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Notice and Grounds of Appeal.

(Filed December 16th, 1925.)

NEW JERSEY SUPREME COURT.

10

EDWARD CLAXTON,
Plaintiff-Appellant,
vs.
NATHAN H. HART,
Defendant-Respondent.

20

On Appeal to New Jersey Court of Errors
and Appeals.

To:

MESSERS. DOLAN & DOLAN,
Attorneys for Nathan H. Hart,
Defendant-Respondent,
Newton, N. J.

30

SIRS:

TAKE NOTICE, that the plaintiff herein appeals from the whole of the judgment entered in this cause, to the New Jersey Court of Errors and Appeals, and states the following as his grounds of appeals:

(1) Because the trial Judge erroneously excluded from evidence letter written by E. A. Ashdown & Company to the defendant, marked "Exhibit P-3" for identification.

40

Notice and Grounds of Appeal.

(2) Because the trial Judge erroneously instructed the jury as follows:

10 "There can be no recovery for services rendered in endeavoring to sell this stock, or for selling this stock after December first, if the time limit was not waived by the defendant, or unless you find from the evidence that Mr. Ashdown, or Ashdown & Co. made this particular sale. Because if the sale was not negotiated through him, even though the time limit was waived, there can be no recovery. He must be the party who negotiated the sale of stock in order to get the commission."

(3) Because the trial Judge erroneously instructed the jury as follows:

20 "As I understand the testimony, Mr. Ashdown was not present when the sale was made or when it was consummated and did not know about it at the time."

(4) Because the trial Judge erroneously instructed the jury as follows:

30 "If you find from the evidence that Mr. Hart waived the provision of this agreement, and consented that Mr. Ashdown should have seven per cent of the price realized from the sale of this stock, and if you are satisfied from the evidence that Mr. Ashdown sold this stock, then he would be entitled to a commission of seven per cent."

(5) Because the trial Judge erroneously instructed the jury as follows:

40 "If on the contrary, you find that there was no waiver of the time by Mr. Hart, or if you find that the sale was not consummated or made by Mr. Ashdown, then there can be no recovery in this case."

(6) Because the trial Judge erroneously instructed the jury as follows:

“But the question, as I said before, for you to determine is as to whether or not the time was extended by Mr. Hart and whether or not Mr. Ashdown actually consummated the sale of the stock.”

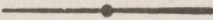
JOHN DREWEN,

Attorney for Edward Claxton,
Plaintiff-Appellant.

10

Dated: December 10th, 1925.

Service acknowledged Dec. 14, 1925.



Complaint.

(Filed June 12, 1924.)

20

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

EDWARD CLAXTON,
Plaintiff,
vs.
NATHAN H. HART,
Defendant.

Action at
Law. 30

Plaintiff, EDWARD CLAXTON, residing in the City of Jersey City, County of Hudson and State of New Jersey, says:

(1) On the 5th day of November, 1923, the defendant entered into an agreement with one 40

Complaint.

Edward A. Ashdown, who is doing business under the name of E. A. Ashdown & Company, a true copy of which is as follows:

“Newton, N. J., November 5, 1923.

10 “I heherby agree to pay to E. A. Ashdown & Co.,
 01 for services in the event of a final agreement be-
 ing reached in negotiations now pending between
 the Hart & Iliff Co., the L. S. Iliff Co., E. A.
 Ashdown & Co., and N. H. Hart of the sale of
 my stock in the said two companies as repre-
 sented by 198 shares of common stock and seventy-
 five shares of preferred stock in the Hart & Iliff
 Co., and seventy shares of common stock in the
 L. S. Iliff Co., seven per cent of said sales price
 20 as offered in a separate agreement made by me
 with the said E. A. Ashdown & Co., bearing even
 date herewith. Said seven per cent to be paid
 upon the first payment for said stock being made
 as specified in said separate agreement.

“In case of the negotiations between the re-
 spective parties herein named shall not be com-
 pleted then this agreement to be of no effect.

30 “Nothing herein contained shall obligate the
 03 said N. H. Hart to deliver the ten shares of com-
 mon stock in the Hart & Iliff Co., now owned by
 Margaret Hart and included in the 198 shares
 above mentioned in case any agreement reached
 is not satisfactory to her.

“This agreement as to commissions for service
 to extend to any sale made by E. A. Ashdown &
 Co., according to the terms of said separate agree-
 ment above mentioned.

“NATHAN H. HART.”

40 (2) Plaintiff alleges that in accordance with

Complaint.

the provisions of contract hereinabove set forth a final agreement was reached in the negotiations referred to in said agreement, and the said defendant, Nathan H. Hart, sold and delivered all of the stock referred to in said contract and in all things the said Edward A. Ashdown complied and performed all the services required of him in the said agreement. 10

(3) That by reason of the services rendered by the said Edward A. Ashdown to the said Nathan H. Hart, the said Nathan H. Hart sold all of the stock referred to in the above agreement for the sum of \$114,000.00, and that there became due and owing from Nathan H. Hart to said Edward A. Ashdown the sum of \$7,980.00, in and by virtue of and in accordance with the said agreement hereinabove referred to, none of which has been paid. 20

(4) Plaintiff alleges that on the 11th day of June, 1924, the said Edward A. Ashdown sold, assigned and set over the said claim and demand against the said Nathan H. Hart, and his right title and interest in said contract and the money due thereunder to plaintiff. 30

(5) That there is due from said Nathan H. Hart to plaintiff the sum of \$7,980.00, no part of which has been paid.

Judgment will be claimed for the sum of \$7,980.00, together with interest and costs.

JOHN F. DREWEN, JR.

Attorney for Plaintiff.

Answer.

(Filed November 5, 1924.)

**NEW JERSEY SUPREME COURT.
HUDSON COUNTY.**

10

EDWARD CLAXTON,

Plaintiff,

vs.

NATHAN H. HART,

Defendant.

Action at
Law.

20

The defendant, Nathan H. Hart, residing in the
Town of Newton, Sussex County, New Jersey,
says that:

1. He denies the truth of the matters and
things set forth in the complaint.

LEWIS VANBLARCOM,
DOLAN & DOLAN,
Attorneys for Defendant.

30

40

Judgment.

(Entered October 10, 1925.)

NEW JERSEY SUPREME COURT.

EDWARD CLAXTON,

*Plaintiff,**vs.*

NATHAN H. HART,

Defendant.

10

Action at
Law.
On Postea.

This action was tried before Judge Willard W. Cutler, with a jury, at the Hudson Circuit, on September 30 and October 1, 1925. 20

The cause having been heard and submitted to the jury, they returned their verdict in favor of the defendant and against the plaintiff.

Whereupon it was adjudged that the complaint be dismissed and that the defendant recover of the plaintiff his costs, which are taxed at \$35.74.

Judgment entered October , 1925.

WILLIAM S. GUMMERE, C. J. 30

Testimony.**NEW JERSEY SUPREME COURT.**

10

EDWARD CLAXTON,
Plaintiff,

vs.

NATHAN H. HART,
Defendant.

Before:

20

HON. WILLARD W. CUTLER, Judge and a
Jury.

Jersey City, N. J.
September 30, 1925.
October 1, 1925.

A P P E A R A N C E S :

30

JOHN F. DREWAN, JR. Esq., For the plaintiff.
DOLAN & DOLAN, Esqs. by WM. A. DOLAN, Esq.
LEWIS VANBLARCOM, Esq.,
JOSEPH H. COULT, JR. Esq., for the Defendant.

A Jury was duly empanelled; being found
satisfactory, they were sworn.
Counsel opened to the Jury.

40

Edward A. Ashdown—Direct.

EDWARD A. ASHDOWN, sworn:

DIRECT EXAMINATION BY MR. DREWEN:

Q. What is your business or profession? A. Certified Public Accountant.

Q. Do you know the defendant, Nathan H. Hart? A. I do. 10

Q. How long have you known Mr. Hart? A. Since 1922.

Q. During that time, what was his business? A. Carrying on business of coal, lumber, feed and building supplies.

Q. Where? A. In Newton, New Jersey.

Q. Did you have any business relations with Mr. Hart, did you do any professional work for him? A. We were employed by him to make— 20

THE COURT: What do you mean by "we"; E. A. Ashdown & Co?

THE WITNESS: I am doing business as E A. Ashdown & Company.

Q. The name E. A. Ashdown & Co. is a proprietary firm? A. Yes, sir.

Q. It is your concern? A. I am sole proprietor.

Q. You say you rendered services as certified public accountant to Mr. Hart from when? A. From October 1922 when we were originally engaged. 30

Q. Until when? A. Until, the last time was in May 1924.

Q. Do you know a Mr. L. S. Iliff? A. Not Mr. L. S. Iliff.

Q. Charles C. Iliff? A. Yes, sir.

Q. Is Charles C. Iliff related in any way to Mr. Hart? A. I don't know that they are re 40

Edward A. Ashdown—Direct.

lated in any way. Charles C. Iliff's father was formerly in partnership with Mr. Hart some years ago.

MR. DOLAN: He is his uncle by marriage.

10 Q. Now, Mr. Charles C. Iliff, do you know what his business is? A. He is in practically the same line of business; coal, wood, lumber and building supplies.

Q. In Newton? A. Newton, New Jersey.

Q. When you say you rendered service as certified public accountant to Mr. Hart, what do you mean, that you examined the books of his company? A. Yes; Mr. Hart realized that his books and records were in very poor shape and that he
20 was in no proper position to give proper income tax returns to the Government.

Q. What I want to know is whether you examined the books of Mr. Hart personally or some corporation? A. Of the corporation, Hart & Iliff Company.

Q. Do you know who managed the affairs of that Company? A. Mr. Nathan Hart.

Q. Did you ever render any professional services to Mr. Charles C. Iliff? A. We did.
30

Q. For whom, for him personally or some corporation? A. It was for the corporation of L. S. Iliff & Co.

Q. Who managed the affairs of the concern of L. S. Iliff & Co.? A. Mr. Charles C. Iliff.

Q. And you say he is also located in Newton, New Jersey? A. Yes, sir.

Q. And conducts a similar business to the Hart & Iliff Company? A. Yes, sir.
40

Q. Did you know, Mr. Ashdown, from your examination of the books and from your conversa-

Edward A. Ashdown—Direct.

tions with the defendant, Nathan Hart, whether or not he owned the common stock of L. S. Iliff & Co.? A. Yes sir,.

Q. You say he did? A. Yes, sir.

Q. So that Mr. Hart owned stock in both the Hart & Iliff Company and in the L. S. Iliff Co?

A. Yes, sir. 10

Q. You have a Mr. Graner who is associated with you? A. I have.

Q. Mr. Graner is this gentleman here? A. Yes, sir.

Q. Is Mr. Graner a certified public accountant? A. No.

Q. He is a public accountant? A. Yes, sir.

Q. In all this work of accountancy on the books of the Hart & Iliff Company and L. S. Iliff & Co. was that done by Mr. Graner or yourself? A. 20

It was largely done by Mr. Graner with occasional visits and conferences with me.

Q. Did Mr. Hart at any time have any conversations with you with regard to the sale by him of the interest that he owned in the Hart & Iliff Company and in L. S. Iliff & Co.? A. Yes, sir.

Q. Did he have any conversation with you with regard to the commission that was to be paid E. A. Ashdown & Co. in the event of a sale; just yes or no? A. Yes, sir. 30

Q. Were the terms that he stated to you with regard to the commission to be paid in the event of the sale of his interest in these concerns reduced to writing? A. In writing, yes, sir.

Q. I show you a paper writing dated Newton, New Jersey, November 5th 1923, purporting to be signed by Nathan H. Hart and I ask you if that is the writing that you refer to? A. Yes. 40
that is the correct agreement.

Edward A. Ashdown—Direct.

Q. Who handed you that paper? A. Mr. Hart, as I recall, handed me that paper personally in Mr. Van Blarcom's office.

Q. Do you know the signature appended to the paper? A. Yes, sir.

10 Q. Whose signature is it? A. Mr. Nathan H. Hart.

MR. DREWEN: I offer it in evidence.

Accepted and marked as Plaintiff's Exhibit P-1 of this date.

Q. I call your attention now to Exhibit P-1 and I call your attention to this language:

20 "Seven per cent of said sales price as offered in a separate agreement made by me with the said E. A. Ashdown & Co. bearing even date herewith."

Was there another agreement given you? A. There was another agreement setting forth the price which he desired.

30 Q. I show you a paper writing on the letter head of Lewis Van Blarcom, 41 High Street, Newton, New Jersey, dated November 5th, 1923, addressed to E. A. Ashdown & Co., New York City, purporting to be such an offer, and ask you if that is the paper you refer to? A. That is the one, yes, sir.

Q. Was that delivered to you at the time of the other paper? A. The same time.

Q. Do you know whose signature that is? A. Nathan H. Hart.

MR. DREWEN: I offer it in evidence.

40 Accepted and marked as Plaintiff's Exhibit P-2 of this date.

Edward A. Ashdown—Direct.

Q. Now, Mr. Ashdown, calling your attention to Exhibits P-1 and P-2, did anything contained in those papers, by way of offering a commission to E. A. Ashdown & Co., your firm, to sell all this stock for the figure of \$100,000. or \$104,000. have anything to do with any services you rendered in a professional way to the Hart & Iliff Company or L. S. Iliff & Co? 10

MR. COULT: I object to that as calling for a conclusion. That is for the jury to determine or particular for the court.

THE COURT: I think that objection is well taken. It speaks for itself. Objection sustained.

Q. Mr. Ashdown, you say these papers were drawn and delivered to you in the office of Mr. Lewis Van Blarcom? A. Yes, sir. 20

Q. Is that the Mr. Van Blarcom sitting at the counsel table with the defendant? A. Yes, sir.

Q. Was Mr. Van Blarcom your attorney? A. No.

Q. Whose attorney was he? A. Mr. Hart's.

Q. In this matter? A. Yes, sir.

Q. You had no attorney there? A. No, sir. 30

Q. Now, at the time that these papers were given to you, Exhibits P-1 and P-2, were there negotiations pending? A. Yes, sir.

Q. Between whom? A. Between Nathan H. Hart, Charles S. Iliff and E. A. Ashdown & Co.

Q. And do you know by whom those negotiations were opened? A. They were opened by E. A. Ashdown & Co.

Q. In what way, Mr. Ashdown? A. Why, Mr. Hart mentioned to Mr. Graner who was doing the accounting work on his visit there that he would like very much to sell out his interest. 40

Edward A. Ashdown—Direct.

MR. COULT: If the court please, I object.

MR. DREWEN: All right.

THE COURT: Sustained.

10 Q. You were not there when this first conversation took place between Mr. Hart and your associate, Mr. Graner? A. I was not at the first conversation.

Q. Were there negotiations conducted by you personally or Mr. Graner on behalf of your company? A. They were conducted by us both.

Q. Did you have any conference with Mr. Iliff on the subject? A. I did.

Q. Did you have any conference with Mr. Hart on the subject? A. I did.

20 Q. Did you have any correspondence with Mr. Iliff on the subject? A. I did.

Q. And with Mr. Hart? A. I did.

MR. DREWEN: I call upon the defendant to produce the original of a letter dated November 28th, 1923, addressed to the defendant Nathan H. Hart, by the firm of Ashdown & Co.

30 MR. COULT: We have no such letter as that.

MR. DREWEN: Is there any objection to the use of copy of the letter?

MR. COULT: We object to it; we have no such communication.

MR. DREWEN: I will prove that we mailed it to you.

THE COURT: I guess you cannot put it in evidence unless they consent to it.

40 Q. I show you what purports to be carbon copy of a letter dated November 28th 1923 addressed to Mr. Nathan H. Hart. Did you mail such letter to Mr. Hart? A. I did.

Edward A. Ashdown—Cross.

Q. Is that a copy of the letter? A. Yes, sir.

Q. "EAA" whose initials are they? A. That is my initials.

THE COURT: Where did you mail it?

THE WITNESS: Mailed it from New York to Newton.

10

THE COURT: Did you put it in the box?

THE WITNESS: Yes, sir.

MR. DOLAN: May I cross-examine on that?

CROSS EXAMINATION BY MR. DOLAN:

Q. Who is "EAR" whose initials also appear on what purports to be copy of that letter? A. "EAR" I don't remember. We have had two or three changes in the office in stenographers and we had two or three people come in to apply whom I have tried out for a couple of days and it may have been one of them. The stenographer we had at that time was Miss E. A. Newmann.

20

Q. So you had no-one in your employ whose initials were EAR? A. I don't know those particular initials.

Q. Have you any recollection of writing any other letters that day? A. I don't know; probably did.

30

Q. How is your correspondence taken care of ordinarily? A. Dictated to the stenographer she brings me the letters; I sign them and she mails them; we have return-address envelopes so that if they do not get to their destination, they will come back.

Q. Do you know who mailed the letters? A. The stenographer has always done that.

Q. It was left to the stenographer? A. I don't mail letters personally.

40

MR. DOLAN: Then we object to this copy,

Edward A. Ashdown—Re-Direct.

RE-DIRECT EXAMINATION BY MR. DREWEN:

Q. What is the regular course of your business, Mr. Ashdown? A. Certified public accountant.

10 Q. I mean to say with regard to the mailing of letters? A. The stenographer would write the letters and bring them to me to sign and I would hand them back to her. She would put them in the envelopes and drop them in the letter box which we had in the building.

Q. And that is what is done in the regular course? A. Yes, sir.

Q. And that is what was done in this case? A. Yes, sir.

MR. DREWEN: I offer it in evidence.

20 MR. DOLAN: I object to what may have been done in the usual course of business.

Q. How many initials are there at the bottom of that letter? A. "EAA" and "EAR".

Q. Whose initials are "EAA"? A. Mine.

Q. What is your name? A. Edward A. Ashdown.

30 Q. "EAR" are the initials of whom? A. I am not sure. I don't recognize those initials at all; it may have been——

Q. The initials of the stenographer? A. Yes, usually are the stenographer's initials.

MR. DREWEN: I again offer it in evidence.

40 MR. DOLAN: I object to it on the ground that the witness said that his stenographer at that time was a Miss Newmann and if these initials mean anything, they are the initials of a stenographer to whom this letter was dictated at that time. And does not prove its mailing.

Edward A. Ashdown—Re-Direct.

THE COURT: I don't think that is sufficient to show it was mailed.

MR. DREWEN: Then I ask that it be marked for identification.

Marked Exhibit P-3 for identification of this date.

10

Q. Did you receive any reply to this letter?

A. No, sir.

MR. COULT: I object to the last question.

Q. With regard to Exhibit P-3 for identification did you receive any reply to that letter?

MR. COULT: I object to that on the ground that it is not in evidence; asking now if there is any reply to a letter which so far as we know was never sent.

20

THE COURT: I think that is perfectly proper.

MR. DREWEN: Answer that question.

MR. COULT: If the answer is 'yes', I move that it be stricken out.

THE COURT: Did you receive an answer to that letter or not?

THE WITNESS: I answered "no".

30

MR. COULT: I move to strike that out on the ground that it is not competent because it is merely the denial of the receipt of an answer to a letter which so far as the evidence goes, was never sent; and cannot possibly have any bearing on the case.

THE COURT: Sustained.

MR. DREWEN: Exception.

MR. DREWEN: What has been marked Exhibit P-3 for identification, I now offer in evidence.

40

*Edward A. Ashdown—Re-Cross.**Deposition of N. H. Hart, of January 5, 1925.*

MR. COULT: That is the same letter.

THE COURT: Refused.

MR. DREWEN: Exception.

10 RE-CROSS EXAMINATION BY MR. COULT:

Q. You say that you did the accounting work for both L. S. Iliff & Co. and the Hart & Iliff Company? A. Yes, sir.

Q. And for these services you were paid? A. I was.

Q. In full? A. Yes, sir.

20

MR. DREWEN: I would now like to read the depositions of the defendant, taken on Order of Mr. Justice Minturn before Judge Kays.

NATHAN H. HART—DIRECT.

MR. DREWEN: (reading)

"New Jersey Supreme Court, Hudson County.

30

Edward Claxton, Plaintiff

vs.

Nathan H. Hart, Defendant.

Action at law.

Order for Examination of Defendant before trial.

Depositions.

40

Depositions taken in the above entitled matter before me, Henry T. Kays, Supreme Court Commissioner, at my office No. 6 Park Place, Newton, New Jersey, at eleven o'clock in the forenoon of Monday, the fifth

Deposition of N. H. Hart, of January 5, 1925.

day of January 1925, in pursuance of an order of his Honor James F. Minturn, a Justice of the Supreme Court, at which time and place before me appeared John F. Drewen, Jr., Esq., Attorney of Plaintiff, and Messers. William A. Dolan, Lewis Dolan, and Lewis Van Blarcom, Attorneys of Defendant, a copy of which order is hereto annexed.

10

The depositions on the part of the Plaintiff were taken stenographically by Vida M. Barber, a stenographer selected by me, in my presence, and who, before the taking thereof, was sworn to take the same truly, she being sworn as follows:

(Reading of the stenographer's oath is waived)

20

MR. DREWEN: (Reading.)

"NATHAN H. HART, being duly sworn, on his oath testified as follows:

DIRECT EXAMINATION BY MR. DREWEN JR.:

Q. Mr. Hart, you are the defendant in this case? A. Yes, sir.

30

Q. You were part owner of the capital stock of the Hart and Iliff Company? A. Yes, sir.

Q. You were also part owner of the capital stock of the L. S. Iliff Company? A. Yes, sir.

Q. Do you own stock in either of those Companies now? A. No.

Q. How did you dispose of the stock in the Hart and Iliff Company? A. I do not care to answer that question at this time, by advice of counsel.

40

Deposition of N. H. Hart, of January 5, 1925.

Q. Have you been advised by counsel not to answer that question?

MR. DOLAN: I see no reason why you should not answer that question if you want to.

10 A. I sold it to a corporation.

Q. Did you sell the stock held by you in both the Hart and Iliff Company and in the L. S. Iliff Company to the same corporation? A. Yes, sir.

Q. What is the name of that corporation? A. The Hart and Iliff Companies.

Q. So that in the two Companies in which you formerly owned stock, as you testified, you no longer have any interest, have you? A. Not in
20 the former companies.

Q. When was the stock sold by you to the Hart and Iliff Companies? A. About May first.

Q. What year? A. 1924.

Q. Was that the time that you actually transferred the stock to the Hart and Iliff Companies? A. That is my recollection.

Q. Did you before that time have a contract with the Hart and Iliff Companies for the transfer of that stock?
30

MR. DOLAN: I object to the question on the ground that it is not a material part of this investigation, an improper question, and not within the time of the contract set forth in the complaint."

MR. COULT: Objection waived. (Reading continued)

"A. Yes, sir.

40 Q. It was pursuant to that contract that you transferred the stock to the Hart and Iliff Companies, is that not right? A. Yes, sir.

Deposition of N. H. Hart, of January 5, 1925.

Q. When was that contract made?

MR. DOLAN: I object on the ground that it is immaterial to this investigation, and does not show a sale under the contract as set forth in the complaint."

MR. COULT: Objection waived. (Reading resumed.) 10

"A. As I remember, about the middle of January, 1924.

Q. When you say "the middle of January", do you mean January 15th? A. About that time; I am not positive as to the date.

Q. It might have been January 9th, might it not? A. Possibly.

Q. Was that contract made by you with the Hart and Iliff companies, or with persons representing the Hart and Iliff Companies? A. With persons representing the Hart and Iliff companies. 20

Q. Who were those persons? A. Charles C. Iliff.

Q. He is the only person, is he not? A. He is the one that represented the companies at that time.

Q. At the time this contract was made between you and Charles C. Iliff, the Hart and Iliff companies had not been incorporated? A. I do not know. 30

Q. Have you a copy of the contract made between you and Charles C. Iliff? A. I think my attorney has.

Q. By your "attorney", do you mean Mr. Dolan or Mr. Van Blarcom? A. One of them; I do not know which one. 40

Deposition of N. H. Hart, of January 5, 1925.

Q. Did you give it to either of them? A. I am not sure about that.

Q. Have you still got it in your possession, or did you give it to some one else? A. I am not sure whether I have that or whether it is in the attorney's office.

10 Q. Did the stock transferred by you under your contract with Charles C. Iliff include ten shares of the Common Stock in the Hart and Iliff Company owned by Margaret Hart? A. I think I did; I am not sure.

Q. Who is Margaret Hart? A. My wife.

Q. Does your wife now own any stock in the Hart and Iliff Company? A. I do not think she does.

20 Q. Well then, those ten shares were transferred, were they not, when yours were transferred? A. I do not know. I think they were transferred.

Q. And if they were transferred, they were transferred at the same time that your stock was transferred. That is right, is it not? A. I would say so.

Q. What was paid to you for the stock which you transferred in the Hart and Iliff Company?

30 MR. DOLAN: I object to the question, on the ground that it is not a matter the plaintiff is entitled to under this examination, and advise the witness not to answer.

Witness refuses to answer by advice of counsel."

40 MR. COULT: The answers to this and the subsequent questions were afterwards given. I was wondering why we could not put them in right now, so that the thing would be consecutive.

Deposition of N. H. Hart, of January 5, 1925.

MR. DREWEN: I would rather wait if you don't mind.

(Reading resumed.)

"Q. The contract which you made with Charles C. Iliff called for the payment of how much money for your stock transferred under the contract? 10

MR. DOLAN: I object to the question on the ground that it does not appear to relate to any matters set forth in the complaint, and advise the witness not to answer.

Witness refuses to answer by advice of counsel.

Q. In the Hart and Iliff Company you transferred 198 shares of common stock, did you not, under your contract? 20

"MR. DOLAN: I object to the question, on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924 after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and advise the witness not to answer. 30

Witness refuses to answer by advice of counsel."

MR. COULT: That objection will be pressed, on the ground stated, that it relates to matters which occurred after the contract expired by the terms of the contract.

THE COURT: I cannot rule upon it until I see how it comes up.

(Reading resumed by Mr. Drewen.) 40

"Q. And you transferred, under your contract

Deposition of N. H. Hart, of January 5, 1925.

with Charles C. Iliff, 75 shares of preferred stock in the Hart and Iliff Company, did you not?

10 MR. DOLAN: I object to the question, on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and advise the witness not to answer.

Witness refuses to answer by advice of counsel."

MR. COULT: That objection is pressed.
(Reading resumed.)

20 "Q. And you transferred under your contract with Charles C. Iliff, that is, you transferred to the Hart and Iliff companies, under that contract, 75 shares of common stock in the L. S. Iliff Company, did you not?

30 MR. DOLAN: I object to the question, on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and advise the witness not to answer.

Witness refuses to answer by advice of counsel."

MR. COULT: All these objections, I want to press now.

(Reading resumed.)

40 "Q. Mr. Hart, for the stock which was transferred by you to the Hart and Iliff companies,

Deposition of N. H. Hart, of January 5, 1925.

under your contract with Charles C. Iliff, you received the equivalent of \$104,000.00, did you not?

MR. DOLAN: I object to the question, on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and advise the witness not to answer. 10

Witness refuses to answer by advice of counsel."

MR. COULT: That is pressed.

(Reading resumed.)

"Q. What did you receive for the transfer of your stock under the contract with Charles C. Iliff? 20

MR. DOLAN: I object to the question, on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and advise the witness not to answer. 30

Witness refuses to answer by advice of counsel."

MR. COULT: May I have it noted that I press the objection to these questions, as just stated.

(Reading resumed.)

"Q. On November 5, 1923, you made an offer of the sale of your stock in the Hart and Iliff Company, and the L. S. Iliff Company, did you not? A. I am not sure about the date the offer 40

Deposition of N. H. Hart, of January 5, 1925.

was made. I have no copy of it. I think my attorney has it.

Q. That was made at the office of Lewis Van Blarcom? A. Yes, sir.

Q. And it was made on November 5, 1923? A. I am not sure about the date.

10 Q. I show you a typewritten paper dated November 5th, 1923, purporting to be signed 'Nathan H. Hart'; the paper being on the letterhead of Lewis Van Blarcom, and ask you if that is the offer to which I have last referred? A. That is my signature.

Q. That is the offer, is it not? A. Yes, sir.

(Paper offered in evidence and marked "Exhibit P-1" by request of Mr. Drewen, Jr.)

20 Q. At any time between November 5, 1923, and December 1, 1923, did you have any agreement, written or otherwise, with Mr. Charles C. Iliff, extending the time for the acceptance of this offer beyond December 1, 1923? A. I do not think so. I do not remember any.

Q. Did you have any such agreement with Mr. Charles C. Iliff after December 1, 1923? A. Not to my recollection.

30 Q. But this agreement was carried through, you say, about the middle of January, 1924? A. As I remember, about that time; not this agreement.

Q. What agreement, then, do you refer to? A. I refer to another agreement altogether.

Q. What is the other agreement?

40 MR. DOLAN: I object to the question, on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924,

Deposition of N. H. Hart, of January 5, 1925.

after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and advise the witness not to answer.

Witness refuses to answer by advice of counsel."

MR. COULT: That is pressed. 10

(Reading resumed.)

"Q. What difference was there between the terms of your offer, which you have identified, marked "Exhibit P-1" and offered in evidence, and the terms of the contract made by you, as you say, in the middle of January, 1924?

MR. DOLAN: I object to the question, on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and advise the witness not to answer. 20

Witness refuses to answer by advice of counsel."

MR. COULT: That is pressed. 30

(Reading resumed.)

"Q. From whom did you receive instructions as to the name of the corporation to which you were to transfer your stock under the contract made between you and Charles C. Iliff?

MR. DOLAN: I object to the question as immaterial.

A. I believe Mr. William A. Dolan; I am not dead sure. Or Mr. Lewis Dolan—one of them 40

Deposition of N. H. Hart, of January 5, 1925.

Q. Was Mr. Iliff present at the time this stock was transferred to the Hart and Iliff companies?

MR. DOLAN: I object to the question as immaterial.

A. I think he was.

10 Q. Since the transfer of this stock, under your contract with Mr. Charles C. Iliff, to the Hart and Iliff companies, the former two companies—the Hart and Iliff Company and the L. S. Iliff Company—have virtually been out of business, have they not?

MR. DOLAN: I object to the question as immaterial.

20 MR. COULT: On this objection, my purpose is to raise before the court some definite point, an objection which will settle what appears to me to be the controlling point in this case. I believe this is one question which might be objectionable. Do you want me to extend the scope of the objection?

MR. DREWEN: No, your objection is immaterial.

(Mr. Drewen continues reading.)

30 "A. I believe they have been out of business since then.

Q. These two concerns were located here in Newton, were they not? A. Yes, sir.

Q. They did their business here in Newton? A. Not all of it.

Q. Their offices were located here in Newton? A. Yes, sir.

40 Q. And their plants were also located here in Newton? A. Yes, sir.

Q. Where do you reside, Mr. Hart? A. At No. 19 Halsted Street, Newton, New Jersey.

Deposition of N. H. Hart, of January 5, 1925.

Q. How long have you lived in Newton? A. For thirty-five years, or longer.

Q. Has the contract which you said you made with Mr. Charles C. Iliff in the middle of January been performed?

MR. DOLAN: I object to the question, on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and advise the witness not to answer. 10

Witness refuses to answer by advice of counsel. 20

Q. For the transfer of the stock made by you under the contract with Mr. Charles C. Iliff, were you to receive all cash, or part cash and part security?

MR. DOLAN: I object to the question, on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and advise the witness not to answer. 30

Witness refuses to answer by advice of counsel.

CROSS EXAMINATION BY MR. WILLIAM A. DOLAN:

Q. Mr. Hart, are you positive that the contract which you made with Mr. Charles C. Iliff for the sale of your stock in the Hart and Iliff Company and the L. S. Iliff Company was made after De- 40

Deposition of N. H. Hart, of June 11, 1925.

ember 1st, 1923? A. I believe it was made about as I have stated—January 15th, 1924—or near that date. I am not sure as to the date.”

(Signed) NATHAN H. HART.

10 MR. DREWEN: Then it is subscribed to; then follows the Commissioner’s Certificate and the Order of Mr. Justice Minturn for the examination.

20 MR. DREWEN: I will now read the depositions taken on the 11th of June, 1925, of Mr. Nathan H. Hart under the Order of Mr. Justice Minturn that he answer certain questions contained in the Order.

(Reading.)

“NATHAN H. HART, being duly sworn on his oath, testified as follows:

30 “DIRECT EXAMINATION BY MR. DREWEN, JR.:

“Q. Mr. Hart, what was paid to you for the stock you transferred in the Hart and Iliff Company?

40 “MR. DOLAN: I object to the question on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the

Deposition of N. H. Hart, of June 11, 1925.

complaint, and on the further ground that it is not relevant nor material to this cause."

MR. COULT: This is an action upon contract and not on quantum meruit. This plaintiff relies on the terms of a written contract between the parties by virtue of which Mr. Hart has agreed to pay a certain sum of money if a certain service is performed on or before a certain date, to wit, the first day of December, 1924. The contract sued upon is that which is now marked Exhibit P-1, and in the pleadings there was not any further allusion to the subsequent contract, and there was an allegation that these services had been performed and that the money was due, and that the limitation as to time was not expressed in this contract P-1. Under a demand for a bill of particulars, the contract P-2 was produced which by way of the bill of particulars became a part of the pleadings, and is part of the basis of suit which is here brought by this plaintiff.

Now, this P-2 contains this clause: "This offer stands good until December 1st, 1923 and if not accepted by this date, then to be null and void."

(Argued.)

THE COURT: I think that may be answered.

(Reading resumed by Mr. Drewen as follows:)

"A. \$100,000.00. I got \$100,000.00 for my holding in the Hart and Iliff Company and the L. S. Iliff Company.

"Q. The contract which you made with Charles C. Iliff called for the payment of how much money for your stock transferred under the contract?"

Deposition of N. H. Hart, of June 11, 1925.

10 "MR. DOLAN: I object to the question on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and on the further ground that it is not relevant nor material to this cause."

THE COURT: That may be answered.

MR. COULT: I raise the same objection to this question, and will ask your Honor to grant me an exception on each question.

THE COURT: You may have your exception.

20 (Reading resumed by Mr. Drewen as follows:)

"A. \$50,000.

"Q. In the Hart and Iliff Company you transferred 198 shares of common stock, did you not, under your contract?

30 "MR. DOLAN: I object to the question on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and on the further ground that it is not relevant nor material to this cause."

(Same objection, ruling, exception.)

"A. No. I transferred 188 shares of common stock in the Hart and Iliff Company.

40 "Q. And you transferred, under your contract with Charles C. Iliff, 75 shares of preferred stock in the Hart and Iliff Company, did you not?

"MR. DOLAN: I object to the question on

Deposition of N. H. Hart, of June 11, 1925.

the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and on the further ground that it is not relevant nor material to this cause." 10

(Same objection, ruling, exception.)

"A. Yes.

"Q. And you transferred under your contract with Charles C. Iliff, that is, you transferred to the Hart and Iliff companies, under that contract, 70 shares of common stock in the L. S. Iliff Company, did you not?

"MR. DOLAN: I object to the question on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and on the further ground that it is not relevant nor material to this cause." 20

(Same objection, ruling, exception.)

"A. Yes.

"Q. For the stock which was transferred by you to the Hart and Iliff Companies, under your contract with Charles C. Iliff, you received the equivalent of \$104,000.00, did you not? 30

"MR. DOLAN: I object to the question on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the 40

Deposition of N. H. Hart, of June 11, 1925.

complaint, and on the further ground that it is not relevant nor material to this cause."

(Same objection, ruling, exception.)

"A. No.

10 "Q. What did you receive for the transfer of your stock under the contract with Charles C. Iliff?

"MR. DOLAN: I object to the question on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and on the further ground that it is not relevant nor material to this cause."

20 (Same objection, ruling, exception.)

"A. \$100,000.00—\$50,000.00 in cash and \$50,000.00 in the form of a mortgage covering the real estate of the Hart and Iliff companies.

30 "Q. What difference was there between the terms of your offer, which you have identified, marked 'Exhibit P-1' and offered in evidence, and the terms of the contract made by you, as you say, in the middle of January, 1924? A. Difference in consideration, difference in holdings to be transferred and definite terms as to manner of payment not mentioned in the offer marked 'Exhibit P-1'.

"Q. Has the contract which you said you made with Charles C. Iliff in the middle of January been performed?

40 "MR. DOLAN: I object to the question on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924,

Deposition of N. H. Hart, of June 11, 1925.

after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and on the further ground that it is not relevant nor material to this cause."

(Same objection, ruling, exception.)

"A. Yes.

10

"Q. For the transfer of the stock made by you under the contract with Mr. Charles C. Iliff, were you to receive all cash, or part cash and part security?

"MR. DOLAN: I object to the question on the ground that it asks for information dealing with the contract, which, as appears by the testimony, was made in January, 1924, after the expiration of the contract with the assignor of the plaintiff, as set forth in the complaint, and on the further ground that it is not relevant nor material to this cause."

20

(Same objection, ruling, exception.)

"A. Part cash and part security.

"Q. Will you produce the contract referred to as having been made between you and Charles C. Iliff in the middle of January, 1924?

"MR. DOLAN: We will produce it, but reserve the right to its being offered in evidence at any trial of the issues in this case. We also object to its being offered as a part of this record, on the ground that it is not relevant nor material to this cause."

30

MR. DREWEN: For what?

"(Paper produced by the witness and marked 'P-1 June 11, 1925 for identification V. M. B.'"

40

MR. COULT: I raise that objection.

THE COURT: I won't let it go into evidence until I see it.

Deposition of N. H. Hart, of June 11, 1925.

(Mr. Drewen resumed reading as follows:)

"MR. DREWEN: Is this the contract, marked 'P-1 June 11, 1925, for identification, V. M. B.' which you say in a previous answer given this morning was performed? A. Yes.

10 "MR. DREWEN: I offer in evidence the paper produced by the witness, and marked 'P-1, June 11, 1925, for identification V. M. B.' and ask that it be marked accordingly, as an exhibit in evidence.

"MR. DOLAN: I object on the ground that this contract appears to have been made and executed subsequent to the time for completion of the contract mentioned in the complaint, and therefore it is not relevant nor material to this cause."

20 (Paper produced by the witness and marked "P-1 June 11, 1925 in evidence V. M. B.")

TESTIMONY CLOSED.

Signed and sworn to and so on.

THE COURT: I am going to admit that paper in evidence and see what effect it may have later on.

30 (Paper produced and marked as Plaintiff's Exhibit P-4 of this date.)

Mr. Drewen then read Exhibit P-4 to the Jury.

MR. DREWEN: Then follows the Certificate of the Supreme Court Examiner, and the copy of the Order of Mr. Justice Minturn ordering the depositions taken and with the questions to be answered.

40

Robert Graner—Direct.

ROBERT GRANER, SWORN.

DIRECT EXAMINATION BY MR. DREWEN:

Q. Mr. Graner, what is your profession? A. Public accountant.

Q. You are associated with Mr. Ashdown, the last witness, in E. A. Ashdown & Company? A. Yes, sir. 10

Q. And have been for how long? A. Possibly four years.

Q. Do you know the defendant, Nathan H. Hart? A. I do.

Q. How long? A. Since 1922; possibly a little while before that; since 1920 I should say.

Q. Since 1920? A. Yes, sir.

Q. You know Mr. Charles C. Iliff, who has been referred to here? A. Yes, sir. 20

Q. How long have you known Mr. Iliff? A. Since 1922.

Q. Did you ever render any services to Mr. Hart or his company as an accountant, to check up his books or the books of the company? A. I went up there to make an examination, to defeat a tax assessment.

Q. When was that? A. In 1922. 30

Q. You had known Mr. Hart before that time? A. I had known him before that.

Q. Did Mr. Hart have any conversation with you with regard to his interest in the Hart & Iliff Company and L. S. Iliff & Co. and his disposing of those interests? A. He did.

Q. About when was that? A. In or about October, 1922.

Q. Can you tell us what he said to you? A. He said to me at that time he was in very poor 40

Robert Graner—Direct.

health and that he desired to sell out his holdings so that he could go away and relieve himself of all responsibility and he said to me that he would base ten per cent—

MR. COULT: I object to that.

10 THE COURT: I don't see that throws any light on it.

Q. As a result of a conversation that you had with Mr. Hart, did you have any negotiations on behalf of E. A. Ashdown & Co. with Mr. Iliff? A. I did.

Q. About when did these negotiations begin? A. I should say shortly after October. I was so busy on the other matter at that time, all inter-
20 twined. I was in the town—

Q. You spoke to Mr. Iliff about it? A. I did.

Q. Mr. Hart ran which of these companies? A. Hart & Iliff Company.

Q. And Mr. Iliff ran which of these companies? A. L. S. Iliff Company.

Q. Was this subject, with regard to the sale of Mr. Hart's interest opened by Mr. Hart to you?

MR. COULT: I object to that as leading.

30 Q. Who spoke first, you or Mr. Hart, with regard to the sale of Mr. Hart's interest opened by Mr. Hart to you?

MR. COULT: I object to that as leading.

Q. Who spoke first, you or Mr. Hart, with regard to his selling his interest in the two companies? A. Mr. Hart.

Q. And did Mr. Hart know that negotiations were being had by you with Mr. Iliff—C. C. Iliff?
40

MR. COULT: I object; one witness cannot testify to what somebody else knew.

Robert Graner—Direct.

THE COURT: Yes, that is bad in form.

MR. DREWEN: I will reframe it.

Q. Did you at any time state, or make it known to Mr. Hart, that you were negotiaing with Mr. C. C. Iliff for the sale by Mr. Hart of his stock holdings in the two companies? A. I did.

10

MR. COULT: I object to that on the ground, first that it is leading. Then the statement as to the negotiations strikes me as a conclusion.

THE COURT: It is objectionable as leading.

Q. What did you say at any time to Mr. Hart about your taking this matter up with Mr. C. C. Iliff? A. I told him, because of his peculiar holdings in his own company, which were at best 50 per cent interest, it would be difficult for anybody else and the most logical people to offer it to would be the Iliff interests.

20

Q. You said that to Mr. Hart how long after he first spoke to you on the subject? A. I would say some time in November.

Q. That is when you first told Mr. Hart about it? A. The first time I mentioned this particular item? I just mentioned that—

Q. I want you to understand the question. A. I don't quite understand what you mean.

30

Q. When did you first tell, if you did at any time ever tell Mr. Hart, that you had taken up with his nephew, Mr. C. C. Iliff, the proposition of buying Mr. Hart out when did you tell Mr. Hart that? A. I told him that sometime in November.

Q. Now, before you told Mr. Hart that, did you have any conversation with Mr. Iliff on the subject, Mr. C. C. Iliff? A. Did I have any conversation with Mr. Iliff?

40

Q. Yes. A. Before or after?

Robert Graner—Direct.

Q. Before you told Mr. Hart? A. No.

Q. When did you first take the matter up with Mr. Iliff? A. Shortly after I outlined the holdings Mr. Hart had in his company and the difficulty it would be to sell to anyone else.

Q. When was that? A. About in November.

10 Q. Were you present when Mr. Hart saw Mr. Ashdown there in Newton on the 5th of November? A. I was.

Q. Were you there when the contract marked Exhibit D-1 and D-2 were prepared by Mr. Hart? A. I was not present in the attorney's office.

Q. You were in Newton that day? A. I was in Newton.

20 Q. On that day negotiations were pending, were they not, with Mr. C. C. Iliff for the sale of this stock? A. They were.

Q. Pending between whom, Mr. Graner? A. Mr. Nathan H. Hart and the Iliff interest represented by Mr. C. C. Iliff, Mr. C. C. Iliff, trustee.

30 Q. You have just mentioned Mr. C. C. Iliff was trustee; he was trustee of what? A. He was trustee of the holdings of the Iliff interest which owned the Hart and Iliff Company and L. S. Iliff, which was left by his father.

Q. Left by his father? A. Yes, to himself and sisters I believe.

Q. At any time did you go back and forth between Mr. Hart and Mr. Iliff with regard to this matter? A. I did.

Q. For what purpose?

MR. COULT: I object to that; calls for a conclusion

40 MR. DREWEN: I withdraw it.

Q. In going back and forth as you have said between the two people what was the subject of your doing so; why did you do so?

Robert Graner—Direct.

MR. COULT: I must again object for the same reason.

THE COURT: Yes, I think it is.

Q. What did you do in continuing these negotiations back and forth? A. I tried to sell the proposition as between these two men.

10

Q. When you say sell the proposition, what do you mean by the proposition? A. I mean at that time Mr. Iliff should buy out Mr. Hart and form a new company, put some youngster ahead of him.

Q. Did you have any correspondence with Mr. Iliff on the subject? A. May have had some correspondence.

Q. Did he have any with Ashdown and Company that you know of? A. I think he did.

20

Q. While these negotiations were pending? A. Yes, sir.

Q. When you told Mr. Hart that you had taken the matter up with Charles C. Iliff, about the purchase of Mr. Hart's interest in these two companies, what did Mr. Hart say? A. He thought they did not have enough money.

Q. What did you say? A. I said I thought that was not such a great stumbling block, that means could be made whereby they could have the amount of money by some financing being done.

30

Q. What was done after that on this subject of bringing these two people together; what was done so far as you know? A. My interests were, my efforts were to compose the differences between the two of them, to get them—

Q. I cannot hear you. A. —were in getting the two men to see each other so that they could finally get together on the proposition.

40

Robert Graner—Cross.

Q. What did you do; you call that effort; what did you do. A. Well, I simply tried to iron out all these difficulties. I told the old man what a fine fellow the young man was and the other one what a fine fellow the other gentleman was.

10 Q. When you say you tried to iron out the differences, what did that effort in ironing out the differences consist of? That's what I want to show. What did you do? A. I simply went to young Mr. Iliff and told him what a wonderful proposition it would be for him.

MR. COULT: I object to the subject matter of the conversation between this witness and Mr. Iliff not in the presence of Mr. Hart.

THE COURT: Sustained.

20

CROSS EXAMINATION BY MR. COULT:

Q. There wasn't any customer for Hart's business except L. S. Iliff Company? A. He mentioned several to me but I never want to see them.

Q. Was there anyone that you know of? A. Do I know of others? I could have easily secured others besides.

30

MR. COULT: I move to strike that out.

Q. I want to know the name of some of the customers for those interests outside of the L. S. Iliff Company.

MR. DREWEN: I object to that as incompetent, irrelevant and immaterial.

THE COURT: No, I don't think that is competent.

MR. COULT: Exception.

40 Q. You said that you had certain correspondence with Mr. Iliff with reference to the proposed sale of the Hart Company; did you? A. Yes,

Robert Graner—Re-Direct.

the correspondence either came to me personally or through the company.

Q. Where? A. Possibly it was in the possession of the company.

MR. COULT: Why isn't it here?

MR. DREWEN: It is here; do you want it? 10

RE-DIRECT EXAMINATION BY MR. DREWEN:

Q. Mr. Graner, I show you a letter addressed to Mr. Robert Graner and signed C. C. Iliff and I ask you if that is a letter you received from C. C. Iliff? (Handing witness.) A. Yes, that is the letter.

Q. I show you a letter addressed to E. A. Ashdown and Company on stationery of L. S. Iliff and Company and signed C. C. Iliff, was that a letter received by Ashdown and Company from C. C. Iliff? A. Yes, it was. 20

Q. I show you a letter of L. S. Iliff and Company written by C. C. Iliff and dated November 26th, 1923, addressed to E. A. Ashdown and Company. Was that a letter received by E. A. Ashdown and Company? A. Yes, sir, that letter was received.

Q. I call your attention to what purports to be carbon copy of a letter written C. C. Iliff on the date of November 7. You did not write that letter. It does not bear your initials. (Handing witness.) A. No. 30

Q. That is Mr. Ashdown? A. Yes, sir.

Q. Also letter of November 20th, addressed to Mr. C. C. Iliff? (Handing witness.) A. Yes, sir.

MR. DREWEN: I offer it and ask that they be marked for identification, these letters of L. S. Iliff and Company, one dated March 30th, 1923, addressed to Mr. Robert Graner. 40

Notice to Produce.

(Marked Exhibit P-5 for identification of this date.)

MR. DREWEN: And to E. A. Ashdown and Company dated November 26th, 1923.

(Marked Exhibit P-6 for identification of this date.)

10 MR. DREWEN: Also one letter dated October 10, 1923.

(Marked Exhibit P-7 for identification of this date.)

MR. DREWEN: Also carbon of a letter of E. A. Ashdown & Company, dated November 20th, 1923 to Mr. Charles C. Iliff.

(Marked Exhibit P-8 for identification of this date.)

20 MR. DREWEN: Also letter dated November 7th, 1923, written by E. A. Ashdown to Mr. Charles C. Iliff.

(Marked Exhibit P-9 for identification of this date.)

RECESS UNTIL TWO P. M.

AFTER RECESS—TWO P. M.

30 MR. DREWEN: I offer notice to produce sent to Dolan and Dolan, attorneys for the defendant and ask that it be marked in evidence.

40 MR. COULT: I will stipulate on the record that on the 30th day of March, 1925, a return Notice to Produce was served upon the attorneys for the defendant which notice contained among other things a requirement to produce at the trial of this case the original letter written to the defendant Nathan H. Hart by E. A. Ashdown and Company, by Mr.

Nathan H. Hart—Direct.

E. A. Ashdown, on the date of November 28th, 1923.

MR. DREWEN: I offer in evidence the assignment to the plaintiff Edward Claxton, to be offered in evidence on behalf of the plaintiff.

(Accepted and marked as Exhibit P-10 of this date.) 10

MR. DREWEN: Plaintiff rests.

MR. COULT: I ask your Honor for a non-suit on the ground that there is no evidence of the performance of the contract sued upon. There is no performance by the plaintiff's assignor of the contract sued upon in this case.

THE COURT: Motion refused. 20

MR. COULT: Exception.

MR. COULT: I also move for a non-suit on the ground that there is no competent proof to sustain the allegations contained in the complaint.

THE COURT: I shall not grant a non-suit.

MR. COULT: Exception.

30

NATHAN H. HART, sworn.

DIRECT EXAMINATION BY MR. COULT:

Q. Where do you live, Mr. Hart? A. At Newton, New Jersey.

Q. You are a little hard of hearing? A. Yes, pretty fair.

Q. What is your business? A. I have not any now. I sold out. 40

Q. What was your business when you had one?
A. Coal and lumber and seed.

Nathan H. Hart—Direct.

Q. Were you connected with any corporation in that business? A. Hart and Iliff Company.

Q. How long did you maintain your connection with that corporation? A. I began in the beginning in 1889.

10 Q. Do you recall certain negotiations for the sale of that business? A. Yes, sir.

Q. When did they take place? A. The actual sale I think took place in May, 1924.

Q. Do you know Mr. Ashdown of E. A. Ashdown & Company? A. Yes, sir.

Q. He is the gentleman who has testified here? A. Yes, sir.

Q. Did he have any part in the negotiations leading to the sale of your company?

20 MR. DREWEN: I object to that on the ground it calls for a conclusion.

MR. COULT: I withdraw it.

Q. Did you have anything at all to do with Mr. Ashdown in connection with the sale of your company? A. Yes, sir.

Q. Just what; tell the jury. A. The sale of the interest that I had in the business and L. S. Iliff's business.

30 Q. What did you have to do with him, just tell the story to the jury. A. He had an option to sell my interest at an agreed price. The option was renewed a number of times, I cannot tell you how many but nothing was accomplished and the last time the option was to be renewed I protested because I was sick and was forced to get out of business so reluctantly I renewed the option for thirty days in Mr. L. A. Van Blarcom's office with the understanding that was the last
40 time; that if nothing was done with the sale—

Nathan H. Hart—Direct.

MR. DREWEN: I object unless that is connected up.

MR. COULT: If I do not I will consent that it be stricken out.

Q. Was there anything said that there would be no further renewal? A. It was understood there would not. 10

Q. What did you say and what did he say? A. This will be the last time that it will be renewed.

Q. I show you the paper marked Exhibit P-2, and I ask you if that is the renewal of the option that you referred to now? (Handing witness.) A. That is the one, yes, sir.

Q. And the date of this is November 5, 1923? A. Yes, sir. 20

Q. Can you say of your recollection how many times before that you had given similar options? A. No, sir, I could not. They started them some time early in the summer and I don't remember how many there was.

Q. When you say early in the summer, can you give the jury some more definite date than that? A. Well, I think in July.

MR. DREWEN: May I ask before there is any further reference to the options. I would like to know whether they were in writing. 30

Q. Were there other option agreements in writing? A. Yes, sir.

MR. DREWEN: Then I ask for the production of the options.

Q. Between the date of November 5th, 1923 when this was made and the date December 1st, 1923, what was done by E. A. Ashdown in connection with the sale of your property that you know of? A. After that? 40

Nathan H. Hart—Direct.

Q. Between November 5th and December 1st.
 A. I don't know whether they ever made; they never made any bona fide offer to me that I could accept.

10 MR. DREWEN: I object and move that that be stricken out.

Q. Regardless of whether it was bona fide or not, did they ever make any offer to you between November 5th and December 1st? A. None that I would accept.

Q. After the first of December, 1923, was anything done by Ashdown and Company or Mr. Ashdown or anyone acting for him with reference to the sale of your property or corporation? A. Not
 20 that I know of.

Q. Was anything ever said to you by Ashdown or anybody connected with him with reference to a further extension of this option? A. He never asked for extension after that. It was understood when that was given that that was to be the last one.

Q. Was anything said by either of you with reference to a further extension after December 1st, 1923? A. No.

30 Q. Did you ever get any letters from Ashdown & Company or from anyone representing them with reference to the sale of the property after the 1st of December, 1923? A. No.

Q. You know Mr. Charles Iliff, do you? A. Yes, sir.

Q. How long have you known him? A. Ever since he was born.

Q. You have known his father before him? A.
 40 Yes, sir.

Q. And what is the relationship between you and his father? A. Brother-in-law.

Q. Were you in business together? A. Yes, sir.

Nathan H. Hart—Cross.

Q. Under what name? A. Hart and Iliff Company; originally Hart and Iliff and then it was changed to Hart and Iliff Company.

Q. Previous to the first of December, 1923, had you had any negotiations direct with Mr. Iliff with reference to the sale of the business or corporation to his corporation? A. Yes, sir.

10

Q. When and where? A. Well, I cannot tell you. In the Town of Newton and in some conversation that I had with Mr. Iliff in regard to my going out of business. I was not satisfied that things were moving so fast as they ought to in regard to the sale of the property.

Q. Can you remember the date of these conversations? A. I do not. I asked him why the thing did not move faster. He didn't think it would ever move any faster with Ashdown & Company at the terms that they wanted to put the company together, the price was so exorbitant so that he could not afford to pay it.

20

MR. DREWEN: I object to that.

Q. You say you cannot recall the date of the conversation? A. No, I cannot. We had two or three or more talks about it and I cannot tell you the date.

30

Q. Can you tell us about the date? A. Well, it was some time along in the winter. I am not sure whether it was November or December. I think in November.

CROSS EXAMINATION BY MR. DREWEN:

Q. Mr. Hart, you say there were other options before this one that is dated November 5th, 1923, is that right? A. Yes, sir.

40

Q. Were they in writing or not? A. Yes, I believe they were.

Nathan H. Hart—Cross.

Q. Well don't you know whether they were in writing or not? A. I know some of them were. I signed one I am sure.

Q. When, do you remember? A. Why I think in the beginning of the operations, when they started to sell it.

10 Q. When was that? A. As I say, sometime in the summer of 1923.

Q. Have you got a copy of it? A. No, sir.

Q. Do you know where it is? A. I do not.

(A paper produced by counsel.)

Q. I show you what your counsel agree is a copy of an option that is dated in August 1923 and I ask you if that is a copy of the paper
20 that you refer to. (Handing witness.) A. Yes sir.

MR. DREWEN: I ask that it be marked for identification.

(Marked Exhibit P-11 for identification of this date.)

Q. Was there any other option that you know of with the exception of this one marked Exhibit P-11 for identification, any other in writing
30 that you know of besides that? A. You want me to read it all?

Q. I don't. I want to know whether there was another one in writing. A. My recollection is that there was a renewal of this. I think that was the last one. I am not sure about that, but I think there was a renewal but I am not sure.

Q. Before November 1st, 1923, you had negotiations with your nephew, Charles C. Iliff
40 about the purchase of your interest, didn't you?

Nathan H. Hart—Cross.

A. Before November. I don't want to get too positive about this.

Q. You have already answered to your own counsel that you did have. A. I know the thing was not moving.

Q. Never mind; just answer the question. Did you or did you not prior to November 1923 have negotiations with Mr. Iliff, your nephew, about the sale of your interest to him? A. Yes I told him I was going to sell out my business, I had to sell out. My condition forced me to and it had to be sold even though it had to be sold at a sacrifice. 10

Q. How long had you been talking to Iliff about that? A. Not so very long.

Q. When do you say you first had these negotiations with Mr. Iliff about the sale of your business to him? A. Well, I had been talking about selling out all summer because I had been sick all summer. 20

Q. You had not been feeling well in October 1922, were you? A. No, sir.

Q. When Mr. Graner was at your office? A. No sir.

Q. That is right, isn't it? A. Yes, sir.

Q. You remember Mr. Graner being there, working on your books for the income tax report? A. Very well, yes sir. 30

Q. In October 1922? A. I don't remember what date. He was there a good many times. He did our work in the office.

Q. You remember speaking to him about it, about your selling your business, did you, about selling out your interest to Mr. Iliff? A. I am not sure whether I talked with Mr. Graner or Mr. Ashdown first. I am not sure about that. I talked to one of them. 40

Nathan H. Hart—Cross.

Q. One of either of them? A. Yes, I had reached the stage where I had to sell out.

Q. You talked either to Mr. Ashdown or Mr. Graner, you are not sure which? A. I am not sure which.

10 Q. Now Mr. Hart I call your attention to what you refer to as the other option, being Exhibit P-11 for identification, to that passage which says that the price to be paid for the 198 shares of common stock of Hart and Iliff Company and 70 shares of common stock of Iliff Company, based upon the book value of that stock as shown in the balance sheets of each corporation as of July 31st, 1923; isn't it a fact that this option was not carried through because that book value
20 was not determined? A. No.

Q. You say no. Isn't it a fact that Mr. Charles C. Iliff, your nephew, accused you of being the man who was holding up the negotiations?

MR. COULT: I object to that if the court please.

THE WITNESS: Never did to my knowledge.

MR. COULT: I think that calls for a conclusion and ask that it be stricken out.

30 THE COURT: I think he might tell the conversation.

Q. Now, Mr. Hart, isn't it a fact that this delay that you have spoken of about putting through this contract for the sale of your property, that Mr. Iliff your nephew told you was caused by you, isn't that true? A. No, sir.

Q. What is the answer? A. What is that question. I don't understand it.

40 MR. COULT: I object to that if the court please, because that is not competent proof.

Charles C. Iliff—Direct.

If it was caused by him that might be one thing but it is not competent to inquire into what Mr. Iliff said was the cause.

Q. Isn't it a fact Mr. Hart that the reason for this delay was because you did not do anything to get up this statement of your balance sheet and present it to your nephew Mr. Iliff? A. Why, Ashdown got up the balance sheet each month. 10

Q. I understand all of that as a regular thing but isn't it true that they could not get out the balance sheet, could not proceed with the preparation of this balance sheet that you would not give them the data so that they could talk to Iliff and show him what the basis of the sale would be, isn't that true? A. No, that is not true. They had a copy in their possession. They made out a balance sheet each month and we paid them for it. 20

(Witness excused.)

CHARLES C. ILIFF, sworn.

DIRECT EXAMINATION BY MR. COULT:

Q. Mr. Iliff, where do you live? A. Newton, New Jersey. 30

Q. What is your business? A. Coal, feed and lumber.

Q. Are you in business for yourself or do you work for a corporation? A. Work for a corporation.

Q. What corporation? A. The Hart and Iliff companies.

Q. You are a stockholder in that company? A. I am. 40

Charles C. Iliff—Direct.

Q. Who else? A. It is made up of my sister, my mother, Rachel N. Crane, John R. Cornell, Louis P. Dolan, William A. Dolan, Claude Mazuy, W. D. Wilson, H. Hart, and Levi Kayes; I believe that's all of the common stockholders.

10 Q. At the same time your company purchased the property of Nathan Hart— A. The Hart & Iliff Company, you mean.

Q. Yes. A. Yes, they did.

Q. When was that? A. May, 1924.

Q. How long, Mr. Iliff, had negotiations for the purchase of that property continued before the sale went through? A. Oh, approximately a year.

20 Q. You know Mr. Ashdown of E. A. Ashdown & Company? A. Why, yes, I do.

Q. And Mr. Graner who works for him? A. I do.

Q. How long have you known them? A. Since late 1922.

Q. And what did the gentlemen or either of them have to do with the negotiations for the purchase value of the Hart Company property? A. They were acting.

30 Q. Never mind about that. A. Perhaps I don't understand your question.

Q. What did they have to do, what did they do and what did they say and what did you do and what did you say? A. They were the go-between Mr. Hart and ourselves to acquire Mr. Hart's interest in the two companies.

Q. And at that time what were your relations with Mr. Hart? A. Our relations, in what manner. Perhaps I don't understand your question.

40 Q. Were they friendly or otherwise? A. Not over friendly.

Q. What was said or done by Mr. Ashdown or

Charles C. Iliff—Direct.

Mr. Graner or either of them towards the effecting of this sale? A. What was done by them?

Q. Yes A. They—

Q. What I want to have you tell us is to tell us the story in your own way. Perhaps that is so much simpler. A. They were employed by L. S. Iliff Company to audit the books of the company the same as they were of the Hart and Iliff Company. During their work, that is with us, and when I say us I mean L. S. Iliff Company, the question came up as to why we did not buy Mr. Hart's interest. I had taken the position for myself that I could not buy and was not in a position to consider it from my own standpoint. I have not the money and I could not see it, but they carried on, information back and forth one with the other, feeling us on the basis between Mr. Hart and myself or ourselves. They carried information back and forth. Naturally we insisted upon having the facts and the figures before we would make up our minds or whether to sell or to buy. It came to a point one time where we did not know whether we would buy or whether we would sell. It had reached that point.

Q. You say, "We". A. When I say we, I mean the others associated with me and the L. S. Iliff Company. I was not acting for myself, for myself alone. I was acting for the others. Then it came to the obtaining of a certain figure of the Hart and Iliff Company and L. S. Iliff Company, to enable us to put this thing on a concrete foundation on which we could base our decision.

Q. Can you tell us approximately when that was? A. During August, 1923 on and off. We had figures in 1923, August, September, October and November. During that time I think we had our figures.

Charles C. Iliff—Direct.

Q. At that time did you know the book value of the stock of both companies? A. Approximately so.

10 Q. Were you yourself willing to go through with the proposition to purchase the Hart Company if it could be arranged? A. I wanted to see the thing go through personally because it meant a lot to the interest that I had in my charge, to my mother and my sister. It meant if it went to an outsider that we would have to sacrifice and we wanted the negotiations to come to something.

Q. Did these two companies compete? A. They did.

20 Q. In the same line of business? A. The same thing.

Q. Did you continue to be willing to purchase it if it could be arranged? A. I was willing to be a party to it.

Q. Until when? A. Until approximately the option that Mr. Ashdown had ran out, that I had given him for the purchase of the stock that I held as a trustee.

Q. When was that? A. That was December 1st that the option ran out.

30 Q. Now previous to that time, had there been any conversation between you and Mr. Ashdown, or between you and Mr. Graner concerning any compensation that you were to pay them?

40 Q. In connection with this sale. A. That question was naturally raised. We wished to know what we would have to pay in order to get this thing put over and that hung fire quite a little while. We could not get any satisfaction about it for probably a couple of months. The only proposition that was made that a minority of ten

Charles C. Iliff—Direct.

per cent or a maximum of fifteen per cent on the total authorized capital of the new company which was in prospect. That was a little exorbitant in our mind.

Q. When was that proposition first made to you? A. That was approximately December 1st.

Q. How long before December 1st? A. It was either a day or two before or a few days after. I could not tell you the exact date. 10

Q. Who made that proposition to you? A. Mr. Ashdown and Mr. Graner.

Q. They were both there personally? A. Yes, sir.

Q. Had anything been said about the capital stock for your new company? A. We had talked of a capitalization of two hundred and fifty or two hundred thousand dollars. 20

Q. That would mean payment by you of how much of that figure? A. Two hundred and fifty at ten per cent, twenty-five thousand dollars with fifteen maximum would be thirty-five or thirty-six thousand dollars approximately.

Q. What did you say to that?

MR. DREWEN: I object to that as not having anything to do with the service rendered under a contract with Mr. Hart. Any conversation or any negotiations with this man concerning services rendered in the organization of a new corporation has nothing to do with this issue. We are suing on a specific contract. 30

THE COURT: I think that the matter can go in.

MR. DREWEN: Exception. 40

Charles C. Iliff—Direct.

Q. Now, what did you say to that? A. I told him we wanted—

MR. DREWEN: That is objected to on the same ground.

10 THE COURT: What did he say? I don't think that is competent.

MR. COULT: I withdraw the question and answer.

Q. Did you do anything with reference to terminating your negotiations with Ashdown and Company at that time?

MR. DREWEN: Objected to.

20 Q. You can answer that yes or no. A. I don't get that question.

Q. (Question read as follows: "Did you do anything with reference to terminating your negotiations with Ashdown and Company at that time") at the time when this proposition was made about compensation? A. No.

Q. Was anything done further after that? A. No.

30 Q. Was anything done by Ashdown and Company or by anyone representing them after the time that this proposition that you mentioned was made to you and up to the time of the actual transfer of the property from the N. H. Hart Company to your company? A. Nothing positive. I talked with Mr. Ashdown I believe once after that and I saw Mr. Graner several times after that but nothing positive was done.

MR. DREWEN: What do you mean by something positive?

40 THE WITNESS: Accept or reject.

Charles C. Iliff—Cross.

MR. DREWEN: You did talk on the subject with him?

THE WITNESS: It was brought up.

Q. I show you a letter from Ashdown and Company dated November 27, 1923, and I ask you if you received that letter through the mail? A. I did. 10

MR. COULT: I offer that in evidence.

(Accepted and marked Defendant's Exhibit D-1 of this date.)

Q. When was the first time you talked with Mr. Hart directly about the purchase of his stock? A. The option of E. A. Ashdown and Company had expired on the stock that I held as trustee. It was after December 1st. 20

Q. Where did you see him? A. I met him on the street one night.

Q. What did you say to him and what did he say to you? A. We passed the time which was natural and he raised the question as to whether E. A. Ashdown Company expected to receive compensation from us.

MR. DREWEN: That is objected to.

MR. COULT: I withdraw it. 30

CROSS EXAMINATION BY MR. DREWEN:

Q. Now Mr. Hart is your uncle, is he not? A. He is.

Q. You say, as I understand it, that these negotiations were pending approximately one year? A. Well, as near as I can recall it.

Q. As a matter of fact they started some time in November, 1922, didn't they? A. I would hardly say they started at that time because Ash- 40

Charles C. Iliff—Cross.

down and Company came to work for our company in the late month of 1922 and these negotiations were not under way as I remember until in 1923.

10 Q. Wasn't Mr. Graner the first man that mentioned it? A. Mr. Graner casually mentioned it. There was nothing happened over there.

Q. Wasn't the subject of your purchasing the stock mentioned? A. He broached it.

Q. Your objection was that you were not able to do it, that you didn't have the money? A. I didn't have the money and didn't care to consider it at the time.

20 Q. At that time what were the relationships between your uncle and yourself; they were not friendly were they? A. Not friendly.

Q. How long had the relationship been unfriendly? A. Possibly a year or a year and a half previous.

30 Q. Now, you say that when Mr. Graner first spoke to you on the subject you did not care to go into it, had no money and didn't want to do it. That did not continue to be your attitude towards it? A. My attitude had always been that I was not to be considered as a buyer, as a party to the deal.

Q. But the question of your company being a party to the deal, that developed subsequently, didn't it? A. Perhaps I don't fully apprehend that question.

Q. I perhaps can repeat it. You say you always were opposed to doing that personally? A. Yes, sir.

40 Q. You had no objection to being a party to the deal? A. Well, at first—

Q. It required some negotiations to develop

Charles C. Iliff—Cross.

this attitude, this change? A. Yes, it was quite some work to form the new corporation.

Q. When did that work begin? A. The work of forming the new corporation? A. Yes. A. Why, not until the latter part of December.

Q. 1924? A. 1924 after all options had expired. 10

Q. When did you say you first spoke to Mr. Hart about this directly, between the two of you I mean. A. I could not answer that question. We would meet occasionally and casually pass the time of the day.

Q. You had talked with Mr. Hart personally of course after the subject had been opened with you by Mr. Graner and Ashdown and Company and before December 1st, 1923? A. Yes, because he had mentioned it in Directors' Meeting that he wished to be out of his part of the business. 20

Q. And when that was mentioned it was after Mr. Graner had first spoken to you? A. It was mentioned before Graner and Ashdown came on the scene.

Q. Graner and Ashdown did considerable work in this matter, going back and forth between you and developing this proposition so that it would be acceptable to you and giving the terms and reducing this stock of Mr. Hart's to a definite value? A. They did nothing more than act as an intermediary because they were paid for the work in establishing the book values. 30

Q. What I mean in asking about that is with regard to the work of effecting the sale of this property to you or someone else, Mr. Hart's interest, that's what I mean. A. They conferred with me several times about it. 40

Q. Mr. Graner you met at the Cochrane House several times? A. Yes, I did talk with him there several times.

Charles C. Iliff—Cross.

Q. I call your attention to a letter dated October 10, 1923, addressed to Ashdown and Company and ask you if that is your signature? (Handing witness.) A. That is my signature.

10 Q. Prior to October 10th, 1923, considerable progress had been made towards the transfer of the interests of Mr. Hart to the new company or whoever it was who was to buy it? A. I would say not.

Q. Well then, I ask you what you mean by saying in this letter of October 10th, 1923, addressed to Ashdown and Company. "I dislike very much to see the progress already made fall through, for that will be to no one's advantage but would be energy wasted on all parts".

20 MR. COULT: I object to that question.

Q. That stated the fact at the time, did it not?

A. It stated we had been working on it and there had been some work which naturally would bring some progress but the progress was not satisfactory.

Q. You disliked to see what progress had been made, to see it fall flat? A. Yes, I didn't like to put work in something and to have it fail.

30 Q. Now, the delay in bringing this thing to a conclusion, Mr. Iliff, that was caused in large part by your failure to get from your uncle Mr. Hart a definite statement as to what he wanted for this stock, wasn't it? A. I cannot answer that question because I don't know why the failure originated.

40 Q. I didn't ask you why. I am asking you if it was not the fact that you could not get this information from him. A. I could not get from Ashdown. They were the ones that were dealing with that. I could not get it from Ashdown.

Charles C. Iliff—Cross.

Q. When did you first come to the conclusion that it was from Ashdown that you had to get this? A. My total negotiations had been with Ashdown.

Q. Isn't it a fact that Ashdown and Company told you that they were having a difficulty in getting it from the books of Mr. Hart, getting a statement from Mr. Hart as to the terms that he wanted? **10**

MR. COULT: I object to that unless somebody representing Mr. Hart was present or he himself.

THE COURT: I think that is objectionable.

Q. On October 10th, 1923, you had received through Ashdown and Company from Mr. Hart a number of statements as to what he wanted but you had not come to terms yet; that is true, isn't it? A. On that particular point I would not attempt to answer that yes or no. **20**

Q. Having reference to this letter that you wrote on October 10th, 1923, does that refresh your recollection? A. It might possibly.

Q. I call your attention to this part; "We know our mutual friend still has his ideas rather high as regards cash and unless I am greatly mistaken"—who is our mutual friend? A. That naturally would be Mr. Hart. **30**

Q. Doesn't that paragraph refresh your recollection as to your having had figures showing what he wanted for his interest? A. No, sir, at that time I had had no figure as to what he did want. I had the figures of the Hart and Iliff Company.

Q. Did you know that "our mutual friend" as you referred to your uncle, still had his ideas **40**

Charles C. Iliff—Cross.

rather high? A. Only what Mr. Ashdown told me; it was not any positive figure.

Q. What you wanted Mr. Iliff, was a positive definite figure so you knew what you would have to do? A. Yes, sir.

10 Q. You never got that until after Mr Hart had negotiated this option to Ashdown and Company on November 5th; that is true, isn't it? A. That is true.

Q. The stock of Margaret Hart was not transferred? A. She was paid by the Hart and Iliff Companies.

Q. Well, independently. It was a deal with Mrs. Hart herself? A. Independently.

20 Q. Had nothing to do with the contract with the Hart and Iliff Companies and Mr. Hart? A. No.

Q. Now, very late in November, 1923, you knew that these negotiations would probably have to extend beyond December 1st? A. It looked that way.

Q. And you wrote to Ashdown and Company stating that fact?

30 MR. COULT: I object to that. Anything he wrote to Mr. Ashdown and Company is not binding on us.

THE COURT: I don't think that question is competent.

MR. DREWEN: Exception.

Q. Now, you had been seeing Mr. Hart for how long, I mean personally toward the latter part of the month of November, 1923? A. I had been seeing him?

40 Q. On the subject of this business? A. I didn't mention it to him. We had had no conversations about this transfer.

Charles C. Iliff—Cross.

Q. You had not? A. Not until after December 1st.

Q. You have already testified that you met him on the street and talked about it. A. Casually only, not anything of any positiveness. Casually he would say, "How are you coming along", and I would tell him that we were working on it, that's all. 10

Q. Now, was there ever any agreement that you would contribute to Mr. Hart any part of the commission that he would pay for this sale, to Ashdown and Company? A. Yes, sir.

MR. COULT: I object to that if the court please.

THE COURT: I think it goes to show his interest. 20

(Question read.)

A. I don't fully understand your question.

Q. At any time was there any understanding that you would contribute to Mr. Hart any portion of the interest or commissions that he would pay to Ashdown and Company for putting this sale through? A. Yes, sir.

Q. When was that understanding arrived at? A. That was made in late November. 30

Q. 1923? A. 1923.

Q. It was arrived at between Mr. Hart and yourself? A. With Mr. Van Blarcom, Mr. Hart's attorney present.

Q. That is the gentleman sitting at the counsel table here? A. Yes, sir.

Q. Mr. Van Blarcom, yourself and Mr. Hart? A. Yes, sir.

Q. And Mr. Hart is Mr. Van Blarcom's father-in-law, isn't he? A. Yes, sir. 40

Q. And the three of you were there together

E. A. Ashdown—Direct.

late in November and you arrived at this understanding that you would contribute part of the commission? A. Yes, sir.

Q. How much were you to contribute? A. One half up to the maximum of seven thousand dollars.

10 Q. You gave us the names of the directors and the stockholders of the new corporation that was organized to take over the Hart interest and you mentioned William Dolan? A. Yes, sir.

Q. That is one of the counsel for the defendant Hart here? A. Yes, sir.

Q. And you mentioned Joseph Dolan. A. And Louis Dolan.

Q. And that is this Mr. Dolan's brother, isn't
20 it? A. Yes, sir.

(Mr. Coult then read Exhibit D-1 to the jury.)

MR. COULT: Defendants rest.

E. A. ASHDOWN, called in rebuttal.

30 DIRECT EXAMINATION BY MR. DREWEN:

Q. Mr. Ashdown, the conversation that you had with Mr. Iliff concerning compensation from him to Ashdown and Company, did it have anything to do with the services you were rendering to effect this sale and the agreement with Mr. Hart? A. None at all.

Q. Did it have any relations with it whatsoever? A. Nothing at all. It is an entirely different proposition.
40

Q. What did that refer to, that conference on the subject of compensation just referred to? A.

E. A. Ashdown—Cross.

That had reference to our trying to organize a new company which would bring these two other companies into the new organization.

Q. An amalgamation? A. Amalgamate the two companies into one and to do this by means of financing and so forth.

Q. Did it have anything to do with the sale under your agreement with Mr. Hart? A. No. 10

Q. Nothing whatsoever? A. No, except that it would facilitate the taking over of the Hart interest.

CROSS EXAMINATION BY MR. COULT:

Q. You say it didn't have anything to do with it. Did it have anything to do with the way that L. S. Iliff Company was going to get money to pay for the N. H. Hart Company? A. Well, the organization of the new company was going to do certain financing, to raise ways and means of taking over the other two companies. 20

Q. That is you were going to help the L. S. Iliff Company get the money to put over this purchase, weren't you? A. We were looking—trying to get it for them.

Q. And with the object of that you were going to float a new company, weren't you? A. Yes, we were going to organize a new company. 30

Q. And you were going to charge something between twenty-five and thirty thousand dollars for it? A. No, we were getting a minority of ten per cent of the common stock of the company. We did not know how many shares were going to be issued and we didn't know what the value of the stock was to be.

Q. That company besides having sufficient capital to cover the L. S. Iliff Company was also to 40

E. A. Ashdown—Cross.

have sufficient capital to purchase the Hart and Iliff Company? A. No, I don't know what you mean.

10 Q. Don't speculate. A. No, it was a question of raising something, going out and raising a certain amount of cash to take care of the Iliff interest.

Q. Did that fall through? A. I don't know as it did. It was carried through at least as far as I know.

Q. Was there ever any trouble? A. At that time we left, we said what we would expect out of it. I mentioned to him what our interest would be and he made no objection.

20 Q. Didn't he tell you that he could not possibly pay such a sum as that? A. No, sir. We went over to Mr. Dolan's office that same afternoon and he said he was going to mention it to Mr. Dolan.

Q. What time was this? A. That was around about three or half past three.

Q. On what date? A. On November 5th.

30 Q. Do you mean to say this was November 5th that you had this conversation? A. The date of the signing of these contracts we went over to Mr. Dolan's office.

Q. Two days later you wrote this letter, didn't you, Exhibit D-1? A. Yes, sir.

40 Q. Why did you tell Mr. Iliff not to talk about the subject to Mr. Hart? A. Simply because I was afraid he might disturb the negotiations that were pending. We had certain plans of placing a mortgage and of borrowing some money, possibly at the local bank and facilitate his acquiring it and if he was discussing it with Mr. Hart there might be things that Mr. Hart did not like.

Q. Did you represent Mr. Hart or Mr. Iliff?

E. A. Ashdown—Cross.

A. I was representing both at that time. I was trying to have the deal consummate properly, satisfactory to both parties.

Q. You were trying to sell Mr. Hart's property, that is in Mr. Hart's company to Mr. Iliff and get paid for that? A. Yes, sir. 10

Q. And at the same time you were representing Mr. Iliff and incidentally another company and get paid for that, weren't you? A. I considered them two entirely different propositions. 10

Q. And you considered the subject matter was such that it would not do to have Mr. Iliff talk to your client Mr. Hart about it, isn't that a fact? A. Knowing the two people as we did we thought it would be better for them not to get together. 20

Q. You thought that you were earning part of the seven or eight thousand dollars that you expected to get from Mr. Hart, when you told Mr. Iliff not to discuss with him the matter that Mr. Hart was interested in; that is so far as you were concerned? A. We were not limiting our work. We were allowing each man—we didn't want them to discuss the matter and interfere with the negotiations. 20

Q. You thought that the interest was so conflicting that you didn't want one party to talk to the other? 30

MR. DREWEN: That is objected to.

THE COURT: No, that is not the question.

Q. You say that you talked the matter of commission over with Mr. Iliff on the 5th of November? A. Well, as I recall it was the date of the signing of this agreement which was on the 5th of November. 40

Q. Is it or is it not a fact that when you wrote that letter on the 7th of November or that

E. A. Ashdown—Cross.

you told Mr. Iliff not to talk because you didn't want Mr. Iliff to tell Mr. Hart that there was that agreement for commission? A. That wasn't the reason at all. He had already discussed that commission.

10 Q. Were there other things that you did not want him to tell, if that wasn't it; what was it if that wasn't it? A. As I before mentioned that there was the question of raising a mortgage and the prospect of taking the local banks to help finance Mr. Hart's proposed sale.

Q. Did you think that Mr. Hart would do anything to hurt your people or this client Iliff Company in raising money to buy his property? A. Well, we didn't know what might happen because Mr. Hart and Mr. Iliff had not been very friendly and we were afraid that if they got together and began discussing the details, there were questions that might arise that would tend to interfere with the negotiations that were going on.

Q. Knowing that Mr. Hart and Mr. Iliff were at that time unfriendly, just tell this jury what it was that you were afraid might be discussed between them which might act to the hurt of Mr. Hart. A. Well, we have no particular reason why it was going to hurt Mr. Hart.

30 Q. You were representing him? A. Yes, we were representing Mr. Hart and also trying to get Mr. Iliff to be favorable to the proposition.

Q. Did you consider their interests were adverse? A. No, their interests were not adverse but they did not take the same view. Mr. Hart did not take the same view that Mr. Iliff took. We did not want them to discuss it with each other and jeopardize our commission.

40

Motion for Direction of Verdict.

Q. Assuming that all that was true, in case that there was some feeling between Mr. Hart and Mr. Iliff, was there some likelihood that one or the other would get hurt; in that case which way were you going to take?

MR. DREWEN: That's objected to.

10

THE COURT: Sustained.

(It is stipulated on the record that the difference of four thousand dollars between the option of Nov. 5th, 1923, being Exhibit D-2 in evidence and the one hundred thousand dollars which was actually received under the contract of January 9, 1924, is explained by the fact that the ten shares of Margaret Hart were not transferred under the contract of January 9th, 1924.

20

MR. COULT: I move for a direction of verdict on the same grounds as stated in my motion for non-suit.

THE COURT: Motion refused.

MR. COULT: Exception.

(Thereupon counsel summed up to the jury.)

30

Hearing adjourned to October 1, 1925 at ten A. M.

40

Charge.

The court charged the jury as follows:

THE COURT: Members of the jury:

10 Nathan H. Hart, the defendant in this suit, is a resident of Newton and in the fall of 1923 was the owner of 188 shares of the Common stock of the Hart & Iliff Company and 75 shares of Preferred stock of that company. He was also the owner of 70 shares of the Common stock of L. S. Iliff & Company.

20 Mr. E. A. Ashdown was doing business under the name of E. A. Ashdown & Company as public accountants, and was engaged upon the books of the Hart & Iliff Co. and learned that Mr. Hart was anxious to sell this stock and go out of the business.

The defendant testifies that about July of that year, he gave Mr. Ashdown an option on the stock, which option at the request of Mr. Ashdown, he renewed at least once.

30 On the 5th day of November of the same year, two papers were signed by Mr. Hart and given by him to Mr. Ashdown; one relating to the terms on which he was willing to sell the stock, reads as follows:—

Charge.

"November 5th, 1923.

"E. A. Ashdown & Co.,
"New York City.

"Gentlemen:

"I hereby offer my interest as represented in stock of the Hart & Iliff Company and the L. S. Iliff Company, as set out in option given you on August 22nd, 1923, for the sum of \$104,000 to be paid for, one half in cash and one half by a bond secured by a first mortgage on the property owned by the two said companies. 10

"This offer to include stock owned by Margaret Hart, provided the price and terms are satisfactory to her, and if not, the value of her stock to be deducted from the amount above mentioned. 20

"This offer is made in anticipation of an agreement being reached between the Hart & Iliff Company and L. S. Iliff Company, negotiations for which agreement are now pending.

"This offer stands good until December 1st, 1923, and if not accepted by that date, then to be null and void.

"Yours very truly,

"WILLIAM H. HART." 30

You will notice, Members of the Jury, that there is nothing in this letter—because it is in the form of a letter—by which Mr. Hart agrees to pay Mr. Ashdown or E. A. Ashdown & Co. any commissions, or any sum whatsoever for any work which he might do in the sale of the stock. You see, it is simply fixing the price for which he will sell the stock at any time prior to the first day 40

Charge.

of December, 1923, and on that date the offer was ended; as he says, if not accepted by that date, it is to be null and void.

10 In other words, Mr. Hart could be compelled to sell that stock at any time between November 5th, 1923 and December 1st, 1923, for \$104,000 if Mrs. Hart consented that her ten shares of stock be included; if not, then the amount to be \$104,000 less the stock that she owned.

Now, on that same date, an agreement was entered into between these people, or rather an agreement entered into and signed by Mr. Hart in reference to the stock.

“Newton, N. J.,

20

November 5th, 1923.

30 “I hereby agree to pay E. A. Ashdown & Co. for services in the event of the final agreement being reached in negotiations now pending between the Hart & Iliff Co. and L. S. Iliff & Co., E. A. Ashdown & Co. and N. H. Hart for the sale of my stock in the said two companies as represented by 198 shares of common stock and 75 shares of preferred stock of Hart & Iliff Co. and 70 shares of common stock in the L. S. Iliff Co., seven per cent of said sale price as offered in the separate agreement made by me with the said E. A. Ashdown & Co. bearing date herewith; said seven per cent to be paid upon the first payment for the stock being made as specified in such separate agreement.

“In case negotiations between the respective parties herein named shall not be completed, then this agreement to be of no effect.

40 “Nothing herein contained shall obligate the said N. H. Hart to deliver the 10 shares of stock in the Hart & Iliff Company now owned by Margaret Hart and included in the

Charge.

198 shares above mentioned in case any agreement reached is not satisfactory to her.

"This agreement as to commission for services to extend to the sale made by E. A. Ashdown & Co. according to the terms of the separate agreement above mentioned."

You see that the second paper, or agreement, which I have read, refers to the first letter and so far as the power to sell was concerned, is governed by the first letter. Any time before the first day of December, Ashdown & Co. had a right to sell that stock for the price named. If sold after that date, Mr. Hart was not obliged to sell for the price named in that first agreement. 10

There is no evidence, so far as I recall, that Mr. Ashdown or Ashdown & Co. negotiated the sale of this stock before December 1st, the time mentioned in the first letter, and there can be no recovery in this case unless the time limit has been waived by Mr. Hart. 20

There is nothing in the pleadings alleging that Mr. Hart by any fraudulent conduct on his part, prevented the sale from going through until after the time limit had expired, in order to avoid payment of commissions, and even if it was charged in the pleadings, the fact must be established by the evidence, for fraud must be proved and it can never be presumed. There is no evidence of fraud or improper conduct which you can consider in this case. 30

Before the plaintiff can ask a verdict at your hands against this defendant, it must appear by a preponderance of the evidence that the defendant waived the terms of this agreement as to the time limit; otherwise there must be a verdict for the defendant, for as the case now stands, 40

Charge.

there can be no recovery for services rendered in endeavoring to sell this stock or for selling this stock after December 1st, if the time limit was not waived by the defendant, or unless you find from the evidence that Mr. Ashdown, or Ashdown & Co. made this particular sale. Because
 10 if the sale was not negotiated through him, even if the time limit was waived, there can be no recovery. He must be the party who negotiated the sale of stock in order to get the commission. After the first day of December, there is nothing that would bind Mr. Hart to sell the stock for the price named in that first letter.

You, Gentlemen, are the sole judges of what the evidence has been. You are not to rely on
 20 what the court or counsel considers the witnesses have testified to. You are the sole judges of what the witnesses have sworn to on the stand, and what weight and credit you will give to their testimony, although the law presumes that witnesses tell the truth on the witness stand unless the contrary appears.

As I understand the testimony—but you are the sole judges of what it has been—Mr. Ashdown organized or was instrumental in the organization
 30 of a new corporation or company, and was paid for his services by some other person than the defendant.

It does not appear that Mr. Hart knew that Mr. Ashdown was employed to form this new company by any of the other parties.

On January 9th, Mr. Hart entered into an agreement to sell this stock for \$100,000 and that agreement has been offered in evidence and you
 40 will have it before you in the jury room. That does not include the wife's stock and the evidence is that the deduction between \$100,000 and \$104,-

Charge.

000 was the amount which was deducted on account of the wife's stock not being included in the sale then made, although it appears that her stock afterwards was sold, but under what conditions does not appear. But the actual sale was not consummated until some time in May. As I understand the testimony, Mr. Ashdown was not present when the sale was made or when it was consummated and did not know about it at the time.

10

For some reason, Mr. Ashdown, or Ashdown & Co. sold this claim which he had, or claimed to have against this defendant, to Mr. Edward Claxton and this suit is brought in the name of Mr. Claxton, but Mr. Claxton has no greater right under this agreement than Mr. Ashdown had. He simply stands in the place of Mr. Ashdown. So, you see, it is simply the name of the person who brings this suit; Mr. Claxton stands exactly in the same position as Mr. Ashdown or Ashdown & Co. had, the same claim to recover, if you think there is any claim in this suit against Mr. Hart. Now, keep that in mind. If you find from the evidence that Mr. Hart waived the provision of this agreement, and consented that Mr. Ashdown should have seven per cent of the price realized from the sale of this stock, and if you are satisfied from the evidence that Mr. Ashdown sold this stock, then he would be entitled to a commission of seven per cent of \$100,000 with interest from the date the first payment was made on this stock, if made in accordance with the terms of the contract which had been entered into by Mr. Hart with Mr. Ashdown.

20

30

If on the contrary, you find that there was no waiver of the time by Mr. Hart, or if you find that the sale was not consummated or made by

40

Charge.

Mr. Ashdown, then there can be no recovery in this case.

10 There can be no recovery for any services which were rendered not under the terms of this agreement. You cannot say in this case that you think he should receive a certain sum for the work which he did, if you find that he did any work in the sale of this stock, because it is on this particular contract. He either fulfilled the contract or he did not fulfil the contract. If he fulfilled the contract, he is entitled to the \$7,000 and the interest from the time the money was due. If he did not carry out the contract, fulfill, the contract, then he is not entitled to anything so far as this suit is concerned.

20 Now, Gentlemen of the Jury, I think that covers the case. In considering the evidence, the plaintiff must establish his case by a preponderance of the evidence before he can ask a verdict at your hands.

Gentlemen: Counsel calls my attention to one question of evidence which I think I shall correct.

30 The evidence was not that Mr. Ashdown actually formed the company or was paid for forming the company. He talked about the company and they did not agree, as I understand it. But the question, as I said before, for you to determine, is as to whether or not the time was extended by Mr. Hart and whether or not Mr. Ashdown actually consummated the sale of the stock. (The jury retired.)

EXCEPTIONS.

40 MR. DREWEN: I except to that portion of the court's charge wherein the court states in substance, "unless you find from the evidence that

Charge.

the Ashdown Company made this particular sale, because if you find the sale was not negotiated through them, even if the time limit was waived, there can be no recovery; he must be the party who negotiated the sale of the stock in order to get the commissions". On the ground that under the terms of the agreement with regard to commissions, it was not necessary for the plaintiff actually to consummate this sale, because it says "in the event of final agreement being reached", he was to pay the commissions. **10**

THE COURT: You may take an exception.

MR. DREWEN: I except to that part, for the same reason as stated in the previous exception, where the court states in substance "If you are satisfied from the evidence that Mr. Ashdown sold this stock, then he will be entitled to commission of seven per cent on \$100,000". **20**

THE COURT: You may take an exception.

MR. DREWEN: I except to that part of the court's charge where the court stated "If on the contrary you find that there was no waiver by Mr. Hart or if you find that the sale was not consummated or made by Mr. Ashdown, then there can be no recovery in this case". The reason is the same as stated in the preceding exceptions. **30**

THE COURT: You may take an exception.

Exhibit P-1.

Newton, N. J., November 5, 1923.

10 I hereby agree to pay to E. A. Ashdown & Co., for services in the event of a final agreement being reached in negotiations now pending between the Hart & Iliff Co., the L. S. Iliff Co., E. A. Ashdown & Co., and N. H. Hart of the sale of my stock in the said two companies as represented by 198 shares of common stock and seventy-five shares of preferred stock in the Hart & Iliff Co., and seventy shares of common stock in the L. S. Iliff Co., seven per cent of said sales price as offered in a separate agreement made by me with the said E. A. Ashdown & Co., bearing even date herewith. Said seven per cent to be paid upon 20 the first payment for said stock being made as specified in said separate agreement.

In case the negotiations between the respective parties herein named shall not be completed then this agreement to be of no effect.

30 Nothin herein contained shall obligate the said N. H. Hart to deliver the ten shares of common stock in the Hart & Iliff Co., now owned by Margaret Hart and included in in the 198 shares above mentioned in case any agreement reached is not satisfactory to her.

This agreement as to commissions for services to extend to any sale made by E. A. Ashdown & Co., according to the terms of said separate agreement above mentioned.

NATHAN H. HART.

Exhibit P-2.

LAW OFFICE
LEWIS VANBLARCOM
41 High Street
Newton, N. J.

November 5, 1923.

10

E. A. Ashdown & Company,
New York City.

Gentlemen:—

I hereby offer my interest as represented in stock in the Hart & Iliff Co., and the L. S. Iliff Co., as set out in option given you on August 22, 1923, for the sum of one hundred and four thousand dollars (\$104,000.00) to be paid for one half in cash and one half by a bond secured by a first mortgage on the property owned by the two said companies.

20

This offer to include the stock owned by Margaret Hart, providing the price and terms are satisfactory to her and if not the value of her stock to be deducted from the amount above mentioned.

This offer is made in anticipation of an agreement being reached between the Hart & Iliff Co., and the L. S. Iliff Co., negotiations for which agreement are now pending.

30

This offer stands good until December 1, 1923 and if not accepted by that date then to be null and void.

Yours very truly,

NATHAN H. HART.

40

Exhibit P-3. for Identification.

November 28, 1923.

Mr. Nathan H. Hart,
Hart & Iliff Co.,
Newton, N. J.

10 My dear Mr. Hart,

We have just received a letter from the L. S. Iliff Company, in which they advise that negotiations, for taking over your interest in the Hart & Iliff Co., are proceeding satisfactorily, although they intimate that they may not be able to arrange matters before December 1st.

20 We have written them today to the effect that we thought you would be willing to give them sufficient time beyond December 1st to permit of their making their arrangements to pay you, as we assume that you are willing to do this.

With best regards,

E. A. ASHDOWN.

EAA/EAR

30

Exhibit P-4.

WHEREAS, Nathan H. Hart, of the Town of Newton, County of Essex and State of New Jersey, is the owner of one hundred eighty-eight shares of common stock in the Hart & Iliff Company; and seventy shares of common stock in the L. S. Iliff Company; and

40 WHEREAS, the said Nathan H. Hart also holds

Exhibit P-4.

a mortgage securing the payment of the sum of twelve thousand dollars covering the real estate of the Hart & Iliff Company; and

WHEREAS, a corporation is now being formed by Charles C. Iliff and others with the intention of taking over the assets of the Hart & Iliff Company and the L. S. Iliff Company; and

10

WHEREAS, the parties hereto are desirous of completing the organization and transfer on or before May 1, 1924;

NOW, THEREFORE, this agreement made this ninth day of January, Nineteen Hundred and Twenty-four, between the said Nathan H. Hart, party of the first part and Charles C. Iliff, as trustee for himself and others associated with him in the organization of said corporation, party of the second part,

20

WITNESSETH:

The said Nathan H. Hart agrees as follows:

(1) To sell, assign, transfer and set over to the said Charles C. Iliff, as trustee for himself and the others associated with him, or to such person or corporation as he may designate, on or before the first day of May, 1924, one hundred and eighty-eight shares of the common stock of the Hart & Iliff Company, seventy-five shares of the preferred stock of the Hart & Iliff Company, and seventy shares of the common stock of the L. S. Iliff Company, all of which is now owned and held by the said Nathan H. Hart and stands in his name on the books of the companies. And the said Nathan H. Hart further agrees to make, execute and deliver unto the said Charles C. Iliff, as trustee, or to such person or corporation as he may designate, all assignments, transfers and conveyances necessary to assure the same to him, them or it, his, their or its successors, administrators and assigns.

30

40

Exhibit P-4.

(2) To cancel said twelve thousand dollar mortgage on or before May 1, 1924, upon payment to him of the sum of six thousand dollars in cash, and the delivery to him of three thousand dollars in preferred stock and three thousand dollars in common stock of the corporation about to be formed. Said preferred stock shall be seven per cent culmulative stock, redeemable at par at the option of the company at any time after three years from the date of issue.

The said Charles C. Iliff agrees as follows:

(1) To pay the said Nathan H. Hart for the stock in the Hart & Iliff Company and the L. S. Iliff Company, herein agreed to be transferred, the sum of one hundred thousand dollars as follows: fifty thousand dollars in cash upon delivery of said stock, and the balance of fifty thousand dollars by delivery to the said Nathan H. Hart of a bond and mortgage executed by the corporation about to be formed, covering all the present real estate holdings of the Hart & Iliff Company and the L. S. Iliff Company; said mortgage to be given to secure a bond for the sum of fifty thousand dollars, with interest at six per cent, said interest to be payable semi-annually and the principal of said bond to be payable as follows: one thousand dollars payable two years after date; two thousand dollars payable three years after date; three thousand dollars payable four years after date; four thousand dollars payable five years after date; five thousand dollars payable six years after date; and five thousand dollars annually thereafter, until the principal is fully paid and satisfied. Said bond and mortgage shall contain a provision that in case the mortgagor, or its assigns, so desire, it, or they, may, on any day on which the interest is payable, in

Exhibit P-4.

	PAGE
addition to payment then due, pay the whole or any part of the principal then remaining due on said bond and mortgage.	
(2) To satisfy said twelve thousand dollar mortgage on May 1, 1924, by paying to said Nathan H. Hart the sum of six thousand dollars in cash, and delivering to him three thousand dollars in common stock and three thousand dollars in preferred stock of the corporation about to be formed; said preferred stock to be of the type hereinabove described.	10
It is mutually agreed between the parties hereto that the net profits of the Hart & Iliff Company and the L. S. Iliff Company from November 1, 1923, to May 1, 1924, as shown by the balance sheets, are to be distributed to the stockholders of the said Hart & Iliff Company and the L. S. Iliff Company on May 1, 1924, in the form of a cash dividend.	20
It is mutually understood and agreed that the time fixed for closing this contract is May 1, 1924. The papers necessary to effectuate the same may be delivered at any time on or before May 20, 1924, to take effect, however, as of May 1, 1924.	
IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this ninth day of January, nineteen hundred and twenty-four.	30
	CHARLES C. ILLIFF. [L.S.]
	NATAN H. HART. [L.S.]
Signed, sealed and delivered) in the presence of)	
	40
Lewis Van Blarcom, William A. Dolan.	

Exhibit P-10.

(Admitted at page .)

KNOW ALL MEN BY THESE PRESENTS, that I, Edward A. Ashdown, of Bronxville, New York, doing business as E. A. Ashdown & Company, in consideration of One Dollar, lawful money of the
 10 United States of America to me in hand paid, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over unto Edward Claxton, of the City of Jersey City, County of Hudson and State of New Jersey, all sums of money, accounts and demands, and claims of every nature which I have against Nathan H. Hart, of Newton, Sussex County, New
 20 Jersey, and particularly the claim arising to me under a contract dated November 5th, 1923, made by Nathan H. Hart aforesaid.

And I do hereby constitute the said Edward Claxton my attorney to sue for, compound, release and discharge the same, and I do hereby ratify and confirm all his lawful acts in the premises.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 11th day of June, 1924.

30

EDWARD A. ASHDOWN.

Signed, sealed and delivered }
 in the presence of }

George Witzel.

40

Exhibit D-1.

November 7, 1923.

Mr. C. C. Iliff,
The L. S. Iliff Company,
Newton, New Jersey.

10

Dear Sir:

Referring to our talk on Monday last at which time we advised you as to the terms which Mr. Hart agreed to sell us his interest, it is our understanding that you are to let us know just as soon as you are in position to discuss purchase of same, terms, means of financing, etc.

In the meantime please do not discuss this subject in any way with Mr. Hart, as there are certain things we wish to take up with you, and don't want to cause confusion. 20

Very truly yours,

E. A. ASHDOWN.

EAA:H

30

40

EXHIBIT C-13

November 1911

19

20

21

I have the honor to acknowledge the receipt of your letter of the 14th inst. in relation to the above mentioned matter. I am sorry that I cannot give you a more definite answer at this time, but I am sure that you will understand the reasons therefor. I am sure that you will find the enclosed report of interest. It is our hope that you will find it of some value in your work. I am sure that you will find it of some value in your work. I am sure that you will find it of some value in your work.

Very truly yours,
 E. A. Ashdown

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

New Jersey Court of Errors and Appeals

EDWARD CLAXTON,
Plaintiff-Appellant,

against

NATHAN H. HART,
Defendant-Respondent.

At Law.

BRIEF OF DEFENDANT-RESPONDENT.

The plaintiff in this case holds by assignment from E. A. Ashdown & Co. an alleged cause of action for commission for the sale of 198 shares of common stock and 75 shares of preferred stock in the Hart & Iliff Company, and 70 shares of common stock in the L. S. Iliff Company. The claim is based upon an agreement dated November 5, 1923 (Exhibit P. 1, p. 80).

The Hart & Iliff Company and the L. S. Iliff Company were corporations, both engaged in the coal, feed and lumber business in the town of Newton, and competitors in trade. The defendant, Nathan H. Hart, in the summer of 1923, found himself in failing health and wished to retire from business. He was the president and manager of the Hart & Iliff Company, and held fifty per cent. of the stock in that company. His nephew, Charles Iliff, with whom he was not then on friendly terms, was the managing officer of the L. S. Iliff Company.

Plaintiff's assignor, E. A. Ashdown & Co., had been employed as accountants to audit the books of both companies. This work was done by Mr. Ashdown himself, who was the sole proprietor of E. A. Ashdown & Co., and by Mr. Robert Graner, an assistant.

Some time previous to August, 1923, Mr. Hart negotiated with Mr. Ashdown to act for him in making a sale of this stock in both corporations to the L. S. Iliff Company, and finally gave to E. A. Ashdown & Co. an option to purchase the stock which he owned in both corporations. This option expired and was renewed (p. 50), and on November 5, 1923, at the expiration of the option last mentioned, or in renewal of some other extension, Mr. Hart signed the offer for the sale of stock (Exhibit P. 2, p. 81). This agreement is an offer to sell all of the stock owned by Mr. Hart for the sum of \$104,000.00, "to be paid for one-half in cash and one-half by a bond secured by a first mortgage on the property owned by the two said companies." Then follows a provision as to stock owned by Mrs. Hart, which is unimportant, and the document concludes as follows: "This offer is made in anticipation of an agreement being reached between Hart & Iliff Co. and the L. S. Iliff Co., negotiations for which agreement are now pending."

"This offer stands good until December 1, 1923, and if not accepted by that date then to be null and void."

The agreement for the sale of commissions was executed by Mr. Hart upon the same day and provides (p. 80) that Mr. Hart would pay seven per cent. of the sales price, "as offered in a separate agreement made by me with the said E. A. Ashdown & Co., bearing even date herewith"; that this should be done "in the event of a final agreement being reached in negotiations now pending * * *." And further, "This agreement as to commissions for service to extend to any sale made by E. A. Ashdown & Co., according to the terms of said separate agreement above mentioned."

During August, September, October and November, 1923, Mr. Ashdown took up from time to time with the L. S. Iliff Company interests a plan for the consolidation of the two companies (p. 55, ll. 10-40). For some months before the option expired there had been a question as to the amount of money the L. S. Iliff Company would have to pay to Ashdown in order to raise capital to take over the business. It was not until a few days before the first of December, 1923, that Mr. Ashdown and Mr. Graner made a proposal to Mr. Iliff that they would float a company with a capitalization of \$200,000 or \$250,000 and that they would expect to receive for that service a commission of ten per cent., or something between \$25,000 and \$36,000 (p. 57, l. 20). This charge was considered exorbitant by Mr. Iliff (p. 57, l. 30) and negotiations were then broken off (p. 58, l. 25). This attempt of the Ashdown Company to obtain from the prospective purchaser a large sum of money for raising the funds with which to make the sale and reorganize the business was not made known to Mr. Hart by Ashdown or his associates. In fact, on November 7th, two days after signing the contract which forms the basis of this suit, the Ashdown Company wrote to Mr. Iliff (Exhibit D. 1, p. 87), referring to the terms on which Mr. Hart had agreed to sell his interests and concluding as follows:

“In the meantime please do not discuss this subject in any way with Mr. Hart, as there are certain things we wish to take up with you, and don't want to cause confusion.”

It was not until some time in November or December that Mr. Hart learned from Mr. Iliff the reason why negotiations for the sale were not progressing (p. 49, l. 35), when Mr. Iliff

told him that he did not think the negotiations would ever move any faster with Ashdown & Company at the terms that they wanted to put the company together, as the price was so exorbitant that he (Iloff) could not afford to pay it (p. 49, l. 20).

On January 9, 1924, one month and nine days after the expiration of the option given to the Ashdown Company, Mr. Hart and Mr. Iliff agreed upon a sale by Hart & Iliff personally, or his nominees, of all of the stock in both companies owned by Hart upon practically the same terms as those provided for in the offer for sale (Exhibit P. 2).

After the first of December, 1923, nothing was done by Ashdown & Company or Mr. Ashdown, or anyone acting for him, with reference to the sale of the stock. There were no communications between Ashdown and Hart, either written or oral, after that date (p. 48, l. 25).

On the trial of this case the court submitted two questions of fact to the jury. First, whether the time limitation contained in Exhibit P. 2 had been waived by the defendant Hart. Second, whether if the limitation had been waived by Hart the sale was actually made or consummated by the plaintiff's assignor. Both of these questions were answered by the jury in the defendant's favor.

The only reason for reversal argued in the plaintiff's brief is that the court required too much of the plaintiff in the way of the performance of his contract of sale, assuming that the time limitation contained in the original contract had been waived.

On pages 6 and 7 of the plaintiff's brief are the excerpts from the charge which are com-

plained of in the argument. The first five are a repetition of the Grounds of Appeal Nos. 2, 3, 4, 5 and 6. Ground of Appeal No. 1 has evidently been abandoned by the plaintiff.

The grounds of appeal above are broader than the exceptions to the charge. The exceptions (pp. 78 and 79) are as follows:

“Mr. Drewen: I except to that portion of the court’s charge wherein the court states in substance, ‘unless you find from the evidence that the Ashdown Company made this particular sale, because if you find the sale was not negotiated through them, even if the time limit was waived, there can be no recovery; he must be the party who negotiated the sale of the stock in order to get the commissions.’ On the ground that under the terms of the agreement with regard to commissions, it was not necessary for the plaintiff actually to consummate this sale, because it says ‘in the event of final agreement being reached,’ he was to pay the commissions.

“The Court: You may taken an exception.

“Mr. Drewen: I except to that part, for the same reason as stated in the previous exception, where the court states in substance, ‘If you are satisfied from the evidence that Mr. Ashdown sold this stock, then he will be entitled to commission of seven per cent. on \$100,000.’

“The Court: You may take an exception.

“Mr. Drewen: I except to that part of the court’s charge where the court stated, ‘If on the contrary you find that there was no waiver by Mr. Hart or if you find that the sale was not consummated or made by Mr. Ashdown, then there can be no recovery in this case.’ The reason is the same as stated in the preceding exceptions.

“The Court: You may take an exception.”

The first exception above quoted challenges that portion of the court's charge which appears in the second ground of appeal on the ground "that it was not necessary for the plaintiff actually to consummate this sale," because the contract sued on provided that commissions should be paid "in the event of final agreement being reached."

The wording of the agreement (Exhibit P. 1) is "in the event of a final agreement being reached in negotiations now pending."

The whole point on this branch of the case was that the negotiations "then pending" never came to a head, that they were broken off by Ashdown's exorbitant demand for compensation from the proposed purchaser for services to be rendered in the flotation of a new corporation, and that the negotiations which actually culminated in a sale January 9, 1924, and the transfer of the stock in May, 1924, were new negotiations made between Mr. Hart and Mr. Iliff. There is no testimony to show through what agency this sale and transfer were accomplished, nor is that material, but it is clear that the sale could not be brought about without some method of financing and this financing was not accomplished by Mr. Ashdown because the L. S. Iliff Company could not pay his price.

There was surely enough proof to go to a jury upon this disputed question of fact, and it was, therefore, essentially for the jury to say whether or not Ashdown had "negotiated" the sale and had thereby earned his commissions.

The court's attention is here directed to another paragraph in the same contract:

"This agreement as to commissions for services to extend to any sale *made* by E. A.

Ashdown & Co., according to the terms of said separate agreement above mentioned."

It is clear from the reading of both of these documents (Exhibit P. 1 and Exhibit P. 2) that E. A. Ashdown & Co. were required to make a sale under the terms of the separate agreement P. 2, as a result of negotiations then pending in order to be entitled to the commissions. This being true, the charge of the court referred to in the exception was entirely correct and quite in accord with the cases cited in the plaintiff's brief as authority for reversal, since a negotiation of the sale implied nothing more than the production of a purchaser able, willing and ready to buy.

The second exception was taken to the charge of the court as follows: "If you are satisfied from the evidence that Mr. Ashdown sold this stock, then he will be entitled to commission of seven per cent. on \$100,000."

How can the plaintiff possibly complain of this instruction? This merely expressed to the jury one of the postures of the proof under which they might award the plaintiff a verdict of \$7,000 against the defendant. It does not attempt to limit or define the plaintiff's right of recovery or tell the jury under what circumstances the plaintiff could not recover.

The third exception attacks that portion of the judge's charge in which he said, "or if you find that the sale was not consummated or made by Mr. Ashdown, then there can be no recovery in this case." The reason given for this exception is that which was previously expressed by counsel, namely, that it was not necessary for the plaintiff to "consummate" the sale.

It is argued in the plaintiff's brief that the use of the words "consummation of the sale" in the charge implied that Ashdown & Co. should not be entitled to any commission unless the jury were satisfied by the preponderance of the evidence that Ashdown & Co. had brought about the actual consummation of the transfer of the stock, whereas Ashdown & Co. would have earned a commission by procuring a purchaser willing and able to effectuate the purchase upon the terms proposed. By the terms of the agreement (Exhibit P. 1) it was incumbent upon the plaintiff to prove that Ashdown & Co. "had made the sale."

There is, of course, a distinction between the making of the sale and the consummation of the transfer of the subject of the sale, but the distinction between the making and the consummating of a sale is so shadowy that the courts have used the terms interchangeably.

In *Klipper v. Schlossberg*, 115 Atlantic 345, Justice Minturn for the Supreme Court construed the term, "perfecting the sale," in a suit for the sale of real estate. The opinion says (p. 346) (italics ours):

"The familiar legal rule *consummates* the contract of sale as between vendor and broker when the broker has secured a purchaser willing and able to effectuate the purchase upon the terms proposed. *Hinds v. Henry*, 36 N. J. L. 328; *Ryer v. Turkel*, 75 N. J. L. 677, 70 Atlantic 68."

And, again:

"It becomes manifest, therefore, the word 'sale' in all these instances where the parties did not expressly otherwise stipulate *consisted* in the bringing together of the vendor and a person able and willing to purchase, upon the terms proposed. The rule

is not uniform in all jurisdictions, but such is the trend of authority here. In consonance with it the corollary is equally true as declared in 4 R. C. L. 50."

In the charge Judge Cutler spoke of the obligation several times. He says, first (p. 76, l. 5), "unless you find from the evidence that Mr. Ashdown, or Ashdown & Co., *made* this particular sale. * * * if the sale was not *negotiated* through him, even if the time limit was waived, there can be no recovery. He must be the party who *negotiated* the sale of stock in order to get the commission."; (p. 77, l. 30) "if you are satisfied from the evidence that Mr. Ashdown *sold* this stock,"; (p. 77, l. 40) "if you find that the same was *not consummated or made* by Mr. Ashdown, * * *"; (p. 78, l. 35) "whether or not Mr. Ashdown actually *consummated* the sale of the stock."

The term "consummated or made" could not have been hurtful, since by putting them in the disjunctive the court permitted the recovery by the jury if they found the sale was made, whether it was "consummated" or not, though how it could be made without being consummated is difficult to comprehend.

At the very conclusion of the charge the court did say that the question for the jury to determine was whether or not Mr. Ashdown actually "consummated" the sale of the stock.

In the first place, this expression of the court was not excepted to. Then, too, the third exception taken by the plaintiff called the court's attention only to the fact that he had said,

"If, on the contrary, you find that there was no waiver of the time by Mr. Hart, or if you find that the sale was not consummated or made by Mr. Ashdown, then there can be no recovery in this case."

If Judge Cutler's attention had been drawn to the fact that at the conclusion of the charge he had said "actually consummated" and not "made or consummated," as he had said just previously, he might easily have corrected the slip, if slip it was, when, in response to the request of counsel, he was correcting an unintentional error in the statement of the facts.

We submit that in the whole case the plaintiff has confused the making *or* consummation of the sale with the consummation of the transfer of the stock. Under the terms of the contract (Exhibit P. 1) Mr. Ashdown could earn nothing until he made a sale according to the terms of the separate agreement (Exhibit P. 2), in the event that a final agreement was reached in negotiations that were then pending. If that sale was made, consummated or perfected, the commissions were earned, whether the actual transfer of the property was consummated or not.

We maintain that the terms "make a sale," "consummate a sale," "perfect a sale," as between vendor and broker, mean all the same thing, namely, the securing of a purchaser willing and able to effectuate a purchase upon the terms proposed, as Justice Minturn stated in *Klipper v. Schlossberg, supra*. If the use of the word "consummated" was improper it was used with the word "made" in the disjunctive, and was, therefore, harmless. Where used once alone in the body of the charge no exception was taken and the matter was not called to the attention of the trial judge.

It is true that it might have been proper for the judge to define the term "make or consummate a sale," as Justice Minturn defined it in *Klipper v. Schlossberg, supra*, by saying that it

meant the securing of a purchaser willing and able to effectuate a purchase upon the terms proposed, but the court was not under any obligation to make this definition in the absence of any request so to charge. If the plaintiff desired the jury to be informed as to just what it was necessary for the broker to do in order to make or consummate this sale, he should have prepared and presented to the judge an appropriate request, and he cannot now complain of any supposed injury resulting by reason of his failure to so request.

It is argued that the court prejudiced the plaintiff in saying, "As I understand the testimony, Mr. Ashdown was not present when the sale was made or when it was consummated and did not know about it at the time." Such portion of the charge was not excepted to and, if it had been, it ought not to avail the plaintiff, because the judge's remark was perfectly justifiable under the testimony. What he said was a fact and the fact was a significant one in dealing with the question as to whether or not there had been a waiver of the time limit by Mr. Hart. The judge might have gone further and have told the jury that Mr. Ashdown did not see, talk to or communicate with Mr. Hart in any way or manner between the 1st day of December, 1923, when the contract expired, and the date when the sale was made or consummated.

The carbon copy of a supposed letter which appears as Exhibit P. 3 for identification was excluded (p. 18, l. 1).

Plaintiff argues, beginning at page 15 of the brief, that the trial court properly denied defendant's motion for a direction of the verdict. We are not now complaining that the court refused

to direct a verdict in our favor (the jury took care of that), but we do urge that there was not a scrap of evidence to substantiate the claim of the plaintiff that Mr. Hart had waived the time limit in his original contract. If there is none, then any error that the court may have made in dealing with the second branch of the case would be entirely harmless; for the question of Ashdown's performance of his contract with Hart would only come before the jury if they first decided that Mr. Hart, by his words or conduct, had waived his right to terminate that contract, in which it is expressly stated that the offer stood good only until December 1, 1923, and if not then accepted should be null and void. That this limitation applied to the contract for commission is made the law of this case. It was expressly charged by the court and no exception taken to such a charge by the plaintiff.

The court said (p. 75, l. 10):

“You see that the second papers, or agreement, which I have read, refers to the first letter, and so far as the power to sell was concerned, is governed by the first letter. Any time before the first day of December, Ashdown & Co. had a right to sell that stock for the price named. If sold after that date, Mr. Hart was not obliged to sell for the price named in that first agreement.

“There is no evidence, so far as I recall, that Mr. Ashdown or Ashdown & Co. negotiated the sale of this stock before December 1st, the time mentioned in the first letter, *and there can be no recovery in this case unless the time limit has been waived by Mr. Hart.*”

Under Point II plaintiff undertakes to point out to the court evidence of waiver. All that the plaintiff can point to is a conversation which

Mr. Iliff says Mr. Hart had with him. His testimony is as follows (p. 64, l. 30):

“Q Now, you had been seeing Mr. Hart for how long, I mean personally, toward the latter part of the month of November, 1923? A I had been seeing him? Q On the subject of this business? A I didn't mention it to him. We had had no conversations about this transfer. Q You had not? A Not until after December 1st. Q You have already testified that you met him on the street and talked about it. A Casually only, not anything of any positiveness. Casually he would say, 'How are you coming along?' and I would tell him that we were working on it, that's all.”

It is perfectly clear from this that the witness' meaning was that he had talked casually to Mr. Hart previous to December 1st about how he was getting along with the Ashdown proposal and was not until after December 1st that he and Hart actually discussed the matter of making a transfer. At any rate, how could such a conversation between Hart and Iliff be evidence of an implicit agreement on the part of Hart to extend further time to Mr. Ashdown in the making of the sale?

In *Loxley v. Studebaker*, 68 Atlantic 98, 75 N. J. L. 599, Justice Reed, speaking for the Court of Errors and Appeals, in dealing with a case where there was a similar time limit, and where there was a sale by the owner to a purchaser with whom the agent had previously been negotiating, said:

“There is absolutely nothing in this case to show that any obstacle was thrown in the way of the plaintiff. On the contrary, he was assisted in his efforts to effect a sale even to the extent of a reduction in the price to be paid. The fact that the principal, after the expiration of the limited period,

sold to a purchaser with whom the broker had been in negotiations during the period does not constitute fraud. *Satterthwait v. Vreeland*, 48 How. Prac. (N. Y.) 508; *Page, et al., v. Griffen*, 71 Mo. App. 524; *Fultz v. Winer*, 34 Kan. 576, 9 Pac. 316; *Farrer v. Brodt*, 38 Ill. App. 617; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. 772; *Zeimer v. Antisell*, 75 Cal. 504, 17 Pac. 642. The reason is manifest. When the broker has failed to perform the condition upon which he was to be paid, there is an end to the contract. All contractual obligations of the owner toward the broker are terminated. The parties stand as if a contract had never been made. The market for the sale of the owner's property is not circumscribed by the fact that some or all available purchasers have theretofore been approached by the broker. The world is open to the owner to sell to whomsoever will buy, upon whatever terms he pleases. No right can thereafter accrue to the broker save under some new contract of employment express or implied. No right of commissions can spring out of any act done by the broker while the original contract was in force. Even where no time is limited in the contract, yet where the principal in good faith terminates the agency, and seeks other assistance by means of which a sale is effected, the fact that the purchaser was one introduced originally by the first broker does not entitle the latter to commissions. *Wylie v. Marine Natl. Bank*, 61 N. Y. 415; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Antisdel v. Canfield*, 119 Mich. 229, 77 N. W. 944; *Stedman, et al., v. Richardson*, 100 Ky. 79, 37 S. W. 259. In so far therefore as the plaintiff seeks to stand upon the written contract of August 17th, his claim for commission has no legal footing."

We have examined the testimony with care and fail to find any evidence to warrant the submission to the jury on the first issue in the case

and, as we have said, if that issue clearly should have been decided in the defendant's favor no error by the trial judge, if there was any error, in the matter excepted to by the plaintiff, could possibly have been harmful to him.

We submit that the judgment under review should be affirmed.

Respectfully submitted,

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JOSEPH COULT,
Of Counsel.

The first part of the book is devoted to a general
 introduction of the subject. The author discusses
 the importance of the study and the scope of the
 work. He also mentions the sources of the material
 used in the book.

The second part of the book is devoted to a
 detailed study of the subject. The author discusses
 the various aspects of the subject and the
 different methods of study. He also mentions the
 results of the study.

The third part of the book is devoted to a
 summary of the results of the study. The author
 discusses the conclusions of the study and the
 implications of the results.

The fourth part of the book is devoted to a
 list of references. The author lists the books
 and articles that he has consulted in the course
 of his study.

The fifth part of the book is devoted to an
 index. The author lists the names of the
 subjects and the pages where they are discussed.

New Jersey Court of Errors and Appeals

EDWARD CLAXTON,
Plaintiff-Appellant,

vs.

NATHAN H. HART,
Defendant-Respondent.

Action at Law.
On appeal from
New Jersey Su-
preme Court.

BRIEF FOR THE PLAINTIFF-APPELLANT.

This is a suit for commissions for the sale of an interest in each of two business corporations.

The contract for commissions was made by the defendant, Hart, with E. A. Ashdown, trading as E. A. Ashdown & Company. The claim was assigned by Ashdown to the plaintiff, Claxton.

The defendant, Hart, was the owner of large holdings of the capital stock of two corporations engaged in the coal and feed business at Newton, New Jersey. The companies were the Hart & Iliff Company and The L. S. Iliff Company.

For a long time prior to November 5th, 1923 (when the contract for commissions was made), Ashdown had been carrying on negotiations for and on behalf of Hart for the sale of Hart's interests in these companies.

And on November 5th, 1923, the date of the contract upon which this suit is based, these negotiations were still pending. Contract for the payment of commissions by Hart is contained in a writing, in evidence as Exhibit P-1 (Case, page

80). It specifically refers to the negotiations then pending. We set out its salient features: By it Hart agreed to pay Ashdown

“for services *in the event of a final agreement being reached in negotiations now pending*” for the sale of his stock in the two companies mentioned.

And what he agreed to pay was 7% of the sale price,

“as agreed in a separate agreement made by me with E. A. Ashdown bearing even date herewith”.

It provides, further, that if the negotiations then pending and referred to in the contract “shall not be completed, then this agreement shall be of no effect”. It states no time limit within which the negotiations must be completed.

And, lastly, it provides that the defendant Hart’s agreement

“as to commissions for services is to extend to *any sale made by E. A. Ashdown & Co. according to the terms of the said separate agreement above mentioned*”.

Now, it is perfectly clear that what this agreement does is simply to designate an event, upon the happening of which Ashdown & Co. shall be paid for the services rendered by it.

What is that event? It is the “*event of a final agreement being reached in the negotiations now pending*”.

We submit that the contract, beyond doubt, recognized the services already rendered by Ashdown in the execution and furtherance of the negotiations pending; it required Ashdown & Co. to do no more for its “commissions for services”, but

to abide the "event of a final agreement being reached in the negotiations".

A final agreement was reached in the negotiations. It resulted in a contract between Hart and those that had been negotiating with Ashdown, as Hart's agent, for the sale by Hart of his holdings, as set forth in the contract, and upon Hart's terms and price—\$100,000, as stated in the "separate agreement" mentioned in Hart's contract for commissions.

The contract resulting from the negotiations by which Hart sold his stock is in evidence, Exhibit P-4 (Case, page 82). And the terms of this were carried out fully, Mr. Hart receiving all that was due him under it (Case, pages 30-36). It is to be noted that the option (2) names a general price of \$104,000, "including the stock of Margaret Hart." It appears that Margaret Hart's stock was not sold. This accounts for the sum of \$100,000 and not \$104,000 being paid the defendant (See Stipulation, page 71, lines 10-20).

So much for the contract upon which this suit is brought. In that contract an offer is mentioned as having been made in writing by Hart to Ashdown, and bearing even date with the contract for commissions. That offer is a writing which is Exhibit P-2 in evidence (Case, page 81).

This offer is no part of Hart's agreement to pay commissions to Ashdown. It is simply a statement of what Ashdown must get for the stock which Hart optioned to Ashdown for sale. The offer states that:

"It is made in anticipation of an agreement being made between Hart & Iliff Company and L. S. Iliff Company, negotiations for which are now pending".

The offer then provides that it is to stand good

“until December 1, 1923, and if not accepted by that date, then to be null and void”.

Under the latter limitation, Mr. Hart had the right, upon the non-acceptance of his offer by the purchaser prior to December 1, 1923, to declare the offer no longer binding and to make new terms. But that he never did. He did not declare it off, but, on the contrary, upon the acceptance of the offer, went through with it, and upon the very terms contained in the offer.

The date of the contract under which Hart's holdings were sold was January 9th, 1924.

But though this contract bears date subsequent to December 1, 1923, the negotiations of which that contract was a “final settlement” were the negotiations pending at the time of Hart's contract with Ashdown for commissions, which were carried through without termination and without any withdrawal of Hart's offer, and without any varying of any of the terms of that offer.

After December 1st, Mr. Hart asked one of the other negotiators: “How are you coming along”. He was told that they were “working on it” (Case, page 65, lines 1-10).

And nothing was done to terminate the negotiations that Ashdown was carrying on (Case, page 58, line 20).

And the negotiations had been pending, before the sale went through, for approximately a year, and during those negotiations Ashdown & Co. “was the go-between” for Mr. Hart and the purchasers; and during the time of this service by Ashdown, the relations between Hart and those negotiating for the purchase of his stock were not friendly, so that Ashdown's services as “go-

between'' were essential (Case, page 54, lines 10-40).

We submit that this case presented two questions for determination at the trial:

- (1) Whether or not the contract for commissions was performed on Ashdown's part in the completion of the negotiations, as set forth above.
- (2) Whether or not the time limitation of the option effected a like limitation on the contract for commissions; and if so, whether or not that limitation was waived by the conduct of the defendant, Hart.

Now we come to our grievance on this appeal. It is this: That what the trial Court told the jury it was necessary for the plaintiff's assignor to do in order to complete its performance of the contract for commissions, was greatly in excess of what is legally required of brokers under a contract like the one in suit.

The question whether this whole issue should not have been determined in favor of the plaintiff, and entirely as matter of law, may be regarded as at least doubtful. But since it was submitted to the jury, the plaintiff was entitled to have the Court give to the jury a legally accurate statement of the necessary scope of the plaintiff's proof, and not one that exaggerated that scope beyond the requirements of the law defining it.

POINT I.

The trial Court erred in its charge to the jury.

In its instructions, the Court mentioned the two questions above set forth, that of the plaintiff's performance and that relating to defendant's waiver. The passages of the charge to which we took exception and which are our grounds of appeal, are these:

I.

“There can be no recovery for services rendered in endeavoring to sell this stock, or for selling this stock after December first, if the time limit was not waived by the defendant, or unless you find from the evidence that Mr. Ashdown, or Ashdown & Co. made this particular sale. Because if the sale was not negotiated through him, even though the time limit was waived, there can be no recovery. He must be the party who negotiated the sale of stock in order to get the commission”.

II.

“As I understand the testimony, Mr. Ashdown was not present when the sale was made or when it was consummated and did not know about it at the time”.

III.

“If you find from the evidence that Mr. Hart waived the provision of this agreement, and consented that Mr. Ashdown should have seven per cent of the price realized from the sale of this stock, and if you are satisfied from the evidence that Mr. Ashdown sold this stock, then he would be entitled to a commission of seven per cent”.

IV.

“If on the contrary, you find that there was no waiver of the time by Mr. Hart, or if you find that the sale was not consummated or made by Mr. Ashdown, then there can be no recovery in this case”.

V.

“But the question, as I said before, for you to determine is as to whether or not the time was extended by Mr. Hart and whether or not Mr. Ashdown actually consummated the sale of the stock”.

Passing over the instructions relating to waiver, we consider what the Court, by the language of the foregoing passages of its charge, required the plaintiff to do. What this language required was that the plaintiff show by the preponderance of the evidence that:

“Ashdown *made this particular sale*”;

that:

“The sale must have been *negotiated through him*”;

that:

“He (Ashdown) must be the party who *negotiated the sale of the stock*”;

that:

“Mr. Ashdown *must have sold this stock*”;

that:

“The sale must have been *consummated or made by Mr. Ashdown*”;

that:

“Mr. Ashdown *actually consummated the sale of the stock*”.

But extreme as these requirements are when compared with those fixed by the cases dealing with this question, we cannot appreciate fully the import and influence of their error until we read them in the light of what the Court also told the jury in the second passage above set out:

“As I understand the testimony, Mr. Ashdown was not present *when the sale was made or when it was consummated and did not know about it at the time*”.

From all this, how could the jury have possibly escaped the understanding that performance, on Ashdown's part, of his contract for commissions required not *simply that he abide the event of a “final settlement being reached in the negotiations then pending”* but that he actually and entirely, by his own means and effort, carry the sale of Hart's stock through to final completion. In a word, that “Mr. Ashdown actually consummate the sale of the stock”.

This is all, indeed, a far cry from the agreement by the defendant, Hart, that he would pay Ashdown for his services “in the event of final agreement being reached”, in the then pending negotiations. We repeat, this agreement simply fixed an event, upon the happening of which Ashdown was to be paid for the work he had done.

But similar situations have already had the attention of our Courts. And in the precedents we cite, where the language of the broker's contract was not as clear as in the present case, the Courts held the broker entitled to his commissions *upon the arriving at an agreement between buyer and seller*, or in other words “upon a final settlement being reached”.

In a suit for commissions on a sale of common stock, it was held that the duty which the agent

undertook, and the obligation he assumed as a condition to his right to demand a commission is to *bring the buyer and seller to an agreement*.

Queen, et als. *vs.* Jennings, 93 N. J. L. 353.

It has been held, and is settled law in this State, that even where the sale is not actually "CONSUMMATED", that still the principal is liable for commissions, and in order to establish the contrary "it must clearly appear by the contract with the broker that payment of commissions was made contingent upon the *actual TRANSFER of title*".

Dickinson et al. *vs.* Walters, 125 Atl., 235 (not officially reported).

The charge of the Court in the instant case ran directly counter to Dickinson *vs.* Walters (*supra*), when the Court required that Ashdown must show that he did "actually consummate" the sale. The trial Court used those very words which were repudiated in Dickinson *vs.* Walters. Indeed, the Court imposed the burden upon the plaintiff to show, not only that the payment of commissions was "contingent upon the actual transfer of title", but that plaintiff's assignor, Ashdown, "actually consummated" such transfer, expressly calling to the jury's attention that Ashdown was not present when the sale was consummated.

The contract in Dickinson *vs.* Walters (*supra*), is like the one here in suit—that it was made in consideration of "negotiating the sale". This language, the Court held, did not mean "actual consummation" of the sale. And while, "negotiating the sale" may possibly be said to admit of some latitude of meaning, certainly such lati-

tude cannot be imputed to the language used in an agreement to pay for services "in the event of a final settlement being reached in negotiations now pending".

Taylor, *et al. vs. Bounincontri*, 128 Atl., 603), (not officially reported) is another case where contract was made in consideration of negotiations. The negotiations were not *consummated*. And the Court held that "to absolve the principal from payment of commission to the broker, it must appear that payment was contingent upon actual transfer of title".

In Lehrhoff *vs. Schwartzki*, 125 Atl., 496, (not officially reported) the contract provided that the commission shall be paid "on the date of closing title to said premises". The Court even here held that the contract did not make payment of commissions dependent upon actual passing of title to property.

It has even been held that the language, "*perfecting* the sale" does not require the actual passing of title, but only the "execution of a contract of sale between the vendor and the proposed purchaser on terms satisfactory to both".

Klipper *vs. Schlossberg*, 96 N. J. L. 397.

In the latter case, the sale was not carried through, and the Court held, further, that the "right to commissions is unaffected by the sale thereafter falling through because of the failure to perfect title".

In the contract sub judice, there is no hint that the "sale must be perfected". The circumstance of the present case that services had already been rendered in the "pending negotiations" covering a period of one year, and that the defendant, Hart, agreed to pay for those services "in the

event of a final agreement being reached" in the negotiations thus pending, shows clearly what the parties simply must, under the canons of reason and common sense, have intended. In *Klipper vs. Schlossberg (supra)*, the Court held:

"The contract must be read in the light in which the parties considered and framed it".

In *Standing vs. Mindlin*, 96 N. J. L. 206 the language of the agreement was:

"This agreement shall hold good only after the property is sold to a purchaser introduced by the broker".

The Court construed the wording so as to mean simply the success of the broker *in getting a buyer and a seller together on terms of sale*.

Here again it is to be noted that the contract in the present case cannot be said to impose any greater burden on the plaintiff's assignor than was imposed by the terms of the contract in *Standing vs. Mindlin (supra)*.

The excessive burden put on the plaintiff by the trial Court was especially harmful in the present case, because there were just one or two features of the testimony from which the jury might possibly have inferred that the plaintiff's assignor did not "actually consummate the sale", especially in view of the Court's calling their attention to the circumstance that *Ashdown* was not present when the sale was consummated and knew nothing about it at the time.

The features of the testimony we refer to are these:

The defendant, Hart, and his witness, Iliff, (whose interest was affected to the extent of an agreement he had with Hart to contribute part

of the commissions (Case, page 65, lines 12-18), testified that Ashdown did "nothing positive" after a certain time referred to by the witness (Case, page 58, line 30, etc.); that so far as the defendant, Hart, knew, there was nothing done "after the first of December, 1923 by Ashdown & Company, or Mr. Ashdown, or anyone acting for him, with regard to the sale" (Case, page 48, line 15); that Hart was not "satisfied that things were moving as fast as they ought to in regard to the sale of the company" (Case, page 49, lines 10-20).

In view of such testimony in the case, the error committed by the trial Court in its charge worked a very definite prejudice to the rights of the plaintiff. It made it possible for the jury to find against the plaintiff on grounds entirely outside of the scope of proof which the law prescribes for such a case as this.

The reference by the trial Court to the failure of proof that plaintiff's assignor was present at the actual making of the contract, and of the consummation of the sale, gave special force to the prejudice which the charge, as a whole, worked against the plaintiff.

"It is sufficient that from the broker's efforts the parties are brought into communication with each other whereby their minds are brought together in an agreement. Where the parties are brought together as the result of the broker's efforts and the sale, lease or exchange results, the broker becomes entitled to a commission, *although he is not present during the negotiations* following the introduction and takes no part therein".

9 C. J., page 615, section 97, Footnote 25;
(citing many cases, including *Vreeland vs. Vetterlein*, 32 N. J. L., 247).

We repeat that in the present case the contract simply required the plaintiff, before being entitled to commissions, to abide the "event of final settlement being reached". But the trial Judge went far beyond this and prescribed the performance of two *other conditions as necessary precedents to plaintiff's right to commissions*—one, that plaintiff's assignor actually negotiated the sale; the other, that plaintiff's assignor *actually consummated* the sale. Nor can we even say that the Court permitted the jury to conclude that these added requirements might be taken as one, and both be merged in the term "negotiation of the sale".

The Court's charge did not permit the jury to have any doubt that when it used the term "negotiation" of the sale, it meant one thing, and that when it used the term "consummation" of the sale it meant still another. The Court said:

"On January 9th Mr. Hart entered into an agreement to sell his stock for \$100,000
* * * *but the actual sale was not consummated until some time in May*".

(Case, page 76, line 37; page 77, line 10).

And our Courts, in the cases cited in this brief, deal with the terms "sale" and "consummation of sale" as different things. For example, in *Klipper vs. Schlossberg*, the Court said:

"It follows, therefore, that the sale contemplated by the parties to this contract was not *the actual passing or devolution of title, but the execution of a contract of sale*", etc.

And in *Dickson vs. Walters*, the Court said that the broker's right to compensation was based

"Upon completion of negotiations, *irrespective of consummation*".

The Courts of this State, in dealing with cases of this kind, have spoken of a public policy for the working out of "practical justice as evidenced by the facts". The present case seems to be an instance of a clear call for the application of just such a policy.

In *Taylor vs. Buonincontri* (*supra*), the Court said at page 604:

"In a situation like the present where due to the peculiar connotation of the language employed, legal construction must be invoked, we prefer to follow those adjudications of this jurisdiction which to us seem to lead at least to a solution consistent with practical justice as evidenced by the facts".

And in *Stevenson vs. Oppenheimer*, 91 N. J. L. 479, referring to the prior case of *Dresser vs. Gilbert*, 81 N. J. L., 358, the Court said:

"In that case we stated as ratio decidendi that the general rule governing the status between the parties was a 'doctrine of public policy intended to effectuate justice between the parties, and is not intended to unmake an agreement which they deliberately executed and which fixes the terms and conditions upon which the compensation may be made'. The language presented by the contract in the case at bar is equally without qualification, and is emphatic and specific".

The language presented by the contract in the present case is certainly "without qualification, and is emphatic and specific in statement".

One thing more: The trial Judge told the jury that it was "this particular sale which the plaintiff must prove his assignor actually made and consummated". (Case, page 76, line 9). And it might be noted, incidentally, that it was Ash-

down's absence from the closing scene of "this particular sale" to which the trial Judge expressly called the jury's attention. As against this statement of the trial Court, the contract itself expressly provides that it is "to extend to *any sale* made by E. A. Ashdown & Co. according to the terms of said separate agreement above mentioned".

POINT II.

The trial Court properly denied the defendant's motion for direction of a verdict.

It may be that the defendant will urge in his brief that he was entitled to the direction of a verdict. And it may be that he will base this contention on the ground that the case did not show that performance by the plaintiff of his contract for commissions was completed before December 1st, 1923.

Defendant's motion for the direction of a verdict appears in the printed case at page 71, and in it the defendant's counsel bases his motion on "the same grounds as stated in my motion for non-suit". The motion for non-suit appears in the printed case, page 45. In this motion counsel makes no reference to any definite ground. It is simply stated, generally, in the motion that "there was no performance by the plaintiff's assignor of the contract sued upon in this case". For one thing, we contend that the defendant has no right now to definitely present as his ground the point that the contract was not performed before December 1st, 1923.

But in any event, we respectfully submit there is no merit in this contention, should it be urged.

There is no time limit set forth in the *contract for commissions* between the plaintiff's assignor and defendant. The time limit appears in the defendant's written statement of terms upon which he would sell. He did sell. The terms were carried out in every detail and particular. The negotiations were continually carried on, bridging the date fixed when the defendant said that his terms would be no longer binding upon him. And at the conclusion of these negotiations defendant made a contract with the purchaser, based upon defendant's own written offer, in which the time limit was stated. It ought to be sufficient simply to state that this amounts to ratification by the defendant of all that had been done. Aside from this, it was a proper question for the jury to consider whether or not the time limit (if it had any effect on the contract for commissions) was waived by the defendant. The defendant's conduct, as shown by the testimony in the case, clearly presented such a question. As we pointed out above, after the date, December 1st, 1923, had passed, and while the negotiations were still pending, the defendant asked one of the negotiators how they were coming along; and he was told they were working on it (Case, page 65, lines 1-10). Nothing was done to terminate the negotiations, either by the defendant or anyone else (Case, page 58, line 20).

There is very interesting and pertinent dicta in the case of *Crowley vs. Meyers*, 69 N. J. L., 245. The Court says, with regard to a waiver there considered (at page 248):

“When consideration is fixed by the owner in the authority given to the agent, at a certain price in dollars, the owner may reject the purchaser procured by the agent, who offers to pay the price, not in dollars, but in

other property. But if the owner *having the option to reject such an offer, accepts and takes other property as equivalent* for so much of the selling price fixed by his authority, I have no doubt that the agent becomes thereby entitled to his commissions”.

We respectfully submit that the same thing can, with equal cogency be said of the assent by the defendant in the present case to the acceptance of his terms after December 1st, 1923. He, of course, just as in the case above referred to had the right to reject the offer. But that he did not do. If a party to an agreement can make a waiver by his conduct of the form of the consideration to be paid to him, we see no reason why he cannot make a like waiver of the time limit in his option. The defendant in the present case accepted and sanctioned all that was done, regardless of the date December 1, 1923, fixed by him. It surely cannot be said under the law of contracts, and in view of the principles of waiver, that he was the only man in the world who had a right to disregard it, and that for all others it held.

We submit, too, that public policy, also, has proper application under this point. It cannot be within any sound principle of jurisprudence to permit one in the defendant's position to stand by and do nothing, but, on the contrary, give assent by his silence, and at times by his interested inquiries during the pendency of negotiations, and even to accept a purchaser who has taken the defendant's terms, and then when the claim for commissions is made, to base his defense upon the expiration of the time limit.

An extension of time will be implied from the owner's subsequent acceptance of an actual purchaser produced in reliance on the contract.

9 C. J., 607, Section 92, Note 84, Par. A.

“Although a waiver is essentially a matter of intention, such intention need not necessarily be proved by express declaration. It may be inferred from the acts and conduct of the parties”.

Farlow *vs.* Ellis, 15 Gray (Mass.), 231; Stewart *vs.* Leonard, 68 Atl., 640. Or it may be inferred from non-action, Burham *vs.* Austin, 73 Atl., 1089 (Maine) (Farlow *vs.* Ellis, *supra*). Or it may be interpreted from the correspondence. West *vs.* Platt, 127 Mass., 367”.

The trial Court may properly enough be said to have left the question of waiver to the jury, but what we complain of is the hardship which the charge worked upon the plaintiff in the matter of performance by plaintiff's assignor of his contract for commissions.

We respectfully submit that the judgment of the Supreme Court should be reversed.

PERKINS AND DREWEN,
Counsel for Plaintiff-Appellant.

