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Notice of Appeal.

Filed July 1, 1913.

New Jersey Supreme Court.

SAMUEL W. THROP,

vs.

PAYNE BROTHERS, INC.

On Contract.

To William J. Backes, Esq.,

Attorney of Plaintiff.

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in the above stated cause.

Dated June 30, 1913.

FRANK E. BRADNER,
Attorney of Appellants.

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Summons.

Summons and Declaration.

Filed May 1, 1912.

NEW JERSEY, ss.

The State of New Jersey to the Sheriff of the County of Essex, GREETING:

10 We command you to summon Payne Brothers, Inc., to be and appear before the Supreme Court of the State of New Jersey, to be held at Trenton, in and for said State, on the fifteenth day of May, instant, one thousand nine hundred and twelve, to answer unto Samuel W. Throp in an action upon contract wherein the plaintiff demands one thousand (\$1,000) dollars, and have you then and there this writ.

20 Witness, William S. Gummere, Chief Justice, at Trenton aforesaid, the first day of May, A. D., one thousand nine hundred and twelve.

WM. J. BACKES, WM. RIKER, JR.,
Attorney. Clerk.

Declaration.

NEW JERSEY SUPREME COURT.

Of the fifteenth day of May, A. D., one thousand nine hundred and twelve.

MERCER COUNTY, ss.

Payne Brothers, Inc. (a corporation organized and existing under and by virtue of the laws of the State of New Jersey), the defendant in this suit, was summoned to answer unto Samuel W. Throp, the plaintiff therein in an action upon contract; and thereupon said plaintiff by Wm. J. Backes, his attorney, complains. For that whereas, heretofore, to wit, on the twenty-eighth day of January, one thousand nine hundred and eleven, at Trenton in the County of Mercer, by a certain indenture then and there made between the said plaintiff of the one part, and the said defendant of the other part (a true copy of which said indenture is hereunto annexed and made a part hereof) the said plaintiff did grant, demise and to farm let unto the said party of the second part, all that lot of land situate on Perry street, in the City of Trenton, County of Mercer, State of New Jersey, known as 338 Perry street, in said city. Said lot adjoins the freight yard of the Pennsylvania Railroad Company and is about twenty-five feet front on Perry street by about two hundred feet deep, running through to Allen street, with the appurtenances, for the term of three years from the fifteenth day of February, one thousand nine hundred and eleven, at the yearly rent or sum of six hundred (\$600) dollars, to be paid in equal monthly payments of fifty dollars, in advance, on the fifteenth day of each month, in each year, during the continuance of said lease, beginning with the fifteenth day of February, one thousand nine hundred and eleven, the first payment to be made on that day.

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Declaration.

And the said defendant did thereby covenant, promise and agree to and with the said plaintiff that it, the said defendant, should and would well and truly pay, or cause to be paid to the said plaintiff the said yearly rent or sum of six hundred (\$600) dollars, in equal monthly payments of fifty dollars, in advance, on the fifteenth day of each month, in each year, during the continuance of said lease, beginning on the fifteenth day of February, one thousand nine hundred and eleven, the first payment to be made on that day. As by the said indenture, reference being thereunto had, will more fully and at large appear. And although the said plaintiff hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled and kept all things in said indenture contained, on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said indenture, yet the said plaintiff says, that after the making of the said indenture, and during the term thereby granted, to wit, on the fifteenth day of July, one thousand nine hundred and eleven, the sum of fifty dollars of the rent aforesaid, for the space of one month, commencing on the fifteenth day of July and ending on the fifteenth day of August, in the year aforesaid, became and was due and still is in arrear and unpaid to the said plaintiff; and further says, that after the making of the said indenture and during the term thereby granted, to wit, on the fifteenth day of August, one thousand nine hundred and eleven, the sum of fifty dollars of the rent aforesaid, for the space of one month, commencing on the fifteenth day of August and ending on the fifteenth day of September, in the year aforesaid, became and was due and still is in arrear and unpaid to the said plaintiff; and further says, that after the making of the said indenture, and during the term thereby granted, to wit, on the fifteenth day of September, one thousand nine hundred and eleven, the sum of fifty dollars of the rent

Declaration.

aforesaid, for the space of one month, commencing
 on the fifteenth day of September and ending on the
 fifteenth day of October, in the year aforesaid, be-
 came and was due and still is in arrear and unpaid to
 the said plaintiff; and further says, that after the
 making of the said indenture, and during the term
 thereby granted, to wit, on the fifteenth day of Octo-
 ber, one thousand nine hundred and eleven, the sum
 of fifty dollars of the rent aforesaid, for the space of 10
 one month, commencing on the fifteenth day of Octo-
 ber and ending on the fifteenth day of November, in
 the year aforesaid, became and was due and still is in
 arrear and unpaid to the said plaintiff; and further
 says, that after the making of the said indenture, and
 during the term thereby granted, to wit, on the fif-
 teenth day of November, one thousand nine hundred
 and eleven, the sum of fifty dollars of the rent afore-
 said, for the space of one month, commencing on the 20
 fifteenth day of November and ending on the fifteenth
 day of December, in the year aforesaid, became and
 was due and still is in arrear and unpaid to the said
 plaintiff; and further says, that after the making of
 the said indenture, and during the term thereby
 granted, to wit, on the fifteenth day of December,
 one thousand nine hundred and eleven, the sum of
 fifty dollars of the rent aforesaid, for the space of
 one month, commencing on the fifteenth day of De-
 cember in the year aforesaid and ending on the fif-
 teenth day of January, one thousand nine hundred and 30
 twelve, became and was due and still is in arrear and
 unpaid to the said plaintiff; and further says, that
 after the making of the said indenture, and during the
 term thereby granted, to wit, on the fifteenth day of
 January, one thousand nine hundred and twelve, the
 sum of fifty dollars of the rent aforesaid, for the space
 of one month, commencing on the fifteenth day of
 January and ending on the fifteenth day of February,
 in the year last aforesaid, became and was due and
 still is in arrear and unpaid to the said plaintiff; and 40

Declaration.

further says, that after the making of the said indenture, and during the term thereby granted, to wit, on the fifteenth day of February, one thousand nine hundred and twelve, the sum of fifty dollars of the rent aforesaid, for the space of one month, commencing on the fifteenth day of February and ending on the fifteenth day of March, in the year last aforesaid, became and was due and still is in arrear and unpaid to the said plaintiff; and further says, that after the making of the said indenture, and during the term thereby granted, to wit, on the fifteenth day of March, one thousand nine hundred and twelve, the sum of fifty dollars of the rent aforesaid, for the space of one month, commencing on the fifteenth day of March and ending on the fifteenth day of April, in the year last aforesaid, became and was due and still is in arrear and unpaid to the said plaintiff; and further says, that after the making of the said indenture, and during the term thereby granted, to wit, on the fifteenth day of April, one thousand nine hundred and twelve, the sum of fifty dollars of the rent aforesaid, for the space of one month, commencing on the fifteenth day of April and ending on the fifteenth day of May, in the year last aforesaid, became and was due and still is in arrear and unpaid to the said plaintiff; which is contrary to the tenor and effect, true intent and meaning of the said indenture and of the said covenant of the said defendant, by it in that behalf so made as aforesaid. And so the said plaintiff, in fact says, that the said defendant, although often requested so to do, has not kept its said covenant so by it made as aforesaid, but hath broken the same, and to keep the same with the said plaintiff hath hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said plaintiff one thousand (\$1,000) dollars, and therefore he brings suit, etc.

WM. J. BACKES,
Attorney for Plaintiff.

Pleas.

Pleas.

Filed May 22, 1912.

NEW JERSEY SUPREME COURT.

SAMUEL W. THROP,

vs.

PAYNE BROTHERS, INC.

10

On Contract.

And the said defendant by Frank E. Bradner, its attorney, comes and defends the wrong and injury when, etc., and says that the said certain indenture mentioned in the said declaration, is not the deed of this defendant; and of this the said defendant puts 20
itself upon the country, etc.

And for a further plea in this behalf the said defendant by leave of the court for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the plaintiff ought not to have or maintain his aforesaid action thereof against it by reason of anything alleged in said declaration, because it says that prior to the alleged execution of the said certain indenture pur- 30
porting to be the deed of this defendant, Theodore P. Payne, the president of this defendant corporation, was authorized to negotiate with the said plaintiff for the purchase of the land described in the said declaration and in pursuance of such authority the said Theodore P. Payne entered into negotiations with the said plaintiff, and then and there to wit, at Trenton, in the County of Mercer aforesaid, on or about the fifteenth day of January, in the year nineteen hundred and eleven, and between that day and the twenty-eighth day of January in the same year, 40

Pleas.

the said plaintiff represented to said Theodore P. Payne, the president of this defendant, that he, the said plaintiff was then the owner of the lands and premises described in the said declaration, and that he could and would sell the said lands and premises to this defendant for the sum of ten thousand dollars at any time within three years, and that he could and would give to this defendant a lease of said
10 lands and premises for the term of three years for a rental of six hundred dollars per year, to be paid monthly, and at the same time could and would give to this defendant an option in writing to purchase said lands and premises at any time within three years, for the sum of ten thousand dollars; and that then and there this defendant relying upon the representations aforesaid made by the said plaintiff, authorized its said president to enter into an agreement with the said plaintiff to take a lease from said plaintiff
20 for said lands and premises for the term of three years at a yearly rental of six hundred dollars, payable monthly, and at the same time to take from said plaintiff an option in writing for the purchase of said lands and premises for the sum of ten thousand dollars at any time within the said three years; and the said plaintiff then and there did agree with this defendant through its said president, to lease the said lands and premises to this defendant for the term of three years from the fifteenth day of February,
30 in the year nineteen hundred and eleven, at the yearly rent of six hundred dollars, payable monthly, and did then and there also agree to make and execute a lease in writing of said lands and premises to this defendant; and did then and there also agree to make and execute an option in writing to this defendant to purchase the said lands and premises from the said plaintiff at any time within the said three years, for the sum of ten thousand dollars; and did then and there agree that the lease of the lands and premises
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Pleas.

should not bind this defendant until the option was made and executed; and afterwards, to wit, on or about the twenty-eighth day of January, in the year nineteen hundred and eleven, the said Theodore P. Payne, president of this defendant as aforesaid, executed in behalf of this defendant the indenture of lease mentioned in the said declaration, and delivered the same to the said plaintiff by mail from Newark, in the County of Essex, New Jersey, and requested the said plaintiff to send to the said defendant the option in writing aforesaid; and afterwards, the said plaintiff refused to give the said option in writing to the said defendant, and thereupon the said plaintiff refused to perform the covenants of said indenture of lease; and this, the said defendant is ready to verify; wherefore, it prays judgment if the said plaintiff ought to have or maintain its action aforesaid against it, etc. 10

And for a further plea in this behalf the said defendant by like leave of the court for that purpose first had and obtained according to the form of the statute in such case made and provided, says that the plaintiff ought not to have or maintain his aforesaid action thereof against it by reason of anything alleged in the said declaration, because it says that the said indenture of lease mentioned in the said declaration was executed by the president of this defendant in reliance upon the promise of the plaintiff that he would execute and deliver to this defendant a writing obligating himself to sell to this defendant at any time within the term of three years from the twenty-eighth day of January, in the year nineteen hundred and eleven, the lands and premises described in the said declaration, for the sum of ten thousand dollars; and that relying upon the said promise of the said plaintiff, the said lease was executed as aforesaid, and rent was paid in accordance with the terms thereof for the period of three months; and at the expiration of said period of three months the said plaintiff 20 30 40

Pleas.

refused to perform his said promise and refused to give the said writing binding himself to sell the said lands and premises to this defendant as aforesaid; thereupon this defendant rescinded its agreement with the said plaintiff and rescinded its obligation to pay any rent to said plaintiff, and refused to pay any more rent; and this, the said defendant is ready to verify; wherefore, it prays judgment if the said
10 plaintiff ought to have or maintain his aforesaid action against it, etc.

FRANK E. BRADNER,
Attorney of Defendant.

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

THEODORE P. PAYNE, being duly sworn according
20 to law, upon his oath says: That he is the President of Payne Brothers, Inc., the defendant in the above stated cause, and that the foregoing pleas filed by said defendant, are not intended for the purpose of delay, and that he verily believes said defendant has a just and legal defence to said action on the merits of the case.

T. P. PAYNE.

Sworn and subscribed before me
this twenty-second day of May,
30 A. D. 1912.

S. M. COOLEY,
*Master in Chancery
of New Jersey.*

Replication.

Replication.

Filed June, 1912.

NEW JERSEY SUPREME COURT.

SAMUEL W. THROP,

vs.

PAYNE BROTHERS, INC.

On Contract.

10

And the said plaintiff as to the plea of the said defendant by it first above pleaded and wherein it has put itself upon the country, doeth the like.

20

And the said plaintiff as to the said plea of the said defendant by it secondly above pleaded, says that the said plaintiff by reason of anything by said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he says that such collateral promise or agreement was not made as in said plea mentioned, and that the said plaintiff did not at the time and place of making the said lease, then and there also agree to make and execute an option in writing to the said defendant to purchase the said lands and premises from the said plaintiff at any time within three years, for the sum of ten thousand dollars, nor did said plaintiff then and there agree that the lease of the lands and premises should not bind the said defendant until the option was made and executed, as set forth in the said plea, but the said plaintiff in fact says, that the only covenant, promise or agreement made by and between the said plaintiff and the said defendant is the covenant or agreement sued upon by the said plaintiff in

30

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Replication.

this suit, and of this the said plaintiff puts itself upon the country, &c.

10 And the said plaintiff as to the said plea of the said defendant by it thirdly above pleaded says, that the said plaintiff, by reason of anything by the said defendant in that plea alleged ought not to be barred from having and maintaining its aforesaid action thereof against the said defendant, because he says
 20 that such collateral promise was not made as in said plea mentioned, and that the lease mentioned in the said declaration was not executed by the president of the said defendant corporation in reliance upon the promise of the said plaintiff that he would execute and deliver to said defendant a writing obligating himself to sell to the said defendant at any time within three years from the twenty-eighth day of January, in the year of nineteen hundred and eleven, the lands and premises described in the said declaration, for
 20 the sum of ten thousand dollars, and that the said defendant did not rescind nor have any right to rescind its said agreement with the said plaintiff, nor did it rescind nor have any right to rescind its obligation to pay any rent to the said plaintiff, nor refuse to pay any more rent, as set forth in the said plea, and of this the said plaintiff puts himself upon the country.

WM. J. BACKES,
Attorney of Plaintiff.

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40

Robert M. Hutchinson, direct.

Testimony.

NEW JERSEY SUPREME COURT.

MERCER CIRCUIT.

No. 18, May Term, 1913.

SAMUEL W. THROP,

Plaintiff,

vs.

PAYNE BROTHERS, a Corporation,

Defendant.

*Action at
Law.*

10

Transcript of shorthand notes of testimony, etc., taken in the above stated matter before Hon. Frank T. Lloyd, Circuit Court Judge, and a jury at the Court House, Trenton, N. J., on Wednesday, June 4, 1913.

20

Appearances:

William J. Backes, Esq., for the plaintiff.

Frank E. Bradner, Esq., for the defendant.

(Jury called and sworn.)

(Counsel opened.)

ROBERT M. HUTCHINSON, sworn for the plaintiff.

Direct examination by Mr. Backes.

30

Q You live in Trenton?

A Yes, sir.

Q And you know Samuel W. Throp?

A I do.

Q Do you know his signature?

A Yes, sir.

Q (Showing witness paper.) Is that your signature?

A Yes, sir, and that is Mr. Throp's.

Q Did you see Mr. Throp sign that?

40

Robert M. Hutchinson, cross.

A I did.

Q And also seal it?

A Yes, sir.

Cross examination by Mr. Bradner.

Q Do you recall where it was that he signed that paper?

A Yes, sir, in his office.

10 Q Who was there?

A No one to my knowledge but him and myself.

Q Do you remember whether there was any other paper signed at the same time?

A No, sir.

Q You don't remember that?

A No, sir.

20 *Mr. Backes.* If the court please, the other witness to this instrument is Miss Anna Lang, and Mr. Bradner agreed that I should read a few questions and answers. "Where do you live?" "Newark, New Jersey." She is one of the employees of the defendant concern, a stenographer. "Are you employed by the Payne Brothers?" "Yes, sir." "I show you a paper marked exhibit P. 1 for identification—" That is the lease—"purporting to be a lease between Samuel W. Throp and Payne Brothers incorporated and ask you whether that is your signature?" "It is." "Did you see Mr. Payne sign this instrument?" "Yes, sir." "And was that seal affixed at the time?" "I don't remember that." "But you saw Mr. Payne sign it?" "Yes, sir."

30

Mr. Bradner. The cross examination is: "Miss Lang, the red seal on the paper that you saw, is that the corporation seal of Payne Brothers?" "I don't know that. They have a regular seal I know."

Ralph W. Payne, direct.

RALPH W. PAYNE, sworn for plaintiff.

Direct examination by Mr. Backes.

Q Are you one of the defendant's corporation employees, an officer?

A Yes, sir.

Q What office do you hold?

A Secretary and first vice-president.

Q And as such do you keep the minutes of the corporation? 10

A Yes, sir.

Q Who are the directors of that corporation?

Mr. Bradner. I object.

The Court. I do not see the relevancy of that, Mr. Backes.

Q Are you one of the officers?

A Yes, sir.

Q And a director also?

A Yes, sir. 20

The Court. He says he is secretary and vice-president.

Q Have you the minutes of the corporation with you?

A Yes, sir, on the table there.

Q Who is your president?

A Theodore P. Payne.

Q What other offices does he hold?

A He is president and treasurer.

Q Also general manager? 30

A I should not say so, not in the term of general managership. The general manager of our place is Mr. Gates.

Q Isn't Theodore Payne the general manager of your corporation?

Mr. Bradner. I object. It don't make any difference what he is.

The Court. What is it contended that this bears out? 40

Ralph W. Payne, direct.

Mr. Backes. That as such he was the person who should have executed this lease.

Mr. Bradner. The lease purports to be signed "Payne Brothers, a corporation by T. P. Payne, President."

The Court. Do you admit the execution of the lease?

10 *Mr. Bradner.* I do not.

The Court. Then the plaintiff has a right to prove the relation of the man who signed it to the company.

After argument.

Objection overruled.

To which ruling of the court defendant's counsel prays an exception and the same is allowed and is sealed accordingly.

FRANK T. LLOYD (L. S.)

J.

20

Q (Last question read.)

A George S. Gates is our General Manager.

The Court. Mr. Payne is not?

The Witness. No, sir.

Q Isn't Theodore P. Payne the manager of Payne Brothers incorporated, a corporation?

A We have a term "General Manager." That position is filled by Mr. Gates.

30 Q Theodore P. Payne, is he not the president and manager of that corporation?

Mr. Bradner. I object. I object on the ground that the best evidence of what he is would be the records of the company, to show what position he holds. If he holds an office that would appear in the minutes. If he is the general manager, he must be so by election by the board of directors or the stockholders and that would appear in the minutes.

40

Ralph W. Payne, direct.

(After discussion.)

The Court. It has been held that proof of election is not the exclusive means of proving that.

(After argument.)

Objection overruled.

To which ruling of the court defendant's counsel prays an exception and the same is allowed and is sealed accordingly.

FRANK T. LLOYD (L. S.)

10

J.

Q Isn't Theodore P. Payne the general manager of the Payne Brothers incorporated, a corporation?

A I can reiterate that Mr. Gates—

By the Court.

Q Answer the question whether he is or not.

A Mr. Gates is our general manager.

Q That does not answer it. Is Mr. Payne?

20

A No, sir.

By Mr. Backes.

Q Have you your by-laws here?

A Yes, sir.

Q Will you refer to that portion of your by-laws which provides for the general manager?

A I do not think there is any provision in them.

Mr. Bradner. We have all the by-laws.

(The witness reads from the by-laws.)

Q After reading that, what will you say with reference to Mr. Theodore P. Payne being your general manager?

30

A We have a term for general manager and Mr. Gates is general manager. I should call this, perhaps, a managing director.

Q Who are the officers of your corporation, who are all of them?

Mr. Bradner. I object.

Mr. Backes. I think I have a right to that.

40

Ralph W. Payne, direct.

The Court. I do not want to go unnecessarily afield in the testimony. Of course it is proper to show who the officers are, but I do not see the necessity of going beyond that. You have already shown that Mr. Theodore P. Payne was the president and you have introduced the by-laws showing what his authority is.

10 Q Does not Mr. Theodore P. Payne attend to all your outside work in the structural line?

A No, sir.

Q Doesn't he attend to nearly all the outside work?

A No, sir.

Q I ask you to refer to a resolution of the corporation which authorizes your president or general manager to execute this lease?

20 *Mr. Bradner.* I object to the question. It assumes that the lease was executed by the corporation by virtue of the resolution. The question assumes something that has not been proved in the case. It assumes that there is a resolution authorizing the president to execute this particular lease.

The Court. If there is not, it is very easy for him to say so. This is simply pointing it out on the book. The resolution will speak for itself. Refer to it and show us where it is.

30 Q You made all these entries, did you not?

A Yes, sir.

Q I ask you when that resolution—

The Court. What is the resolution? "That" does not mean anything.

Mr. Bradner. I think the resolution ought to go in evidence.

40 Q Referring to page 19 of the minutes I ask you when that resolution was introduced or when that minute was made?

Ralph W. Payne, direct.

A That was dictated by me to the stenographer from pencil notes shortly after that meeting referred to.

By the Court.

Q When was the meeting?

A January 21, 1911.

Q What is the date of the lease?

Mr. Backes. January 28, 1911.

10

By Mr. Backes.

Q I ask you to read it.

The Court. No, you read it if it is important.

(*Mr. Backes reads from the minutes.*)

The Court. You offer the resolution in evidence?

Mr. Backes. I do.

Exhibit (not marked).

Q I ask you whether that minute was dictated by you on or about January 21, 1911?

20

A Yes, sir.

Q Was it signed by you at that time?

A It was dictated by me but the stenographer writes this—

The Court. He has already said that.

Mr. Backes. I am asking whether he signed that as secretary at that time.

The Court. He said he did.

Mr. Bradner. No, he did not say it was signed at that time.

30

By the Court.

Q Is it a correct minute of the proceeding?

A Yes, sir.

Q And made at the time?

A Yes, sir.

By Mr. Backes.

Q Did you know of this lease which I show you as having been executed on or about January 28, 1911—when did you first know of that lease?

40

Ralph W. Payne, direct.

A Of the lease itself I do not think I knew anything of it until a length of time after the date of it. I do not just remember what date.

Q What do you mean by length of time after, a week?

A I should say a week or two.

Q Who are the directors of your company?

A Theodore P. Payne—

10

The Court. What has that to do with it?

Mr. Backes. It may have a great deal to do with it in showing the directors themselves knew of this lease, and that is what I am trying to get at. If they knew of it and they did not dissent, they surely are chargeable with it.

The Court. Haven't you got a lease signed by the president in pursuance of this resolution?

Mr. Backes. I have, if your honor will take that as sufficient.

20

Q Did any of the officers or directors of your corporation speak to you of this lease about the time it was executed?

Mr. Bradner. I object.

(After argument.)

Objection overruled, to which ruling of the court defendant's counsel prays an exception and the same is allowed and sealed accordingly.

FRANK T. LLOYD, (L. S.)

30

J.

By the Court.

Q Are you one of the directors?

A Yes, sir.

Q You say there were two others at that time?

A Yes, sir.

Q Who were they?

A Theodore P. Payne, George H. Payne and myself. I knew nothing of the lease and nothing of the proposition after the meeting of the directors which

40

Ralph W. Payne, direct.

was recorded there until the time that I mentioned, a week or two after the date on that lease.

By Mr. Backes.

Q Who spoke to you of it then?

A My brother.

Q Which brother?

A Theodore P. Payne.

Q What did he say?

10

Objected to.

The Court. I will receive it. Note the exception.

Mr. Bradner. I will state the grounds of my objection. It involves the action of the board of directors of the company and the company can only be bound by the corporate action, by the meeting of the board.

Objection overruled.

20

Defendant's counsel prays an exception to the above ruling of the court and the same is allowed and sealed accordingly.

FRANK T. LLOYD, (L. S.)
J.

Q What did he say?

A We advocated at that time making sketches for the plant—

By the Court.

30

Q What did he say?

A It was merely a discussion on the plant to go on that property.

Q You say he spoke to you about a week later on the lease, what did he say about it; you say he told you about it about a week after it was made?

A Yes.

Q What did he say?

A The lease had been forwarded to Trenton and we were considering what we proposed to do with it.

40

Ralph W. Payne, direct.

That was the only thing that was discussed with me at that time.

By Mr. Backès.

Q This was a director's meeting?

A Yes, sir.

Q Who else was present?

A No one that I know of.

10 Q He told you that he had executed the lease and forwarded it to Mr. Throp, at Trenton?

A Yes, sir.

Q What did you say the other directors' name was beside Mr. Theodore Payne?

A George H. Payne, Theodore P. Payne, and myself, R. W. Payne.

Q Did you speak to George H. Payne on having forwarded this lease to Trenton to be executed?

A No, sir, I did not forward it.

20 *The Court.* Did you speak to him, the question is, to your brother, George?

A No, sir.

Q Did you speak to George H. Payne at all about this lease?

A Only as it was discussed at the meeting of the directors recorded. That was the only conversation I had about it prior to the time I mentioned to you.

30 Q Within a short time after this lease had been forwarded to Trenton, didn't you speak to George H. Payne about it?

A I cannot recall that I did—shortly afterward.

Q You won't say that you did?

A My memory will not recall that.

Q Didn't you speak to George H. about your plant in Trenton, or your proposed plant in Trenton?

A Those things were in the drawing room and would naturally be taken up I suppose within a week or something like that.

40 Q I am asking you if you did not speak to George H. Payne about your proposed plant in Trenton?

Ralph W. Payne, direct.

A No, sir; it was discussed as I told you.

Q When did you first speak to him about this plant in Trenton?

A At the time it was discussed, as recorded in the minutes.

Q When after that?

A I couldn't define the time.

Q Well, within two weeks?

A No, I should say longer than that. 10

Q How much longer than that?

A I would not confine it within two months.

Q Do you mean to say that although you were secretary of the company you did not speak to George H. Payne about your plant in Trenton until about two months after it had been first spoken of?

A No, sir; except as it is mentioned, as I say to you, in the minutes; then it was discussed and tentative plans made for what we proposed doing with it. I speak of building plans. 20

By the Court.

Q Were these plans made after the building had been leased or before?

A The property?

Q Yes, after the property had been leased or before?

A I should say it was about the time.

Q Were they carried on after the lease had been signed? 30

A They were put in the drawing-room.

Q At whose direction was that done?

A I suppose it was the chief draftsman; there was a sketch gotten up.

Q But you don't know who he got his directions from?

A No, sir.

By Mr. Backes.

Q Wasn't George H. Payne spoken to by you of those plans about that time? 40

Samuel W. Throp, direct.

A No, sir.

Q Do you know whether he knew anything of it?

A I don't think he did, other than what is recorded there, in our talking about that time.

Cross examination by Mr. Bradner.

Q Mr. Payne, did you ever see an option in writing from Mr. Throp?

10 Objected to.

(After discussion.)

Question withdrawn.

Q You had a conversation with your brother, Theodore, in which something was said about a lease having been sent to Mr. Throp?

A Yes, sir.

Q What else was said in that conversation?

20 A He said that the lease had been sent and he expected Mr. Throp to send the option that was discussed at the meeting of the board of directors.

Q That you say was about a week—

A I should judge about that time.

Q A week or two after the date of this paper?

A Thereabouts.

SAMUEL W. THROP, the plaintiff, sworn.

Direct examination by Mr. Backes.

30 Q You are the plaintiff in this case?

A Yes, sir.

Q And you live where?

A 246 East Hanover street, Trenton.

Q Do you know Theodore P. Payne?

A Yes, sir.

Q How long have you known him?

A Well, I think I first met him along in December, possibly, of 1910—the winter of 1910-11.

Q Where?

40 A He came to my office.

Samuel W. Throp, direct.

Q (Showing witness a paper.) You have seen that lease before?

A Yes, sir.

Q I ask you whether there is anything due to you, any moneys due to you, from Payne Brothers, on account of that lease or contract?

Objected to.

The Court. Objection sustained. It is not a question of whether anything is due to him. It is a question of what has been paid, not what has not been paid under the contract, if there is a contract. 10

Mr. Backes. It is not a question of whether anything is due to him?

The Court. It is a question of what has been paid or what has not been paid. That contract, if it is a good one, creates an obligation unless it has been altered in some way and the question is what payments have been made. 20

Q What payments have been made under this lease?

Mr. Bradner. I object. The contract ought to be proved and put in evidence.

The Court. Do you offer the contract?

Mr. Backes. I do, I offer it in evidence.

Mr. Bradner. I object to it because it does not appear on its face to be executed by the corporation. 30

The Court. Well, what is the objection?

Mr. Bradner. The objection is the paper is not executed by the corporation and it has not the seal of the corporation on it; it does not purport, in the attestation clause, to be the seal of the corporation or to be executed by the corporation. The seal that is on it is not proved in any way. There is nothing from which the law would presume that it was a document executed by the corporation. 40

Samuel W. Throp, direct.

(After argument.)

The Court. For the time being, I will admit the paper.

Exception to defendant and the same is allowed and sealed.

FRANK T. LLOYD, (L. S.)
J.

10 Paper above referred to is marked Exhibit P. 1.
The Court. The question is how much you received on account of this.

The Witness. I received two hundred dollars.

By Mr. Backes.

Q How was that paid to you?

A Monthly.

By the Court.

Q Fifty dollars a month?

20 A Fifty dollars a month.

By Mr. Backes.

Q What was the last payment made to you?

A In May.

Q In May of what year?

A 1911.

Q Was there anything paid to you after that?

A No, sir.

Q The next instalment was due to you when?

A June 15th.

30 Q And nothing has been paid to you since?

A No, sir.

Q I show you a paper and ask you whether you received that?

A Yes, sir.

Q How?

A By mail.

Q Do you know the signatures of Theodore P. Payne?

A Yes, sir.

40 Q Is that his signature?

Samuel W. Throp, direct.

A Yes, sir, as president of Payne Brothers, Incorporated.

Q It reads "We would ask you to kindly send us description of the plot we have leased from you so we can plot the lines of the property. This we imagine you would have to get from your deed, or should you happen to have a surveyor's map of same would ask you to kindly send us copy of same." Did you send them the description? 10

A Yes.

Q What else?

A I sent a description I had made myself, as Mr. Payne said when they rented the property all they wanted it for was a yard and all they expected to put up was a crane to unload their structural iron into the lot. They just wanted it as a storing place.

Q How often was Mr. Theodore P. Payne in your office in relation to this map?

A Three times. 20

Q The third time was when?

A It was in May.

Q What time in May, what part of May?

A About the middle.

Q And did he say anything, did he ask you to be relieved—

Objected to.

Q —from this lease?

Mr. Bradner. I object to the question as leading. 30

The Court. It is leading.

Q State whether or not any offer was made by Theodore P. Payne to you in reference to this lease.

Mr. Bradner. Objected to. First he must fix the time.

The Court. He said after the lease—

Mr. Bradner. And if there was any offer relating to a compromise it is not competent.

The Court. Well, that does not appear yet. 40

Samuel W. Throp, cross.

Q State whether or not Mr. Payne offered to pay you any rent in advance at that meeting?

Objected to.

The Court. It depends, Mr. Backes, upon what construction is to be placed upon this—

Mr. Backes. I will withdraw the whole matter.

Cross examination by Mr. Bradner.

10

Q Mr. Throp, you are in the real estate business in Trenton?

A No, sir.

Q A life insurance agent?

A Yes, sir.

Q Where did you first meet Mr. Payne?

A At my office.

Q How long was that before January 28th, the date of this lease?

20

A Two or three weeks, something like that.

Q Was anybody with him?

A Yes, sir.

Q Mr. Grover Lanning?

A Yes, sir.

Q Did you know Mr. Lanning at that time?

A Yes, sir.

Q Mr. Lanning brought Mr. Payne in and introduced him to you, didn't he?

A Yes, sir.

30

Q On that occasion did you say to Mr. Payne that you would rent this property for a term of years for \$50 a month?

Mr. Backes. I object.

Mr. Bradner. It may not be cross examination.

The Court. I am not sure it is not otherwise incompetent but still I will rule that it is not cross examination now.

Mr. Bradner. Then of course your honor would not, in your discretion, allow me to open up the defense at all upon cross examination?

40

Samuel W. Throp, cross.

The Court. I think it is better not to.

Q Afterwards, you made out two papers and sent them to Payne Brothers, didn't you in Newark?

A Yes, sir— Well, not at that first meeting I didn't.

Q There was another meeting after that?

A Yes, sir.

Q And then you made out a couple of papers. In fact, you made out duplicates of this particular lease and signed them? 10

A I had them made out. Judge Gnichtel made them for me.

Q You executed them yourself?

A Yes, sir.

Q And sent them to Payne Brothers?

A Yes, sir, I did just what Mr. Payne told me to do.

Q I did not ask you that. They were sent back to you? 20

A Yes, sir.

Q Did you get a letter from Payne Brothers?

A Yes, sir.

Mr. Backes. I object. It is not cross examination.

The Court. This is a part of the case that will have to be brought out later.

(After discussion.)

The Court. What is it you want to ask him? 30

Q Did you get a letter from Payne Brothers?

A What do you mean? I got that letter, yes, sir.

Q Didn't you get a letter before that?

Objected to.

A I don't know.

Mr. Backes. It is not cross examination.

Q I gave your attorney notice to produce a letter dated Feb. 9th, 1911. Was that called to your attention by Mr. Backes? 40

Samuel W. Throp, cross.

A I don't remember whether he did or not.

Mr. Bradner. I will ask counsel whether he has a letter dated Feb. 9th, 1911.

Mr. Backes. We have a copy of it here.

Q Your attorney produces a copy of a letter. Do you identify it as a copy of a letter that you received?

10 *Mr. Backes.* I object to that because it is going into the defense; it is only a matter of defense.

The Court. The witness is simply asked to identify it now.

The Witness. I guess that is all right.

Q Where is the original letter?

A I don't know, sir.

Q Have you looked for it?

A Yes, sir.

Q And cannot find it?

20 A No, sir.

Mr. Bradner. I offer the copy in evidence.

The Court. You may on your own case.

Mr. Bradner. It is part of the plaintiff's case. It is part of the correspondence between them.

The Court. Yes, but they have not seen fit to introduce it and you cannot force it on them.

(Letter referred to is marked D. 1 for identification.)

30 Q Have you a letter dated May 18, 1911, of Payne Brothers?

Mr. Backes. I object to the defendant calling for any letter from the plaintiff at this time.

The Court. Only so far as it may be pertinent on cross examination. Of course, if he chooses to present to the witness letters and have him identify them he may do so. But if it is necessary to first get them from the defendant I do not think you can introduce them now. I think, Mr. Bradner, that you had better wait.

Motion for Non-Suit.

Mr. Bradner. I want it identified.

The Court. Yes, but he will not give it up and I will not compel him to at this stage of the case.

Mr. Bradner. He can say whether he received it.

The Court. He does not seem to want to and the court will not compel him to.

Mr. Bradner. Then I have no further questions. 10

PLAINTIFF RESTS.

Mr. Bradner. If the court please, I move to non-suit the plaintiff on the ground the plaintiff has not proved his declaration. He has not proved a covenant or a breach of a covenant.

The Court. I will deny the motion and grant an exception. 20

An exception to defendant.

Mr. Backes. I have offered the lease and I want to offer the letter also.

(Marked Exhibit P. 2.)

Mr. Bradner. There is a second ground that I want to put on the record. The plaintiff has proved that a resolution was passed by the directors of the corporation authorizing the president to enter into a written agreement—and an option to buy, on the terms offered by Mr. Throp 30—and he has not proved any such agreement. It does not appear that the president of the corporation had any authority to execute the paper that is produced and offered in evidence. Consequently there is no liability on the part of the corporation.

(After argument.)

The Court. I think there is sufficient evidence to let it stand and go to the jury. 40

Motion for Non-Suit.

Exception to the defendant; and it is allowed and sealed.

FRANK T. LLOYD. (L. S.)
J.

Mr. Bradner opened for the defense.

10 *The Court.* Mr. Bradner, there is no plea of a failure of consideration here, is there?

Mr. Bradner. Except that it may be included in this special plea. We did not get what we bargained for.

Mr. Backes. There is no such plea at all.

The Court. As I gather your defense is that the plaintiff agreed to give something which he has not given.

Mr. Bradner. That is exactly it. That is what we set up.

20 *Mr. Backes.* We say, as a legal proposition, that they cannot sustain that defence.

 (After argument.)

The Court. Have you a brief here?

Mr. Backes. We have.

Mr. Bradner. We have not exactly a brief; we have a memorandum of the cases.

 Adjourned to Thursday, June 5th, 1913, at 10:15 o'clock in the forenoon.

30

40

Theodore P. Payne, direct.

Trenton, N. J., June 5th, 1913.

Case resumed.

Appearances as before noted.

The Court. Gentlemen, my impression is that it would be wise to hear this testimony and then determine its legal effect when it is in. 10

Mr. Backes. I make a motion that, as the defendant has opened, that it does not constitute a defense, and I ask your honor to overrule the proposed defense and direct a verdict.

The Court. I will overrule the motion and enter an exception.

Exception to plaintiff.

THEODORE P. PAYNE, sworn for the defendant. 20

Direct examination by Mr. Bradner.

Q Where do you live?

A In Newark.

Q Are you an officer of Payne Brothers Incorporated?

A Yes, sir.

Q What office do you hold?

A President and treasurer.

Q Were you the president of the company, January 28th, 1911? 30

A Yes, sir.

Q Prior to that date, did you have any negotiations with Mr. Throp relating to a property at Trenton?

A Yes, sir.

Q What was the property?

Mr. Backes. I object. The lease speaks for itself. The instrument is in writing and it is the whole contract as concluded by the parties themselves. 40

Theodore P. Payne, direct.

The Court. I think probably you are right but I think it is desirable that we should have on the record what the court is acting upon and I will admit the testimony.

Exception to plaintiff.

The Court. You need not take the exceptions specifically. You may consider you have an exception to this line of testimony.

10

A A piece of property located alongside the Pennsylvania Railroad on Perry street, I think it is 338.

Q Was it improved property?

A No, sir.

Q What size was the lot?

A I think it was twenty-five feet wide; the length I can't recall.

Q You saw Mr. Throp?

A Yes, sir.

20

Q When was the first visit made?

A Some time in December, I believe.

Q Following that visit was any action taken that you know of by your company?

A We had a meeting of the board of directors and a resolution was passed.

Q Was that the resolution that was read in evidence yesterday?

A Yes.

30 Q Did you see Mr. Throp after that resolution had been adopted?

A Yes.

Q Where?

A At his office.

Q In Trenton?

A Yes, sir.

Q Was there anyone with you?

A Mr. Lanning.

Q What is his first name?

A Grover Lanning.

40 Q What occurred at that meeting?

Theodore P. Payne, direct.

A I explained to Mr. Throp the gist of the transactions, which we had had in the directors' meeting and requested him to prepare the papers in accordance. We also discussed the terms, and so forth, at that meeting.

Q State what was said?

A As I recall it the first thing that we discussed was the value of the property. We objected rather strenuously to the value that had been set on the property. We arrived at that value— 10

By the Court.

Q You mean its rental value?

A I mean the option to buy. We arrived at that value through the assessment valuation that was in the city records and figured the net investment on that valuation.

Q Tell us what was said?

A We recalled the fact that on the valuation of twenty-one hundred dollars as assessed in the city hall he was making a very liberal—what we considered a very high price. 20

By Mr. Bradner.

Q What did you say to Mr. Throp about it?

The Court. What was it you said would be a high price?

The Witness. The \$10,000.

Q What was said about \$10,000? 30

A That was to be the option purchase price of the property.

Q State what was said before that; that is a conclusion.

A This whole discussion was with relation to terms of the agreement to lease and to purchase. We explained to Mr. Throp in considerable detail the fact that we were going to locate a locomotive travelling crane derrick there which we had ready to put there. We had a locomotive crane derrick, a fifteen ton der- 40

Theodore P. Payne, direct.

rick and we would have to put tracks in there and make arrangements to unload, and have to put an office building there and also have to have some sort of storage facilities under cover. This was explained with same detail to Mr. Throp with reference to the option to buy, the pertinance of that discussion being that on a purely rental basis we could not afford to go to that expense. The terms of the option to buy in the
10 lease were finally agreed on a fifty dollars a month for rent and ten thousand dollars for the option to buy.

Q Did you and Mr. Throp come to any conclusion?

A Mr. Throp agreed to arrange for those terms.

Q What was the agreement that you made with Mr. Throp at the time in Mr. Lanning's presence?

A The agreement at that time was that Mr. Throp
20 would prepare the papers in the case based on those terms.

Q What terms?

A Fifty dollars per month rental for three years and an option to renew for two years on a rental basis of seventy-five dollars, and then to buy any time within the three years for \$10,000.

By the Court.

Q Did you say he was to prepare a lease embodying those terms?

30 A Yes, sir, he was to prepare the papers in accordance with that agreement.

By Mr. Bradner.

Q What papers were specified, if any?

A I don't think we specified. The conversation was directly pointed towards the terms, the rental value and the option to buy. At least, that is the part that is left in my mind very distinctly. I can remember it was left to Mr. Throp to draw the necessary
40 papers in accordance with that understanding.

Theodore P. Payne, direct.

Q And after those papers had been prepared what was to be done with them?

A They were to be sent to us.

Q Did Mr. Throp afterward send you any papers?

A Yes, sir.

Q Do you recall what they were?

A A lease and duplicate.

Q What did you do with those?

A I signed those and sent both of those back to Mr. Throp without putting the corporate seal on them. I left instructions with our stenographer in sending those out, that there was to be an option returned with those two leases. 10

Q You say you did not put the corporate seal on?

A No, sir.

Q Do you know whether there was any corporate seal put on?

A There was no seal on them when I signed them. 20

Q (Showing witness paper.) There is a red seal upon that now, on this Exhibit P. 1. Do you know who put the seal on there?

A No, sir.

Q Did you do it?

A No, sir.

By the Court.

Q Was it there when you signed it?

A It was not, no, sir.

Q Wasn't the other seal there when you signed it? 30

A No, sir.

Q Let me see the seals?

A (Paper handed to the court.)

By Mr. Bradner.

Q What is your system of writing letters in the office?

A We dictate them to a stenographer.

Q And do you keep copies?

A Yes, sir.

Q What kind of copies? 40

Theodore P. Payne, direct.

A Carbon copies.

Q I show you a paper. Can you tell me what it is and where it came from?

A This is a letter dictated by me, to Mr. Throp.

Q Where did that particular paper come from?

A This is a carbon copy of an original letter.

Q Where did the carbon copy come from, where did you get it?

10 A Out of our files.

Q The regular files of the company?

A Yes, sir.

Q This is a letter dated Feb. 9, 1911?

A Yes, sir.

Mr. Bradner. I ask Mr. Backes to produce the original letter. I gave him notice to produce it. Mr. Throp testified yesterday he could not find it but he had a copy of it. I offer my copy in evidence.

20

(Marked Exhibit D. 2.)

Q Do you know who wrote the original letter, or dictated it?

A I dictated the letter.

Q Is there anything in this copy to indicate that, as to who dictated it?

A Yes, every letter we write the initials of the party who writes the letter, and also the initials of the stenographer are put on it.

30 Q Who was that stenographer?

A It was a Miss Lord, who was in our employ at that time.

Q Did you ever get any reply to the letter of February 9, from Mr. Throp?

A No, sir.

Q You afterwards wrote a letter which has been put in evidence of February 13th. Have you the original?

(Mr. Backes produces a paper.)

40 Q Exhibit P. 2, that is signed by you, is it?

Theodore P. Payne, direct.

A Yes, sir.

(Mr. Bradner reads same to the jury.)

Q That seems to have been dictated by you to the same stenographer, was it not?

A Yes, sir.

Q Did you receive the description?

A We received a sort of surveyor's plot of the property, yes, sir.

10

By the Court.

Q What business were you in?

A We have a structural steel works.

Q And this ground was to be used for the purpose of the business?

A Yes.

By Mr. Bradner.

Q I show you a paper. Is that the description you received from Mr. Throp?

A Yes, sir.

20

Mr. Bradner. I offer that in evidence.

(Marked Exhibit D. 3.)

The Witness. There is a correction I would like to make—with reference to when I was asked if the other seal was there. I am not sure about any seal opposite Mr. Throp's name. That was a matter I would not have impressed on my mind. My testimony referred to the red seal opposite our own name.

30

Q You do not mean to say the seal was not opposite Mr. Throp's name?

A No, sir.

Q Did you ever get the option from Mr. Throp?

A No, sir.

Q You paid some rent?

A Yes.

Q Why was that?

A That was paid—when we initially wrote this letter for the option I notified our bookkeeper to enter

40

Theodore P. Payne, direct.

that on his calendar as a monthly payment due at a certain time and I also, when sending back the lease, notified our stenographer there was an option to be returned. The matter of the further following up of the option is one that is more or less of a clerical one, inasmuch as the fact that I had not the slightest idea but what that option would be sent to us, on account of the price being what it was. We had not
10 the slightest hesitation in believing that Mr. Throp would keep his agreement and that he would be glad and willing to, at the price. My mind was relieved of the subject, and that looked to me like an oversight where a man would not want a lawyer to draw up a paper or advise him.

Q When did you learn at any time that Mr. Throp would not give you any option?

A The matter was called to my attention, before the payment of rent in May. I told him to stop the
20 payment of the rent in May, and wrote a further letter for that option and said not to pay any rent until we received it.

Q But it seems that there was a check sent in May, was there not?

Mr. Bradner. I ask for the letter of May 18th.

Mr. Backes. We have one letter of May 18th.

The Witness. It may have been my attention was called by the bookkeeper about the same time.

30 *Mr. Bradner.* There is something on the bottom of this letter, Mr. Backes. It is something that was not on the letter.

The Court. Is it in lead pencil?

Mr. Bradner. Yes.

Q I show you a letter dated May 18th. Can you identify that?

A Yes.

Q And can you tell to whom that was dictated?

40 A That was dictated to Miss Lang.

Theodore P. Payne, direct.

Q That is her mark on it?

A I think so.

Q Now there is some pencil memorandum at the bottom of the page. Do you know anything about that?

A That has no connection with the letter.

Q That was not on the letter when it was mailed?

A No, sir.

Q That letter was signed by you?

10

A Yes.

(Mr. Bradner reads the letter last referred to.)

Q After hearing that letter read, does the matter come back to your mind?

A There is no doubt about the rent being sent.

Q And at the same time you asked for the option?

A My attention evidently was called to that after the letter had been sent.

By the Court.

20

Q Called to what?

A Called to the fact—

Q What was called to your attention?

A My attention was called to the fact some days after that that option was not received.

Q But you speak of it in your letter. You ask for it in your letter.

By Mr. Bradner.

Q The letter says: "Would ask you to kindly forward us option to purchase as per our agreement." I may have confused the question. I did ask you when you first learned that Mr. Throp—if you ever did learn—that he refused to give you any option.

30

A It was after that letter.

Q What happened after you sent that letter which directed your attention again to the non-production of this option?

A We received a letter from Mr. Throp which simply stated "The price is \$20,000."

40

Theodore P. Payne, direct.

Q Have you found that letter? Have you looked for it?

A We have looked for that letter, but up to the present I do not think we have it, unless you have it in your papers.

10 *Mr. Bradner.* Have you got a copy of it? I might state to the court that when we took some depositions in the case—if there is no objection I will ask Mr. Payne what the letter said.

The Witness. The letter simply stated that the price was \$20,000.

Q That is all?

A Yes.

Q It didn't say anything about the option?

A It made no reference to the option.

The Court. What was your letter to them? Did you answer that letter?

20 A No, I took the matter up personally.

Q What did you do?

A I went to Trenton the next day.

The Court. Was the letter that you received later on in regard to the one that inclosed the rent or—

The Witness. The letter which stated the price at \$20,000 came as a reply to my letter which was just read.

30 Q I find on the bottom of this letter "May 23, 1911, price \$20,000, S. W. T." Do you know whose writing that is?

A No, sir, I could not say positively. It looks like Mr. Throp's.

Q Did you hear Mr. Throp testify in this case before the commissioner?

A Yes, sir.

Q What did he say about the reply to your letter?

A He stated that he wrote us a letter saying the price was \$20,000—simply the fact that the price was
40 \$20,000.

Theodore P. Payne, direct.

Q Then after that you went to see him in Trenton?

A Yes.

Q Was there anybody with you?

A Mr. Lanning.

Q Did you see Mr. Throp?

A Yes.

Q Where?

A At his office.

10

Q Who was there?

A Mr. Throp, Mr. Lanning and myself. I think that was all. There may possibly have been Mr. Matthews around there.

Mr. Backes. Mr. Throp and yourself?

The Witness. And Mr. Lanning.

Q What occurred at that meeting?

A I called Mr. Throp's attention to the fact that we had written him for this option, and called his attention to the fact the letter which we had just received stated the price was \$20,000 and told him a price as high as that would be absolutely preclusive; that we couldn't handle the proposition in any way, shape or manner.

20

Q Was anything said about the option?

A Mr. Throp stated at that meeting that he had never agreed to give any option.

Q What did you say to that?

A I called his attention to the fact that we had written him that it was the original agreement, we had written him on the 9th of February and that we certainly could not go into a business transaction of that nature without receiving the option; we couldn't figure on meeting the expense without some direction in the matter.

30

Q What did he say?

A He denied all knowledge of any option being given, or any agreement to give an option.

Q Then what happened?

40

Theodore P. Payne, cross.

A I told Mr. Throp if that was the case we would have to consult our attorney and act accordingly.

Q What did you do? You are getting a little ahead of your story. Tell us what occurred there about consulting your attorney, when you went there the last time with Mr. Lanning?

A I don't understand just exactly what you mean.

10 Q You went there after you got this letter stating that the price was \$20,000. What I want is what occurred at that meeting and what was the conversation between you and Mr. Throp.

A That was the essential part of the conversation.

Q What did you say to him and he to you?

A I told Mr. Throp that if he was going to place that property at \$20,000 we absolutely could not use it.

Q What did he say to that?

20 A He said that he had us under a lease and intended to hold us.

Q Do you know whether any rent has been paid since?

A There hasn't been any rent paid since, no, sir.

Q Has the company ever taken possession of the land?

A We have not been near the place.

The Court. You mean since then?

The Witness. From the first.

30 Q Do you mean at any time?

A At any time.

Q You mean by that you have never used the property?

A We not only have never used it but we have never surveyed it or made any location on it.

Cross examination by Mr. Backes.

Q Mr. Payne, when did you first become acquainted with Mr. Throp?

A Mr. Lanning brought me to Mr. Throp.

40 Q When?

Theodore P. Payne, cross.

A Some time in December.

Q Of what year?

A 1910.

Q How long were you in Mr. Throp's office that day?

A I should judge about fifteen minutes.

Q What took place?

A We discussed the matter of this property and told him we had it under consideration provided we could get favorable terms, what we would consider favorable terms. 10

Q Did he state the price of the rental that day?

A Yes, sir.

Q What else did he do?

A There was a discussion with reference to rental and an option price. The terms were not agreed upon that day.

Q All that was spoken of that day was the fifty dollars to be paid for the rental? 20

A No, sir.

Q What was spoken of?

A We told Mr. Throp that in view of what we intended doing with the property we could not consider it unless we had a price that would be agreeable, and an option to buy.

Q Then you next met when?

A About four weeks later, as I recall it.

Q Had you any communications in the interim with Mr. Throp? 30

A No, sir.

Q None whatever?

A None whatever.

Q At this second meeting, what was done?

A At the second meeting the terms were agreed upon.

Q What were the terms agreed upon?

A Fifty dollars monthly rental for three years, a renewal for seventy-five if we wished it, a ten-thousand dollar option to buy, at the price of \$10,000, at any time within three years. 40

Theodore P. Payne, cross.

Q Are you positive anything was said with reference to an option to buy at this meeting?

A Most emphatically.

Q What happened after that?

A Mr. Throp sent us two leases.

Q What did you do with those leases?

A I signed those leases and returned them to him.

Q Did you read them?

10

A Yes.

Q All of it?

A I think so.

Q You said that the larger seal here opposite the name of the Payne Brothers was not there when you signed it?

A No, sir.

20

Q You see there is the instrument, "in witness whereof" the parties to these presents have interchangeably set their hands and seals the day and year first above written." Now if you had read it, what have you to say as to that?

A I will say this: that I had not completed signing the instrument. I had the company's seal to affix to that instrument to complete that signature, at least the secretary would have to do that. I knew when I sent those back to Mr. Throp that that transaction was not completed. I sent both leases back to Mr. Throp.

30

Q You knew it had not been completed?

A Yes, at least that was my idea of the transaction. I notified our stenographer there was an option coming.

Q What did you send it back for?

A I sent both of them back to him to be returned with the option.

The Court. Didn't you retain either copy of this lease?

The Witness. No, sir.

40

Q Didn't you ever get the second copy?

Theodore P. Payne, cross.

A There was a copy returned afterwards and we called his attention to the fact we must have the option.

Q I show you a letter of January 31st and ask you if that is your signature?

A That is my signature.

Q In this letter you say "We beg to acknowledge receipt of yours of the 30th inst. and enclose you herewith leases signed as noted." Now what did you mean by leases? 10

A I meant leases signed as noted.

Q What do you mean by that?

A The signature would speak for itself; it is as noted.

Q I show you another letter that has been put in evidence marked Exhibit P. 2. That is your signature, isn't it?

A Yes. 20

Q In which you speak, nearly a month after—

Mr. Bradner. I object to "nearly a month after." The date will speak for itself.

Q In which you say "would ask you to kindly send us description of the plot which we have leased from you so we can plot the lines." What do you mean by "leased" there?

A You must bear in mind that a man conducting the business we do, or a company, does not look at all those things from a lawyer's standpoint. Letters go through that office—sometimes I sign two hundred letters a day. That is about the best answer I can give you to that. 30

Q After the second meeting that you had with Mr. Throp did you pay Mr. Throp any rent?

A Yes, sir.

Q When?

A I think it is all on record. The dates can be clearly established. 40

Theodore P. Payne, cross.

Q I am asking you. Did you, the time they fell due, afterwards?

A Yes.

Q The first date they fell due was Feby. 15th, wasn't it?

A Yes.

Q How did you make the payment?

A Those payments are sent out by our cashier, our bookkeeping department.

10 Q By check?

A Yes, sir.

Q Who signed the checks?

A I signed them.

Q Do you know whether there were any letters sent out with your checks?

A Very, very rarely is a letter sent with a check. That goes through an entirely another department of our office. I have a bunch of checks brought in to me to sign and they are all of the date they are
20 brought to me which is natural for them to be in a business of any size, because one man cannot devote his time and attention to the detail supervision of a business such as that.

Q Your next payment was made in March, wasn't it?

A Yes, sir.

Q Second the same way?

A Yes, sir.

Q Did you enclose a letter with that check?

30 A That letter would not go from that same department—

The Court. Just answer the question, Mr. Payne.

The Witness. No, sir.

Q Your next payment after that was in April. Did you send a letter with that?

A No, sir.

Q And your next payment was made in May?

Theodore P. Payne, cross.

A Yes, sir.

Q Did you send any note with that?

A Yes, sir.

Q But with the three prior payments you sent no letters?

A None to my knowledge, no, sir,—except the one of February 9th, which was sent immediately before any payment had been made at all.

Q Did Mr. Throp write any letters to you or to your company requesting the payment of the rent? 10

A I think there was a letter in May which occasioned our letter to him.

Q Don't you recall receiving any letter at all from Mr. Throp requesting payment of the money prior to the May rent?

A There may have been letters. They naturally would not come under me. I might explain here for the benefit of everybody that when mail comes into our office, it is sorted— 20

Q I did not ask you for any explanation in that respect.

A Do you mean did I personally receive such a letter?

Q Yes or your company?

A The company may have received such a letter.

Q Don't you examine the company's correspondence?

A Not always, no, sir. It all goes to different departments. It would be an impossibility for one man to attend to that mass of detail. 30

Q Don't you sign all the letters of the company that go out?

A No, sir, there are comparatively few of them that I do sign, and that only pertains to special business. The routine work of the business as a rule is not signed by me.

Q Now your next meeting with Mr. Throp after the second meeting was held when? 40

Theodore P. Payne, cross.

A We had a meeting in December. We had another one in January. Is that the one you refer to?

The Court. After that.

The Witness. After that we met Mr. Throp in May.

Q What time in May?

A It was immediately—within a day or two as soon as I could get to Trenton—after we received his letter.

The Court. About the option for which he wanted \$20,000?

The Witness. Yes, sir.

Q What took place at that meeting?

A This discussion, as explained a few moments ago. I told Mr. Throp we could not handle the proposition in any way, shape or manner on those terms, and called his attention to the fact that we had been relying upon him to send the option and had written him for it and had written that he had evidently overlooked it and never sent any reply to those letters, as per our agreement.

Q What else was said?

A Mr. Throp stated he never had made any agreement whatever with reference to an option to buy.

Q What else?

A We told him most emphatically that under such terms a business man would be very foolish to enter into a contract of that kind and be entirely at the mercy of any party who could do just as he pleased with him after he had him landed.

Q Was that all that took place that day?

A With reference to this transaction, yes, sir.

Q With reference to the lot?

A Yes, sir.

Q Mr. Payne, didn't you at that meeting offer Mr. Throp three months' rent in advance to release you from your lease?

Theodore P. Payne, cross.

Mr. Bradner. If that is an offer of compromise, I object to it.

Mr. Backes. It is not for the purpose of showing a compromise. It is for the purpose of showing that they recognized the lease at that time.

(After argument.)

Objection withdrawn.

A When Mr. Throp made the statement that he never had made any promise of option I explained to Mr. Throp that in that case we would be entirely at his mercy if we had located our plant on that property and I told him, "We have got to consult our attorney in this matter and if this matter is a matter that involves a lawsuit we would very much prefer to pay three months' rent to allow him to rent the property to somebody else, in view of the fact he stated he could not give us the option he had agreed to do, or would not." That was all subject to consulting our attorney, however. 10 20

Q You did offer to pay him three months' rent in advance, did you not?

A I told Mr. Throp we would take that up with our attorney. That offer was subject to consultation with our attorney. I told him if that was the status of the case we would have to consult with our attorney but that our attitude in the matter would be—

Q I am asking you whether you did not offer Mr. Throp three months' rent in advance to release you from the lease. 30

A I did not, except under the conditions mentioned.

Q Didn't you, before the referee in this case, in answer to a question by Mr. Bradner as to what form did you put that, meaning your offer, as to the release, didn't you answer him "I told him that on account of this being an option, the amount of the option, the price of \$20,000 would be entirely out of the question, and to avoid any further discussion on the 40

Theodore P. Payne, cross.

subject we offered to pay him three months' rent in advance, as we had never used the property in any way, shape or manner." Did you say that?

A I said, that, yes, sir, and more too.

Q Hadn't you decided before that meeting in Mr. Throp's office, in May, 1911, not to come to Trenton?

A No, sir.

10 Q Hadn't you decided before paying the May rent that you would not go any further with the Trenton transaction?

A Absolutely, no, sir.

Q Did you have any work in Trenton after the May meeting?

A I think we did. I would not be positive about that.

Q Don't you know that you did not?

A Now, the old city hall contract was one of our
20 contracts—

Q Now I am asking you whether you had any business in Trenton, or Payne Brothers, after that?

A You mean contracts running here?

Q I am asking you whether your company had any work in Trenton after you made your May payment to Mr. Throp?

A Oh, yes.

Q Where?

A I would have to look that up for you. I know
30 we had several jobs here.

Q Well, mention one of them.

A We have done work for Mr. Schuman, who is a contractor here.

Q Did you do any work in Trenton after the May meeting?

A Oh, yes, we also had a church here in Trenton, I think.

Q Where?

A I believe the name was St. Vincent's.

40 Q Did your company do the work there?

Theodore P. Payne, cross.

A Yes.

Q When was that?

A I couldn't state.

By the Court.

Q What was this ground to be used for?

A We told Mr. Throp we had a fifteen ton locomotive crane derrick on a fifteen foot gauge track and had a sixty foot boom, that is a big heavy boom, and we told him it was our intention to put tracks on this property for that work, so we could handle any material that came into this district. We could carry the stock here and unload any kind of material we wished, not only for ourselves but for others. 10

Q Did that contemplate any buildings?

A Yes, sir.

Q What?

A An office building and a storage building.

Q Storage for metal? 20

A No, sir, it would be for storage of rigging and derricks and small machinery, iron work.

Q To house the machinery you would use in Trenton?

A Partly for that, and small machinery.

By Mr. Backes.

Q Principally it was to be used as a stock yard, wasn't it?

A Well, we would call it more of depot headquarters. 30

The Court. Mr. Bradner, have you gone as far as you contemplate in the proofs you want to offer?

Mr. Bradner. I have corroborative evidence.

The Court. Yes, but the principle is involved here sufficiently to get before the court what you want.

Mr. Bradner. Except a little redirect examination, that is all. 40

Theodore P. Payne, cross.

The Court. Suppose then, Mr. Backes you suspend.

Mr. Backes. I will.

By Mr. Bradner.

Q Mr. Payne, have you looked through your files in your office for letters of Mr. Throp?

A Yes.

10 Q Have you produced here to-day all the letters you find in your files from Mr. Throp?

A Yes, sir.

Q I show you then two letters. These are all that you have?

A To the best of my knowledge, yes, sir.

Q I will say to you that these are all the letters I have that you gave to me, and if that is so, are they all you have in your files?

A To the best of my belief and knowledge.

20 *Mr. Bradner.* I offer a letter dated February 14, 1911, to Messrs. Payne Brothers, Newark, N. J. (reads letter).

(Marked Exhibit D. 4.)

Mr. Bradner. And I also offer a letter dated May 15, 1911 (marked Exhibit D. 5).

Mr. Bradner. (Reads same.)

Q You cannot say of your own knowledge, can you, whether any other previous letters have been received asking for the rent?

30 A I don't think so.

Q You don't find any letters?

A No, sir, there is nothing in our files.

Mr. Bradner. I have Mr. Lanning here to corroborate the conversation.

The Court. I will hear what counsel have to say on the legal question involved, whether or not there is sufficient to go to the jury. I understand you to say the other is merely corroborative of what is already in. It gets before the

40

Theodore P. Payne, cross.

court all that is necessary for this court or a higher court to deal with.

(After argument.)

The Court. I think I will hear the case out. Mr. Bradner, you may put on your other witnesses.

THEODORE P. PAYNE, recalled.

By Mr. Bradner.

10

Q Have you in your office, or did you have in January and February, 1911, any seals?

A Corporate seals?

Q You had a corporate seal?

A Yes.

The Court. Do you mean any wafer seals?

Q Did you have any of these wafer seals?

A No, sir.

Q The little seals?

20

A No, sir.

Q You never have used them?

By the Court.

Q Do I understand you to say it is an impression that you have that the seal was not there, or that you distinctly recall it?

A There was no seal affixed to our signature. I am positive of that. That could only be affixed in one way in our office.

By Mr. Bradner.

30

Q Have you got the impression of the corporate seal?

The Court. Never mind that.

Further cross examination by Mr. Backes.

Q Now, after you left Mr. Throp's office after the meeting in May, you said you consulted Mr. Bradner?

A Yes, sir.

Q And it was after consulting Mr. Bradner that you stopped payment on this lease?

40

Theodore P. Payne, cross.

A Yes, sir.

Q Why did you do it?

A On counsel's advice.

Q You say you did not take possession of this property?

A No, sir.

Q You made plans didn't you before that first payment?

10 A No, sir; before our first payment we had not—the fact of the matter was we did not know we could get hold of the proposition until we got those leases.

Q Before February 15th you made no plans whatever?

A I would not swear to that, because we had taken up the matter in a tentative way, and the papers were in the course of preparation, but not extensively. I do not think we even undertook that before that time; I would not be sure of that.

20 Q When did you make your preparations or your plans for taking possession of the property?

A After the agreement had been reached, which was along in February, March, or April, I should say, we had those things moving right along.

Q And you made all plans for taking possession, plotting the ground, and so on?

A We made some, in our own office.

Q Mr. Payne, you had in your employ last year a man by the name of Clarence Mather?

30 A Yes, sir.

Q Was he in your office?

A Yes, sir.

Q What did he do?

A He was in the engineering department.

Q Did you not send him to Trenton in the spring of 1911, for the purpose of renting this property to a man by the name of Urshel?

A No, sir.

Theodore P. Payne, cross.

Q Didn't you give Mr. Mather directions to come over here and meet Mr. Urshel?

A Not directly, no, sir.

Q What do you mean by "not directly"?

A Mr. Mather was in Trenton for us sometimes several times a week. We received a letter from a man by that name, I believe, and it was in the course of his other duties he was informed by somebody in the office to find out what that man wanted.

10

Q Did you receive a letter from Mr. Urshel in reference to the property that had been leased to you by Mr. Throp?

A Do you mean me, or the company.

Q The company.

A I think there was a letter come in, yes.

Q Don't you know there was a letter?

A No, sir.

Q Didn't you pass such a letter to Mr. Mather?

20

A I can't recall that.

Q And didn't you send Mr. Mather to Trenton with that letter to meet Mr. Urshel?

A I imagine that was taken up in the course of his duties.

Q Didn't you do so personally?

A Not that I recall.

Q Didn't you personally give Mr. Mather directions to come to Trenton and see Mr. Urshel?

A No, sir.

Q And didn't you pass to Mr. Mather at that time Mr. Urshel's letter to Payne Brothers?

30

A No, sir, not that I recall.

Q Didn't you communicate yourself, with Mr. Urshel over the telephone with reference to this property?

A I would not be sure of that. We had a call, I think, as I recall it—I would not be positive whether it was myself or Gates. I know the gist of the conversation, however, I would not be certain whether it was myself or Mr. Gates.

40

Theodore P. Payne, cross.

Q Didn't you answer the 'phone and the man on the other end announced himself as Mr. Urshel from Trenton?

A I could not recall that.

Q Do you recall talking to a man by the name of Urshel?

10 A I recall that the matter was taken up with me; to the best of my recollection it was with our Mr. Gates. I know what answer the man got. The answer was given by my direction.

Q What was it?

A That we could not enter into any negotiations whatever with reference to that property.

Q Was that before or after you had sent Mr. Mather to Trenton?

A I did not send Mr. Mather to Trenton.

Q Was that before or after Mr. Mather came to Trenton with reference to this matter?

20 A I imagine it was afterwards. It must have been.

Q Before you had this conversation over the 'phone, before this direction was given to Mr. Mather that you could not act on the property, and so on, hadn't Mr. Mather reported to you what took place at Trenton between himself and Mr. Urshel?

A I cannot recall. I know the gist of his report but I do not think that report was made directly to me.

30 Q What was the gist of that report?

A This man was in the ice business and wanted to rent part of the property on Perry street.

Q Yes, did you rent it to him?

A No, sir.

Q You did not personally send Mr. Mather to Trenton to treat with Mr. Urshel?

40 A Not in that matter, no, sir. Mr. Mather was here for us frequently in connection with contracts. The matter of Mr. Mather meeting this man was purely incidental.

Theodore P. Payne, cross.

Q But before Mr. Mather came to Trenton from Newark, no matter on what business it may have been, didn't you tell him to stop and see Mr. Urshel with reference to this property?

A I think that was done through his—

The Court. Just answer the question.

The Witness. Not that I can recall, no, sir.

Q Didn't you describe to Mr. Mather this prop- 10
erty and tell him you had leased it from Mr. Throp and see whether he could not rent it?

A No, sir.

Q Mr. Mather had no authority from you then?

A Absolutely none.

Q To treat with Mr. Urshel?

A Absolutely none.

Q And you say that Mr. Urshel did not speak to you directly over the 'phone?

A I know the matter was referred to me; at the 20
time I was in the office.

Q Answer the question.

A He was not talking to me, no, sir.

Q He did not talk to you over the 'phone?

A Not to the best of my recollection. I knew of the matter at the time it was taken up.

Q You read this lease you say?

A Yes.

Q Why did you execute a lease without an option 30
in it if Mr. Throp had promised you such an option?

Mr. Bradner. I object. There is no evidence that Mr. Throp promised to put the option in the lease.

Objection overruled.

Exception to defendant, and it is allowed and sealed.

FRANK T. LLOYD, (L. S.)
J.

Theodore P. Payne, cross.

A We had no agreement with Mr. Throp to have the option and the lease in one paper.

Q Why, if you should have such an option to purchase within three years, did you put an option in that to renew the lease for two years longer?

A That was simply a business transaction, as a man may use his own judgment.

10 Q But why, if you had an option to buy within that period for \$10,000, did you agree in the lease to pay \$75 a month during the extended period?

A That is a business transaction which depends on a business man's judgment.

By the Court.

Q The question, I apprehend is bothering counsel and bothers the court somewhat, is why, if you put in the right to extend two years, you did not put in the same agreement the right to extend it perpetually.

20 A The matter was never brought up with Mr. Throp about a perpetual lease and that is something I have never had any experience in acquiring.

Q If it was part and parcel of this general agreement, why didn't you put it in or see it was in the lease?

30 A The best answer I can give you to that is that we, as far as legal matters go, leave everything to our own attorney. We do not pretend to know anything about law. The fact the lease was sent on and returned I think would clearly convey our attitude of mind on that subject.

By Mr. Backes.

Q Why didn't you confer with your attorney on it?

A It did not get to the point—

Q You returned them to Trenton?

A Yes.

Q You returned both of them?

40 A Yes.

Theodore P. Payne, cross.

Q Had you consulted with counsel up to that time?

A Not yet.

Q Why didn't you?

A The matter of the simple terms of the lease, as far as the transaction had gone, was satisfactory to us. We can understand the lease—we were familiar with that paper, with the terms of the lease.

Q What else was said with reference to this option in Mr. Throp's office? 10

A At what time?

Mr. Bradner. We have been all over that. That is just a mere repetition.

The Court. You haven't any right to go on indefinitely, to ask him to recite it again. He has given it twice. If there is anything particular about what you want to ask there is no reason why you should not. 20

Q Was there anything said as to how soon after your expressing your desire to accept the option that a deed should be made and the money should be paid? Was there any such conversation with Mr. Throp?

A Not as to the terms, or any particular terms of purchase. The purchase price was fixed and naturally anything of that nature would devolve upon us in case we took the property unless Mr. Throp would give us time.

Q Nothing was said about Mr. Throp taking a mortgage on it? 30

A No, sir.

Q Or what part of the consideration should be paid in cash?

A No, sir.

Q Nothing was said as to Mr. Throp's wife joining in the option?

A Not a particle, no, sir.

Q Nothing was said as to what kind of a deed was to be delivered in accepting the option? 40

Theodore P. Payne, cross.

The Court. There is only one kind of a deed.

Mr. Backes. There are several kinds of deeds.

The Court. That is hardly of importance here.

A We would naturally expect if there was a definite statement as to the property you referred to, to appear in the option which would have set up naturally the time and any details of that nature.

10 Q You say none of the details were agreed upon.

A The purchase price was to be \$10,000; we had an option to buy at any time within three years. That is not a large amount of money; it would not involve anything in the way of terms.

Q What?

A In our business that is not an extensively large purchase, a purchase that would involve negotiations of terms.

20 Q Why, if you understood the lease was not binding upon you, did you offer to pay Mr. Throp three months' rent in advance to be released from the agreement?

A I have already explained that. I told Mr. Throp at that meeting—

The Court. He was asked that question in substance and went all over it when he gave his explanation.

By the Court.

30 Q When you got this lease and paid the rent, after having sent the leases back, saying you had executed it, you understood the transaction was complete between you, didn't you?

A No, sir.

Q So far as that was concerned—I mean the lease?

A No, I cannot say we did; we knew at the time it went out it should have our corporate seal on and should be attested by the secretary.

40 Q Why did you say "properly executed"?

Grover C. Lanning, direct.

A "Executed as noted," I said. I sent both of those leases back to Mr. Throp to be returned with the option. Both leases were returned to them after I sent them to him.

Q How soon did you get a copy of the lease?

A I couldn't say.

Mr. Bradner. It was February 7th.

Q When you got it then—

10

A I immediately wrote Mr. Throp for the option as per agreement.

GROVER C. LANNING, sworn for the defendant.

Direct examination by Mr. Bradner.

Q You live in Trenton?

A Yes, sir.

Q And how long have you lived here?

A All my life.

20

Q Have you been engaged in business here?

A I have been, yes, sir.

Q With your father?

A I was connected with my father, James W. Lanning.

Q Do you know Mr. T. P. Payne?

A Yes.

Q How long have you known him?

A Perhaps seven years, six or seven, I won't say positive.

30

Q You are now employed by Payne Brothers?

A No, sir.

Q Not at this time?

A No, sir.

Q Were you in the employ in 1910 or 1911?

A No, sir.

Q Do you know Mr. Throp?

A Yes, sir.

Q Did you ever go to Mr. Throp's office with Mr. Payne?

40

Grover C. Lanning, direct.

A Yes, sir.

Q On more than one occasion?

A Yes, I think I was there two times.

Q When was the first occasion, if you recall it.

A The first occasion was in the winter of 1910.

Q The latter part of the winter?

A Well, near Christmas, I should judge; it was about that time of the month.

10 Q Do you recall whether it was in December, 1910, or January, 1911?

A I think the first time was in December.

Q What was the occasion for going there?

A Oh, called there to see Mr. Throp in reference to a plot of ground on Perry street.

Q Did you know anything about the property?

A Not until I had gone the first time with Mr. Payne.

Q You saw Mr. Throp?

20 A Yes, sir.

The Court. Are we interested in any part of the matter until he reaches the negotiations?

Q Did you hear any conversation between Mr. Throp and Mr. Payne?

A At the first meeting there was nothing spoken of only in reference to the ground, as to the rental; that is, as to what the rental price would be—at the first meeting.

30 Q What happened at the second meeting?

A Mr. Payne was there, Mr. Throp and myself.

Q When was that?

A The second meeting, some time in 1911, I should judge it was right after the first meeting a few weeks.

Q What was done at the second meeting?

A Mr. Throp told Mr. Payne they could have the ground at \$50 a month for three years with the privilege of renewal for two years and an option to buy for \$10,000.

40 Q What did Mr. Payne say to that?

Grover C. Lanning, direct.

A Mr. Payne told Mr. Throp to draw up the lease, or the papers, and have it sent to him with the option to buy.

Q On that occasion do you recall anything being said about the value of the property?

A Well, as I have just stated—

Q I mean before that was said. Was there any discussion between them as to the value of the property?

10

A No, I cannot recall any discussion before that.

Q Did you ever see Mr. Throp after that, in January, 1911?

A Yes, sir, it was several months later.

Q Then that would be a third time?

A Yes.

Q On this third occasion, can you recall when it was?

A The exact date I could not say, but I should judge it would be perhaps three months and may be longer than that.

20

Q What was the object in going there then?

A As far as I know it was to see Mr. Throp with reference to the same plot of ground.

Q You called there with Mr. Payne?

A Yes.

Q When you got there tell us what occurred?

A Mr. Payne met Mr. Throp in the office and they were speaking about this ground and Mr. Payne told Mr. Throp it would be impossible for him to use the ground on a three year lease basis without the option, as he could not put his machinery, his buildings, on the ground without knowing that he had a possible chance of getting possession of the ground with this option to buy.

30

Q What did Mr. Throp say?

A Mr. Throp said he never said he could have the ground at that price.

Q Then what happened?

40

Grover C. Lanning, cross.

A Mr. Payne, from what I recall, told Mr. Throp that he would have to consult some one else and that that was as far as he could go in the matter.

Cross examination by Mr. Backes.

Q How often were you in Mr. Throp's office in reference to this property?

10 A I should say two or three times, three times, I am quite sure.

Q Was Mr. Payne with you each time?

A Yes, sir.

Q When was the first time?

A The first time was in the latter part of 1910.

Q Mr. Payne was with you?

A Mr. Payne was with me, that was the first time.

Q Didn't you go to Mr. Throp's office before that or to his house before that?

A Alone, yes, to his house.

20 Q And you spoke of this property to him then?

A Yes.

Q And that you wanted it?

A I asked if he was the owner of that plot of ground and told him I was looking at it for a friend of mine in Newark in reference to placing a plant, that is a crane, to carry on their business at Trenton and take care of any work they had at Trenton, to unload cars, and so forth.

30 Q What took place at the first meeting at Mr. Throp's office? How long were you there?

A I don't suppose we were there over half an hour, if we were there that long.

Q Tell us what took place?

A I introduced Mr. Payne to Mr. Throp and we were speaking in reference to this piece of ground and the only thing I know was said was the plot of ground could be had at \$50 a month for a term of three years, with an option to buy.

Q Is that all that was said?

40 A That is about all that was said at that time.

Grover C. Lanning, cross.

Q What was said with reference to the option to buy?

A That was all that was said at that time.

Q Surely they said something else?

A There was another meeting later than that—

Q No, at the first meeting now, surely there was something else said besides an option to buy.

A At \$10,000, yes, at the first meeting.

Q What was the conversation on that? Who spoke first?

10

By the Court.

Q Did you say that was at the first meeting in December?

A No, it was not at the first meeting.

Q I understood you to say that in December there was nothing talked about the rental?

A No.

20

By Mr. Backes.

Q There was nothing said as to the option, then, at the first meeting?

A No, there was not. It was the second meeting I had reference to.

Q When was the second meeting held?

A The first week or second week in January; I would not say positive as to the time.

Q That is the second meeting?

A That is the second meeting that I am speaking of now.

30

Q What was said at that meeting by Mr. Throp in reference to this lease or this option?

A Mr. Throp and Mr. Payne were talking and Mr. Throp said he would draw up a lease for three years with an option to buy at \$10,000 and a rental for two years with an increased rental.

Q You are sure at that meeting a conversation was had both as to the option to renew the lease for two

40

Grover C. Lanning, cross.

years longer and also an option to buy this property at \$10,000?

A Yes, sir

Q That was talked of at the second meeting?

A At the second meeting

Q Mr Lanning, before the commissioner that took the depositions last summer didn't you testify that
 10 "on that day there was a conversation in reference to the lease and Mr. Payne told Mr. Throp that their prospects in Trenton had not been very bright for him and he wanted to know if Mr. Throp would not accept,—I think it was three months' rent—"

The Court. That is confusing. You have left the witness at the second meeting in January and you are referring to the meeting in—

Mr. Bradner. You omitted the question before that.

20 Q At that hearing, Mr. Lanning, in response to a question put by me: "Now, when you were there with Mr. Payne, in Mr. Throp's office—" that is, at the second meeting—"what was said in reference to this renting?" and didn't you say, "Mr. Throp told him that the rent would be, that he would want \$50 a month for it, and Mr. Payne asked him if he would take a lease, and he said 'Yes, for three years' and Mr. Payne asked him if he could have one for longer and he said 'yes, but not for the same price' and then Mr. Payne
 30 asked him if he would draw him a lease at \$50 a month for three years and an option to buy'—don't you mean, Mr. Lanning, with the option to renew the lease for a further period of two years?" and your answer was "What I understood at the conversation, it was an option to buy." "Was there anything said as to a renewal or an option for an extension of the term for two years more?" "Only as I have stated that Mr. Throp said if it was to be for over three years, it would be for an increased rent." "But was it agreed that
 40 there should be an option given to the Payne Brothers

Grover C. Lanning, cross.

to extend the lease for another period of two years?" "Well, that I cannot say, whether it was agreed to extend it any longer, other than the conversation that took place at the time I was there, because I had never seen the lease and could not say." Didn't you say that?

A I may have said it.

Q And the next question—

10

The Court. Is it true?

A Yes, I have said that; but my meaning in there, the intent of my meaning was that it was with the option to buy.

By the Court.

Q Does that mean you have forgotten or you don't remember the option to buy or to extend for any additional period?

A No, the option to buy, I had forgotten it at that time.

20

Q What brings it to your mind since?

A I have refreshed myself by thinking the matter over. At the time I was called there I had business worries of my father that kept my mind from the case a long time.

Q When was that testimony taken?

Mr. Backes. July 13th, 1912.

Mr. Bradner. He says right here "with an option to buy" and then he is interrupted and the question is put to him by Mr. Backes. He was not allowed to testify at that time. That is what the record shows—on the former examination he was interrupted and was not allowed to finish his answer and that is the reason it does not appear straight in the testimony.

30

The Court. I understand now the witness has an explanation to make as to his recollection on that point. What is it? What is it that is clear to you now that was not clear to you then?

40

Grover C. Lanning, cross.

The Witness. This option to buy, where I was interrupted there, I said an option and Mr. Backes said that I said to extend the lease. I meant that it was an extension of time for two years with still the option to buy.

10 *Mr. Bradner.* That is what he said before, and he is being confused by this cross examination. The very next question is "Don't you mean, Mr. Lanning, with the option to renew the lease for the further period of two years? A What I understood at the conversation, it was an option to buy."

By Mr. Backes.

20 Q The next question was "Proceed" and you say "And that was about all that I can recall at the present time that occurred in the office, outside Mr. Payne telling Mr. Throp to draw up the lease and mail it to them and they would sign it and return it." Do you remember saying that?

A Yes.

Q Didn't you say in answer to Mr. Bradner's question at that time: "Q Was that the first time? A Yes, sir."

A I may have said "Yes, sir."

30 Q And then in answer to the question I put to you, "Are you sure, Mr. Lanning, that that was at the first meeting that you had with Mr. Payne and Mr. Throp?" Answer: "This was the meeting that we had at Mr. Throp's office. O But that may be the second meeting, may it not? A No, sir; I hardly think so. I think it was the first meeting, because I met Mr. Throp and then I brought Mr. Payne; the next time Mr. Payne was in Trenton I took him to Mr. Throp's office." Do you remember saying that?

A Yes.

Q The next question: "Was that the only meeting at which you were present with Mr. Payne? A No,

Grover C. Lanning, cross.

sir, I was present at one later than that." Do you recall that?

A Yes.

Q "The later one was after the execution of this lease? A I believe so, yes, sir. Q Then you were only in Mr. Throp's office with Mr. Payne once before the lease was executed? A That is all I remember." Do you recall saying that?

A Yes, sir.

10

Q State whether also you did not say in answer to a further question by myself, "Now at that meeting, state whether or not Mr. Throp, promised or agreed that he would give an option to Payne Brothers to purchase this property at any time during the term of the lease?" And did you not answer: "From the conversation, I understood Mr. Throp to say that—Q Not what you understood from Mr. Throp, but what was said. A Mr. Throp said that he would rather lease for three years, with an option at \$10,000." Do you recall saying that?

20

A Yes, sir, I do.

Q "What else? A That is all I can say." Do you remember saying that?

A Yes, sir.

Q "That he would draw a lease for three years, with an option to do what? A To buy. Q For \$10,000? A Yes, sir. Q Was there anything else said? A Only as I have stated before, that if they wished to continue the lease, it would be for an increased rent after three years." Do you remember saying that?

30

A Yes, sir, I do.

Q When do you recall saying in answer to this question: "Now you are sure it was said at that meeting by Mr. Throp that he would write them a lease and would give them an option—would write a lease for three years and give them an option to purchase this land at \$10,000? A I feel quite sure." Do you recall that?

40

Grover C. Lanning, cross.

A I do.

Q "And nothing else was said? A Not that I recall." Do you recall saying that?

A Yes, sir.

Q Mr. Lanning, at that time, or prior to that time, wasn't there an agreement that you should go into the employ of Payne Brothers company?

A There was no written agreement, no; in case
10 Mr. Payne was located in Trenton, I was to accept a position with him.

Q Haven't you done business with him?

A I have never done any business for Mr. Payne.

Q Have you been looking after business here for him?

A Only in a friendly manner. If I heard of anything that was worth while his coming here for, I would notify him in that respect; but that was the only way I was connected in business with Mr. Payne.

20 Q When you went with Mr. Payne to Mr. Throp's office, in 1911, do you recall the occasion?

A I do.

Q What took place there that day between Mr. Throp and Mr. Payne?

A Mr. Payne told Mr. Throp that he could not use the property on Perry street at a rental of \$50 a month without this option, as he could not afford to place his machinery and cranes and so forth there without the option to buy the ground, as it would not
30 be a paying proposition.

Q Was anything else said?

A That is as far as I can say.

Q What was said with reference to payment of any rent, if anything?

A There was something said in reference to the payment of rent that I cannot recall.

Q Why cannot you recall what was said with reference to the payment of rent, at this time?

Grover C. Lanning, cross.

A I haven't thought of it, perhaps. I cannot say just what it is. I heard something but I would not say positive what it was.

Q You recalled at the time the depositions were taken before the referee or the special commissioner, something in reference to the paying of rent?

A I did, yes.

Q And don't you recall it now?

A No, I cannot say that I do. 10

Q But you recall something now that you did not recall at that time?

A I don't know as I do.

Q You have stated that you recalled something, in answer to the court's question, that you did not recall at that time?

A I have, yes.

Q In answer to a question I put to you before the referee, "Now, tell us what took place there on that day. A There was a conversation that day in regard to the lease and Mr. Payne told Mr. Throp that the prospects in Trenton had not been very bright for him, and he wanted to know if Mr. Throp would not accept—I don't know—I think it was three months' rent. Q Anything further? A As they did not see that it would be a paying proposition to put a plant in Trenton at that time." 20

A I remember that. My memory was that the paying proposition was to place the buildings on the ground without the option to buy it. 30

Q Hadn't Mr. Payne told you before that meeting in May, 1911, they were not going to locate in Trenton?

A No, sir, he had not.

Q Hadn't he told you their prospects in Trenton had not been as bright for them as they had expected, or words to that effect?

A No, sir.

Q And that they were not going to locate here? 40

Grover C. Lanning, cross.

A No, sir.

Q Do you know the reason why they did not locate here?

A No, sir; I do not.

Q Didn't Mr. Payne ever tell you why they were not to locate here?

A No, sir.

10 Q Don't you know to-day any reason assigned by Mr. Payne to you of why they did not locate here?

A The only reason I can give was from what I have already stated, the proposition on that piece of ground; that is the only thing I can say as a reason why they have not located.

Q Why didn't you say that before the commissioner when I put the question to you as to what else took place there that day?

20 A Because I was not familiar with the case; it had been so long and I had some business that had taken my mind from the case and I did not think of it at that time.

Q You are familiar with the case to-day?

A Yes.

Q Who made you familiar with it?

A Myself; I refreshed myself a great deal by talking to Mr. Bradner.

Q Haven't you refreshed yourself a great deal by talking to Mr. Payne?

A No, sir.

30 Q When did you see Mr. Payne, just within the last two weeks?

A It has been about three weeks ago I saw Mr. Payne.

Q You talked over this at that time?

A No, sir; we talked over some private business matters.

Q When did you first talk to him of this matter within the last three weeks?

Grover C. Lanning, cross.

A I have not talked to him within the last three weeks except when I came on the train yesterday from my place in Marion.

Q You talked with Mr. Bradner?

A Yes.

Mr. Bradner. And Mr. Payne too, on the train?

The Witness. Yes, sir.

By the Court.

10

Q I do not understand your explanation about this former testimony. You were asked whether you did not say in your testimony that Mr. Payne gave as his reason that the prospects in Trenton were not bright for him and he wanted to know if Mr. Throp would not accept three months' rent?

A I have already stated to Mr. Backes that I do recall saying that after he read that to me.

Q Why do you put that now in connection with anything about the option. You do not say it there. 20

A I say it later there.

Q You were asked: "Anything further? A As they did not see that it would be a paying proposition to put a plant in Trenton at that time." What was said about the \$10,000, what was said in connection with that?

A Mr. Payne said he could not really see how he could put the plant on the ground without being able to buy the ground at that price.

Q Why didn't you recall something of that at that time? That was nearer the time of the occurrence than now. What has got that into your mind? 30

A It came to me as I recalled the conversation I had at that time in the office.

Q Why were you so particular to put it on the ground the prospects were not good, and for that reason he said he did not want to start the plant?

A I did not mean by the prospects, the business, because Mr. Payne was doing quite some work previous to being here. 40

Grover C. Lanning, cross.

Q What did you mean by saying the prospects were not very bright for him?

A I meant for putting the plant here without securing the ground.

Q Why didn't you say something about the ground?

A That was the intent of my meaning.

10 Q Why did you use this peculiar language if you put it on the ground of putting the plant in Trenton at that time?

A My meaning is as I have just stated before; I meant that it would not be, without his being able to secure the ground, a paying proposition.

Q Don't you think that is rather an unfortunate way of expressing yourself?

A Well, it may be.

By Mr. Backes.

20 Q What did you mean when you say "As they did not see that it would be a paying proposition to put a plant in Trenton at that time?" Why did you say that?

A As I have just stated to the judge, that without being able to secure the ground it would not be a paying proposition.

Q Who said that to you?

A I said it to myself. Mr. Payne said that some time before that.

30 *By the Court.*

Q You are supposed to be giving the conversation that took place with respect to the offer of three months' rent. Are you giving what Mr. Payne told you or what occurred at that time?

A This is supposed to be what occurred at that time.

Q Did it occur?

A Yes, sir.

40 Q What do you mean by saying it was something Mr. Payne had previously told you?

Grover C. Lanning, re-direct.

A I mean at that meeting. The meeting was previous to the time of this meeting.

Q He told it to Throp too, didn't he?

A Yes, but I meant he was in the office that day.

By Mr. Backus.

Q Didn't you mean when you answered me just now, when you said it was some time previously, that it was days before?

A No, it was in that office I have reference to. 10

Q Didn't Mr. Payne tell you days before this meeting in Mr. Throp's office they were not going to locate in Trenton?

A No.

Q And that things had not been bright for them in Trenton?

A No, sir.

Q Or words to that effect?

A No, he had not.

Q Had he said anything to you? 20

A No, he had not.

Re-direct examination by Mr. Bradner.

Q How did you happen to give testimony before this referee?

A I was subpoenaed by Mr. Throp.

Q Called there as his witness?

A Yes.

Q When did you get the subpoena, how long before the hearing? 30

A I couldn't say. I was at Skillman and Mr. Throp came out there for me. I don't know whether he met me there or down town; I guess it was down-town at State and Broad he met me.

Q Have you had any experience as a witness before in any court?

A No, sir.

DEFENDANT RESTS.

Frederick W. Gnichtel, direct.

HON. FREDERICK W. GNICHTEL, sworn for the plaintiff.

Direct examination by Mr. Backes.

Q You are the Judge of the Court of Common Pleas of this county?

A I am.

10 Q I show you a paper marked P. 1 and I ask you whether you drafted that paper?

A It was drawn in my office.

Q On or about the time it bears date?

A About the time it bears date.

Q Do you annex seals to instruments, as a rule, to your deeds as a rule?

A Usually.

Q Were these seals annexed to that instrument when it left your office?

20 A The first seal is about the size of the seals that I use. The second seal is not. Speaking from its appearance. I should say the first seal was probably put on in my office but I am not sure as to the second seal.

Q But it might have been put on in your office?

Objected to.

Q You have no recollection of that seal (indicating) being put on?

A No, I have not.

30 Q Did you examine the deed before it left your office?

A I should say yes, although I have no recollection of it. I usually do.

Q What did you do with the deed after it left your office?

Objected to.

Q What did you do with this paper writing?

A I think I gave it to Mr. Throp.

Q Don't you recall?

Charles Urshel, direct.

A I think I gave it to Mr. Throp. I do not think I could say anything else in regard to it. I think he came there to have it drawn and it was drawn and handed to him.

Q That is all you recall about it?

A That is all I recall about it.

Cross examination by Mr. Bradner.

Q The seal opposite the name "Payne Brothers" is considerably larger than the other one? 10

A Yes, sir.

Q And it is larger than the seals you use in your office?

A I think so. I think this is about the size of the seals I use.

Q The one opposite Mr. Throp's name?

A Yes. It is within the range of possibly that both were put on but I do not recall it.

Q But in drawing a release or a deed to be used by a corporation you would not, probably, put any seal on that? 20

A Probably not, because it would be assumed they would have their own seal.

CHARLES URSHEL, sworn for the plaintiff in rebuttal.

Direct examination by Mr. Backes.

Q What business are you in?

30

A Ice business.

Q How long have you been in that business?

A About a year and a half.

Q In 1912 did you have any dealings with Payne Brothers of Newark?

A I wrote them a letter and asked in regard to renting a lot on Perry street.

Q Did you get a reply to your letter?

A I got a reply. They said they would have a man here to meet me. 40

Charles Urshel, direct.

Mr. Bradner. You got a letter?

Witness. Yes, sir.

Mr. Bradner. Have you got it?

The Witness. No, sir.

Q What became of that letter?

A I lost or destroyed it or something, I don't know. I did get the letter.

10 Q Have you made a diligent search for it?

A Yes, but I couldn't find it.

Q Was that letter written on paper similar to that (showing witness)?

A I couldn't swear to that.

Q Don't you recall the head line was like that?

A I couldn't say yes to that; I don't just remember.

Q From whom was the letter?

A Payne Brothers.

20 Q Payne Brothers, Newark?

A Yes, sir, that is where it was sent from.

Q What was said in that letter?

A They said they would have a representative here to meet me in regard to renting the lot.

Q Was anything else said in it?

A That is all.

Q Did you meet a representative from that company afterwards?

A I did.

30 Q Where?

A At my house.

Q Who is he?

A The gentleman sitting there (indicating). I cannot recall his name.

Q Mr. Mather?

A I guess that is his name. That is the gentleman there, anyway.

Q He came to your house do you say?

A Yes, sir.

40 Q What did you do?

Charles Urshel, direct.

A Talked about the lot and walked over and looked at it.

Q And what did you do then?

A Got to an agreement to rent about thirty feet of the front end facing Perry street.

Mr. Bradner. I object. There is nothing to show Mr. Mather had any authority to make an agreement.

The Court. Perhaps it ought to be connected a little more closely. 10

Mr. Backes. I shall connect it.

Mr. Bradner. You can take what Mr. Mather said, subject to its being ruled out if you don't connect it.

The Court. Yes.

Q What was done?

A We went over and looked at the lot and I wanted about thirty feet in front facing Perry street, room enough to put up a storehouse and platform, and he said they wanted \$25 for that, but we got together on \$15 a month and he was going to draw up the papers and send them to me and I was going to sign them and send them back. 20

By the Court.

Q When was this?

A I should judge it was last April a year ago.

By Mr. Backes.

Q That would be April 12th? 30

A Yes.

By the Court.

Q This last April or a year ago?

A Yes, either April or May; I am rather certain it was in April.

By Mr. Backes.

Q Then what happened?

A I waited a week or ten days and I didn't get any papers, and I had to go to New York, and I 40

Charles Urshel, cross.

stopped off at Newark, got off at Market street, and I asked the officer which car to take and he said it would take an hour to get there, and I didn't have the time to spare, so I went into Market street depot and called him up on the 'phone. A lady answered the 'phone, and I asked for Mr. Payne and she wanted to know who I was, and I told her, and she said to wait a minute and I waited and somebody answered
10 the 'phone and said he was Payne and I told him who I was and he said they had decided not to rent the lot.

Q When Mr. Mather came to your house did he introduce himself?

A Yes.

Q What did he say?

Objected to.

Q Did you know that he was from Payne
20 Brothers?

A Yes, he had the letter I sent.

Q And then you walked over to the lot with him?

A Yes, sir.

By the Court.

Q Do you mean the letter you sent to Paynes?

A Yes, sir.

Cross examination by Mr. Bradner.

Q You received the reply from Payne Brothers and all they said in that letter was that they would
30 send someone to see you?

A They would send someone to see me.

Q And then Mr. Mather came to see you and had your original letter with him?

A Yes, sir.

Q And you made a bargain with him for \$15 a month?

A Yes, sir.

Q And you would have that much of the property for \$15 a month?

40 A If it was satisfactory to the Payne Brothers.

Clarence Mather, direct.

Q And you called up Mr. Payne and he said he would not rent it to you?

A Yes, sir.

CLARENCE MATHER, sworn for the plaintiff in rebuttal.

Direct examination by Mr. Backes.

Q Where do you live? 10

A I live in Newark at the present time. My home town is here in Trenton.

Q Were you in the employ of Payne Brothers?

A Yes, sir.

Q From what time?

A I think I started there in 1911, about the first of the year, 1911.

Q How long were you with them?

A I guess it was 1912, I was there just a little over a year I think. 20

Q Do you know Mr. Urshel?

A Yes, sir.

Q When did you first become acquainted with him?

A It is about a year ago this April, I guess, April or May, some where around in there, I don't just remember the date.

Q What was the occasion of your needing him?

A I come over here on business and at the same time I was to stop in and see this Mr. Urshel. 30

Q Why do you say that?

A I was told to stop in and see him.

Q By whom?

A I would not want to swear to who told me that, but it was one of the Paynes I think.

Q Wasn't it by Theodore P. Payne?

A I would not want to swear to that.

Q Didn't you tell me yesterday that it was by Theodore P. Payne? 40

Clarence Mather, direct.

A I might have said that yet I would not want to swear to that.

Q Didn't you say so to Mr. Throp also?

A I think I did.

By the Court.

Q Did you get a letter at the same time from them?

A Yes.

10 *By Mr. Backes.*

Q Who gave you that letter?

A That is just what I say I would not want to swear to, just who it was that gave it to me.

By the Court.

Q What difference does it make?

By Mr. Backes.

Q You came on here to Trenton?

A Yes.

20 Q After receiving the letter?

A Yes.

Q What did you do?

A After I got here I went out to see this Mr. Urshel, went out to his house and met him there and from there we went to the plant on Perry street and I asked him what offer he had to make, and he stated that he would give and I don't recall just now what sum of money he said he would pay, but after we got through talking he told me just exactly what he wanted to use the land for and that was all that was said, and I told him I would carry his information in to the office, and from there on it would be taken up with the office and I would not have anything more
30 to do with it.

By the Court.

Q Did you make a bargain with him for \$15 for a portion of it subject to the approval of Mr. Payne?

A No, sir, I did not say anything about the bargain at all. I was not instructed to do that and I
40 didn't do it.

Clarence Mather, direct.

By Mr. Backes.

Q Didn't Mr. Payne say to you before coming to Trenton, "Stop down and see this man and see what proposition he wants to make you in reference to this piece of land."

Mr. Bradner. Objected as leading.

Mr. Backes. He is an adverse witness and I think I have a right to lead him.

The Court. I haven't seen any inclination that the witness is not inclined to be truthful.

Mr. Bradner. We are willing to have him tell everything that occurred but I do not want it brought out by such questions.

Q What directions were given you before leaving Newark by any of the Paynes?

A Well, the letter was handed to me and I was told to stop in and see this man as I have already stated.

A And you cannot tell me now who handed you that letter or who spoke to you?

A I would not want to swear to it. It has been over a year.

By the Court.

Q What is your best recollection about it?

A Well, there were three or four different men I got my orders from over there on different propositions, and I don't just recall—I would not want to swear to it, that it was given to me by Mr. T. P. Payne; it might have been he or one of the other Paynes or the manager.

Q What is your best memory on the subject?

A I would not want to swear to it; that is all.

Q Do you mean you have no memory?

A Sure I have a memory but—

Q What is it then?

A I think it was Mr. T. P. Payne that gave it to me but I would not want to say positive.

Clarence Mather, direct.

By Mr. Backes.

Q And didn't Theodore P. Payne, the person who passed you that letter say to you "We have a piece of land in Trenton on Perry street which we have leased—"

Mr. Bradner. I object to the question as leading.

10 *The Court.* I think I will permit. The witness is not as clear as it seems he ought to be.

A Yes.

Q He told you to stop around and see the man?

Mr. Bradner. Of course, the question is answered with the permission of the court, but I move to strike it out on the ground the corporation would not be bound by any such statement.

20 *The Court.* The court admitted the question because it thought, under the circumstances of this witness's manner, to ask a leading question. The answer will stand as it is.

A Yes.

Q And he likewise told you to see what you could rent the land to him for?

Mr. Bradner. I object on both grounds—the question is leading, and the answer would be a statement which could not bind the corporation.

The objection is overruled.

30 Exception to defendant, and it is allowed and sealed.

FRANK T. LLOYD. (L. S.)
J.

A Yes.

Q Did you see Mr. Urshel after that day?

A No.

By the Court.

Q You saw him in consequence of this conversation?

40 A Yes.

Clarence Mather, cross.

Q But not at a later date?

A No.

Q When was this, last April or May?

A April or May, I don't know which.

Q Of last year?

A Last year.

By Mr. Backes.

Q Did Mr. Urshel tell you what he wanted the land for? 10

Mr. Bradner. I object. The witness has already testified he did not make any bargain. And it is clearly objectionable as a leading question.

The Court. I think that would be true if I had not already ruled that the witness could be asked leading questions.

Mr. Bradner. Your honor makes that ruling on the ground you think the witness is hostile to the plaintiff.

The Court. Yes. 20

Mr. Bradner. I respectfully submit that he is anything but hostile to the plaintiff.

Q Didn't you say to me yesterday morning up in my office that going on the witness stand here in this case put you in an awkward position with the Payne Brothers?

A Yes.

Mr. Bradner. I object.

The Court. I will permit the question and treat the objection as being in time. 30

Cross examination by Mr. Bradner.

Q How long have you been in the employ of Payne Brothers?

A It is going in to two months now.

Q Do you know Mr. Throp?

A Yes, sir.

Q How long have you known him?

A Well, I couldn't say just exactly, I have known him for some years. 40

Samuel W. Throp, direct.

Q You have visited in his family?

A I have visited, yes.

Q Your social relations are friendly?

A Yes, sir.

Q Do you know Mr. Backes also?

A Yesterday morning was the first I ever met Mr. Backes.

10 *Re-direct examination by Mr. Backes.*

Q Didn't you say to Mr. Throp yesterday morning that the business of the Payne Brothers had not shown up satisfactorily in Trenton and therefore they did not construct their plant here?

Objected to.

Objection sustained.

Q Did Mr. Payne or any of the firm—

20 *The Court.* This is a corporation. You are asking it as though it was a firm, which would be a very different matter.

SAMUEL W. THROP recalled in rebuttal.

Direct examination by Mr. Backes.

Q I show you exhibit P. 1 and ask you where you first saw that instrument?

A In Judge Gnichtel's office.

Q Did you get possession of it?

A Yes, sir.

30 Q Who gave you—

A Judge Gnichtel.

Q He passed it to you personally?

A Yes, sir.

Q Was that instrument at that time possessed with those two seals?

A Yes, sir.

Q And in every respect that instrument—

The Court. There is no attack on it, Mr. Backes.

40

Samuel W. Throp, direct.

Q What did you do with the instrument after you procured it from Judge Gnichtel?

Mr. Bradner. Is there any use going over that? It was sent us and we signed them and sent them back.

By the Court.

Q They remained on, when you signed it?

A Yes, sir. 10

By Mr. Backes.

Q And both of them?

A Yes, sir.

Q Both seals the same way?

A Yes, sir.

Q When did you first become acquainted with Mr. Payne?

A It was along in December, I think, 1910.

Q Then when you first met him was there any conversation between you and Mr. Payne with reference to an option on this land? 20

A An option to purchase?

Q An option of any kind.

A No, sir.

Q What was said?

A He came in my office with Mr. Lanning, and in fact Mr. Lanning introduced me to him, and I had seen Mr. Lanning prior to that, and he said that he had some parties in Newark who intended locating here in Trenton and they wanted to rent property and he had noticed that property along the Pennsylvania Railroad and he had stepped into Heath's office next door to see who owned it, and found that I owned it and came to my house and I told him I owned it and he wanted to know if it was for rent, and I said I would rent it to a good party and he said he would communicate with these people in Newark, Payne Brothers, and after that I saw him in front of the building when they were building the American Mechanics Building and he said those people would be 30 40

Samuel W. Throp, direct.

over pretty soon and he would bring them down, and one day he and Mr. Payne came in there.

Q What day was that?

A Along in December.

The Court. The principal conversation is the one in which it is alleged this agreement was made. Bring him to that.

10 Q After that meeting did you meet Mr.—

A Yes, sir, in my office.

Q When was that?

A Along in January, about the middle or about the 20th or along there.

Q What took place at that meeting?

A Mr. Payne said—I have given a price on it of \$50 a month rental and he said he thought that was pretty high and I told him I didn't care to rent it unless I could get \$50 a month for it, and he said it
20 was very centrally located and he thought it would do very well. They wanted the railroad facilities to put in their crane and use it for storage and I told him I would not take less than \$50 for it, and he finally wanted to know if I would give him a five years' lease on it, and I said not at that price and he asked me what I wanted and I told him I would lease it to him for three years with a rental of \$50 a month and give him the privilege of extending the lease two
30 years further at \$75 a month, and he accepted it and he said that would be all right and to have the lease drawn up and sent to him and they would execute and return it.

Q Was there anything said with reference to buying this property at that meeting?

A Never a word said about it.

Q Then, when Mr. Payne said on the witness stand that there was an agreement by you—

The Court. That is for the jury, Mr. Backes.

Samuel W. Throp, direct.

Q Did you at any other time have any conversation with Mr. Payne with reference to purchasing this property?

A No, sir.

Q Or making an option to buy this property?

A No. He came in to my office in May and he said the business had not shown up here very good and he put up the argument that I had agreed to give him an option on to it to purchase the property and I told him very plainly there that an option was never asked or never offered and no price was given and nothing said about an option, then he said that he wanted to know whether—he said business had not shown up here very good and wanted to know—he said he would give me three months in advance to release him from the lease. I told him no, I would not do it, that I had leased it to him for three years, and proposed to make him stand by the lease if I could. He never said anything to me or asked me for an option and I did not offer it to him. I had refused two or three years ago ten thousand dollars for the property. 10 20

Q State whether or not at the meeting in January, 1911, you stated to Mr. Theodore P. Payne that you would rent this property to them for a term of three years with an option to buy the property at any time within three years for the sum of \$10,000?

A No, sir, I never made any such proposition.

Q Did you at that time, or any other time, state to Mr. Payne that you would give him such an option and that the lease should not go into effect or be binding until such option was delivered to them? 30

A No, sir, never.

Q Or until such option was executed by them?

A No.

Samuel W. Throp, cross.

Cross examination by Mr. Bradner.

Q When Mr. Payne and you did make a bargain, as you say, in January, 1911, did he say to you that \$10,000 was a pretty big price, considering that the property was only assessed at \$2,100?

10 A No, sir, he never mentioned it was a pretty big price. There was never ten thousand dollars mentioned and he never said the assessed value was \$2,100.

Q That is the fact, that it is only assessed for \$2,100?

A No, sir, I don't know about; it is assessed for more than that?

Objected to.

The Court. Do not go any further. He has answered it.

20 Q Then in May, 1911, Mr. Payne came in to see you again with Mr. Lanning?

A Yes.

Q And Mr. Lanning was there on the first occasion when you made the arrangement?

A Yes.

Q You got a letter from Payne Brothers in May enclosing a check?

A Yes, sir.

Q And you made a memorandum on that letter with lead pencil?

30 A Yes.

Q What does that read?

A May 23, 1911, I replied to it and gave them a price on the property of \$20,000.

Q They don't ask you to give them a price on that property, in that letter?

A No, they asked me for an option.

Q "And would ask you to kindly forward us option to purchase as per our agreement which has evidently been overlooked."

40 A Yes.

Samuel W. Throp, cross.

Q And your answer to that is "The price of the property is \$20,000"?

A Yes, sir.

Q Since that time you have not received any rent?

A No, sir.

Q And you waited a whole year before you asked for any?

A I don't know when the suit was commenced.

Q The record will show this suit was not started until May, 1912? 10

A Well, I put it in Mr. Backes hand. I don't know when; I haven't any recollection of that. I drew on Payne Brothers for rent and it came back unpaid.

By the Court.

Q Why did you, when you got a letter of this kind calling attention to a breach of an agreement on your part, make no response at all? 20

A There wasn't any breach.

Q "We ask you to kindly forward us option to purchase as per our agreement."

A I knew nothing was said about that agreement.

Q Why did you come back then with a price of \$20,000?

A I thought if they wanted to buy, \$20,000 was my price.

Q They were charging you with overlooking an agreement? 30

A I never knew about any agreement.

Q If you had no such agreement why did you let that stand without reply?

A I did reply and told them I would give them the property for \$20,000. But I would not give anybody an option to run on the property for three years, to purchase any property I have got. I do not think it would be a business proposition.

Q The only thing I don't understand is it does not seem to be a reply? 40

Theodore P. Payne, direct—cross.

A I had no option to send them.

Q They say you have already agreed to give them an option?

A Yes.

Q Why didn't you reply to that and say they were mistaken or something of that sort?

A I supposed they had an idea they wanted to buy the property and I would give them a price for it.
 10 There was no talk about any option; it was never mentioned in my office at any of the meetings. The first I knew of any option was when I wrote about it. I would not give any man an option on any property for three years, and they never asked me to give them an option.

(PLAINTIFF RESTS IN REBUTTAL.)

THEODORE P. PAYNE, recalled for defendant.

20 *Direct examination* by Mr. Bradner.

Q Did you tell Mr. Mather to see Mr. Urshel and make any arrangement to rent this property?

A No, sir.

Q Did you tell Mr. Mather you had leased this property from Mr. Throp?

A No, sir.

Q What did you say to Mr. Urshel when he called up on the 'phone?

A I told him we could not enter into any negotiations in the matter.
 30

Cross examination by Mr. Backes.

Q Did you know of negotiations pending with Mr. Urshel?

A No, sir, no negotiations.

Q Then why did you say, when he opened up the conversation, you would not negotiate with him for the land?

A He telephoned to us and I told him we could not go into any negotiations with him in that matter.
 40

Motion to Strike Out Defense.

Q Did not Mr. Urshel, prior to that time, negotiate with you?

A No, sir.

Q You have received his letter, haven't you?

A It may have come in the office.

(DEFENDANT RESTS IN REBUTTAL.)

(TESTIMONY CLOSED.)

10

Mr. Backes. I want to move to strike out the defense altogether because it shows there is no defense. There is no defense set up in the pleadings, or not a sufficient defense. There has not been a particle of defense as to conditions here. There is no testimony on the part of defendant's witness that an option was promised by Mr. Throp; that the lease should not go into effect until that option was given or executed, and there is no sustaining of the pleadings in that respect. 20

(After argument.)

The Court. My inclination is that I will submit this case to the jury. While I think the evidence is very strong, Mr. Backes, I do not think I can treat it legally.

The motion will be denied.

(Counsel summed up.)

30

40

Charge to Jury.

CHARGE.

The Court. (Lloyd, C. C. J.) Gentlemen, this action is for rent, upon a lease that is alleged to have been made between the plaintiff, an individual, and the defendant, a corporation, for some vacant ground on this city. The paper is dated the 28th of January, 1911. It appears to be executed by the signature of Throp and witnessed. There is no dispute about the fact that no rent has been paid since the rent due on the fifteenth day of May, 1911, and from that time up to the time of bringing this action the plaintiff would have a right to recover for the various installments of rent together with the interest on the installments from the time they fell due till the present time, if you find this was an effective agreement between these parties.

The defendant seeks to avoid the lease because it claims that it never became an effective agreement between them; that in point of fact there was a subsidiary verbal understanding between the plaintiff and defendant whereby the plaintiff was to give to the defendant the option to take its property within the lifetime of the lease at the price of ten thousand dollars, and the defendant's contention is, although he has not called any witnesses to so testify that I recall, that that was a condition of the lease becoming an effective agreement between these parties. There is also some attack made upon the execution, the complete execution, of this agreement as it stands before you. The paper purports to be a written agreement between Throp and the defendant corporation; the corporation had properly passed a resolution by a certain number of directors authorizing its president to negotiate a lease, and also to negotiate the option. I have no hesitation in saying to you that the authority of the president was sufficient, in my judgment,

Charge to Jury.

ment, to enable him to make the contract that is claimed by the plaintiff to exist in this case. I say there is an attack made upon the instrument itself. It is claimed that while it contemplated the signatures of the parties it also contemplated their seals and the contention is that the seal of the defendant company was not attached to this paper at the time it was signed by the defendant, by the president of the corporation. Upon that point you have substantially but the testimony of the defendant's president, who says that the seal was not there when he signed it, and of the plaintiff, Throp, who said that it was there when he received it from Judge Gnichtel's office. Judge Gnichtel said he could not speak about the second seal, nor indeed could he speak with certainty about the first seal, but he presumed that the first seal was there because it was a seal of about the size that he used; but he could not say whether the second seal was there when it left his office. That is substantially the testimony upon the question of the full and complete execution of this paper, in order to make it a sealed agreement.

If it was a sealed agreement between these parties and delivered to the defendant company, that is the end of this case. The plaintiff then is entitled to recover the whole amount of the various installments, together with interest from the times they became due. If it was not a completed agreement between these parties, then the defendant would not be bound by it.

On the question of whether or not it was a completed agreement let me recount to you substantially what the testimony leads to. The defendant says that when they negotiated for this lot in the first instance, in December, 1910, the plaintiff was asked simply the price at which he would rent this property; that another interview took place in January, 1911, at which time there was a conversation between them about

Charge to Jury.

the rental of the property and about the terms of it, and he claims that at the same time there was a discussion of the right on the part of the defendant to buy the property within three years at the price of ten thousand dollars. As I have already said to you, no witness for the defendant has said that that side agreement was a condition of the full binding force of this lease, but counsel contends that is the reasonable conclusion which you should draw. A witness was called, Mr. Lanning, who seems to have been present at these two interviews, but it seems to the court that his memory was very lax upon what had taken place with respect to this alleged agreement. Indeed, he himself said, in undertaking to reconcile certain statements he had made some months ago, that his memory had been somewhat impaired at that time by losses he experienced and that he was not so sure about it, but for whatever his testimony is worth it goes to you insofar as it tends to corroborate the defendant. The plaintiff's claim is that no such agreement, of any kind, was ever entered into; that the contract in this case is enclosed within the four corners of this lease and that that is the whole agreement between these parties, and there was no other agreement aside from that entered into.

Even if there was this lease, this agreement, and this agreement was not a completely sealed agreement when it was delivered, if there was this agreement of an option, the defendant had a right to waive any benefits under that agreement, and if with full knowledge of the terms of this lease and of the alleged agreement he chose to take this property and accept the lease, he cannot now come back and insist upon the execution of the agreement as a condition of the payment of his rent. Has he done that? The testimony in this case is, and it is not contradicted on the principles I am now going to refer to, that when these leases were handed to the defendant he signed them

Charge to Jury.

and returned them with a letter in which he mentioned the fact that they had been executed, and at that time it is entirely clear that this agreement was absolutely devoid of having within its bounds any agreement as to an option to buy, and it may well be asked in this connection if such an agreement was entered into, and that bears upon the truthfulness of the parties on either side, why was it not incorporated in the lease itself, if there was any such agreement? But passing that by, the next step was that so far as accepting the property and accepting the lease was concerned, the defendant then wrote for plans or any description the plaintiff might have of the property. It is true that in one letter he asks for the option. The matter runs on then and rent is paid until the middle of May; four months of rent are actually paid by this defendant. In addition to that there is testimony in the case that a would-be tenant wrote to the defendants about leasing a portion of the ground and the defendant replied that somebody would call on him, and subsequent to that a messenger from the defendant did call on him and practically negotiate terms of a leasing on the basis, as I recollect, of \$15.00 a month. This messenger testified when he was called on the stand that Payne said to him that they had leased the property, that is to say, a person in authority at Payne Brothers, the defendants, told him they had leased that property, and he thought the person who told him was Theodore P. Payne, a witness who has been called here; that he then saw the applicant for the property and talked to him about it. Now, gentlemen, is that at all consistent with the idea that this agreement never went into effect between these parties? On the other hand, doesn't it indicate as clearly perhaps, as action and language can do it that there was no intention on the part of the defendant to stand upon its right and insist upon the giving of this option before the lease became effective between these parties?

Exceptions to Charge.

10 The burden is on the defendant in this case to show there was such an option and that it was a condition precedent to this lease becoming effective between the parties, and unless he has done that the plaintiff is entitled to recover. And even if he has done it and has gone into possession of the property and paid the rent, with full knowledge of all its obligations and has waived the performance of it even without the giving of the option, then he must pay the rent that is due.

A Juror. Are there two leases?

The Court. There is only one lease here. I understand there were two leases mailed to Payne brothers, two copies, one kept by the plaintiff and one by the defendant.

The Juror. Is the other copy here?

The Court. No.

20 *Mr. Backes.* The other is not put in evidence. This is the only one we have.

A Juror. Would that lease be binding without both seals on, with only one seal on?

The Court. It would if the defendants accepted it.

30 *Mr. Bradner.* I desire to take an exception to your honor's instructions to the jury in answer to the question of a juror as to whether the lease would be good without the seal and your honor's statement that it would if it was accepted by the defendant.

Exception is allowed and the same is sealed accordingly.

FRANK T. LLOYD. (L. S.)

Judge.

40 *Mr. Bradner.* Also to what your honor said: "Does not that indicate"—referring to the transaction with Mr. Urshel—"no intention on the

Exceptions to Charge.

part of the defendant to require the option," on the ground that that was calling special attention to that evidence in the case.

Exception allowed and the same is sealed accordingly.

FRANK T. LLOYD. (L. S.)
Judge.

Mr. Bradner. And also to that part of the charge where your honor said "If it was a sealed agreement and was delivered to the plaintiff he will be entitled to recover." 10

Exception allowed and the same is sealed accordingly.

FRANK T. LLOYD. (L. S.)
Judge.

Mr. Bradner. Also to your honor's statement that the authority of the president was sufficient to make this contract, or whatever your honor said in that connection. 20

Exception allowed and the same is sealed accordingly.

FRANK T. LLOYD. (L. S.)
Judge.

30

40

Plaintiff's Exhibit—(not marked)

Plaintiff's Exhibit (not marked).

Meeting of the board of directors of Payne Brothers, Inc., at the principal office of the company, Emmett street and Avenue D., in the City of Newark, New Jersey, on January 21, 1911.

All the members of the board being present, the president called the meeting to order.

10 The president stated that he had been looking at some property in the City of Trenton, which he thought was suitable for the erection of a plant to be used in conjunction with the plant at Newark, and that the land was situated near the Pennsylvania Railroad and was owned by Mr. Samuel W. Throp, and that Mr. Throp had offered to give a lease of the land for three years at a rental of fifty dollars per month, with an option to buy at any time within the three years, for ten thousand dollars.

20 The subject was discussed at some length, and on motion duly made and seconded, the president was authorized to enter into a written agreement with Mr. Throp to make a lease of the land and an option to buy, upon the terms offered.

(Signed) R. W. PAYNE,
Secy.

30

40

Exhibit P. 1.

EXHIBIT P. 1.

THIS INDENTURE made the twenty eighth day of January One Thousand Nine Hundred and Eleven BETWEEN Samuel W. Throp, of the City of Trenton, County of Mercer, and State of New Jersey, of the first part and Payne Brothers, Inc., a corporation, of the State of New Jersey, having its principal office at Newark, in the County of Essex and State of New Jersey of the second part,

10

WITNESSETH, That the said party of the first part has Let and by these presents does grant, demise, and to farm let, unto the said party of the Second Part All that lot of land situate on Perry street, in the City of Trenton, County of Mercer and State of New Jersey, known as 338 Perry street, in said city. Said lot adjoins the freight yard of the Pennsylvania Railroad Company and is about 25 feet front on Perry street by about 200 feet deep, running through to Allen street, with the appurtenances, for the term of three years from the fifteenth day of February One Thousand Nine Hundred and Eleven at the Yearly Rent or Sum of Six Hundred dollars, to be paid in equal monthly payments of fifty dollars, in advance, on the fifteenth day of each month in each year, during the continuance of this lease beginning with the fifteenth day of February, 1911, the first payment to be made on that day.

20

AND it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom.

30

AND the said party of the second part does covenant to pay to the said party of the first part, the said yearly rent as herein specified that is to say, Six Hundred dollars, in equal monthly payments of fifty dollars, in advance, on the fifteenth day of each month in each year, during the continuance of this lease, beginning on the fifteenth day of February, One thou-

40

Exhibit P. 1.

sand nine hundred and eleven, the first payment to be made on that day.

AND that at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

10 AND the said party of the first part does covenant that the said party of the second part on paying the said yearly rent, and performing the covenants aforesaid shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

20 And the said party of the first part, for and in consideration of the premises, hereby covenants and agrees to and with the said party of the second part, that at the expiration of the term hereby created and upon notice given three months prior to the expiration of this lease by the party of the second part to the party of the first part to the effect that the party of the second part desires to have the said lease renewed, he, the party of the first part, will let and demise to the party of the second part the premises covered by this lease for a further term of two years, commencing at the expiration of this lease, at a yearly rental of Nine Hundred dollars, to be paid in monthly installments of Seventy five dollars, in advance, on the fifteenth day of each month, in each year.

30 IN WITNESS WHEREOF, the parties to these presents have inter-changeably set their hands and seals, the day and year first above written.

SAMUEL W. THROP (L. S.)

Signed, sealed and delivered in the presence of

R. M. HUTCHINSON

as to Samuel W. Throp.

A. LANG.

Payne Bros., Inc.

By T. P. PAYNE, (L. S.)

Pres.

Exhibit P. 2.

EXHIBIT P. 2.

T. P. Payne

G. H. Payne

R. W. Payne

PAYNE BROTHERS, INC.,

Engineers and Contractors.

Structural and Ornamental Steel and Iron Works

Emmett Street and Avenue D.

10

Telephones: 880 Waverly, 881 Waverly.

Newark, N. J., Feb. 13, 1911.

Mr. Samuel W. Throp,

The Equitable Life Assurance Society,

120 Broadway, Trenton, N. J.

Dear Sir:—

20

Would ask you to kindly send us description of the plot which we have leased from you, so that we can plot the lines of the property.

This, we imagine, you would have to get from your deed, or should you happen to have a surveyor's map of same would ask you to kindly send us copy of same.

We wish this in order to lay out plans with reference to our locations, etc.

Yours very truly,

PAYNE BROTHERS, INC.

30

By T. P. Payne.

TPP-IML

40

Exhibit D. 2.

PLAINTIFF'S EXHIBIT—(not marked).

T. P. Payne G. H. Payne R. W. Payne

PAYNE BROTHERS, INC.,

Engineers and Contractors.

Structural and Ornamental Steel and Iron Works

10 Emmett Street and Avenue D.

Telephones:—800 Waverly, 881 Waverly.

Newark, N. J., Jan. 31, 1911.

Samuel W. Throp, Agent,

The Equitable Life Assurance Society of the U. S.,

Cor. Broad & State Sts., Trenton, N. J.

Dear Sir:—

20 We beg to acknowledge receipt of yours of the 30th
inst., and enclose you herewith leases signed, as noted.

Yours very truly,

PAYNE BROTHERS, INC.

TPP-IML

By T. P. Payne.

EXHIBIT D. 2.

Feb. 9, 1911.

Mr. Samuel W. Throp,

30 The Equitable Life Assurance Society,

120 Broadway, Trenton, N. J.

Dear Sir:—

Beg to acknowledge receipt of yours of the 7th
inst. and enclosed leases, as noted.

Would ask you to kindly send us the option to purchase,
as per our understanding, and oblige,

Yours very truly,

PAYNE BROTHERS, INC.

40 TPP-IML

By

Exhibits D. 4—D. 5.

EXHIBIT D. 4.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES.

120 Broadway, New York.

Samuel W. Throp, Agent,
Trenton, N. J.

Trenton, Feb'y 14th, 1911.

10

Messrs. Payne Bros., Inc.,
Newark, N. J.

Gentlemen:

Replying to your favor I enclose you a rough home-made description of the premises No. 338 Perry St. which you have lease from me. I have no surveyor's map and trust the enclosed will answer your purpose.

Yours very truly,

20

SAM'L W. THROP.

EXHIBIT D. 5.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

120 Broadway, New York.

Samuel W. Throp, Agent,
Trenton, N. J.

30

Trenton, N. J., May 15, 1911.

Messrs. Payne Bros., Inc.,
Emmett St. & Ave. D.,
Newark, N. J.

Gentlemen:—

Kindly send me check for \$50.00 amount of rent now due for premises No. 338 Perry St., and oblige,

Yours truly,

S.W.T./O.D.

SAM'L W. THROP.

40

Defendant's Exhibit—(not marked)

DEFENDANT'S EXHIBIT—(not marked).

T. P. Payne

G. H. Payne

R. W. Payne

PAYNE BROTHERS, INC.,

Engineers and Contractors.

Structural and Ornamental Steel and Iron Works

10

Emmett Street and Avenue D.

Telephones:—880 Waverly, 881 Waverly.

Newark, N. J., May 18, 1911.

Mr. Samuel W. Throp,

Trenton, N. J.

Dear Sir:—

20 We beg to enclose you herewith our check account
of rent; also attach copy of ours to you of the 9th
inst., and would ask you to kindly forward us option
to purchase as per our agreement which has evidently
been overlooked.

Yours very truly,

PAYNE BROTHERS, INC.,

By T. P. Payne.

May 23, 1911.

Price \$20,000.

30

S. W. T.

*Postea.***Postea.**

Filed June 23, 1913.

NEW JERSEY SUPREME COURT.

SAMUEL W. THROP,

vs.

PAYNE BROTHERS, INC.

On Contract.

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Afterwards, that is to say, on the sixth day of June, A. D. nineteen hundred and thirteen, at a Circuit Court held at Trenton, in and for the County of Mercer, before his Honor Frank T. Lloyd, one of the Circuit Court Judges, according to the form of the statute in such case made and provided, comes as well the within named Samuel W. Throp as the within named Payne Brothers, Inc., by the respective attorneys within mentioned, and the jurors of the jury whereof mention is within made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oaths say: that the within mentioned writing is the deed of the said Payne Brothers, Inc., as the said Samuel W. Throp has within in that behalf alleged, and they assess the damages of the said Samuel W. Throp on occasion of the non-performance of its said covenant, over and above his costs and charges by him about his suit in that behalf expended, to five hundred and forty-seven dollars and fifty cents (\$547.50) and for those costs and charges to six cents.

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FRANK T. LLOYD,
Judge.

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Rule for Judgment.

Rule for Judgment.

Filed June 23, 1913.

NEW JERSEY SUPREME COURT.

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SAMUEL W. THROP,

vs.

PAYNE BROTHERS, INC.

On Contract.

On Postea.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of five hundred and forty-seven dollars and fifty cents besides costs to be taxed.

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Entered June 23, 1913,

On motion of

WILLIAM J. BACKES,
Attorney.

30

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Grounds of Appeal.

Filed July 26, 1913.

New Jersey Court of Errors and Appeals

SAMUEL W. THROP,
Plaintiff-Respondent,

vs.

PAYNE BROTHERS, INC.,
Defendant-Appellant.

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The appellant states the following grounds of appeal.

1. The following question was erroneously admitted: to the witness Ralph W. Payne on direct examination by the plaintiff.

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Q Isn't Theodore Payne the general manager of your corporation?

2. Also the following question to the same witness on his direct examination:

Q Theodore P. Payne, is he not the president and manager of that corporation?

3. Also the following question to the same witness on his direct examination:

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Q Did any of the officers or directors of your corporation, speak to you of this lease about the time it was executed?

4. Also the following question to the same witness on his direct examination:

Q What did he say?

5. The paper purporting to be a lease and marked Ex. P. 1, was admitted in evidence.

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Grounds of Appeal.

6. The motion to nonsuit the plaintiff, for the following reasons:

First. Because the plaintiff had not proved a covenant or a breach of covenant.

10 Second. Because the plaintiff had proved a resolution passed by the directors of the defendant corporation authorizing the president of the corporation to enter into a written agreement and an option to buy on the terms offered by the plaintiff, and had not proved any such agreement, and had not proved that the president of the corporation had any authority to execute the document that had been produced and put in evidence; consequently, there is no liability on the part of the corporation—was denied by the court.

7. The following question to the witness Theodore P. Payne on cross examination by plaintiff, was admitted:

20 Q Why did you execute a lease without an option in it, if Mr. Throp had promised you such an option.

8. The following question to the witness Clarence Mather, on direct examination by the plaintiff, was admitted:

Q And he likewise told you to see what you could rent the land to him for?

9. The following question, and answer thereto, asked by one of the jurors:

30 A Juror. Would that lease be binding without both seals on, with only one seal on?

The Court. It would if the defendants accepted it.

10. The instruction by the court to the jury, that the lease would be good without the seal of the defendant corporation, if the corporation accepted the lease.

11. The charge of the court to the jury substantially as follows: "There is testimony in the case that a would-be tenant wrote to the defendant about leasing a portion of the ground, and the defendant replied

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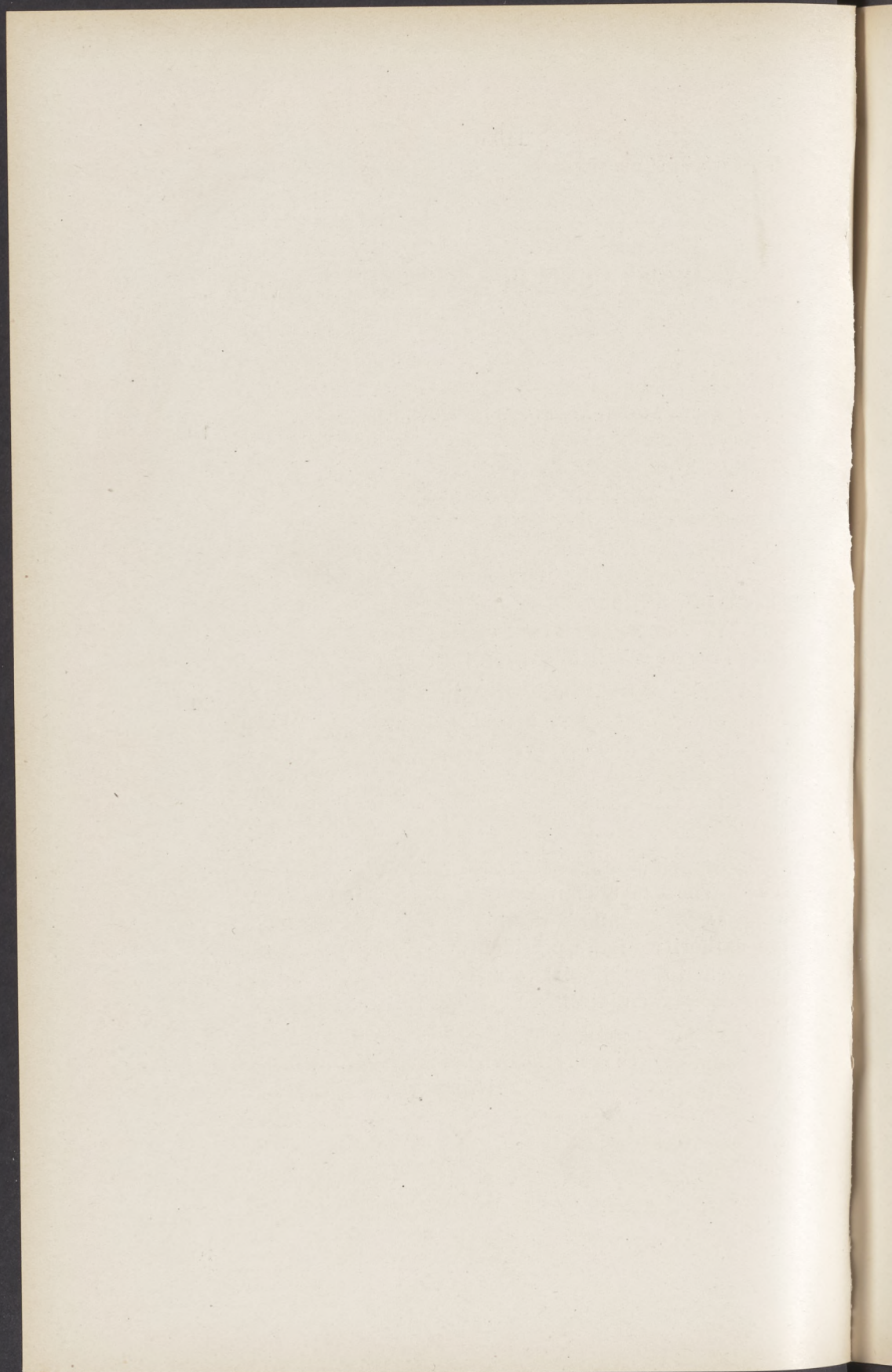
Grounds of Appeal.

that somebody would call on him, and subsequent to that, a messenger from the defendant did call on him and practically negotiated terms of a lease; this messenger testified that Payne said to him that they had leased the property, that is to say—a person in authority at Payne Brothers, the defendants, told him that they had leased that property, and he thought the person who told him was Theodore P. Payne—that he then saw the applicant for the property and talked to him about it. Now, gentlemen, is that at all consistent with the idea, that this agreement never went into effect between these parties; on the other hand doesn't it indicate as clearly perhaps as action and language can do it, that there was no intention on the part of the defendant to stand upon its right and insist upon the giving of this option before the lease became effective between these parties.” 10

12. The court charged the jury substantially as follows: “If there was a sealed agreement between these parties and delivered to the defendant company, that is the end of this case—the plaintiff then is entitled to recover the whole amount of the various installments together with interest, from the times they became due. 20

13. The court charged the jury substantially as follows: “I have no hesitation in saying to you that the authority of the president was sufficient in my judgment to enable him to make the contract that is claimed by the plaintiff to exist in this case.” 30
Dated July 26th, 1913.

(Signed) FRANK E. BRADNER,
Attorney of Appellant.



New Jersey Court of Errors and Appeals

SAMUEL W. THROP,

Plaintiff-Respondent,

vs.

PAYNE BROTHERS, INC.,

Defendant-Appellant.

*On Appeal
from
Supreme
Court.*

Brief for Appellant.

Abstract of the Case.

In the month of January, 1911, Mr. Theodore P. Payne approached the plaintiff with an inquiry as to his ownership of certain land in the City of Trenton, and had some conversation with him relating to the rental value and the price of the land. The plaintiff denies that there was anything said about the price, but Mr. Payne, at a meeting of the Board of Directors of the defendant corporation, on January 21, 1911 (Exhibit, p. 102), stated to the Board that he had been looking at some property in the City of Trenton, which he thought was suitable for the erection of a plant to be used in conjunction with the plant at Newark, and that the land was owned by Mr. Samuel W. Throp, who had offered to give a lease of the land for three years at a rental of fifty dollars per month, with an option to buy at any time within the three years for ten thousand dollars. A resolution was adopted whereby the president of the com-

pany was authorized to enter into a written agreement with Mr. Throp, to make a lease of the land, and an option to buy upon the terms offered. Subsequently, there were some negotiations between Throp and T. P. Payne, and there is conflict in the testimony as to what was said and as to what was agreed upon. However, Throp caused to be made out duplicate leases of the land; one of the leases is Exhibit P. 1, page 103. The two leases were signed by Throp and sent to the defendant corporation, and they were signed by T. P. Payne, but the seal of the corporation was not affixed. After signing the leases, they were returned by T. P. Payne to Throp. It seems that Throp then sent one of them back, and receipt was acknowledged by T. P. Payne in a letter of February 9, 1911 (Exhibit D. 2, p. 106), in which he asks Throp to send "the option to purchase as per our understanding." No reply was made to this letter by Throp. In the meantime, Throp was requested to send a description of the premises, and he did so enclosed in a letter of February 14, 1911 (Exhibit D. 4, p. 107).

A check was sent for the rent of fifty dollars in February and also in March and April. On May 15, 1911, Throp sent a letter requesting a check for fifty dollars (Exhibit D. 5, p. 107). In reply to that letter, Mr. T. P. Payne wrote to Throp May 18, 1911, a letter in which he stated that a check was enclosed for rent, and added—"also attach copy of ours to you of the 9th inst. and would ask you to kindly forward this option to purchase as per our agreement, which has evidently been overlooked." In reply to this letter, Throp wrote on the margin of the letter, the following: "May 23, 1911, Price \$20,000, S. W. T.," and sent the letter back. There was some conference then between T. P. Payne and Throp, and an offer was made in settlement, which was refused. This conference took place in May, 1911. In May, 1912, one year

after the last conversation between the parties, Throp brought suit based upon the written lease. The pleas set up substantially the defense, that the deed upon which the action is founded, is not the deed of the defendant, and that the president of the corporation was authorized to enter into a lease together with an option to purchase, and that an agreement was made with the plaintiff, whereby the plaintiff agreed to give the lease for three years for a rental of fifty dollars per month, and also an option to purchase at any time within the three years for the sum of ten thousand dollars. And that relying upon the said agreement, the president signed the indenture of lease and afterwards, the plaintiff refused to give the option, and then the defendant refused to perform the covenants; and also, relying upon the plaintiff, the lease was executed and rent was paid for a period of three months, and the plaintiff then refusing to carry out his agreement, the defendant rescinded its obligation and refused to pay any more rent.

At the trial, the theory of the plaintiff was that the lease was an instrument under seal, and having been delivered to the plaintiff, there could be no proof made of any condition upon which it was delivered, and the court held that the lease had been executed by the defendant corporation, and admitted it in evidence and told the jury that if there was a sealed agreement between the parties and delivered to the defendant company, that was the end of the case; and also told the jury, that the authority of the president was sufficient to enable him to make the contract, that is—the contract included within the lease itself.

The resolution of the Board of Directors was proved by the plaintiff, and the plaintiff failed to prove that the president of the corporation had entered into a written agreement and an option to buy, and therefore, the plaintiff failed to prove that the president of the corporation had any authority to execute the

document that was produced and put in evidence. Consequently, a motion was made to non-suit, which was denied.

The case was treated by the court as one involving the question as to whether the corporation had by paying rent accepted the lease and had waived any agreement to give an option to purchase. Throughout the course of the trial, the court admitted over objection testimony of the individual acts of directors of the corporation, and conversations between the directors.

The real defense to the action is, that the defendant corporation had not executed the lease and had never agreed to take a lease without an option to purchase, and had not authorized its president to execute any agreement for a lease without an option to purchase, and that rent was paid in reliance upon the agreement of Throp to give an option to purchase; and this defense does not seem to have been submitted to the jury by the court. This situation grew out of the refusal of the court to grant the non-suit, and the appellant did not make a motion to direct a verdict, but relied upon the motion to non-suit.

Specification of Errors.

1. Admitting this question on direct examination of Ralph W. Payne (p. 15), who was called as a witness by the plaintiff: "Isn't Theodore Payne the general manager of your corporation?"

Exception, page 16.

Ground of appeal, No. 1, page 111.

2. Admitting this question to the same witness, page 16:

Q Theodore P. Payne, is he not the president and manager of that corporation?

Exception, page 17.

Ground of appeal, No. 2, page 111.

3. Admitting this question to the same witness, page 20:

Q Did any of the officers or directors of your corporation speak to you of this lease about the time it was executed?

Exception, page 20.

Ground of appeal, No. 3, page 111.

4. Admitting this question to the same witness, page 21:

Q What did he say?

Exception, page 21.

Ground of appeal, No. 4, page 111.

5. Admitting the paper purporting to be a lease, and marked Exhibit P. 1.

Exception, p. 26.

Exhibit P. 1, page 103.

Ground of appeal, No. 5, page 111.

6. Denial of the motion to non-suit the plaintiff, for the reasons given.

Motion to non-suit, page 31.

Exception, page 32.

Ground of appeal, No. 6, page 112.

7. Permitting this question to Theodore P. Payne on cross examination by plaintiff, page 59: "Why did you execute a lease without an option in it if Mr. Throp had promised you such an option?"

Exception, page 59.

Ground of appeal, No. 7, page 112.

8. Admitting this question to the witness Clarence Mather on direct examination by the plaintiff, page 86:

Q And he likewise told you to see what you could rent the land to him for?

Exception, p. 86.

Ground of appeal, No. 8, page 112.

9. The answer of the court to the question of the juror, that the lease would be binding without both seals on if defendants accepted it.

Exception, page 100.

Ground of appeal, No. 9, page 112.

10. The instruction by the court to the jury, that the lease would be good without the seal of the defendant corporation, if the corporation accepted the lease.

Exception, page 100.

Ground of appeal, No. 10, page 112.

11. The charge of the court substantially, that a would-be tenant of the ground wrote to the defendant corporation about leasing a portion of the ground, and that the action of the defendant on that occasion indicated that there was no intention on the part of the defendant to stand upon its right and insist upon the giving of the option to purchase.

Charge, page 99.

Exception, page 100.

Ground of appeal, No. 11, page 112.

12. The charge of the court substantially as follows: "If there was a sealed agreement between these parties and delivered to the defendant company, that is the end of this case—the plaintiff then is entitled to recover the whole amount of the various installments together with interest from the times they became due."

Charge, page 97.

Exception, page 101.

Ground of appeal, No. 12, page 113.

13. The charge of the court substantially as follows: "I have no hesitation in saying to you that the authority of the president was sufficient in my judgment to enable him to make the contract that is claimed by the plaintiff to exist in this case."

Charge, page 96.

Exception, p. 101.

Ground of appeal, No. 13, p. 113.

Brief of Argument.

The specifications of errors will be taken up in their numerical order.

1. The question asked was incompetent, because it did not make any difference whether T. P. Payne was the general manager of the corporation. He did not either as president, or general manager, have any authority by virtue of the office, to execute a lease.

Bennett vs. Keen, Rec. etc., 59 Eq., 14; *Dick.*, 634, and cases cited.

2. This specification is covered by No. 1, and also what was said when the objection was made on page 16, state of case.

3. The error indicated in this specification is, that the question called for individual action of the officers or directors, which was incompetent. The corporation could not be bound by anything that was said. The testimony was particularly objectionable, as the resolution authorizing the president to enter into a contract in writing, had been admitted in evidence on the plaintiff's offer, page 19, Exhibit not marked, p. 102.

Demarest vs. Spiral Riveted Tube Co., 71 N. J. L., 42 Vr., 14.

4. This specification is covered by No. 3.

5. The writing purporting to be a lease and signed "Payne Brothers, Inc., by T. P. Payne, Pres." which in the attestation clause purports to be executed by the corporation and the seal of the corporation was not affixed. The seal following the name of T. P. Payne was a common seal. See page 25 and testimony of Anna Lang, read by plaintiff's attorney on page 14; and testimony of T. P. Payne, page 37, and Frederick W. Gnichtel, page 78. There was no presumption of authority arising from the use of a com-

mon paper seal. There is nothing on the face of this instrument indicating that it was executed by the corporation, so as to raise a presumption that it was executed by authority of the corporation.

Raub vs. Blairstown Creamery Assn., 56 N. J. L., 27 Vr., 262.

It also appeared from the resolution in evidence that the president was only authorized to execute a lease with an option to purchase. He had no authority to execute the lease in question, and it should not have been admitted in evidence.

See also :

Durbrow vs. Hackensack Meadows Co., 77 N. J. L., 48 Vr., 89.

Thomson vs. Central Passenger R. W. Co., 80 N. J. L., 51 Vr., 328.

The plaintiff having proved the resolution giving the express authority to the president of the corporation, was obliged to stand on that proof, and the lease offered, not having on its face any evidence giving rise to a presumption of authority, and not being a contract executed in accordance with the resolution, it was not competent in the case.

6. The defendant moved for a non-suit upon two grounds: 1st, that the plaintiff had not proved a covenant or a breach of a covenant. This of course, is based upon the incompetency of the lease that was offered in evidence. There being no proof that the lease was executed by authority of the corporation, of course there was no proof of a covenant or breach of covenant.

2nd, the plaintiff had proved the resolution authorizing the president to enter into a written agreement for the lease and an option to buy, and the plaintiff had failed to prove any such agreement. The corporation of course, could only be held upon an agreement executed by the president in accordance with

the resolution, and no such agreement having been proved, the plaintiff's case fell. The cases already cited, are authorities in support of the motion to nonsuit.

7. The evidence showed that the president of the corporation had actually executed a lease, and he was asked why he executed the lease without an option if Mr. Throp had promised such an option. This question is deemed to have been incompetent, because the president had no authority to execute a lease without an option, and it did not make any difference why he had done so, and moreover, there was no evidence that Mr. Throp promised to put the option in the lease; it might have been a separate writing.

8. Clarence Mather was called by the plaintiff in rebuttal, for the purpose of showing that he had been sent to negotiate with a man by the name of Charles Urshel, who was endeavoring to get possession of the land, which Throp claimed he had leased to the defendant corporation, and he had been permitted to testify that he was sent to Trenton to see Urshel by T. P. Payne, although objection was made, and he was then asked whether T. P. Payne had told him to see what he could rent the land for to Urshel. This was objected to upon the ground that such a statement by Payne would not bind the corporation. It is clear that it related to an individual act of T. P. Payne, and was not competent evidence.

9. After the court had charged the jury, one of the jurors asked the court whether the lease would be binding without both seals on, with only one seal on. There had been testimony as to whether the seals were on the lease at the time they were signed by T. P. Payne, and there was conflict in the testimony. The question of the juror indicated that his mind was in doubt whether the lease would be binding upon the corporation if it did not have the seal on, which Throp

had testified was on when he sent the two leases to the defendant. The court's answer, that the lease would be binding if the defendant accepted the lease, was erroneous, because there was no evidence whatever in the case that the defendant had ever authorized or accepted such a lease.

10. This specification is covered by No. 9.

11. The court charged that a would-be tenant, meaning Charles Urshel, wrote to the defendant corporation about leasing a portion of the ground, and that the action of the defendant on that occasion, indicated that there was no intention on the part of the defendant to stand upon its right and insist upon the giving of the option to purchase. A reading of the testimony of Charles Urshel and Charles Mather and T. P. Payne, will show that the corporation took no action whatever in relation to Urshel. Whatever was done, was the individual action of T. P. Payne, and the testimony relating to what he did was objected to, and the objections are covered by Specification No. 8. The court assumed that the corporation could be bound by the conduct of the president. There is nothing to show that the letter or alleged letter of Urshel, was ever brought to the attention of the Board of Directors, or that any action was ever taken upon it.

12. The court charged the jury, that if there was a sealed agreement between the parties and delivered to the defendant company, the plaintiff would be entitled to recover. This charge ignored the resolution of the Board of Directors, which required that the agreement should be in writing, and should include an option to purchase either as a part of the same agreement, or a collateral written agreement. There was no evidence that the defendant corporation had ever sealed an agreement, or authorized a seal to be put on an agreement, and consequently, the charge assumed facts that were not in evidence, and as has

been stated, ignored the important fact of the resolution.

13. The court charged the jury that he had no hesitation in saying that the authority of the president was sufficient to enable him to make the contract claimed by the plaintiff to exist in this case. That was equivalent to saying to the jury, that the president of this corporation had authority to execute the lease that was put in evidence, and that therefore, it was the lease of the corporation. That of course, was an end of the case. This charge ignored the resolution which the plaintiff had called for and put in evidence as a part of his case. The president had no authority to execute this particular lease.

In addition to the cases cited, reference is made to the following cases:

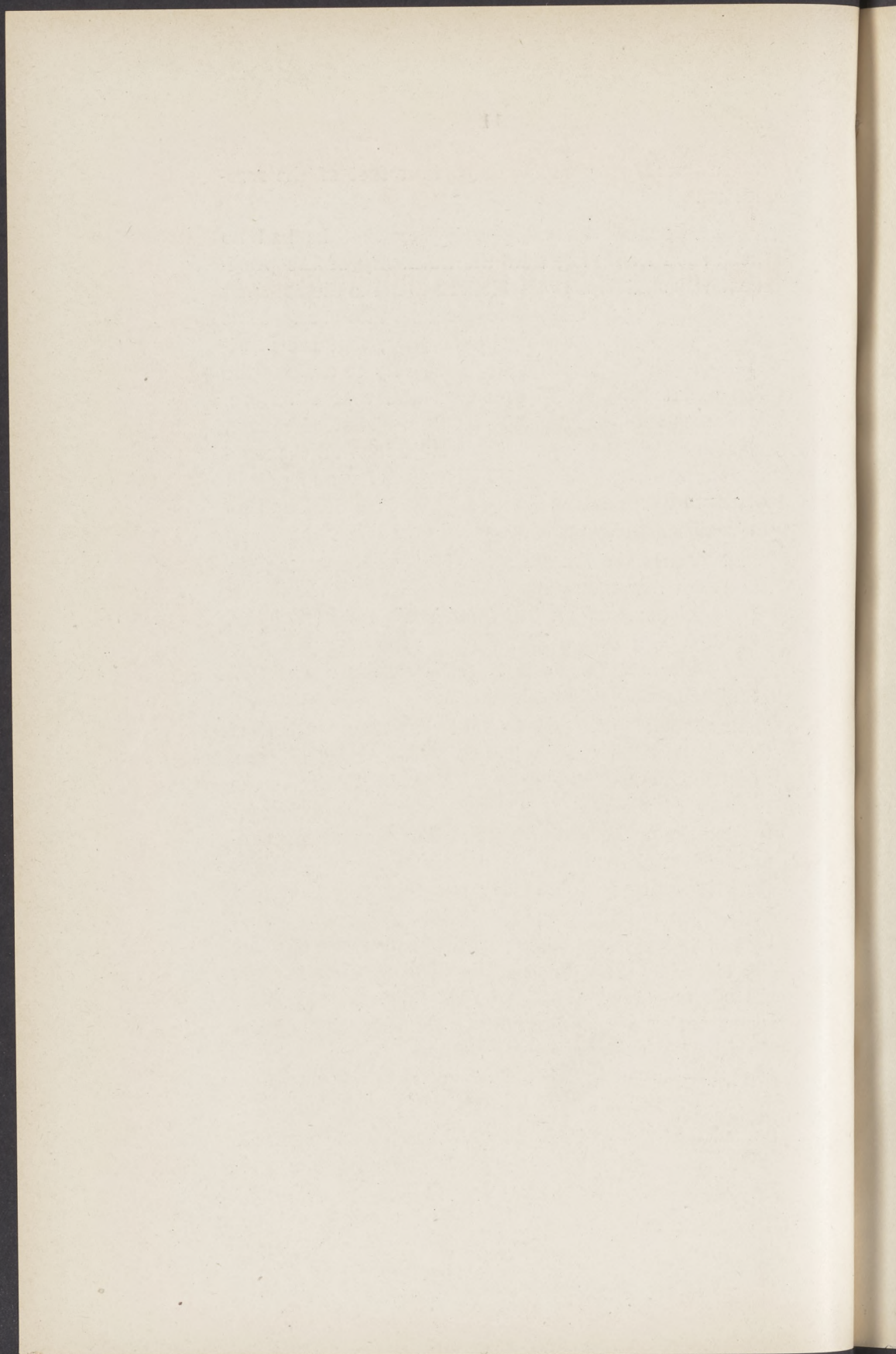
Lister Agricultural Chemical Works vs. Selby,
68 Eq., 2 Robb., 271.

Clement vs. Young, McShea Amusement Co.,
70 Eq., 4 Robb., 677.

In conclusion, it may be said that the president of this corporation was negligent. He signed this lease, and he signed checks to pay rent. He relied upon the honesty of the plaintiff to carry out his agreement to give the option to purchase. The corporation cannot be bound by what the president did, which was directly contrary to the express authority that had been given to him by the resolution. There isn't anything to show that the corporation had notice of what the president had done. All the correspondence is signed by the president of the company. Nothing seems to have been brought to the attention of the Board of Directors, except the resolution.

The case was submitted to the jury by the court upon an erroneous theory, and it is respectfully contended that the plaintiff should have been non-suited.

FRANK E. BRADNER,
Of Counsel with Appellant.



New Jersey Court of Errors and Appeals.

SAMUEL W. THROP,

Plaintiff—Respondent,

vs.

PAYNE BROTHERS, Inc.,

Defendant—Appellant.

On Appeal from the
Supreme Court.

Brief of Respondent.

Abstract of Case.

The plaintiff below brought this action to recover damages for breach of defendant's covenant to pay rent, contained in a lease dated January 28th, 1911, made between himself as lessor and the defendant as lessee.

The lease was executed by the president of the company, writing the name "Payne Brothers, Inc. By T. P. Payne, Pres." To the usual attestation clause was the signature of A. Lang, who testified that she witnessed the signing of it by T. P. Payne, but could not recall the affixing of the seal. The plaintiff testified the seal had been affixed before the paper was sent to defendant to be executed (page 88, line 35). The lease concluded with the clause, "In witness whereof the parties to these presents have interchangeably set their hands and seals, the day and year first above written."

The plaintiff proved the defendant's minutes showing a resolution of its board of directors authorizing the president to execute the lease sued on; the execution of the lease by its president; the breach of the defend-

ant's covenant therein, and the resultant damages. He also proved that the president of the company communicated his action in executing the contract, for and in the name of the corporation, to Ralph W. Payne, at a directors' meeting (pages 22 and 24), and that the defendant afterwards made four monthly payments of \$50 each in compliance with its covenant.

The plaintiff, by the foregoing proof, established his right to recover. By the witnesses Urshel (page 79) and Mather (page 83), he proved that the corporation, a year after the execution of the lease, dealt with the land as if owner of the term.

In the defendant's opening no offer was made to establish that the lease was made upon any condition. The only defence offered can be best understood from the question addressed by the court to defendant's counsel, "As I gather it, your defence is that the plaintiff agreed to give something which he has not given," and his answer, "That is exactly it. That is what we set up" (page 32).

In the proof submitted no attempt was made to sustain the second plea set up by the defendant. Not one word appeared to prove that the plaintiff agreed with the defendant's president "that the lease of the lands and premises should not bind the defendant until the option was made and executed." On the contrary, by the testimony of the defendant's own witnesses, it was shown that if any agreement had been made as to an option to purchase, it was to be embraced in the lease itself. Theodore P. Payne so testified. He said that Mr. Throp was to prepare the papers in the case based upon the following terms: "\$50 per month rental for three years and an option to renew for two years on the rental basis of \$75 and then to buy at any time within three years for \$10,000," and when asked by the court, "Did you say he was to prepare a lease embodying those terms?" answered "Yes, sir, he was to prepare the papers in accordance with that agreement" (page 36).

Mr. Lanning also testified that Mr. Throp said he would draw up a lease for three years with an option

to buy at \$10,000 and a renewal for two years with an increased rental (page 67, line 34).

The court—desiring to have on record what the court was acting upon—overruled the plaintiff's motion to exclude the offered defence (page 33) and the defendant's proofs (page 34), notwithstanding the rule of evidence prohibiting the terms and effects of a written lease from being added to, contradicted, or varied by parol or extrinsic evidence of the intention of the parties, their negotiations leading up to the lease, or what was 10 said and done prior to and at the time of the execution of the instrument.

There was no valid defence to the action consequently no harm was done the defendant at the trial.

BRIEF OF ARGUMENT.

The specifications of error will be answered in their numerical order.

1 & 2. There was no objection to the witness's statement that Theodore P. Payne was the president of the defendant corporation. The objection was only to his 20 statement that Theodore P. Payne was the general manager thereof, when the records of the corporation might disclose that fact, and would be the best evidence. The witness produced and proved the minute book and it was shown thereby that the by-laws provided that the president should have the general management of the business of the corporation (page 17, line 29).

3 & 4. The purpose of this testimony was to show that the directors of the corporation had knowledge of the execution of the lease. The witness subsequently did 30 testify that at a directors' meeting a week or two after the execution of the lease, Theodore P. Payne informed him that he had executed the lease and forwarded it to Mr. Throp at Trenton (page 22).

Two directors constituted a quorum, there being but three (page 22).

The question was competent in order to show that

with full knowledge the board of directors did not disaffirm the president's action, but by its acquiescence and subsequent acts impliedly ratified it.

5. The common seal of the corporation not having been used, it is true a presumption of antecedent authority on the part of the president to execute the lease did not arise. The plaintiff therefore proved the minutes showing the resolution of the board authorizing the president to execute the lease (page 18, exhibit not marked, 10 page 102).

Any seal which is affixed as the corporate seal by competent authority, may become *pro hoc vice*, the seal of the corporation.

Stokes v. N. J. Pottery Co., 46 N. J. L. (17 Vroom) 237.

The defendant in his special pleas did not deny, but expressly admitted, that the president "executed in behalf of this defendant the indenture of lease mentioned in the said declaration and delivered the same to the 20 said plaintiff by mail from Newark," &c.

6. The motion for nonsuit was properly denied.

(1) The plaintiff had proved the defendant's covenant as well as its breach.

(2) Had there been no proof of authority on the part of the president to execute the lease sued on, such authority would have been implied from the fact that the board of directors, after full knowledge, did not disaffirm the president's action in executing the lease and forwarding it to Trenton, and also from the fact that four months' 30 rent was paid to the defendant under the lease.

In *Lister Agricultural Chemical Works v. Selby*, 68 N. J. Eq. (2 Robb.) 271, V. C. Stevens said: "It is undoubtedly true that a board of directors to whom the president of a company communicates his action in making a contract for and in the name of a corporation—action which it is within the power of the board to authorize, but which it had not in fact authorized—must disaffirm that action within a reasonable time. If the

board does not disaffirm, it will be presumed to ratify. *Indianapolis Rolling Mill v. St. Louis Railroad Co.*, 120 U. S. 256. But knowledge must precede acquiescence. It must, in the words of Chief Justice Morton, in *Murray v. Nelson Lumber Co.*, 143 Mass. 250, be shown 'that the directors, or at least a majority of them, knew of the contract and its terms, and that with such knowledge they acquiesced in and adopted it.' "

The agent's authority to act may be shown as well by subsequent ratification of his acts as by proof of a previous appointment.

Brahn v. Jersey City Forge Co., 38 N. J. L. (9 Vroom) 74.

7. The objection to this question was groundless.

The witness on his direct examination had been asked and answered the following questions:

"Q. What was the agreement that you made with Mr. Throp at the time in Mr. Lanning's presence?

"A. The agreement at that time was that Mr. Throp would prepare the papers in the case based on those 20 terms.

"Q. What terms?

"A. Fifty dollars per month rental for three years and an option to renew for two years on a rental basis of seventy-five dollars, and then to buy at any time within three years for \$10,000."

By the Court:

"Q. Did you say he was to prepare a lease embodying those terms?

"A. Yes, sir; he was to prepare the papers in accordance with that agreement."

8. T. P. Payne was the president and general manager of the defendant company, and his orders to one of its employes came from him as such officer. To believe otherwise is incredible.

The question excepted to was not only properly admitted in rebuttal, but its answer clearly impeached the testimony of T. P. Payne, who had been called by the defendant as a witness, and on his cross-examination had

denied that he had described to Mr. Mather the property and told him the company had leased it from Mr. Throp, and to see whether he could not rent it. That Mr. Mather had no authority from him, absolutely none, to treat with Mr. Urshel (page 59).

9 & 10. The court's instruction that the lease without both seals on, with only one seal on, would be binding, if the defendant accepted it, was not error.

The grantee in a deed, by accepting the same, becomes
10 liable on the covenants therein purporting to be made by him, just as if he had signed and sealed the instrument.

Sparkman v. Grove, 44 N. J. L. (15 Vroom) 252.

Finley v. Simpson, 22 N. J. L. (2 Zab.) 311.

The instrument was recognized as a specialty by the court (page 20).

Whether a writing is a specialty is a question of law.

Corlies v. VanNate, Admr., 16 N. J. L. (1 Harr.) 324.

20 That the defendant had accepted the lease was proved:

By what Ralph W. Payne testified was said to him by Theodore P. Payne at the directors' meeting a week or two after the execution of the lease, viz., that he had executed the lease and forwarded it to Mr. Throp at Trenton (pages 22 and 24), and the directors acquiescing therein.

By paying four months' rent under the lease by check of the company to the plaintiff (pages 27 and 48).

By all the letters admitted in evidence (exhibits, pages
30 105 to 108).

By offering Mr. Throp three months' rent in advance to be released from the lease (pages 73 and 91).

By the president's statement on the witness-stand that "The manner of the simple terms of the lease as far as the transaction had gone, was satisfactory to us. We can understand the lease, we are familiar with that paper, with the terms of the lease" (page 61, line 5).

By writing Mr. Urshel in April or May, 1912, upwards

of a year after making the lease, and in answer to his request to rent a part of the property, that they would have a representative in Trenton to meet him (page 80); by sending such representative with instructions, and by generally dealing with the property as if the defendant was the owner of the term (page 86).

11. We fail to see why the defendant excepted to that part of the court's charge set forth in the eleventh ground of appeal, as it favored the defendant. There was no proof that any agreement had been made conferring a 10 right upon the defendant to insist upon the plaintiff giving an option before the lease became effective between the parties. The defendant's own witnesses said that the option to purchase was to be embodied in the lease itself. The supposed right spoken of by the court consequently did not exist, and therefore no injury could have been done by what the court here charged.

12. That part of the charge excepted to under the twelfth specification was not error.

The large paper seal was on the lease when it was 20 signed by the president of the defendant corporation. The plaintiff testified that when he procured the instrument from Judge Gnichtel, before it was sent to the defendant, it was possessed of two seals, that both seals remained on it when he signed it after it had been signed by the defendant at Newark, and sent back to the plaintiff (page 88, line 35).

The attesting witness, Anna Lang, testified to her own signature having been subscribed to the attestation clause; that she saw Mr. Payne sign the instrument, but did not 30 remember whether the seal was affixed at the time (page 14).

Where a deed is signed and sealed and the attesting witness recalls the signing only, the attestation clause being in the usual form, the presumption is that it was also sealed, and the jury will be so advised.

Burling v. Paterson, 9 C & P. 570.

Dewey v. Dewey, 1 Met. 349.

Quimby v. Buzzell, 4 Shep. 470.

New Haven Co. Bank v. Mitchell, 17 Conn. 76. 40

13. The plaintiff had not only proved that the express authority to execute the lease was conferred upon the president by the board of directors of the corporation, but that it acquiesced in his action in executing the lease.

He had also proved that the defendant had paid four months' rent under the lease; that its president and general manager had offered plaintiff three months' rent in advance to release defendant from it; and had, upwards of a year after the lease had been executed, recognized it by attempting to rent the property to Urshel, thereby dealing with the property as if the defendant was the owner of the term. From these facts, as we have already said, an antecedent authority will be implied.

In conclusion, it may be observed that the authority of the president to execute the lease sued on was not denied at the trial by any witness, and that the true reason why the defendant did not avail itself of the benefits of the lease, and comply with its terms, was because it realized, after the lease was executed, that it would not be a paying proposition for the defendant to put a plant in Trenton at that time.

Mr. Lanning so testified when asked to tell what took place between Mr. Payne and Mr. Throp in the latter's office in May, 1911, and answered, "There was a conversation that day in regard to the lease, and Mr. Payne told Mr. Throp that the prospects in Trenton had not been very bright for him, and he wanted to know if Mr. Throp would not accept—I don't know—I think it was three months' rent." "Q. Anything further? A. As they did not see that it would be a paying proposition to put a plant in Trenton at that time" (page 73, line 20).

The plaintiff also testified that that was what Mr. Payne said at that meeting (page 91).

We submit that the facts of the case show not only a legal but a just ground of action in favor of the plaintiff against the defendant, and pray that the judgment below be affirmed.

WM. J. BACKES,
Attorney for Respondent.

