plaintiff, a salary of $15.00 to $18.00 a week.

These employes came squarely within Section Two (2) of the Real Estate Salesmen and Broker's License Act, Pamphlet Law 1921, page 370, as amended by Pamphlet Law 1925, page 673, which is as follows:

> "* * *. A real estate salesman within the meaning of this act is any person who, for compensation, valuable consideration or commission, or other thing of value, is employed by a licensed real estate broker to sell or offer to sell, to buy or offer to buy, or to negotiate the purchase, sale or exchange of real estate, or to lease or rent, or offer to lease or rent any real estate for others * * * as a vocation * * *."

and therefore there was no question of fact involved which required submission to the jury and the trial Court erred in holding that it was a question of fact for the jury because the facts were not in dispute and since this was true the effect of the violation of the contract by the plaintiff became a question of law for the Court. This being so, it is respectfully urged that the judgment should be reversed because of this error.

The next point raised by the motion to direct a verdict for the defendant was point 4, in which point the Court was asked to direct a verdict for the defendant because of the fact that the plaintiff had not given his entire time exclusively to the sale of the lands of the defendant and was therefore not entitled to recover. Charles E. Wallington, a witness for the defendant, and a former salesman for the plaintiff, testified (S. C. p. 142, l. 24 to p. 143, l. 36) that plaintiff had told him to hold off a prospective purchaser because he would have closed the purchasing of an adjoining tract of land in a few days and that his prospective purchaser could then be interested in the other lots. The same witness

further testified (S. C. p. 140, l. 7 to l. 28) that the defendant corporation was not concerned in any way with the purchase of this adjoining tract of land and that the plaintiff had told him that after the purchase of the adjoining tract of land, known as the Marshall property, had been closed, he, the plaintiff, was to become associated with the purchaser to plot and sell the said Marshall tract. This information was communicated by the witness to the Blackwood Estates. The plaintiff testified (S. C. p. 185, l. 10 to l. 28) that the Marshall tract was near the Blackwood Estates, that he had attempted to buy the Marshall tract and that he had not told the Blackwood Estates about the negotiation with the owners of the Marshall tract. The plaintiff testified in explanation of the foregoing testimony that Mr. Russell and Mr. Yelton, who owned 95% of the stock of the Blackwood Estates, had asked him, the plaintiff, to sell the said stock and that he had negotiated with a man who wanted the Marshall tract and the Blackwood Estates tract. He further testified that his prospective buyer did not want either property alone but wanted both and that when the alleged offer for sale of the stock in the Blackwood Estates, owned by Mr. Russell and Mr. Yelton, was withdrawn that the proposed purchase of both properties failed of consummation. (S. C. p. 184, l. 26 to 196, l. 34.) In no part of the plaintiff's testimony did he deny that he had told Wallington, the witness of the defendant, to hold off prospective buyers of lots in the Blackwood Estates with the hope that they would buy some lots in the Marshall tract and since the only explanation of his endeavor to effect the sale of the Marshall tract was the plaintiff's testimony as to the necessity of sale of both the Marshall tract and the Blackwood Estates together, this was insufficient to establish a compliance by him with Paragraph 11 of the con-

tract (S. C. p. 216, l. 26 to 29), and therefore it is respectfully submitted that a verdict should have been directed for the defendant and against the plaintiff upon this point. It is fundamental that an employe is bound to act with utmost good faith in relation to his employment with his employer and the failure on his part to devote himself with that degree of good faith and diligence which an employe is bound to exercise in his business with his employer will disentitle him to maintain any action against his employer after the severance by the employer of the relationship theretofore existing between them. For this reason it is submitted that a verdict should have been directed for the defendant and against the plaintiff and the refusal of the trial Court to so direct was error. (*George H. Allen v. Jonas A. Aylesworth, et al,* 58 New Jersey Equity, page 249, &c.)

The 5th point raised by the motion to direct a verdict for the defendant is abandoned.

The ground of appeal which is numbered 15, deals with a portion of the charge of the Court and is abandoned.

The next ground of appeal is that numbered 16 and deals with a portion of the Court's charge to the jury. (S. C. p. 26, l. 24 to p. 27, l. 23.) This charge dealt with the testimony which had been introduced with respect to the plaintiff's activity in attempting to negotiate the purchase of the Marshall tract for another person other than his employer, the defendant, and the charge was given further in relation to the effect of his attempts to close the said sale of the Marshall tract upon his right to maintain an action against his employer, the Blackwood Estates. That which has been said under point 4 of ground of appeal numbered 14 we asked to be considered to be repeated in consideration of this

ground of appeal together with the further argument that the charge completely ignored the undenied testimony of the defendant that the plaintiff had instructed at least one of his salesmen to refrain from closing a prospective purchaser of the Blackwood Estates in expectation of the plaintiff being successful in consummating a sale of the Marshall tract and the further purpose of interesting the prospect in the purchase of the lots to be plotted in the Marshall tract. It is, of course, well known law that it is not error for the Court to fail to charge on all points in the case but it is respectfully submitted with respect to the ground of appeal here under consideration that this portion of the charge completely ignored and inferentially eliminated from the jury's consideration the very vital and important testimony just adverted to above. It is respectfully submitted that this portion of the charge was error.

The next ground of appeal is that numbered 17. (S. C. p. 227, l. 23 to p. 228, l. 7.)

Ground of appeal numbered 17, generally brings up for consideration the principles involved in point 3 on the motion to direct a verdict which previously were discussed under ground of appeal numbered 14 and the Court is respectfully requested to consider the argument as repeated in the discussion of this ground of appeal with the further argument, however, that the Court said:

> "Now, if the contract was broken in this regard then of course, the defendant had a right to call it at an end."

(S. C. p. 228, l. 5 to 7). The vice of this portion of the charge as the defendant sees it is that if the plaintiff as is contended, had himself breached the terms of the contract in the respect claimed the

plaintiff could not recover and it was not that the defendant had a right to rescind the contract because of such breach, but that the plaintiff could not recover because of his breach regardless of the reason which the defendant had given for cancelling the contract at the time the notice of cancellation was given. The Court's attention is respectfully directed to the exception which was taken to this portion of the charge (S. C. p. 213, l. 23 to 214, l. 10). (Also to S. C. p. 151, l. 23 to 34.) In view of the argument made by counsel for the plaintiff (S. C. p. 151, l. 23 to 34), in his objection to the two amendments to the answers made by the defendant during the trial of the cause which have been referred to in the foregoing portion of this brief and in anticipation of the plaintiff in his brief in reply to this brief, taking the position that the defendant could not set up by way of defense any breach by the plaintiff of the terms of his contract with the defendant other than the failure to make the required number of sales, that is to say, 140 before November 1, 1924, because that was the only reason given in the notice of cancellation, it may be said that it has been held that the fact that an employer when discharging an employe gives certain reasons therefor at the time does not prevent the employer when sued for an alleged wrongful discharge from assigning additional reasons in connection for such discharge, (*Allen v. Aylesworth,* 58 New Jersey Equity, page 349) and assuming in this discussion, although not conceding it to be true, that the Court was correct in submitting to the jury as a question of fact, the questions as to the effect upon the plaintiff's cause of action of his breach of Paragraphs 11 and 12 of the contract, it is respectfully submitted that the Court should have charged the jury that if the jury found that the plaintiff had breached the contract by permitting persons not authorized to make sales to act as real estate salemen in violation of the statute hereinbefore recited, then the plaintiff was not entitled to recover but instead of such charge the Court said:

> "The defendant had a right to call it to an end."

(S. C. 228, l. 6 and 7.) As is shown by the colloquy between counsel for the defendant and the Court (S. C. p. 213, l. 23 to p. 214, l. 10) the Court intended to say that which the defendant contends should have been the charge but that is not what he did say as the Court said:

> "* * * What I said was that the defendant had a right to terminate the contract, either because * * * either of those I said would defeat a recovery or intended to say that." (S. C., 213, l. 34 to 214, l. 9.)

It is respectfully submitted that this charge of the Court was legal error because it must necessarily have caused the jury to believe that if the defendant had not given these additional breaches by the plaintiff of his contract as the reasons for the cancellation of the contract then the plaintiff was entitled to recover.

In conclusion of the discussion under this ground of appeal it is respectfully urged that the charge was incorrect as a matter of law and misled the jury and on this point alone the judgment should be reversed.

What has been said above in the discussion with the respect to ground of appeal numbered 17 applies in certain measure to ground of appeal numbered 18, which is the last and final ground of appeal. In this portion of the charge (S. C., p. 228, l. 7 to 17) the Court again said:

> "* * * You consider whether or not the plaintiff broke his contract or that the defendant was privileged to call the contract to an end. If the plaintiff broke his contract then the defendant did not have to go on with it but could stop it."

What we have said in the discussion in ground of appeal numbered 17, applies in part with equal force to this ground of appeal and the Court is respectfully requested to consider what has been said in the discussion under that ground of appeal in its consideration of this portion of ground of appeal numbered 18 and again it is urged that the effect of this charge was to mislead the jury and that the Court erred in its charge in that the charge should have been that if the jury found that the plaintiff had broken his contract such breach would defeat a recovery on his part and that in such event the verdict should be for the defendant.

This ground of appeal also again brings up for consideration the argument advanced in the foregoing portions of this brief with respect to the question of waiver and the Court is respectfully requested to here consider what has been said before with respect to this question of law.

In conclusion it is respectfully submitted that the trial Court erred in the grounds of appeal heretofore argued and that therefore the verdict should have been for the defendant and against the plaintiff and the defendant therefore respectfully submits that the verdict of the trial Court and the judgment entered thereon should be reversed and the judgment entered for the defendant.

Respectfully submitted,
RIGGINS & DAVIS,
Attorneys of Defendant-Appellant.

New Jersey Court of Errors and Appeals

CLAUDE A. LANE,
Plaintiff-Respondent,

vs.

BLACKWOOD ESTATES,
Defendant-Appellant.

On Appeal from the New Jersey Supreme Court.

BRIEF OF CLAUDE A. LANE, PLAINTIFF-RESPONDENT.

COUNTER STATEMENT OF FACTS.

On March 10, 1924, Claude A. Lane entered into a written contract with Blackwood Estates.

The contract gave Lane, for a period of two years, the exclusive right to sell on commission the lots of the Blackwood Estates reserving only to Blackwood Estates the right to sell to prospects other than those of Lane.

Lane was obliged to accept sole responsibility for his agents, maintain at his expense a Philadelphia office, pay all advertising, selling and transportation ex-

penses, secure approvals on all literature and advertising matter, sell at prices fixed from time to time by Blackwood Estates, give his exclusive time, secure licenses for himself and agents and be responsible for all collections made by his office.

Finally it was stipulated

> "* * * no sale shall be for less than two lots, and that if by November 1, 1924, the sales made by * * * (Lane) * * * have not exceeded 140, * * * (Blackwood Estates) * * * may cancel this contract by 30 days notice in writing to * * (Lane) * * * *"

On September 26, 1924, Blackwood Estates withdrew from sale all lots fronting on the Black Horse Boulevard. These were the choice lots in the operation.

On November 1, 1924, Lane had made 110 sales. Blackwood Estates did not cancel the contract. On the contrary at this time Lane inquired of the President of Blackwood Estates as to his status and was told that the Company had no thought of cancelling his contract. Thereafter Lane, at his own expense, continued his two room Philadelphia office, retained a sales manager, 11 salesmen, 20 sub-salesmen and a stenographer, advertised the lots, made collections on previous sales, paid all transportation expenses to the site of the lots, and between November 1, 1924, and January 26, 1925, the dull season, made without objection 27 sales, bringing his total to 137 sales or 3 less than the 140 quota. All of Lane's sales, amounting to $82,847.00, were accepted by Blackwood Estates, of which $17,309.00 worth had been sold and accepted by it after November 1, 1924.

On January 26, 1925, without any previous warning Blackwood Estates cancelled the contract to be effective February 26, 1925. The cancellation was in

writing and specified as the only reason therefor Lane's breach of paragraph 14 of the contract, viz: his failure to make 140 sales by November 1, 1924. Lane then instituted suit and after trial before Circuit Court Judge Ralph W. E. Donges and a jury, on February 8-9, 1926, a verdict was returned in the plaintiff's favor for $7,500.00. Judgment having been entered on the verdict, Blackwood Estates appealed to this Court.

ARGUMENT.

The grounds of Appeal raise three main questions.

I. BLACKWOOD ESTATES WAIVED ITS RIGHT TO CANCEL.

This point is raised by grounds of appeal Nos. 1, 2, 3, 4, 8, 12, 14, 17 and 18.

Under the 14th paragraph of the contract which reads (S. C. p. 216, 29. 35.)

> "* * * no sale shall be for less than two lots, and that if by November 1, 1924, the sales made by * * * (Lane) * * * have not exceeded 140, * * * (Blackwood Estates) * * * may cancel this contract by 30 days notice in writing to * * * (Lane) * * *"

Blackwood Estates had the undoubted right to cancel the contract "if by November 1, 1924" Lane's sales had not exceeded 140. As of November 1, 1924, Lane's sales had not exceeded 140 and Blackwood Estates *did not* cancel. It must not be forgotten however that the contract also provided (S. C. p. 214, 35. 36. to p. 215, 1. 4.)

"* * * (Lane) shall for a period of 2 years from the date hereof have the right to * * * sell lots * * * *"*

"Where a contract provides that it shall continue for a stated period it is not terminable at the option of either party" 13 C. J. 604 Sec. 629.

First Presbyterian Church vs. Ntl. State Bank, 57 N. J. L. 27; 29 Atl. 320 (see 58 N. J. L. 406; 36 Atl. 1129).

Until midnight of October 31 Lane was safe under his contract even had he not sold a single lot, but on the next day Blackwood Estates was forced to act, it then had to come to a decision under the terms of a contract it itself had prepared (S. C. p. 158, 14. 32. to p. 159, 1. 15.) and to which it had willingly agreed.

"The notice to terminate must be given at the stipulated time." 13 C. J. 607 Sect. 635.

The contract was "for a period of 2 years from the date hereof" and there was only one "if" to this period and that "if" was not self operating. "May cancel" were the words used and if Blackwood Estates did not cancel with full knowledge of Lane's failure to make 140 sales there could be but one reason possible for its non action—it was satisfied notwithstanding the breach. Specifying the 2 year period meant something—it meant that 2 years was the term of the contract provided by November 1, 1924, Lane had not exceeded 140 sales and Blackwood Estates did not then cancel for that reason. November 1 was the end of the probation period. Lane could convert his "provisional commission" into a 2 year one by exceeding 140 sales by not doing so Blackwood Estates might or might not pemit him to continue. It did nothing *except* speak through its president just prior to the end of the probation period and say

"You need not worry in the least, Mr. Lane; we are perfectly satisfied." (S. C. p. 56, 31. 32.)
"Mrs. Lane * * * we haven't any thought of cancelling Mr. Lane's contract" (S. C. p. 129, 12. 14.)

And *except* permit Lane at his own expense to maintain his costly sales establishment for almost 3 months and gladly pocket the benefit of *$17,309.00 worth of sales.*

Could there be a more beautiful example of *waiver?*

"Anything which draws on the other party to execute the agreement after the default in respect to time, or which shows that it is deemed a subsisting agreement after such default, will amount to a waiver, as will also a failure to avail one's self of it at the first fit occasion, and before or when the other begins, after default, to act again on the agreement."

6 R. C. L. 1022 Sect. 383.

In 6 Ruling Case Law, Sec. 358, page 990, it is said:

"A person for whose benefit anything is to be done, may, if he pleases, dispense with any part of it, or circumstance in the mode of performance. Where he is present to receive performance, whatever is not exacted is considered as waived, for if objection had been made on the ground of those matters in which the proposed performance was deficient, these might have been supplied at the time, and therefore it is not proper to surprise the party who performed the act, by an objection to the mode of performance, after his vigilance has been disarmed by an apparent acquiescence, for that would be a fraud."

Ginsberg vs. Wolters et al, 94 N. J. E. 532, 541.

"* * * defendants did not promptly elect to rescind and that their failure to rescind within a reasonable time is plenary evidence of their election not to do so."

Wilson vs. Renner, 85 N. J. L. 340, 343, 89 Atl. 758.

"It is a firmly-settled rule that proof of a waiver of performance by the party who is entitled to insist upon performance is tantamount to a performance."

Grigg vs. Landis, 21 N. J. E., 494, 506;

It appeared that Landis had agreed to sell to Foster (Grigg's assignor) 10 acres of land at Vineland. Payment was to be made in installments, before the deed was given and by certain times specified in the contract, Foster was to have made several improvements otherwise Landis had the right to take back the land upon refunding the money which had been paid. It was of great importance to Landis that actual settlers should buy, and that improvements should be promptly made as inducements to others to purchase and improve, and this intention is expressed in the agreement and in the times limited. The time for planting shade trees, "before the 1st day of May or November next following;" the erection of a habitation for the purpose of occupancy "within one year from the date hereof;" at least two a half acres should be cultivated "each year from the date hereof;" these are all specified with particularity as to time, and the purpose is manifest.

The shade trees were not planted until some time in the month of November, 1865, instead of before the first day; the house was not built until January 1st,

1866, instead of before September 4th, 1865; and none of the other improvements appear to have been made within the time specified. But Foster was in possession of the property under the agreement, and had made his payments at or very near the times stipulated, and such payments had been received by Landis. After the breach of these improvement stipulations, to wit, on the 31st of October, 1865, a further payment was made and received, and again on the 4th day of January, 1866, the balance of the purchase money was paid, received, and a receipt given in full. Before the last payment was made the dwelling-house had been built, costing about $1000, two and a half acres of land had been cultivated, and trees had been planted upon the road in front of the lot. Before the deed was demanded, on the 13th of March, 1866, the underbrush had been cut in front of the property, and it had been plowed and seeded. It appears that some of the trees died, others had been planted, and that neither the trees nor the clearing and seeding are satisfactory to Mr. Landis.

And the Court held

SCUDDER, *J.:*

"Even where time is of the assence of the contract, it may be waived by proceeding in the purchase after the time has elapsed. Story's Eq., Secs. 776, 1025a.

In Hipwell v. Knight, 1 You. & Coll. Eq. Ex. 401, Baron Alderson, speaking in a case where time was the essence of the agreement, says: 'The result of all the cases on this subject seems to be, that slight circumstances are sufficient in a court of equity to prevent a party from taking the benefit of such a stipulation, and that whenever a party has done any act inconsistent with the supposition that he continues to hold his opponent strictly to his part of the agreement, he is to be taken to have

waived it altogether.' See also Seton v. Slade, 7 Ves. 265, and notes; 3 Lead. Cas. in Eq. 49."

* * * * * * *

"In the first place he has accepted two payments, the last in full of the balance of purchase money, after default in making improvements at the time fixed.

The acceptance of rent will defeat the right to proceed for a forfeiture previously committed, Arnsby v. Woodward, 6 B. & C. 519; Bowser v. Colby, 1 Hare. 130."

* * * * * * *

"Mr. Landis gave no intimation or notice that he intended to forfeit the contract because the improvements were not made at the time agreed upon. What would have been the practical effect if he had done so promptly? He could return all the purchase money he had received, and the parties would have been in statu quo. No loss would be incurred, except to the purchaser a probable speculation in the value of the lot bought. By neglecting to give such notice promptly, the purchaser has been permitted to build a house, and make other improvements amounting to one thousand dollars. To forfeit the property after this has been done, is to permit the vendor to take advantage of his own wrong, and add the amount of these improvements to his large wealth, and take it from the purchaser, who has acted upon the fair presumption from his silence, that he would not insist on the forfeit. This cannot be equitable. There are intervening equities which cannot be taken away under such circumstances."

Commercial Trust Company vs. L. Wertheim Coal and Coke Company, et al., 88 N. J. E. 143, 151;

LEWIS, *V. C.*:

"I am in accord with the complainant's views

in this regard. In the first place, the default under the lease for the non-payment of tax for 1913 was effective January 19th, 1914, and no action to enforce a forfeiture was taken by the railroad company until September 17th, 1914, at which time the receivers of this court were in possession of the property. This delay is, in effect, a waiver of the default in equity where forfeitures are not regarded with favor. * * * Some definite action must be taken to claim a forfeiture, and it is well settled that if such action is taken after a lapse of time this constitutes a waiver of the right to declare a forfeiture. 24 Cyc. 1364. It has been held that the lessor may waive the forfeiture by neglecting to assert his right within a reasonable time after the default. 24 Cyc. 1364."

Schlegel vs. Bott, 93 N. J. E. 607, 610; 117 Atl. 605.

GUMMERE, *C. J.*:

"The rule is settled that whenever a party to a contract has consistently acted in such a way as to indicate to his co-contractor that he does not intend to hold the latter to a particular provision in the agreement, he is to be taken to have waived his right to enforce that provision. The whole agreement does not become absolutely void for failure of performance of a particular provision in it. It is merely voidable at the option of the party for whose benefit it has been inserted. If he desires to exercise that right and annul the contract, he must manifest his intention to do so by some act done or notice given within a reasonable time after the failure occurs; and, in the absence of such manifestation, he is to be presumed to have elected to consider the contract in force."

McLain-Hadden-Simpers Co. vs. Trent Rubber Co. (U. S. C. C. A., 3rd circuit appeal from D. C. of N. J.) 275 Fed. 831.

In this case the contract provided "Application of these terms (of Credit) subject to the approval of our Credit Department"

WOOLLEY, *J.*:

> "The provision in the contract that the terms of payment shall be subject to the approval of the seller's credit department was not a right reserved by the seller to extend and withdraw credit at will during the running of the contract, but was a right to be exercised by the seller only before it began performance * * * the only shipment made was on 10 days cash or 30 days credit. Credit thus became an established term of the contract."

S. H. Benjamin Fuel & Supply Co. vs. Bell Union Coal & Mining Co. (U. S., C. C. A., 3rd Circuit; Certiorari denied 43 Sup. Ct. 251) 284 Fed. 227.

DAVIS:

> "The party injured by a breach may disregard it or terminate the contract, but it may not ignore it and plead it as an offset to his own breach."

On the facts the closest case—a most interesting one—is: Bour et al. vs. Kimball, 46 Ill. A. 327; Kimball authorized Bour to place his advertisement in certain places for the term of 12 months. The contract was dated June 1 and provided,

> "I have privilege to discontinue at the end of 3 months by paying $25 in addition and giving 30 days' notice."

On August 31 Kimball elected to discontinue. The

lower Court found that $25 and no more was due to Bour.

GARY, *J.*

> "This was error. The contract was for a whole year. If no privilege to discontinue had been reserved, the appellee (Kimball) could not have shortened the time. Having the privilege he must use it according to its terms * * * no notice given later than August 1st could be effectual."

The defendant-appellant urges that the question of waiver was a question of law and not a question of fact, and as a question of law the learned trial Judge should have ruled there was no waiver. If so should he not also have ruled—*as a question of law*—that the plaintiff did not waive defendant's *prior breach* of the contract in withdrawing from sale on September 26, 1924, the lots fronting on the Black Horse Boulevard? (S. C. p. 164, 34 to p. 166, l. 37) and hence defendant having made the first breach was liable for—*as a question of law*—neither party waived. Again it is urged that the making of 140 sales was a condition precedent to the right to continue. Suppose it were, can it not also be waived?

Appellant also objects to the admission of testimony relating to a conversation between plaintiff and defendant's president which occurred just prior to November 1, 1924, relating to the satisfaction of this corporate officer with the manner in which Lane had carried out the contract up to that time. The main ground of objection was that the plaintiff had not averred an express waiver. The difficulty with appellant's objection is that the conversation did not prove an express waiver. An express waiver could only have taken place *between the plaintiff and the corporation itself,* but the declarations of a corpo-

rate officer most certainly are the best kind of evidence when it is desired to show by implication the action of the corporation. As a member of the board of directors and as president of the corporation he spoke with authority and although not binding on the corporation for the purpose of showing an express waiver, it did, together with other relevant circumstances tend to established facts from which if believed the jury could find implied waiver, or waiver by estoppel.

And so Blackwood Estates made its election. It crossed the Rubicon.

> "A waiver once made can not be recalled. Hence, after a party has acquiesced in a breach of the contract, he cannot thereafter urge a forfeiture because of such breach." 13 C. J. 609 Sect. 645.

The first breach of the contract was made by the defendant and consisted of its letter of January 26, 1925 (S. C. p. 218, l. 31.), wherein Lane was, for the first time and out of a clear sky, notified that Blackwood Estates

> "hereby elects to cancel said contract, same to take effect February 26th, 1925."

There was no reasonable notice of an intention to thereafter enforce the contract—if indeed such a notice would have done any good—there was simply a flat, final and complete concellation of the contract.

II. DEFENDANT-APPELLANT MUST STAND OR FALL ON THE REASON GIVEN FOR CANCELLATION.

This point is raised by grounds of appeal Nos. 14, 16, 17 and 18.

At the trial, over plaintiff's objection (S. C. p. 135, l. 11) defendant was permitted to amend its answer and introduce two new grounds of defense (S. C. p. 27, l. 30. and also p. 135, l. 11.).

A. Plaintiff was not devoting all his time to the Sale of Blackwood lots.

B. Plaintiff was permitting agents to sell without a license.

The legal question raised will be discussed later, before doing so some attention will be given separately to each of these defenses.

(*A.*) *Plaintiff was devoting all his time to the sale of Blackwood lots.*

This point is most amusing. It is based mainly upon the testimony of one Charles E. Wallington who because of his foolish utterances on cross-examination became from the standpoint of the "atmosphere of the case" the plaintiff's most valuable witness. This witness had been one of Lane's salesmen and continued as a salesman with the defendant after Lane's dismissal. He testified that he was an Ohio lawyer (S. C. p. 139, 29. 30.) and

> "At present I am specializing in practicing before the Interstate Commerce Commission."

On cross-examination he willingly admitted that he represented both carriers and shippers, but when asked to name some of the carriers whom he represented he replied (S. C. p. 147, 13. 14.)

> "I have not represented carriers, but I hold myself out to represent carriers."

He then went on to say how his Interstate Com-

merce Commission practice took him to Washington "as occassion arises" to try cases based "both on formal and informal complaints" (S. C. p. 147, 26. 30.) It was unfortunate that he must have forgotten for the second that cases before the Interstate Commerce Commission based on informal complaints are never tried, and those based on formal complaints are tried by an examiner who comes to a large city at or near the residence of the complainant. Of course the jury could not credit him and the verdict proves their lack of confidence in what he said. However Lane's contract provided (S. C. p. 216, 13. 15.)

> "11. He will give his exclusive time to the sale of said lots and handle the lots of (Blackwood Estates) in said sub-division exclusively."

To prove a breach of this clause this witness testified that he had wanted to sell some lots to one Pappano, but that Lane had held him back because apparently Lane was then (about January 6, 1925) contemplating the purchase of the Marshall tract which adjoined Blackwood Estates and Lane wanted to sell to Pappano from the Marshall tract (S. C. p. 142, 20. 36 to p. 143, 1. 36). But Lane had admitted on cross-examination that in October or September, 1924, he had negotiated for the purchase of this farm and had not told Russel or Yelton (the President and Secretary respectively of Blackwood Estates) about it (S. C. p. 115, 17. 35.). In rebuttal Lane explained the whole matter by testifying that he first had endeavored to sell to one Matt Garwin the controlling interests of Russel and Yelton in Blackwood Estates at their request, but that Garwin wanted to buy both tracts or neither and in order to try and sell for Russell and Yelton, the controlling stockholders of Blackwood Estates, he had to negotiate for the purchase of the Marshall tract. When Yelton refused to sign the contract the deal fell through and that was the end of it (S. C. p. 184, 30. 35. to p. 196, 1. 34.). The testimony of plaintiff and defendant on this point can not possibly be reconciled. It was a jury question pure and simple and the jury believed the plaintiff's story. Hence the answer is, there was no breach by plaintiff of paragraph 11 of the contract.

(*B.*) *Plaintiff was not permitting agents to sell without a license.*

The defendant also sought to prove a breach of paragraph 12 of the contract, which reads as follows (S. C. p. 216, 16. 19):

> "12. He will not sell or permit his agents to sell said lots without first obtaining a license from the Real Estate Board of the State of New Jersey, * * * "

Admittedly the plaintiff was licensed—admittedly his agents were licensed, and admittedly his so-called sub-agents, sub-salesmen, solicitors or whatever they were called, were not licensed.

But there is not *one word* in the *whole record* upon which a finding that plaintiff's sub-salesmen had sold or were permitted to sell could be based.

The defendant had no such testimony. It made no effort to prove that any sale had been made by an unlicensed agent although it had with it in the Court room all its records. For this breach of the contract it relies entirely upon the plaintiff's own testimony.

The plaintiff testified that he had 20 sub-sales-

men (S. C. p. 42, 22. 32.). He described their duties as follows (S. C. p. 43, 9. 14.):

> "We had lady solicitors go out getting what we call leads * * * The men that went out to those leads, part of them went out to get deposits; now, *the salesmen that had a license would take the man that put the deposit up, down to the ground and sell him.*"

These sub-agents resided in Pennsylvania and

> "No sub-agents had any licenses; that is why we wouldn't let them sell." (S. C. p. 90, 32. 33.).

These men were not salesmen at all. They were "solicitors getting leads" (S. C. p. 92, 5. 6.)

They never worked on the tract (S. C. p. 99, 16. 20.). And yet the defendant with no better evidence than this complains that the jury did not find that plaintiff had permitted his agents to sell without a license. The Act itself quoted on page 24 of appellant's brief defines a real estate salesman as one employed to "sell or offer to sell * * * or to negotiate the * * * sale of real estate." Could the jury have said that these so-called sub-salesmen were employed to "sell or offer to sell," etc., when the only testimony was that they were employed to get leads so that licensed salesmen could "sell or offer to sell" etc.? The defendant could get no comfort even had there been a breach of the statute. It must rely upon a breach of the contract and the evidence does not show one single sale to have been made by an unlicensed agent. The only way defendant could have shown a breach of this clause in the contract was to have proven that the sale of lots Nos. 14-16 was made by John Doe, an unlicensed salesman. A jury can

not be permitted to guess that because generally speaking solicitors were employed to get leads for or bring those leads to, if you please, the licensed salesman who made the sale that the contract had been broken in this respect. The defendant's rights were more than protected, for notwithstanding the evidence, or, properly speaking, lack of evidence, the learned Trial Judge left to the jury the question as to whether or not the plaintiff had breached the contract in this respect (S. C. p. 209, 9. 26. and p. 214, 2. 10.) and the jury said "No!"

But suppose the jury had found both these questions in defendant's favor.

> "Where a party has attempted to terminate a contract on a stated ground, such action cannot afterward be justified on the ground that other sufficient reasons therefor existed at the time." 13 C. J. 607, Sect. 632.
>
> "A statement of a specific ground for forfeiture waives other breaches." 13 C. J. 609, Sect. 645.
>
> Honesdale Ice Company vs. Lake Lodore Improvement Company, 232 Pa. 293, 300.

The contract provided for cancellation after a default in payment for a period of over 5 days. It was cancelled by a letter which stated that "The essential conditions in reference to paying * * * were not complied with * * * " At the trial defendant defended on this ground and also attempted to defend on the ground of the plaintiff's insolvency. This latter testimony the trial judge excluded.

POTTER, *J.*

> "But this reason was not suggested at the time when the defendant sought to cancel the contract. Its action was at that time avowedly based

upon the specific ground that the payments were not made as required. This was the only reason assigned, at the time, and it was too late, we think, at the trial to attempt to base the right to rescind upon the alleged insolvency of the assignee of the contract."

This is general law.

"A refusal to perform on the ground of a specific breach assigned by the party so refusing as a ground for such refusal, is a waiver of other breaches which are known to him or brought to his notice." 3 Page on Contracts (1905) Sec. 1504.

And see

Wright vs. Land Co. 100 Wis. 269, 274.

"A party who proposes to insist upon a technical forfeiture of a contract upon certain grounds specified, is usually held to the case he has made. If he assumes to claim a forfeiture upon grounds specifically stated, he is deemed to have waived other breaches."

Railway Co. vs. McCarthy, 96 U. S. 258, 267.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

Brush-Swan Electric Light Co. of New England vs. Brush Electric Co. (C. C., S. D., N. Y.) 41 Fed. 163, 168.

COXE, *J.*

"Without any change in the situation, the defendant refused to fill orders, unless security

was given in advance, and, upon failure to receive it, repudiated the contracts. It seems that the defendant must stand or fall upon its right to take this course. It is too late now to justify its acts by asserting that there were other faults of the complainant which might have been available. If such faults existed they were venial in character and were waived or condoned. The complainant's insolvency and refusal to give security "were the reasons and the only reasons which led the defendant to ask for an arbitration." If the defendant founded its right to terminate the contracts upon an untenable ground it cannot justify its course upon the theory the complainant was guilty of other acts which might have been used as the basis of a complaint, if defendant had thought of them in time."

III. THE CHARGE OF THE COURT CONTAINS NO ERROR.

This point is raised by grounds of appeal Nos. 16, 17 and 18.

As we understand the appellant's complaint it objects to the learned trial Judge's charge because he did not leave to the jury the question as to whether or not there had been a breach of the 11th and 12th paragraphs of the contract relating to plaintiff's devoting his exclusive time and permitting unlicensed agents to sell. Of course we contend that no such defenses should have been permitted, and hence it was unnecessary for the Court to charge thereon, but they were permitted and on this point the Court's charge was full and adequate. Quotations from the charge answer the appellant's contentions.

"The defendant says that not only did it not waive that provision, but that the plaintiff broke his contract in at least two other particulars, and they are questions of fact for you to determine,

because, of course, each of these parties was bound to keep this contract. The defendant says that the plaintiff broke his contract by having persons not authorized to make sales act as real estate salesmen in violation of the statute. The statute says that a real estate salesman, within the meaning of this act, is any person who for compensation, valuable consideration or commission, is employed, either directly or indirectly by a licensed real estate broker to sell or offer to sell, to buy or offer to buy, or to negotiate the purchase, sale or exchange of real estate, or to lease or rent or offer to lease or rent any real estate for others as a vocation—to do those things as a vocation. Now, if the contract was broken in this regard, then of course the defendant had a right to call it at an end.

Likewise, if the plaintiff was not in fact devoting himself with that degree of good faith and diligence which persons who make a contract have a right to expect from the other person, then they would have a right to call the contract at an end and discharge the plaintiff. In that connection you will recall all the facts and circumstances, that there is testimony—and I think it is practically uncontradicted—that there were negotiations between the plaintiff and some members of the defendant corporation, those who appear to have been in control and direct charge of its business, for the purchase and sale respectively of the interests of the officers of this corporation; and I think it may be assumed that they were dealing and had a right to deal not then as a principal and agent, not then as a person who was an employer and employe, but when the employe was in a position where he was dealing with his employer for something which the employer had to sell and which the employe wanted to buy, that they were dealing then each as a principal, and each was dealing at arm's length, and he was not obliged to disclose to the person with whom he was dealing for his own

account everything that he may have had in his mind; because we know that in ordinary affairs if he was dealing as an agent, as a salesman, as sales-manager, or whatever he may have been under this contract, then he was obliged to deal in absolute good faith with his employer; sound business policy as well as law and morals require that. But you will consider how far a person who is on his own account negotiating a sale or purchase for himself from his employer is obliged to tell his employer everything that he may have in his mind with respect to the property that he is trying to buy, and how far a purchaser on his own account is obliged to tell the other party everything that is in his mind and everything that he contemplates, and an entirely different situation may be raised, whether he was dealing for himself in trying to effect a purchase, or whether he was selling to strangers the things which his employer had to sell. That is just a circumstance for you to consider if it is in the case, but it is a question of fact.

First, was defendant's right to terminate this agreement waived? If it was not, then of course defendant had a right to terminate it by giving notice. If it was waived, then you consider whether or not the plaintiff broke his contract so that the defendant was privileged to call the contract at an end. If the plaintiff broke his contract, then the defendant did not have to go on with it, he could stop it. If you find all of these questions or any one of them in favor of the defendant, then your verdict will be for the defendant; if you find them in favor of the plaintiff, then you would find that the defendant, without lawful right, broke the contract, discharged the plaintiff from his occupation, and you would consider how much, if anything, under the testimony in this case the plaintiff lost by reason of the unlawful breaking of this contract by the defendant and his discharge from its service." (S. C. p. 209, 7. 36. to p. 211, 1. 16.)

* * * * * * *

> "The Court: I don't think I said that, I don't think I said anything that could be construed to that effect. What I said was that the defendant had a right to terminate the contract either because of the failure to make a hundred and forty sales or because of the failure of the plaintiff to perform the contract in either of the two respects mentioned, namely, that salesmen were used which were not licensed, and that the plaintiff was not devoting his time and was not acting in good faith toward his employer, and either of those, I said would defeat a recovery, or intended to say that. All right, you may take Mr. Davis' exception." (S. C. p. 213, 33. 35. to p. 214, 1. 10.)

No answer is made to grounds of appeal Nos. 5, 6, 7, 9, 10, 11, 13 and 15 as they have all been abandoned.

For these reasons it is respectfully submitted that the appeal should be dismissed and the judgment entered below affirmed.

WILBERT V. PIKE,

(with whom appears
RALPH S. CROSKEY,
of the Pennsylvania Bar),
Attorney for Plaintiff-Respondent.