INDEX

	Page
Complaint	1
Schedule "A"—annexed to Complaint	6
Answer	8
Reply	11
Judgment	12
Clerk's Certificate	13
Notice of Appeal	13
Grounds of Appeal	15
Notice of Argument	17
Testimony	18
Motion for Non-Suit	219
Defendant's Motion for Direction of Verdict.	341
Plaintiff's Motion for Direction of Verdict...	341
Charge of the Court	344
Defendant's Exceptions	356
Stipulation as to Exhibits	357

WITNESSES FOR PLAINTIFF.

Davis Houston:	
Direct	18
William C. Fiedler:	
Direct	20
Cross	31
Redirect	41, 43
Recross	43, 44
Recalled—Cross	168
Recalled—Redirect	169
Frederick J. Hartman:	
Direct	44
Cross	58
Redirect	67, 73
Recross	71
Recalled—Cross	169
Recalled—Redirect	172

New Jersey State Library

Page

Craig E. Vail:
Direct 75
Cross 118
Redirect 152
Recross 163
James F. Mitchell:
Direct 174
Cross 184
Redirect 188
Blanche Smalley:
Direct 190
Cross 205
Redirect 216
Recross 218

WITNESSES FOR DEFENDANT.

Ferdinand A. Hubert:
Direct 226
Cross 227
Charles Lefkowitz:
Direct 228
Cross 248
Redirect 284
Hugh B. Reed:
Direct 284
Cross 287
Redirect 290
Recross 291
J. Hollis Hall:
Direct 291
Cross 300
Redirect 319
Elmer E. Ross:
Direct 319
Cross 325
Redirect 335
Recross 336

Page

Rulif L. Hornby:
Direct 337
Cross 339

TESTIMONY IN REBUTTAL.

James Mitchell:
Direct 340
Cross 340

PLAINTIFFS' EXHIBITS.

	Off'd Page	P't'd Page
P-2—Commission Agreement.....	102	356a
P-3—Lease dated June 16, 1926..	52	358
P-5—Lease dated May, 1926.....	92	358
P-6—Lease dated May 24, 1926...	95	359
P-7—Lease dated May 24, 1927...	116	359

DEFENDANT'S EXHIBITS.

D-1—Letter dated Sept. 22, 1925..	37	360
D-3—Letter dated Sept. 28, 1925..	231	362
D-4—Lease dated June 16, 1926..	184	363
D-5—Letter dated Sept. 13, 1926..	240	369
D-6—Letter dated Sept. 9, 1926..	240	370
D-7—Letter dated March 24, 1927	241	371
D-9—Letter dated March 25, 1927.	240	372
D-10—Letter dated Sept. 13, 1926.	241	373
D-11—Letter dated Nov. 10, 1927.	247	374

Judgment Record.

New Jersey Supreme Court

FIEDLER CORPORATION, a corporation, Plaintiff, vs. MANUFACTURER'S DEVELOPMENT Co., a corporation, Defendant.	Judgment Record. Action at Law. On Postea. Pitney, Hardin & Skinner, Attorneys.

Manufacturer's Developing Co., a corporation the defendant in this cause was summoned to answer unto Fiedler Corporation, a corporation the plaintiff therein in an action at law upon the following complaint:

(Summons issued February 8, 1928).

Complaint.

Filed Feb. 16, 1928.

Plaintiff, Fiedler Corporation, a corporation of the State of New Jersey, with its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

FIRST COUNT.

1. At all the times hereinafter mentioned the plaintiff, Fiedler Corporation, was and still is a

corporation duly organized and existing under the laws of the State of New Jersey.

2. At all the times hereinafter mentioned the defendant, Manufacturer's Developing Co., was and still is a corporation organized and existing under the laws of the State of New Jersey.

3. In the latter part of 1924, or the early part of 1925, the defendant engaged the services of Fiedler Corporation, as agent and broker to secure tenants for its buildings then erected and buildings to be erected on a large tract of land owned by it on Thomas Street and Avenue C in the City of Newark, and agreed to pay to the plaintiff a commission of 5% on the gross rentals under all leases made with tenants procured by the plaintiff and upon any renewals of said leases.

4. Relying upon said agreement plaintiff devoted its time in securing tenants. As a result of its efforts it procured Brandes Products Corporation as a tenant for premises at No. 350 Thomas Street and a building to be erected in the rear of the same for a term of five years from June 15, 1926 with an option for a renewal of five years from June 15, 1931. The rental was $13,500.00 a year for the building at No. 350 Thomas Street, and an additional rental of $15,000.00 from the time of the completion of the new building in the rear thereof. A lease was thereupon executed on or about June 16, 1926 between the defendant and Brandes Products Corporation.

5. The said new building in the rear of 350 Thomas Street was completed on or before September 15, 1926.

6. The plaintiff by reason thereof is entitled to

a commission of 5% for the period from June 15, 1926 to September 15, 1926 at an annual rental of $13,500. and 5% for the remaining term of said lease from September 15, 1926 to June 15, 1931 at an annual rent of $28,500.00, amounting to $6,993.-75. Defendant has paid on account of said commission the sum of $4,725.00, leaving a balance due of $2,268.75, no part of which has been paid.

SECOND COUNT.

1. Plaintiff repeats the allegations of Paragraphs 1, 2, 3 and 4 of the First Count.

2. The said Brandes Products Corporation on or about May 24, 1927 exercised the option for a further term of five years under said lease of June 16, 1926.

3. Plaintiff by reason of the foregoing is entitled to a further commission of 5% for the renewal period of five years at an annual rental of $28,-500.00, amounting to the sum of $7,125.00, no part of which has been paid.

THIRD COUNT.

1. Plaintiff repeats the allegations of Paragraphs 1 and 2 of the First Count.

2. During the latter part of 1925 and the early part of 1926 the plaintiff at the request of the defendant performed services for the defendant as agent and broker in the leasing of premises of the defendant on Thomas Street and Avenue C, in the City of Newark and on or about June 15, 1926 procured a lease with Brandes Products Corporation for a term of five years from June 15, 1926 with an option for a renewal of five years further

at a rental of $28,500.00 a year. Said option was exercised on or about May 24, 1927.

3. The reasonable value of plaintiff's services rendered in this connection is $14,118.75.

4. The defendant has paid to the plaintiff on account thereof the sum of $4,725.00, leaving a balance due of $9,393.75, no part of which has been paid.

FOURTH COUNT.

1. Plaintiff repeats the allegations of Paragraphs 1, 2, 3 and 4 of the First Count.

2. On or about June 16, 1926, in consideration of the services rendered by the plaintiff in procuring the Brandes Products Corporation and the Federal Telegraph Company as tenants for the premises of the defendant, the defendant agreed in writing to pay to the plaintiff a commission of 5% on the gross rentals involved in any renewals or extensions of the said lease with the Brandes Products Corporation and the Federal Telegraph Company. A true copy of said written agreement is hereto attached, made a part hereof and marked Schedule "A."

3. The said Brandes Products Corporation on or about May 24, 1927 exercised the option for a further term of five years under said lease and extended the original term for that period.

4. The plaintiff is entitled to a commission of 5% on the gross rentals for said renewal or extension period at an annual rental of $28,500.00, amounting to the sum of $7,125.00, no part of which has been paid.

FIFTH COUNT.

1. The plaintiff repeats the allegations of Paragraphs 1, 2, 3 and 4 of the First Count.

2. On or about June 16, 1926, in consideration of the services rendered by the plaintiff in procuring the Brandes Products Corporation and the Federal Telegraph Company as tenants for the premises of the defendant, the defendant agreed in writing to pay to the plaintiff a commission of 5% on the gross rentals involved in any renewals or extensions of the said lease with the Brandes Products Corporation and the Federal Telegraph Company, and upon the gross rentals under any lease made with the Brandes Products Corporation for any additional space in said premises or any other premises owned by the defendant. A true copy of said written agreement is hereto attached, made a part hereof and marked Schedule "A."

3. On or about May 24, 1927 the said Brandes Products Corporation leased from the defendant additional space on the said property of the defendant for the period of nine years from June 15, 1936 at an annual rental of $28,500.00.

4. The plaintiff by reason of the foregoing is entitled to a commission of 5% upon the gross rentals under said lease amounting to the sum of $12,825. no part of which has been paid.

SIXTH COUNT.

1. Plaintiff repeats the allegations of Paragraphs 1 and 2 of the First Count.

2. During the years 1926 and 1927 the plaintiff at the request of the defendant performed ser-

vices for the defendant as agent and broker in the leasing of premises of the defendant on Thomas Street and Avenue C in the City of Newark, which resulted on or about May 24, 1927 in a lease between the defendant and Brandes Products Corporation for a portion of said premises for the period of nine years from June 15, 1936 at an annual rental of $28,500.00.

3. The reasonable value of plaintiff's services rendered in this connection is $12,825.00, to which the plaintiff is entitled and no part of which has been paid.

Plaintiff demands as damages:

On the First Count $2,268.75 with interest.
On the Second Count $7,125.00 with interest.
On the Third Count $9,393.75 with interest.
On the Fourth Count $7,125.00 with interest.
On the Fifth Count $12,825.00 with interest.
On the Sixth Count $12,825.00 with interest.

PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff.

Schedule "A".

Whereas the undersigned acknowledges that the Fiedler Corporation procured as tenants in our premises located 350 Thomas St., Newark, N. J. the Brandes Products Corporation and the Federal Telegraph Company.

Now, Therefore, in consideration of the services rendered by the Fiedler Corporation should the within mentioned tenants, their successors, or as-

signs renew their lease, or extend their occupancy beyond the original term, or lease additional space in the premises in question or any other premises we may own; or should they purchase the premises referred to, or any other property which we may own, we agree to pay the Fiedler Corporation a commission of five (5%) per cent. on the gross rentals, involved in such renewals, additions, or extensions of the lease; or if a sale is made as before mentioned a commission of five (5%) per cent. of the gross sale price.

The said commission to be due and payable upon the date of execution of the leases or contracts of sale.

MANUFACTURERS DEVELOPING COMPANY
(Signed) Elmer E. Ross,
(SEAL)
(Signed) Chas. Lefkowitz, Pres.
Sec'y-Treas.

Answer.

Filed March 8, 1928.

Defendant, Manufacturers Developing Co., a corporation of the State of New Jersey, with its principal office in the City of Newark, Essex County, answering the complaint filed by the plaintiff herein, says that:

FIRST COUNT.

1. It admits the facts alleged in paragraphs Nos. 1 and 2 of said complaint.

2. It denies the facts alleged in paragraph No. 3 of said complaint.

3. It denies the facts alleged in the first sentence of paragraph No. 4 of said complaint, and admits the balance of the facts alleged in said paragraph No. 4 of said complaint.

4. It admits the facts alleged in paragraph No. 5 of said complaint.

5. It denies the conclusions and calculations as alleged in paragraph No. 6 of said complaint, but admits that it did owe the plaintiff $6825.00 which was to be paid at the rate of $500.00 per month, and that all payments due to date had been paid.

SECOND COUNT.

1. Defendant repeats the allegations of its answers to paragraphs Nos. 1, 2 and 3 and of the First Count as its answer to paragraph No. 1 of the Second Count.

2. This defendant denies the facts alleged in paragraphs Nos. 2 and 3 of this Count in the Complaint.

1. Defendant repeats its allegations in its an-

THIRD COUNT.

swers to paragraphs Nos. 1 and 2 of the First Count as its answer to paragraph No. 1 of this Third Count.

2. It denies the allegations in paragraph No. 2 of the Third Count.

3. It denies the facts alleged in paragraph No. 3 of the Third Count.

4. It denies the facts alleged in paragraph No. 4 of the Third Count.

FOURTH COUNT.

1. Defendant repeats its allegations to its answer to Paragraphs Nos. 1, 2 and 3 and 4 of the First Count and makes them its answer to paragraph No. 1 of this Fourth Count.

2. It denies the facts alleged in paragraphs Nos. 2 and 3 of the Fourth Count.

3. It denies the facts alleged in paragraph No. 4 of the Fourth Count.

FIFTH COUNT.

1. Defendant repeats its allegations to paragraphs Nos. 1, 2, 3, 4, of the First Count and makes them its answer to paragraph No. 1 of this Fifth Count.

2. It denies the facts alleged in paragraphs 2, 3 and 4 of this Fifth Count.

SIXTH COUNT.

1. Defendant repeats its allegations to paragraphs Nos. 1 and 2 of the First Count and makes the same its answer to paragraph No. 1 of this Sixth Count.

2. It denies the facts alleged in paragraphs 2 and 3 of the Sixth Count.

FIRST AND SEPARATE DEFENSE.

Defendant further answering the complaint filed herein says that:

1. The alleged agreement, copy of which is annexed to the complaint, is void and of no effect as against this defendant, because the same was not authorized by the Board of Directors of the defendant corporation.

SECOND AND SEPARATE DEFENSE.

Defendant further answering the complaint filed herein, says that

1. The alleged agreement copy of which is annexed to the complaint, is of no legal force and effect, because there was no consideration for the making of said alleged agreement.

THIRD AND SEPARATE DEFENSE.

Defendant further answering the complaint filed herein, says that

1. The alleged agreement, copy of which is annexed to the complaint, is void and of no effect as to this defendant because the execution thereof was induced by fraudulent representations of the agents of the plaintiff, who represented that the same was a commission agreement for the payment of commissions for procuring the lease described in Count No. 1 of the Complaint.

STEIN, McGLYNN & HANNOCH,
Attorneys of Defendant.

Reply.

Filed March 15, 1928.

The plaintiff, Fiedler Corporation, in reply to the answer of the defendant says that:

REPLY TO FIRST SEPARATE DEFENSE.

1. It denies the allegations of the First Separate Defense.

REPLY TO SECOND SEPARATE DEFENSE.

2. It denies the allegations of the Second Separate Defense.

REPLY TO THIRD SEPARATE DEFENSE.

3. It denies the allegations of the Third Separate Defense.

PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff.

Judgment.

This action, having been referred to the Honorable Newton H. Porter, Circuit Court Judge, by the Justice of the New Jersey Supreme Court holding the Essex Circuit, for trial, came on for trial before the Honorable Judge Porter and a jury on the 26th, 29th and 30th days of September, 1930, and the 1st day of October, 1930, and resulted in a verdict in favor of the plaintiff, Fiedler Corporation, a corporation, and against the defendant, Manufacturer's Developing Co., a corporation, for the sum of $14,744.22.

Whereupon it is adjudged that the plaintiff Fiedler Corporation, a corporation do recover of the said defendant Manufacturer's Developing Co., a corporation the sum of Fourteen thousand seven hundred forty-four dollars and twenty-two cents damages together with its costs which have been taxed at the sum of Sixty-eight dollars and twenty-two cents making in the whole the sum of Fourteen thousand eight hundred twelve dollars and forty-four cents.

$14,744.22
68.22

$14,812.44

Judgment signed and entered October 2, 1930.

WILLIAM S. GUMMERE,
C. J.

Clerk's Certificate.

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment and pleadings entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fifteenth day of December, A. D. nineteen hundred and thirty.

(Seal)

FRED L. BLOODGOOD,
Clerk.

Notice of Appeal.

NEW JERSEY SUPREME COURT.

FIEDLER CORPORATION, a corporation, Plaintiff, vs. MANUFACTURER'S DEVELOPMENT CO., a corporation, Defendant.	Action at Law. Notice of Appeal.

To: FIEDLER CORPORATION, a corporation, plaintiff, or PITNEY, HARDIN & SKINNER, its attorneys.

Take Notice that the defendant, Manufacturers Developing Co., a corporation, hereby appeals from the whole of the judgment of the New Jersey

Supreme Court entered in the above entitled matter, to the New Jersey Court of Errors and Appeals of last resort in all causes.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant.

Due service of a true copy of the within Notice of Appeal is hereby acknowledged this 27th day of October, 1930.

PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiff.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

FIEDLER CORPORATION, a corporation, Plaintiff-Appellee, vs. MANUFACTURER'S DEVELOPMENT CO., a corporation, Defendant-Appellant.	Action at Law. On Appeal. Grounds of Appeal.

The defendant-appellant hereby writes down the following grounds of appeal upon which a reversal of the judgment of the New Jersey Supreme Court in the above entitled matter will be urged:

1. The trial court permitted the witness Hartman to answer the following question:

> "In cases, such as I have just told you, where the parties are brought together and the lease is afterwards made, what is the custom of the real estate business in this Town and vicinity as to whether or not a commission shall be claimed and paid, if afterwards it turns out that the lease is actually made though nothing has been done to bring them together."

to which ruling of the trial court defendant prayed and was granted an exception.

2. The trial court permitted the witness Smailey to answer a series of questions regarding payments made by the defendant to one Hall, an officer of the Kolster Radio Company, to which line of questioning the defendant objected and prayed and was granted not only exceptions to individual

questions but a general exception to the court's ruling on the entire line of testimony.

3. The trial court refused to grant defendant's motion for a non-suit, to which ruling of the trial court defendant prayed and was granted an exception.

4. The trial court refused defendant's motion for the direction of a verdict in its favor, to which ruling of the trial court defendant prayed and was granted an exception.

5. The trial court charged the plaintiff's requests to charge numbers one, two, three, four, five, six and eight, to which portion of the Court's charge defendant prayed and was granted an exception.

6. The trial court made certain remarks after charging the plaintiff's requests to charge numbers one, two, three, four, five, six and eight, to which portion of the Court's charge to the jury defendant prayed and was granted an exception.

7. The trial court after charging defendant's request to charge number four made certain remarks in its charge to the jury with regard to said defendant's request to charge number four, to which portion of the charge of the trial court defendant prayed and was granted an exception.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant-Appellant.

Due service of a true copy of the within Grounds of Appeal is hereby acknowledged this 25th day of November, 1930.

PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiff-Appellee.

Notice of Argument.

NEW JERSEY COURT OF ERRORS AND APPEALS.

FIEDLER CORPORATION, a corporation, Plaintiff, vs. MANUFACTURER'S DEVELOPMENT Co., a corporation, Defendant.	Action at Law. On Appeal. Notice of Argument.

To: FIEDLER CORPORATION, a corporation, or PITNEY, HARDIN & SKINNER, its attorneys.

Take Notice that the argument on the appeal in the above entitled matter will be moved before said Court on the first Tuesday in February, 1931, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant.

Due service of a true copy of the within Notice of Argument is hereby acknowledged this 25th day of November, 1930.

PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiff.

Testimony.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

Friday, September 26, 1930.

FIEDLER CORPORATION, a corporation, Plaintiff, vs. MANUFACTURER'S DEVELOPMENT CO., a corporation, Defendant.	Action at Law.

Before—HON. NEWTON H. PORTER, *J.*, and a jury.

APPEARANCES:

For plaintiff appear PITNEY, HARDIN & SKINNER (by MR. SKINNER).

For defendant appear STEIN, MCGLYNN & HANNOCH (by MR. MCGLYNN).

(A jury is called and sworn.)

Mr. Skinner opens for plaintiff.

Mr. McGlynn opens for defendant.

DAVIS HOUSTON, sworn in behalf of plaintiff.

Direct-examination by Mr. Skinner:

Q. Mr. Houston, you are in the business of buying—acting as a broker in the selling and leasing of real estate, are you not? A. Yes, sir.

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

Q. How long have you been in this business? A. Interested twenty-one years.

Q. Are you connected with any company or firm? A. My firm was G. E. Bond & Company—

Q. Edgar E. Bond— A. After David Houston Bond & Company; now it is David Houston Corporation.

Q. Is there not an organization of real estate brokers and realtors in this city? A. New Jersey Real Estate Board.

Q. Are you connected with them? A. I am one of the governors of the Real Estate Board.

Q. How long have you been? A. Ever since it was.....1918, until to date.

Q. Then you are familiar with the usage and custom in the real estate business, leasing and selling business? A. Yes, sir.

Q. The business of leasing and selling real estate? A. Yes, sir.

Q. Then, as to the basis on which commissions are computed, in the case of leasing, and the ground of the computation? A. Yes, sir.

Q. As the result of this experience? A. Yes, sir.

Mr. McGlynn: I suppose, you mean in absence of written agreements?

Mr. Skinner: Oh, yes, in the absence of written agreements.

The Witness: Yes.

Q. Now, in the absence of a written agreement, what is the general custom in this community and neighborhood as to the amount of commissions that shall be paid, and the commission allowance on the rentals of property, if any, the commission that is

due the broker? A. Industrial property, I presume you mean.

Q. Yes. A. Industrial property is five per cent. of the gross rentals.

Q. For the gross rentals? A. For the gross rentals, for the entire period.

Q. Now, if there be in the lease a provision for a renewal for five years, that provides an option to renew for five years more, of the building, and that option is exercised, would there be any allowance of commission according to usual custom, to the broker, of the gross rental for the option period? A. According to our Real Estate Board rules, if there is an option in the lease, the broker is entitled to get the commission, if the option is exercised, for the period.

Q. Aside from the rules of the Real Estate Board, what has been the custom of the profession in that connection in the years past in this community? A. The practice is always to collect the commission for the option period.

Mr. Skinner: That is all.

Mr. McGlynn: No questions.

Mr. Skinner: (After discussion between counsel) It is agreed, and may appear upon the record, that the testimony upon this point need not be amplified, and there will be no dispute of what Mr. Houston has said.

Mr. McGlynn: Correct.

WILLIAM C. FIEDLER, sworn in behalf of the plaintiff.

Direct-examination by Mr. Skinner:

Q. Mr. Fiedler, you are a resident of this city, are you not? A. No, South Orange.

Q. Well, you were brought up here, were you not? A. Born in Newark; yes, sir.

Q. Have you carried on the business of real estate broker in this city for many years? A. Yes, sir; about thirty-six years.

Q. Are you now head of the Fiedler Corporation? A. Yes, sir.

Q. And is that the incorporated form of the business which you had before carried on? A. Yes, sir.

Q. Connected with that business, have you had, at various times, a staff of men, all working along different lines, under your directions? A. Yes, sir.

Q. Were Mr. Craig Vail and Mr. Howard Hartman, at one time associated with you? A. Yes, sir.

Q. Were they in the period between 1923 and May—June, 1927? A. Later than that.

Q. Later. Now, Mr. Fiedler, you have some slight difficulty in hearing, haven't you? A. Yes, sir; I cannot hear very well.

Q. So that you would want those that address you to raise their voices? A. Yes, sir.

Q. Are Mr. Hartman and Mr. Vail still associated with you? A. No, sir.

Q. Since when have they been apart and separated? A. Since when have they gone?

Q. Yes. A. Since May, 1929.

Q. Now, Mr. Fiedler, did you at any time have any contact—personal contact with Mr. Lefkowitz, the president of the Manufacturers Developing Company, with reference to a tract of land of that company down at Thomas Street? A. Yes, sir.

Q. When was that? A. I cannot recall the ex-

act time, but I think it was in late '23 or early in '24, about that time.

Q. What kind of a contact, by writing, telephone or conversation? A. No, Mr. Ross, the secretary of that company, whom I knew for many years, wanted me to meet Mr. Lefkowitz.

Q. How do you know he did? A. He told me so. I met him at a meeting of the Rotary Club and he said he wanted to discuss their real estate affairs with me, and he would like to bring the president of the company, Mr. Lefkowitz, to my office, which he subsequently did.

Q. Now, had you before that heard of their property and of any plans for circularizing or otherwise to open it up for industrial enterprises? A. I knew it was there.

Q. I mean, had you heard or seen circulars describing it? A. I had not.

Q. Mr. Lefkowitz, you say, called; was he alone? A. He came with Mr. Ross.

Q. Was there anything said there about those plans? A. Yes, we had a session which lasted two or three hours. I would like—may I go into the conversation?

Q. Yes. A. They referred to their property on Thomas Street, South Street, of having an area of twenty-one acres, that they were in the manufacturing business, that they wanted to do something with this property, that Mr. Ross had suggested that they see us with a view of having us interest ourselves in the development of this property, that they had a railroad siding, I think, at that time. The property was a little off, it was, I think, of the railroad. I was not so particularly keen about it at that time, but after analyzing it further, it looked to me as if it had great possibilities.

Q. Just keep telling us what took place at that meeting now. A. Well, the conversation was along the lines of developing it and we, after the conference or during the conference—

Q. Pardon me, not that the conversation was along the lines, but summarize the conversation as repeating it. A. Well, they wanted us to handle the property.

Q. Did they say so? A. To take charge of it to develop it.

Q. Yes. A. And we told them we would consider it, as we usually do—

Q. Yes. A. —in transactions like that, and that is all there was to that conference.

Q. Yes. Was there any discussion at all about the kind of development? A. Oh, yes, it was industrial property, to be developed along industrial lines.

Q. Did they say what they had on the property in the way of existing buildings? A. I think they did, although I do not recall the exact details of that.

Q. Was there anything said about the erection of new buildings? A. Well, that was a feature which we discussed that day; that was quite serious because it is not easy to finance industrial properties, and I wondered whether it would not be a terrific job to get manufacturers to that out of the way place, better known now, due, I think, to our efforts.

Mr. McGlynn: I ask that that be stricken out, your Honor.

The Court: Strike it out.

Mr. Skinner: Yes.

Mr. McGlynn: And the witness be in-

structed to stick to the conversation.

The Court: Yes, strike it out.

A. And the question of financing industrial property is not easy.

Q. Tell us what was said that day. A. Well, that was discussed, the question of financing it.

Q. What was said about that? A. Mr. Lefkowitz' suggestion—he could do that with the property, to make financial arrangements—

Q. Yes? A. So we had many conferences after that—

Q. Yes? A. —but that is about all that took place that day.

Q. Now you say you had many conferences after that; whom do you mean? A. In our office, and with Mr. Lefkowitz and Mr. Ross.

Q. Were there any more at which you were present? A. I beg pardon?

Q. Were there any more at which you were present? A. Oh, yes, I was present at most of the sessions that took place in my office.

Q. You said something was said about the difficulty of financing— A. Yes.

Q. A development of that kind. I want to ask whether the fact that there were no buildings—that buildings were to be erected, and tenants were to be procured for the buildings to be erected, or taking leases with you, and undertaking to run the buildings, whether that presented any special difficulty from the broker's point of view, from the getting of tenants.

Mr. McGlynn: I object. I do not see any relevancy.

The Court: I think it is competent, with respect to what the arrangement was, what

the conversations were, with respect to rentals. You may answer.

A. The question of financing—

Q. I am not talking about financing. A. The question of financing and developing the property was discussed at subsequent meetings.

Q. I asked you whether, when this was presented to you, it presented to your mind any special difficulty from the broker's point of view. A. No doubt about it.

Q. What was the difficulty? A. The difficulty was this—

Mr. McGlynn: I object.

The Court: Objection sustained. The question is whether that was discussed. I allowed it in that form.

A. It certainly was discussed.

The Court: He says it was discussed; that is the answer.

Mr. Skinner: But I thought he was going to say it was discussed at later meetings.

The Court: At the first meeting, was it discussed, Mr. Fiedler?

Witness: Yes, sir.

Q. What was said? A. Well, the difficulty of finding a tenant for a building to be erected involving the delays incumbent upon examination of plans, preparation of plans, makes it very difficult for a real estate man to handle and that was one of the great questions discussed at all our meetings, and that was discussed too. Ordinarily in real estate transactions a man has a building and all that is necessary is to bring the two forces to-

gether and the deal is done. In this transaction many other elements were involved, also the question of getting the key tenant to that place was considered and discussed.

Q. What do you mean by the key tenant? A. A tenant that would be strong enough to attract other tenants and a tenant that was to expand, that would need more space. We had twenty-one acres there, a big plot of ground, which made it so a tenant that would need twenty or thirty or forty thousand feet would not go very far, and the question of further expansion was discussed, whether they would be in the position to finance that, and they said that they would.

Q. Have you told practically all of what was said, of the conversation, and what was said at that meeting? A. That is about it, yes.

Q. You said there were other conferences. Was there any subsequent discussion of these same things, the difficulty of financing, the difficulty of getting tenants, under those circumstances, at the time of getting a key tenant, those various things; did they come up again in further discussions at all? A. All of the time the question of financing was discussed.

Q. You said you told them you would consider it; do you mean that there was no decision reached at that meeting? A. No definite arrangement made, no.

Q. What was the next that was done? A. The next—after that conference, we discussed it with our office; we had many meetings as to the best method to approach this thing; as we went into it more deeply the possibilities began to present themselves more and more.

Q. You say you discussed it with the office; what

do you mean by that? A. With my office staff, among whom was Mr. Hartman, who was the vice-president in charge of salesmen; Mr. Vail was the head of the industrial development, and we always considered it together.

Q. Had you conferences further about this same matter? A. Yes, sir; many conferences.

Q. Was there any arrangement—you said you would consider it, that you would undertake it? I think you stated at the first meeting, two or three propositions that you would consider. A. Yes.

Q. Did you say you would consider it? A. Yes.

Q. As a result of your considerations what, if anything, did you do with reference to it? A. Then we had another conference with Mr. Ross and Mr. Lefkowitz; I told them we were ready to tackle the job; that it was—

Q. Where was that? A. At my office.

Q. And you were present? A. Yes, sir.

Q. Now, was there anything said about a commission? A. Certainly.

Q. Well, when and where; what was said? A. We told them that if we went to work on this matter it would require a great deal of planning, service of the staff, not only to get tenants, but to get the right tenants. The kind of tenants that would help the property and who would grow, so that they would use more and more space. We went into that matter thoroughly.

Q. What did you state to them about the commission? A. The commission, five per cent. on the lease entered into, five per cent. on subsequent renewals or extensions, or deals made with successors or assigns of the original concern.

Q. You told them that; was there anything said

by them at all with reference to it? A. Very satisfactory to them.

Q. You mean they said that? A. Yes, sir.

Q. Was that at that time reduced to any writing? A. I do not think it was.

Q. All right; later, did you have any personal knowledge of the—

Mr. Skinner: I will withdraw that.

Q. At that time, had you had any contact with or business relations with the Brandes Products Company? A. No, as to that point the matter was referred to Mr. Hartman and Mr. Vail; I did not have any part in the actual negotiations.

Q. No, I am not asking you about negotiations, but I mean had you before that time had any connections with the Brandes Corporation or the Kolster Radio Company or the Federal Telegraph Company, with reference to other property? A. Oh, we brought them to Newark and sold them a property on Mt. Pleasant Avenue, I think, for $240,000; I do not remember the price.

Q. At the time you had this conversation—that was the first conversation with Mr. Lefkowitz and Mr. Ross—were the Brandes Products Company in that plant at Mt. Pleasant Avenue that you have mentioned? A. Yes, they not only were in there but they had grown so fast that they had to build another building equally as large.

Q. There? A. There, at the same location.

Q. Now, did you at this conference, hear of any, or know anything at all of any work done toward procuring tenants for the Manufacturers Developing Company, or did you just turn that over to others and leave it to them? A. I certainly did.

Q. Did what? A. Mr. Vail devoted the major portion of his time—

Mr. McGlynn: I object; the witness was asked, personal knowledge.

The Court: Yes, only what you personally know, not what they told you.

A. I was the head of the concern; I knew what they were doing.

The Court: You may have been the head and not know what they were doing at times.

Witness: I think I did.

Q. What I mean, Mr. Fiedler, did you have any personal knowledge, or did you just turn it over to others, and know nothing about what they were doing? A. We had meetings almost daily, as we have today, on other matters, every morning.

Q. Were you present? A. Of course, many times.

Q. I am talking about those meetings. A. And we would start from there—

Q. I am talking about those meetings, were you present? A. Yes, sir.

Q. What do you know about anything that was being done?

Mr. McGlynn: I object to any statement by his men, at his office.

The Court: Objection sustained.

Q. I am asking you, Mr. Fiedler, and I do not think Mr. McGlynn objects, I am asking you not about meetings generally, but about meetings with reference to this particular business of finding tenants for that property.

Mr. McGlynn: I object to that.

The Court: I sustain that.

Q. I am asking you what personal knowledge you had, if any, of any efforts that were being made by your staff, and I do not ask you to tell what that knowledge was; I asked you if you kept in touch, in any way, or had any method of keeping in contact with what they were doing. Just tell me that. A. Yes, sir.

Q. What was the method? A. Conferences almost daily.

Q. Well, conferences on that or on any other— A. On that particular matter.

Q. Is that right? A. Yes, sir.

Q. Any other method of keeping in touch with it? A. Well, there was correspondence which I would look over from time to time.

Q. At that time, to what extent were you in personal contact with the business of the Fiedler Corporation? A. I was paying the salaries at the end of the week.

Q. No, no; I am not asking you what they were doing. To what extent were you giving your own time? A. I was there every day; I had twenty salesmen and they kept me pretty busy, probably fifty or a hundred transactions on in the office all of the time.

Q. But you were there every day? A. Yes, every day, except days that I was not there, but mostly every day (laughing).

Q. I show you a letter dated May 21, 1926, signed Manufacturers Developing Company, E. E. Ross—

Mr. Skinner: There is no objection to its being received in evidence.

The Court: Let it be marked.
(Marked P-1, in evidence.)

Q. This letter, Mr. Fiedler, says, in compliance with your request, we are enclosing circulars showing pictures of the Thomas Street building recently leased through your office, dated May 21, 1926; do you remember receiving the circulars personally? A. I do not think so.

Mr. Skinner: All right, that is all.

Q. You spoke of the Brandes business as expanding; did you discuss that expansion at all with Mr. Lefkowitz or Mr. Ross? A. When we were negotiating with that concern?

Q. Yes. A. Of course, yes.

Cross-examination by Mr. McGlynn:

Q. Why the "of course"? A. The most logical thing in the world, we brought them to Newark; they had grown so fast it was the type of a tenant to bring there.

Q. You have no personal recollection of having discussed the Brandes Company with them the day they were in your office, have you? That is why you say, of course? A. The day who was in my office?

Q. Why, Ross and Lefkowitz. A. I thought you were talking about Mr. Vail and Mr. Hartman.

Q. Answer my question. A. Yes.

Q. You have personal recollection of having discussed Brandes with Ross and Lefkowitz the first time they were in your office? A. No, sir; I did not say that.

Q. That is what I asked you; that was why you

said "of course", because you say it would have been the logical thing to have done. A. That was not the question Judge Skinner asked me, whether it was the first time, I told you we did not discuss the clients the first day; we discussed the policy of conducting the business.

Q. All right. Now, the second time they were in your office did you discuss Brandes with them? A. I don't know whether it was the second or tenth time, but we did discuss them.

Q. You are sure of that? A. Absolutely.

Q. So that as far as going out and digging up a tenant so hard, there was absolutely no extra effort on the part of your organization to have the tenant right there when you were there? A. Not at all.

Q. That is the tenant you finally procured, isn't it? A. It took a great deal of effort to get the Brandes to go down there.

Q. Well, that is the tenant yon finally procured, isn't it? A. We are proud of it.

Q. Please, Mr. Fiedler, answer my question. A. Yes.

Q. And that is the tenant that you discussed with these gentlemen in the course of your preliminary negotiations, the same tenant? A. I won't say preliminary, in the course of our conferences.

Q. All right. Take your word. In the course of your conferences. A. (No answer.)

Q. Now, do you consider that the arrangement you made after this first conference with Ross and Lefkowitz is the agreement on which your concern is endeavoring to recover now?

Mr. Skinner: I object.

The Court: Objection sustained. What difference does it make?

(Followed by discussion.)

Q. You testified a few minutes ago on your direct examination that after some conferences with Ross and Lefkowitz, you stated that you would tackle the job, and upon your counsel asking you whether anything was said about commission, you said certainly. I am not positive of the word, but I understood your answer to be that you told these gentlemen that your commission agreement would be five per cent. on all leases entered into, five per cent, on all subsequent renewals and extensions, deals made with successors and assigns of the original tenant— A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Is that substantially what you said? A. Yes, sir.

Q. Now, is your firm, of which you are president, endeavoring to recover on that agreement in this suit?

Mr. Skinner: Same objection.

The Court: I will allow that.

A. That and subsequent agreements.

Q. How many agreements did you have? A. We had an oral agreement and we had a written agreement.

Q. Is this the oral agreement that you mean? A. Yes, sir.

Q. So that there were only two? A. We discussed the question of commission many times.

Q. How many agreements were there? A. Two distinct agreements.

Q. When was this oral agreement made? A. I cannot recall the date.

Q. Well, give me the year. A. I think it was in '24.

Q. In 1924? A. I think so; I am not sure about that.

Q. Might have been '25? A. It was at the time, within two or three months of the time that they came to my office first; I don't know just when that was; we had kept no record of that.

Q. You mean to say that this important conference, culminating in this oral agreement, that your entire organization was going to tackle the business, to bring the tenants, no record was made of the—of this particular transaction? A. Not on this oral one, I do not think so.

Q. What about the culminating conference, that resulted in this oral agreement, no record made of that either? A. I do not think so.

Q. Wasn't it a rather unusual transaction, involving such an enormous proposition? A. No.

Q. Do you have any form of listing in your offices, in which you list properties such as this? A. Yes, sir.

Q. Have you those records with you? A. No, sir.

Q. Do you know whether or not those records or listings show when you first listed the property of this defendant corporation, or any portion of it? A. Sometimes; we are not very fussy about that.

Q. Well, do you know whether your records show any listing of their property? A. I cannot tell you now—

Q. Who would know? A. —I would have to consult my files.

Q. How are those listings kept? A. Well, for thirty years I have tried to keep them, but have not succeeded very well yet.

Q. What are they, cards? A. Cards, sheets; sometimes only correspondence.

Q. Let me ask, Mr. Fiedler, just what you were supposed to do for this five per cent. on all leases entered into, five per cent. on all renewals, extensions, et cetera? A. What we were supposed to do?

Q. Yes, what you were supposed to do for all of that money.

Mr. Skinner: I object to the question.

Mr. McGlynn: Strike out the last part.

Q. What were you supposed to do for that commission?

Mr. Skinner: I object.

A. (Interrupting objection) I think we have demonstrated what we have done.

The Court: What did you agree to do?

Q. What did you agree to do? A. We agreed to find tenants.

Q. That is all? A. That is quite enough.

Q. What about this financing proposition? You were not to have anything to do with that, were you? A. No.

Q. You did not have anything to do with it? A. No.

Q. The only thing your— A. We were ready to cooperate in it, but we were never called upon.

Q. The only thing your organization, or you on behalf of your organization, agreed to do, and all that you actually did do, was to endeavor to get tenants for this particular piece of property? A. That is all.

Q. That is no different than you do in any case, is it? A. Quite.

Q. What? A. Quite.

Q. How so? A. I tried to tell that before, that to sell an ordinary piece of property that is already in existence, is quite a different proposition from bringing a tenant to a piece of raw material and noticing that raw material, and then, through our influence, getting that tenant to take an undeveloped proposition, that is quite a job, Mr. McGlynn.

Q. But you did not have to go out and find this tenant; you had this tenant in your office, didn't you? A. Oh, but we had to sell him the idea.

Q. Oh, you had to sell him the idea? A. Yes.

Q. Do you know when they built this extension on their original property that you discussed here upon Mt. Pleasant Avenue? A. Yes, when?

Q. The dates? A. No.

Q. You are sure it was before this conference with Ross and Lefkowitz, to get your organization to tackle this job? A. Oh, sure.

Q. You knew, of your own knowledge, that other real estate agents in Newark had this property listed, didn't you? A. I do not think they had, after we tackled it.

Q. You knew they had, didn't you? A. No, I did not.

Q. Did you receive, from time to time, circulars from the Manufacturers Developing Company, showing what they were doing with reference to advertising this tract, bringing it to the attention of manufacturers and real estate people? A. I do not remember of having received any.

Q. You do not know whether these subordinates of yours did or not? A. Maybe they did; I cannot answer for them.

Q. But you are fairly sure now that either in 1924, I think you said, or 1925, this preliminary

conference or conferences, with Ross and Lefkowitz, concluded in this interview in which you said your organization would tackle the job? A. Yes, sir.

Q. And commissions were discussed? A. Yes, sir.

Q. Did you say they said they would actually pay this commission, or what did you say? A. Why, they were very anxious for us to go to work.

Q. What was the talk about paying commissions? A. They said they would pay; we would not have started, if they had not said it.

Q. I show you copy of a letter, dated September 22, 1925,—

Mr. McGlynn: We have waived the notice to produce, your Honor.

Q. (Continuing) This is the carbon copy, Mr. Fiedler, of letter supposed to have been written to you by Mr. Ross. Will you look at it, and see if you recall having seen it? A. I do not recall having seen it.

Mr. Skinner: This is a carbon copy of an original that is said to have been received by us. We have looked for the original without finding it, but we have no objection to the carbon copy.

The Court: Very well.

(The same is received in evidence and marked Exhibit D-1.)

Q. You have no personal recollection, Mr. Fiedler of the fact that the Manufacturers Developing Company brought to your attention the fact that on September 22, 1925, they were erecting on Thomas Street a new building which would be

available for rent? A. I have no recollection of it.

Q. Pardon me? A. I have no recollection of it.

Q. Did you notice the last sentence of that letter that I have shown to you, please list both of these properties, and get in touch with us at once, if you have any present prospects? A. I did not pay any attention to it when I read it, but if you say it is there, I think it is Okay.

Q. That is what I want you to do; this is quite important. Yes, sir (examining paper) Okay.

Mr. Skinner: Make up your own opinion of its importance.

Q. You do not recall that sentence in that letter? A. I do not recall the letter, of having received the letter.

Q. The letter being addressed to you personally, do you suppose you did, if you did receive it? A. Probably never reached me.

Q. Addressed to Mr. William Fiedler, addressed Dear Bill. A. Not always; in a lot of correspondence—

Q. Even if it is addressed to Dear Bill? A. It depends upon what the invitation is.

Q. This is a business invitation, isn't it? A. Well, that is good enough.

Q. Doesn't that come to you, usually? A. Not always.

Q. Do you know whether or not those two properties were listed, after September, 1925, on your records? A. I do not know.

Q. Do you know whether that one of them is, the one that you actually leased to Brandes? A. I am not actually sure of that, no.

Q. You had nothing to do with the kind of a

building that the manufacturers built on Thomas Street, described in this letter, and eventually leased to the Brandes Products Company, had you? A. I had nothing to do with the actual negotiations.

Q. Did you have anything to do with the type or kind or size of a building which this defendant corporation erected in 1925 on this property? A. No, sir.

Q. So that the element of getting a building to suit some particular key tenant you had in mind did not influence them in the erection of this building, did it? Wasn't even discussed by them with you, was it? A. I do not get that question.

Q. I say, the kind of building, or the type of building, that this concern erected on their property, which is a portion of the property we have been discussing, was not discussed with you before it was erected, so as to meet the demands of any particular tenant you had in mind? A. I presume it was; I am not sure of that.

Q. You presume— A. Yes.

Q. —but you have not any personal knowledge of any such discussion? A. Not exactly, no.

Q. These two men that you mentioned, Hartman and Vail, did they have a personal interest in the commission received by your company from any leases on this property? A. Mr. Vail did.

Q. Mr. Vail did? A. Yes.

Q. Mr. Hartman did not? A. Mr. Hartman was a member of the firm.

Q. Why did Mr. Vail leave your employ?

Mr. Skinner: I object.

The Court: Objection sustained.

A. Very pleasantly.

The Court: No, I ruled it out.

Q. Now, can you tell me, Mr. Fiedler, what your company did in this particular case, in reference to this particular property, that you did not do with reference to any other property listed by you, industrial property for sale, or for lease? A. I presume that we have several thousand of properties that are listed; this was entirely a different kind of a job.

Q. All right. I have heard that explanation of yours three or four times. I want to know what specific thing you can tell me your organization did with reference to this property that it did not do with any of those other pieces of industrial properties that you have listed. A. Well, we discussed it almost daily in our office, decided on the policy; that is the first thing we did; and then my sales force went out and contacted perhaps dozens and dozens of concerns that they thought that they might interest.

Q. Weren't you contacting with dozens and dozens of other organizations with reference to other industrial sites? A. Yes.

Q. Weren't you discussing at these daily conferences other properties besides this? A. Not on each day, no.

Q. This was the only property? A. This was one of the key tracts in our office.

Q. How long did your conferences last in your office? How long did those conferences take? A. Until we discovered that we had been thrown out in the street.

Q. When was that? A. I do not remember the date.

Q. Had you any personal knowledge of the ef-

forts being made by members of your organization to carry out this job which you had taken on for this defendant corporation? A. What is the question?

Mr. McGlynn: I will withdraw it.

Q. Do you know personally—

Mr. McGlynn: No, withdraw that.

Q. You considered the Brandes Products Corporation as a key tenant, that you have described in your direct testimony? A. Yes, sir.

Q. Do you know personally that members of your organization, after your taking on of this job, and before the execution of the lease of 1927, for the Brandes Products, took the Brandes Products officials to other sites, for the purpose of leasing and sales? A. Yes, sir.

Redirect-examination by Mr. Skinner:

Q. Mr. Fiedler, you said you had difficulty in selling this proposition to the Brandes Company although they were already in your office. What do you mean by that, what do you refer to? A. They owned their own property on Mt. Pleasant Avenue.

Q. They offered it— A. They owned different property on Mt. Pleasant Avenue, which had cost them up to that time, maybe half a million dollars, and it was quite a decided step for them to move to an entirely new section, and of course the question also came up as to whether they should rent or whether they should go somewhere and buy. They had a big expansion program, and they did not know just exactly how big they would grow.

It did subsequently grow to very large proportions.

Q. You were asked this question, if you had personal knowledge of the fact that your salesmen offered other properties to the Brandes Company. A. Yes, sir.

Q. And I think— What was your answer? A. I said yes.

Q. Have you any personal knowledge of why that was done? A. Yes, sir.

Q. Why? A. That is fundamental in our business.

Mr. McGlynn: Now, if your Honor please, it does not seem to me that is the answer to that question.

The Court: No, what is the reason they offered other pieces, is the question.

A. Why, Brandes wanted to see other things.

Q. Yes. A. It was our duty, as a broker, to show them other properties, but always with the idea of bringing them back to this particular piece of property, and show them the superiority of a new building over an old building somewhere else.

Q. Yes. Whose broker were you in connection with the leasing of the Brandes tract? A. I was the broker of the Manufacturers Developing Company.

Q. Did you call the Manufacturers Developing Company's attention to the fact that Brandes were in the market for additional space? A. Personally, I do not remember that I did.

Q. Do you remember whether your organization had? A. I do not know.

Recross-examination by Mr. McGlynn:

Q. You say it was rather a difficult job to get the Brandes people to take this particular lease, because they would have to move; they did not move from the Mt. Pleasant Avenue property, did they? A. Entirely, no.

Q. Did they at all? A. No, they are still there.

Q. They did not have any railroad siding on Mt. Pleasant Avenue, did they? A. No, sir.

Q. They did have one down below, on Thomas Street? A. Yes, sir.

Q. You had no difficulty in selling them that idea, had you? Did you have any? A. I do not think we did.

Mr. McGlynn: That is all.

Redirect-examination by Mr. Skinner:

Q. Did you have any personal knowledge as to whether, after they went down there, whether they did have any difficulty with the use of the siding? A. Not personally, no.

The Court: Mr. Fiedler, the first conversation that was held between Mr. Lefkowitz and Mr. Ross and yourself, was anyone else present at that time?

The Witness: I do not think so.

The Court: All right.

The Witness: I am not sure; I think we called in Mr. Hartman and Mr. Vail later; I do not remember.

The Court: All right.

Recross-examination by Mr. McGlynn:

Q. How long was this agreement to last that you made, this oral agreement. A. Well, we thought indefinitely, until we had completed the job.

Mr. Skinner: That is all.

FREDERICK J. HARTMAN, sworn.

Direct-examination by Mr. Skinner:

Q. Mr. Hartman, you have been in the real estate business for some years, I mean as a broker? A. Yes.

Q. And were, for sometimes, connected with the Fiedler Corporation? A. Yes.

Q. For how long? A. About eleven years.

Q. In what capacity? A. As Vice President, in charge of sales, Mr. Fiedler's personnel assistant.

Q. Mr. Fiedler's what? A. Mr. Fiedler's personnel assistant.

Q. You are no longer connected with the company? A. I am not.

Q. Since when? A. Early 1929, April or May.

Q. Now, in your work there, in that office, did you have any personal knowledge of the work being done in the obtaining of tenants for the Manufacturing Development Company, at Thomas Street and South Street? A. Considerably.

Q. How did that come to you? A. Through Mr. Fiedler, at his telling us that we were to make a special effort, on the Manufacturers Developing Company property.

Mr. McGlynn: I ask that that be stricken out.

The Court: Strike it out, not the conversation.

The Witness: What was the question?

Q. I asked you, Mr. Hartman, about how it came to you, not how he came, but how it came. A. From Mr. Fiedler to me.

Q. Was anybody else present? A. When Mr. Fiedler first talked to me about it, it possibly may have been; I have no recollection that there was.

Q. All right. Did you get any instructions at all from Mr. Fiedler as to what should be done in connection with that matter? Did you get any? Yes or no. A. Yes.

Q. What were they? A. Instructions to concentrate, to try and secure tenants.

Q. Do you know of any talks or conferences where others were present besides Mr. Fiedler and yourself as to the obtaining of tenants for this property, when it was discussed? A. Conferences with whom, Judge?

Q. Conferences between Mr. Fiedler and yourself and anybody else, where was this discussion, the discussion of this subject, the subject of obtaining of tenants for this property? A. Why, I have recollection that he may have been in one or two of those conferences with Mr. Lefkowitz, but at no length.

Q. No, I mean office conferences. A. Oh, yes, with the office, I had considerable conferences.

Q. You were present at such conferences? A. All of the time.

Q. Well, now, having received these instructions from Mr. Fiedler, what, if anything, did you do about it? A. I called together my industrial department, sales department, it consisted, at that

time, of three men, Mr. Vail, Mr. Haggerty and a man now deceased, by the name of Hardwig.

Q. You called them into your office together, did you?

Mr. McGlynn: I object to what he told them.

The Court: Yes, I think that is not important, except for him to say, in a general way, that he instructed them to go and concentrate on that job.

Mr. Skinner: That is all I had in mind.

The Witness: That was done.

Q. You carried out the instructions that you got from Mr. Fiedler, is that it? A. That is right.

Q. After that, did you have any more knowledge of it, by way of a report from those different men, or otherwise? A. Yes.

Q. Did you, yes or no? A. Yes.

Q. From whom did you get reports? A. I got reports from all of the three men.

Q. On this matter, I mean. A. On this matter?

Q. Yes. A. And I personally was in contact with our salesmen, with several of the prospects. When I say personal contact, I went out with those men and called on those various prospects.

Q. Now, at the time that you had those instructions from Mr. Fiedler—by the way, do you remember when that was, Mr. Hartman? A. It was sometime in 1924 or early '25, I believe; I have no diaries, I have no records, just my recollection.

Q. At that time, did you know anything about the Manufacturers Developing Company, I mean, before Mr. Fiedler spoke to you about it? A. Not very much, no.

Q. Well, following that, did you make inquiries

about their property, get any information as to its extent, character, et cetera? A. Why, when Mr. Fiedler spoke to me about it, we got a description of it, with the general lay-out.

Q. Yes. Now at that time did you know anything about the Brandes Products Company? A. Considerable.

Q. What did they—what business were they engaged in? A. Manufacturing radio equipment.

Q. Well, had they any connection with the Federal Telegraph Company? A. Of what time are you speaking?

Q. Back in 1924, 1925. A. When they originally came to Newark they had none, that is that I was cognizant of; they were then making practically only ear sets.

Q. Later however— A. Later they embarked in the manufacture of radio sets.

Q. What has that got to do with the Federal Telegraph? A. Except that from my knowledge, that the Federal Telegraph Company was interested in helping to capitalize a larger company, but I have no direct knowledge of that.

Q. Did you know of any relations between the Brandes Products Corporation and the Federal Telegraph Company and the Kolster Radio Company? A. As it subsequently developed there was a man by the name of Spreckles, whom I understood was one of the officers of the Federal Telegraph Company, a man of considerable wealth, who had been interested in the company, created a much larger unit than they had before.

Q. What did you mean, Mr. Hartman? A. Why, they seemed to be one.

Q. What do you mean, they seemed to be one? A. Anyway, it was the same, the president of the

Brandes Company, and he left the Federal Company, and it was a part of the office.

Q. Well, when you talked—did you talk with Mr. Dietrich of the Brandes Company about the premises of the Manufacturers Developing Company? A. Yes.

Q. And about the advisability of the Brandes Company leasing down there? A. That originally was done by Mr. Vail.

Q. Did you have anything to do with it at all? A. Subsequently, yes.

Q. Now, in those talks that you had with him, did he talk about leasing it for the Brandes Company or the Federal Telegraph Company or the Koister? A. There was no direct reference to which company was going to take it.

Q. How do you know there was not? A. I have no recollection that there was.

Q. Have you any recollection as to which company he was speaking of? A. I assumed that it was the Brandes Company.

Q. Did you hear anything to the contrary from him? A. None.

Q. Well, while receiving any of the salesmen's reports, from them, did you at any time after that, have any personal knowledge, by your own direct contact with the interested parties, of the making of a lease to the Brandes Company? A. Yes.

Q. I see; personal knowledge? A. Yes.

Q. How did you get that? Not what was it, but how did you get it? A. By making personal contacts with the Brandes Company with our Mr. Vail.

Q. By contacts, do you mean calling upon them? A. Calling upon them.

Q. Whom did you call on? A. Mr. Dietrich, the vice president, Mr. , vice president.

Q. Did you have any talk with Mr. Dietrich or with anybody connected with the Brandes Company about a lease of 350 Thomas Street? A. I would not recollect it by numbers, Judge.

Q. Well, with a building in the rear, to be erected? A. No.

Q. Did you have—I do not ask you, again, what it was,—but did you have any information of a lease about to be executed around the middle of June, 1926? A. Yes.

Q. And from whom did you get it? A. Mr. Vail.

Q. Some report that he had made to you? A. Oral and written.

Q. And preceding that, had you had any contact with Mr. Dietrich or anyone else connected with the Brandes Company, on the subject matter that he reported to you? A. Yes.

Q. Tell us about that.

Mr. McGlynn: Now, if your Honor please, I do not see how a conversation with a prospective tenant has any bearing on the defendant.

The Court: This is the talk with reference to the lease that commissions have been paid on, is it not?

The Witness: Yes.

The Court: I do not think it is so much with respect to the conversations, or with respect to the lease, as it is with respect to something else.

Mr. Skinner: If your Honor please, of course, as to the hearsay part of it, I am attempting to prove the actual services rendered by conversations had between repre-

sentatives of the Fiedler people with prospective tenants to procure tenants.

The Court: (After discussion) I will allow it.

Mr. McGlynn: I ask for an exception.

The Court: You may have an exception.

Mr. Skinner: Will you read the question?

Q. (Question repeated by stenographer) A. Why, sure, I received a telephone call from Mr. Dietrich.

Q. Pardon me just a minute. I want to shorten it, if we can. I think perhaps that there is something in this letter that has been received as an exhibit, and in the condition of the pleadings, which should make it unnecessary for me to.

Mr. McGlynn: There is no point. The Fiedler Corporation was the broker, agent on the first lease; there is no use of wasting a minute on that, I will give you a copy of the letter.

Mr. Skinner: The only thing I want to prove, perhaps it is not necessary for me to do it, is that in accomplishing that lease, that after the broker, the agent, they expended a lot of time on it.

The Court: I do not know whether it is very material, whether they did or not.

Q. I show you now a paper which has been referred to before as an agreement for commissions, and ask you if you have seen that paper before. A. Yes.

Mr. Skinner: I ask that it be marked for identification.

The Court: Let it be marked.

(The same is marked Exhibit P-2 for identification.)

Q. Now, when did you first see this paper, or have any knowledge of it, the paper marked Exhibit P-2 for identification? A. Sometime in May or June, 1926.

Q. In what—how did you come to see it? A. I had it prepared.

Q. You had it prepared? A. I did.

Q. Where did you have it prepared? A. In the office of the Fiedler Corporation.

Q. By typing? A. By a typist.

Q. Who dictated it? A. I did.

Q. After that had been typed, what did you do with it? A. Turned it over to Mr. Vail.

Q. Why to Mr. Vail? A. Because he was closing the transaction that day with the Brandes Company and the Manufacturers Developing Company.

Q. What transaction? A. The leasing of three hundred—I forget the number—Thomas Street.

The Court: When did you say you saw it May of what year?

The Witness: 1926, May or June of 1926; I haven't got the month clearly in my mind.

The Court: All right.

Q. You say he was closing—did you describe it as a lease? A. A lease, yes.

Q. I show you a paper, which begins with this, agreement made this 16th day of June—purporting to be a lease—

Mr. Skinner: And is it admitted to be the lease.

Mr. McGlynn: (No response.)

Mr. Skinner: And I now offer it in evidence; it is received without objection.

The Court: Very well.

(The same is received in evidence and marked Exhibit P-3.)

Q. Now, I show you Exhibit P-3, which is a lease from the Manufacturers Developing Company to the Brandes Products Company, known as 350 Thomas Street, and it is with the further provision that the lessor will cause to be erected a building in the rear part of the leased premises, and ask you if that is the transaction which you have just referred to that Mr. Vail was about to close. A. That is the transaction.

Q. Yes? A. Whether that is the lease or not, I do not know.

Q. Well, now you gave this, you say, to Mr. Vail, this P-3 for identification; did you give him any instructions about it? A. Yes.

Q. What? A. To have it signed.

Mr. McGlynn: I object to what instructions he gave Mr. Vail.

The Court: Mr. Vail is here, isn't he?

The Witness: Yes, sir.

The Court: I will allow it to stand; I have no doubt he will tell that.

Mr. McGlynn: May I have an exception?

The Court: You may have an exception. You gave it to Mr. Vail with instructions to have it signed?

The Witness: Yes.

Q. Did you see it again after you had given it to him? A. Yes.

Q. When? A. The same day.

Q. What time in the day? A. Later on, in the afternoon.

Q. Thereafter what became of it? A. It was filed in our files and I don't know what became of it.

The Court: When you saw it later in the afternoon, was it then executed?

The Witness: It was, your Honor.

The Court: When was that with reference to the execution of the lease, if you know?

The Witness: I assume that it was the same day.

Q. What made you assume it? A. Because Mr. Vail reported that he had it signed when the lease was signed.

Mr. McGlynn: I object, if the Court please.

The Court: Strike it out.

Q. What were your instructions to Mr. Vail with reference to this work, on this Manufacturers Developing Company property?

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

The Court: I think he has already stated, as far as it should be permitted to be stated with respect to that.

Q. Well, the 16th of June, 1926, when this commission agreement, when this lease is supposed to have been made, do you know of any effort on tenants or efforts, on the part of the Fiedler Corporation, or anybody connected with it, to bring the

Brandes people and the Manufacturers Developing Company into a further lease? A. Yes.

Q. What do you know about that. A. Why, right after this lease was consummated Mr. Vail carried on negotiations for further space with the Brandes Company. In other words, they had a development program which was uncertain; their business was growing in such leaps and bounds that they did not know from one day to another whether they were going to use 50,000 or 100,000 square feet.

Q. How do you know that? A. Because I knew from Mr. Dietrich they are in the type of business which was growing, which we originally brought them to Newark—

Q. All right; go on. A. Then, after he got started in this subsequent conference, Mr. Vail told me one day—

The Court: No, not what Mr. Vail told you.

Q. By reason of what Mr. Vail told you did you do anything? A. Yes, called on Mr. Dietrich.

Q. With reference to what? A. With reference to his having plans and specifications prepared and discussion of this additional unit on the Manufacturers Development Company property.

Q. Was that more than once? A. I personally was at two of those conferences, as far as I can recollect.

Q. That, you say, was subsequent to June, 1926? A. Oh, yes.

Q. Do you know about what time? A. Why, I should say, along towards September and October, of 1926, towards, the fall of the year.

Q. Have you any way of fixing it more accurate-

ly? A. No other way, but our negotiations did not cease at this execution of the lease, as our contact with the Brandes Company kept on, and during the summer months there was a little lull; that is the reason I fix it as the early fall of 1926, to the best of my recollection.

Q. Did you at any time after that, did you hear —not what you heard,—but did you hear of any further lease that had been made between the Manufacturers Developing Company and Brandes Company, of additional space? A. Yes.

Q. Did you call upon the Brandes Company, in that connection? A. Personally, I do not recall that I did.

Q. Did you call upon Mr. Dietrich? A. I have no recollection that I personally did.

Q. Now, did you, during the time that you had this acquaintance with what the Brandes people wanted, what Mr. Vail was doing, did you have personal knowledge of any other properties being offered to the Brandes people by Mr. Vail? A. Yes.

Q. Personal knowledge, other than by reports from Mr. Vail? A. Well, not excepting from the reports, no.

Q. Was there anything unusual about that? A. No.

Q. Why not? A. Well, you mean, as a general procedure, Judge?

Q. Yes, offers to the Brandes Company. A. Oh, no, general procedure, you show a man everything you might think would fit his needs.

Q. At any time, did you talk with the Brandes people along the line of overcoming any objections they had toward extending down at the Manufacturers Developing Company place? A. I did.

Q. Why? A. Mr. Dietrich remarked that they were getting very unsatisfactory service from the Pennsylvania Railroad, with the switching conditions; I said, I couldn't understand, he should have no difficulty with the railroad, trying to attract other tenants—

Mr. McGlynn: Your Honor please, I fail to see the materiality of that to this suit.

The Court: I do not know what it is, except it may have been that it caused the renewal of the lease, or something of that sort.

Mr. McGlynn: I cannot see how the conversation between the employee of the broker and the prospective tenant would have any materiality to this.

Mr. Skinner: We are going to show that there was a continuance, by this Fielder Company, of their efforts to obtain a lease from the Brandes people, and I cannot put it all in at once.

Mr. McGlynn: All of that, we have no objection to, but conversation about the railroad.

The Court: All right.

Mr. Skinner: This conversation, though, I think, tends to show that although they were being shown other properties, they were being brought back to the Manufacturers'.

The Court: I will allow it for that purpose.

A. Question?

The Court: I think he answered it, with respect to the railroad.

Q. You told him what? A. I told him it was a surprise to me, that the Pennsylvania Railroad would not give a concern of that magnitude the best available possibilities of good service.

Q. Besides expressing that surprise, did you make any suggestions what he should do? A. I suggested to Mr. Vail something, yes.

Q. Any to Mr. Dietrich? A. No.

Q. Did you give any instructions to Mr. Vail on that point? A. I did.

Q. What?

Mr. McGlynn: I object, if your Honor please.

The Court: Objection sustained.

Mr. Skinner: Your Honor will allow me an exception.

The Court: You may have it.

Q. Now, after you heard that there had been a new lease made, which I think you said you heard sometime in 1927—if I am wrong about that, I will ask you now, did you hear about it? A. Yes.

Q. You followed that, I think you said by—Did you follow it by a call upon Mr. Dietrich? A. No, I have no recollection of calling on Mr. Dietrich.

Q. Have you any recollection of instructing Mr. Fiedler or Mr. Vail to call upon Mr. Dietrich? A. I do recall, I think, that either one or both of them called on Mr. Dietrich.

Q. No; did you accompany them? A. No, not to my recollection of it; I have no recollection of it.

Q. Mr. Hartman, I call your attention to P-2 for identification, particularly to the fact that the

words, "or any other property which we may own", are interlined. A. Yes.

Q. Have you any personal recollection of the circumstances under which the interlining was done? A. Yes, because it was—

Q. Have you personal recollection? A. Yes.

Q. What is it? A. That I drew this agreement, I dictated it, and it was brought to me, and I realized that I had overlooked a very important thing.

Q. Then what did you do? A. I had the stenographer interline it, in order to save time, because Mr. Vail was then waiting to go to this closing of the deal.

Q. That was before the return by Mr. Vail with the paper bearing some signatures? A. Absolutely.

Q. That part of it, that has to do with other property which I understand is not involved in this suit at all. A. (No answer).

Mr. Skinner: That is all.

Cross-examination by Mr. McGlynn:

Q. You say that after the execution of the first lease between the Manufacturers and the Brandes, which was sometime in May, 1926, and covered what is generally known as 350 Thomas Street, do I understand that your organization practically never ceased other efforts to get this Brandes Company to take additional space, in this particular tract; is that your general statement? A. Subsequent to the making of that lease?

Q. Yes. A. That we never ceased?

Q. Did you constantly keep after them? A. Yes.

Q. In all that time, your men were in contact with them about going down there? A. Yes.

Q. And that kept up until when? A. That kept up until, I think, the early part of the following year.

Mr. Skinner: What year?

The Witness: 1927.

Mr. Skinner: All right.

Q. Until the early part of '27? A. Yes.

Q. I think you said that in the—sometime in '27, you were in direct contact with Mr. Dietrich, the president of this company, with reference to some program for additional space, that he wanted. A. '27?

Q. Is that right? A. No, '26.

Q. '26? A. Yes.

Q. So that you had no contact with anybody after the year '26? A. Up until the early part of 1927.

Q. Eh? A. Up until the early part of 1927.

Q. Up until the early part of 1927? A. That is right.

Q. Do you recall anything of Mr. Hall, of the Brandes Company, who had something to do with the real estate? A. Yes, I do.

Q. Leasing, etc? Do you recall having gone to the Brandes place on Mount Pleasant Avenue, with Mr. Vail, for the express purpose of discussing with Mr. Dietrich the possible sale or lease of a property in Passaic? A. Yes, sir.

Q. When was that? A. That was some time in 1926.

Q. '26? You are sure of that? A. Yes, sir.

Q. Are you familiar with the efforts made by your organization, or any of your men, to get any

other than the Brandes Product to lease a portion of this property? A. Yes.

Q. Your organization, or Mr. Vail, put through a lease with the Quimby (?) Pump Company, did they not? A. Correct.

Q. Was Mr. Vail the man who actually did that, too? A. He was the salesman on the job.

Q. Did you have charge of the listings, Mr. Hartman, given to the firm, of various properties, by owners? A. No, sir.

Q. Who has charge of that? A. The file clerks.

Q. With supervision by you? A. No.

Q. Who is the executive in charge of that? A. The office manager.

Q. Who was that? A. At that time, a man by the name of Staley.

Q. S-t-a-l-e-y? A. Yes.

Q. Didn't you have occasion to see those files, and as the president's assistant in charge of sales? A. I occasionally referred to them, if I wanted information; I would get them from him.

Q. You didn't have to consult them frequently, to determine what properties you had listed? A. Not necessarily, no; I was handling men, not the listing.

Q. How would your men? A. They made records of listings in their department .

Q. Didn't you get it from those? A. No.

Q. How were those records of listings made up, by card, in books, or folders, or what? A. Cards, letters, blue prints.

Q. Had you any personal knowledge of when your organization listed these properties, than what they have told you? A. No, except after the Mr. Lefkowitz' episode.

Q. That is what I am talking about, after that episode, naturally. A. Yes.

Q. You have no knowledge? A. Yes,—you mean, of the listing?

Q. Yes. A. No.

Q. Do you know whether you listed that property in—this specific property— A. In writing?

Q. —in writing? A. I do not know.

Q. You say you discussed with Mr. Dietrich, president of the Brandes Company, specifically and personally, sometime in '26, or the early part of '27, an expansion program which would involve more space; is that right? A. That is right.

Q. Do you recall how much space he wanted? A. He did not know.

Q. Did he give you any idea? A. Yes, he started in first with 50,000, then at 100,000, 200,000; then they were discussing 300,000 square feet; they didn't know whether it might go to a million.

Q. Of course, you had Mr. Vail or you, yourself, bring to the attention of the Manufacturers Developing Company immediately the fact that their tenant was in the market for additional space, did you not? A. Yes.

Q. Who did that? A. Mr. Vail.

Q. Sure of that? A. Quite.

Q. How sure are you that he did that? A. From his reports and the knowledge that I went up there afterwards.

Q. What kind of reports? A. Written reports, verbal reports.

Q. Are they still on file? A. I have no knowledge of that.

Q. How were they kept? A. In their files.

Q. A special file for each firm? A. Under dates, and, of course, filed.

Q. They are not destroyed, are they? A. I do not know.

Q. You, yourself, never got in contact with any representative of the Manufacturers Developing Company, and brought to their attention the fact that Brandes wanted this additional space, did you? A. No,—I think that I did, once, meet Mr. Lefkowitz at Mr. Dietrich's office.

Q. At Mr. Dietrich's office? A. Yes.

Q. When was that? A. 1926.

Q. Sure of that? A. Quite.

Q. By appointment, or just ran into him up there? A. No, by appointment, we were all together there, to discuss the blue prints for new building to be erected.

Q. How did Lefkowitz come to be there? Had you told him, as your client, to be there? A. No.

Q. Who had him there? A. Presumably, Mr. Vail; he was there.

Q. Do you know that Vail invited him there? A. I do not.

Q. How do you know the Brandes people didn't ask him to be there? A. I don't know.

Q. Did that conference result in anything concrete or definite? A. No.

Q. Did you ever attend any other conference? A. With Lefkowitz? No.

Q. How long did your conference last? Tell only your personal knowledge, now, as to that, with Dietrich and the Brandes. A. That one conference, I should say, lasted the best part of two hours.

Q. Do you know, when was the last conference you had with them? A. Date of the conference?

Q. Yes. A. In 1926.

Q. Eh? A. In 1926 sometime.

Q. When did you first find out that there was a—
A. (Interrupting) I do not know, Mr. McGlynn.

Q. Was it late in '27? A. Might have been,—might have been 1928.

Q. What was it that stopped your organization from keeping after this key tenant for additional space down there? A. Something that was pretty hard to put your finger on.

Q. What do you mean? A. Just what I said, that there seemed to be a suspicious atmosphere created.

Q. Eh? A. Seemed to be very suspicious, breaking off all negotiations.

Q. By whom? A. Mr. Hall.

Q. Not the tenant? A. One phase of the tenant.

Q. What do you mean? A. One member of the personnel up there.

Q. Oh, one member of the personnel? A. Yes.

Q. Had this one member of the personnel pointed out any specific objection to your organization that brought about this mysterious phase? A. No.

Q. So that as a result of this that you have just described, your organization stopped endeavoring to lease this property to tenants from there? A. No, we didn't stop endeavoring.

Q. What did you do? A. Our efforts were blocked.

Q. What did you do after that? Anything? A. We couldn't.

Q. Did you do anything? A. We tried to, but we couldn't.

Q. What did you do in order to try to overcome it? A. Tried to go down, to keep this matter alive.

Q. With whom? A. Mr. Lefkowitz.

Q. Who went up to the tenant? A. Vail, I presume.

Q. You are presuming all of this? A. I hope to tell you, I am not.

Q. You were not sure? A. What do you mean by that?

Q. You said, there was a time arrived in the negotiations when something mysterious occurred, and you did not seem to be getting anywhere; I asked you what you did to overcome that mysterious something, and you said Vail went down to the tenant— A. (Interrupting) Yes.

Q. —and you went down to the landlord, did you not? A. No.

Q. So that all you know is what Vail told you? A. That is right.

Q. You do not remember when that was? A. It may have been late '27, it may have been '28; I have no recollection, only I remember it.

Q. Now, the time you remember drawing this agreement, you say that the parties were meeting that afternoon to execute what we have been calling the first lease, is that right? Is that what I understand you to say? A. Yes.

Q. At that time, did your organization have any agreement with any other owner of real estate similar to the one you drew? A. I did not get the question, Mr. McGlynn.

Q. At the time you drew this contract, P-2 for identification, did your company have any similar agreement, in writing, with any other real estate owner? A. Quite likely.

Q. Oh, not "quite likely"; did you or didn't you? A. I cannot answer you yes or no; we had hundreds of commission agreements on file.

Q. I appreciate that; did you ever have one like this? A. Quite possible, I do not know.

Q. Is that the best you can tell me? A. That is the best I can tell you.

Q. Can you name me one specific owner who executed any such agreement, similar to the one you say you dictated in this case? A. I would have to go back, to examine the record, to find out.

Q. Wasn't this a rather unusual agreement, Mr. Hartman? A. Yes.

Q. You knew it to be unusual? A. Yes.

Q. Did you discuss with anybody the contents of that agreement? A. Did I discuss it with anybody?

Q. Yes, that is what I asked. A. Yes.

Q. Who? A. Mr. Vail.

Q. Mr. Vail was to receive, personally, some interest in the deal? A. What do you mean, to receive under the agreement?

Q. Wasn't he? A. He was a commission man.

Q. How many years experience did you have up to this time, in '26, as a real estate broker? A. About ten.

Q. In your ten years' experience, had you ever drawn or had you ever seen such a contract? A. Yes.

Q. Where? A. In our office.

Q. With whom? A. With another development company.

Q. Name of it, please. A. A man in South Orange—it slips my mind just now,—Lova.

Q. Who? A. Lova.

Q. L-o-v-e? A. L-i-v-a.

Q. That was not industrial, was it? A. No.

Q. That was the development of a tract for residences? A. Correct.

Q. That did not involve leasing, did it? A. No.

Q. You mean to say that contract with Liva contained a clause, that he would pay you a commission on any other property, outside of that tract,

that he sold, notwithstanding the fact that you had nothing to do with it? A. No.

Q. You never saw any such an agreement before in your life, did you? A. Yes, I have.

Q. When? A. That is customary in our business.

Q. Tell me one person which you know anything about. A. I would have to go back over my files, Mr. McGlynn; I cannot recall. We have had hundreds and hundreds of commission agreements.

Q. Do you mean to say that in that hundreds of commission agreements, they present a clause the same as this one? A. No, that is not it.

Q. Did you ever see any of them? A. Not possibly just the same as the one in that.

Q. That is the best you can say? A. Yes.

Q. You can't name me one? A. No; we had a special case here.

Q. Absolutely— A. Correct.

Q. —and you drew a special agreement? A. To cover it, correct.

Q. How is it that you drew this one, in this case? A. In accord with our understanding.

Q. With whom? A. With the owners, apparently.

Q. What? A. With the owners.

Q. Apparently? A. No, with the owners.

Q. Didn't you say "apparently"? A. No, I said, with my understanding with the owners.

Q. Wasn't that another word you had in your first answer? A. No, another word of no significance, no.

Q. You had not discussed with the owners what the commission was, had you? A. No.

Q. You don't know how long, before you drew that, P-2, there had been any discussion between

anybody and the owners, about compensation, do you? A. Exactly, no.

Q. How long before do you say the last discussion had been between somebody about commission, and the allowances, before you drew that paper? A. Probably within a week, or so.

Q. Who had that discussion? A. I assume, it would be Mr. Vail.

Q. Do you know that he did? A. I have no proof, other than his report to me.

Q. Did you make a carbon copy of that agreement? A. Probably there is one on file of it, maybe.

Q. Did you make a carbon copy of that agreement? A. Yes.

Q. Did you give that carbon copy to Mr. Vail to deliver to the owners when they signed the original? A. No.

Q. Why not? A. Because it was not done; it wasn't our custom.

Q. Wasn't that unusual? A. No.

Mr. McGlynn: That is all.

Redirect-examination by Mr. Skinner:

Q. Mr. Hartman, you spoke of some time when plans for buildings were shown, and that they resulted in nothing concrete. Do you mean by that that there wasn't any building erected under any lease that was obtained by this company, this Fiedler Corporation, directly? A. Well, at that time, if my recollection serves me, Judge, we were talking 300,000, 100,000, 50,000 square feet.

Q. I know, but you also said in your testimony, you said there were plans and specifications,—by

whom had they been prepared, do you know? A. By an engineer by the name of Mitchell.

Q. Do you know whether or not—personally, do you know whether or not those plans and specifications had been presented to Mr. Lefkowitz? A. I have no personal knowledge of it.

Q. You do not know whether or not any building was subsequently erected along the line of those plans—any personal knowledge? A. Excepting that there is a building down there.

Q. Now, you said something about one member of the personnel, do you remember that? A. Yes.

Q. Of the Brandes personnel? A. Yes, I do.

Q. Was that, in connection with your difficulty in getting along, or making any progress? A. Yes.

Q. Who was that one member? A. A man by the name of Hall.

Q. J. H. Hall? A. I think that is his initials.

Q. Why did you pick him out? What had he done? Or what did you have—personal knowledge, I mean, if you did,—that made you refer to him? A. I did not quite understand the question.

The Court: Why do you say he was the man that caused these suspicions to arise, and caused you to make no progress? I think that is the question.

Mr. Skinner: Yes, sir.

A. From his actions.

The Court: What were they?

A. Evasive, as the whole picture showed.

Q. What do you mean by the "whole picture showed?" A. They were evasive in their contacts with us.

Q. What caused you to think that? A. Well, we

were always welcome up there; we had been looked upon as their real estate brokers, more or less.

Q. What difference was there, if anything? A. Well, there was a coolness; there was an attempt to get away from the whole situation.

Q. Was there any definite acting of their—or statement to you, that you were no longer working in their behalf, or in that connection? A. I have no recollection of any such a statement.

Q. Well, following that time, or when you saw that disposition that you are speaking of, did you actually have an approach from the Brandes people about that property, or any other, about the leasing of this Manufacturers Developing Company property, or any other? A. Personally.

Q. Well, to your personal knowledge. A. To my personal knowledge, Mr. Vail continued on with his work up there.

Q. You said something that you had—that you knew of property being brought to the attention of the Manufacturers by Mr. Vail's reports, and by your going up there; do you remember that? A. Yes.

Q. Going up where? A. Up to the office of the Brandes Products Company.

Q. When was that, with reference to June 16, 1926? A. Subsequent thereto.

Q. About how long subsequent? A. In September or October, it was beyond the summer season, as I remember it.

Q. Was that the same time that you spoke of, when plans and specifications were presented? A. Yes.

Q. By the way, was Mr. Mitchell present at that meeting? A. I do not recall, Judge, whether he was, or not.

Q. Now, when you speak of this agreement, P-2 for identification, as being unusual, is there anything unusual, in the business, as you have known it, that an agreement should be made to pay commission upon the leases, gross rentals of the term fixed by the lease, and upon any renewals or extensions of the lease,—anything unusual about that? A. Not the slightest, Judge.

Q. This agreement contained an agreement to pay commissions upon any renewals that were made for the—that were obtained for the Brandes people elsewhere than on the property down at South Street; do you remember that? A. Correct.

Q. Was that unusual? A. No.

Q. What was it that was unusual about this? A. Except that it is unusual to this extent, that we had a condition here or a concern that was prepared to embark in a general expansion program, and it was possible that, in order to keep the tenant in the hands of one owner, that Mr. Lefkowitz or his associates may have to purchase adjoining lots, lots across the railroad, I think, on which to build; it was in order to cover that condition that I say that this was unusual, to that extent.

Q. Do you know of any instance, in the course of your dealing with the Manufacturers Developing Company, whether that was discussed, with reference to the obtaining of additional land by that company to be then leased to the Brandes? A. I did not get the question, Judge.

Q. Do you know of any occasions, in the course of the dealings with the Manufacturers Developing Company where that kind of a thing was discussed, the obtaining of additional land by the Manufacturers Developing Company, on which they should

erect a building before? A. Personally, no; only from reports of Mr. Vail.

Q. But not of personal knowledge? A. No.

Mr. Skinner: That is all.

Recross-examination by Mr. McGlynn:

Q. Mr. Hartman, I did not quite understand your answer, with reference to this agreement marked for identification, P-2. You told me it was unusual,—just told Judge Skinner, on redirect, the unusual feature of it is the fact that it involved additional land which the landlord might thereafter acquire. Was that the only unusual feature to it? A. That was not, I would say, unusual, yet in the general run, it would be unusual.

Q. Well, you drew this paper? A. I did.

Q. This document says nothing about who was to be the procuring cause for the leases and sales mentioned in this paper, does it? A. It does not what?

Q. It does not say in there, that these leases or sales, between the Manufacturers and Brandes, or their successors and assigns, would have to be obtained or procured by you, in order to entitle you to a commission, does it? A. No.

Q. That was your intention, when you drew that contract, wasn't it? A. Yes.

Q. That irrespective of whether or not the Fiedler Corporation had anything to do with the leasing contract, or sale, between the Brandes and the Manufacturers and irrespective of whether or not the property was contingous on South Street, or anywhere in the world, you would get a commission? A. That was right.

Q. That was unusual, wasn't it? A. No, sir.

Q. I would like to know of one other commission agreement where it says that. A. I cannot answer the question from memory, where we have dealt with hundreds and hundreds, on a commission agreement.

Q. We are going to adjourn soon; will you go back to the Fiedler Corporation and obtain another agreement similar to this agreement? A. I have no access to the Fiedler Corporation records.

Q. Suppose I ask Mr. Fiedler to do it, can you do it?

Mr. Fiedler: He can have access to anything he wants in our records.

Q. What do you say now? A. I will bring you the records.

The Court: Is that all?

Q. You mentioned a man's name, by the name of Mitchell. A. Yes, sir.

Q. Whose engineer is he? A. Presumably the landlord, or the Manufacturers' Developing Company.

Q. You knew he was the engineer, didn't you, of the landlord? You know he drew the plans for the building, don't you? A. Yes.

Q. Did you arrange for him to be there? A. Personally? No.

Q. Did you know of a building he was drawing plans for? A. Several, I presume.

Q. Now, you say, because of the attitude of Mr. J. H. Hall, of the Brandes Products, you got the impression that the Fiedler Corporation wasn't wanted up there, around there; is that right? A. Yes, sir.

Q. Don't you know, as a matter of fact, your or-

ganization leased to Mr. Dietrich, through Mr. Hall, additional space, after that? A. Yes.

Q. You still contend that that stopped your carrying on negotiations between Brandes and the Manufacturers? A. It may have been just during the interval; I do not know.

Q. Do you still stick to the fact that all of this mysterious influence of evasion, and so on, blocked your work in this matter? A. I do.

Q. You do? A. Absolutely, yes.

Mr. McGlynn: All right.

Redirect-examination by Mr. Skinner:

Q. Mr. Hartman, you said that this agreement was intended to cover commissions upon properties that had been obtained without the procurement of the Manufacturers Developing Company, do you remember?

Mr. McGlynn: Of the Fiedler Corporation.

Q. I mean, of the Fiedler Corporation; do you remember that? A. Yes.

Q. In the real estate business, when you bring the party, that is the letting or renting of property, or space, and the owner of the property or space to be rented, together, what do you understand, as to whether you have done anything toward the procuring of the lease, if it afterwards is made?

Mr. McGlynn: I object, if your Honor please.

The Court: Objection sustained.

Mr. Skinner: I will withdraw the question.

Q. In cases, such as I have just told you, where the parties are brought together and the lease is afterwards made, what is the custom of the real estate business in this town and vicinity, as to whether or not a commission shall be claimed and paid, if afterwards it turns out that the lease is actually made?

Mr. McGlynn: I object.

Q. (Continuing) Though nothing has been done to bring them together?

The Court: I will allow it.

Mr. McGlynn: I object to that, and ask for an exception.

The Court: You have an exception.

A. Why, yes, it is customary, Judge.

Mr. McGlynn: May I state my reasons?

A. (Continuing) It is quite customary; we always collect, where a man takes additional space, in any building.

The Court: Just a moment. Do you want to state your reasons?

Mr. McGlynn: I think the bald exception, standing by itself, might be subject to criticism, because nobody else would know why your Honor ruled, as you did. The question is objectionable, for two reasons, first, because it calls for a conclusion on the part of the witness, bringing into question, in this case, custom, which, in this case, is not applicable; secondly, it does not seem to me to be proper redirect.

The Court: I think it is proper redirect, because you have stressed the unusualness,

of this contract, and it is for the purpose of rebutting that.

Mr. Skinner: Is there any question about Mr. Hartman's qualification, as an expert?

The Court: I think not.

Mr. McGlynn: No, we have made no objection at all.

Mr. Skinner: The answer, I think, stood?

The Court: Yes.

Q. Mr. Hartman, as a matter of fact, when the Brandes Products Company were first brought in contact with the Manufacturers Developing Company, back in June of 1926, or thereabouts, or theretofore, was there anything said—to your personal knowledge—about their probably or possibly wanting more space? A. Yes.

Q. Was there anything said about that to Mr. Lefkowitz, to your personal knowledge? A. Yes.

Q. What was said? A. That they probably would want a great deal more space than this location.

Q. So that when the contact was established, and the introduction made, it was discussed as one of the possible or probable outcomes of that contact? A. Quite so.

Mr. Skinner: That is all.

CRAIG E. VAIL, sworn.

Direct-examination by Mr. Skinner:

Q. Mr. Vail, you are now in the real estate business as a broker? A. Yes, sir.

Q. And have been for how long? A. About eight years.

Q. Were you at one time one of the staff of the Fiedler Corporation, one of the salesmen or assistants? A. I was.

Q. For how long? A. For a period of about six and a half years—six and a half to seven years.

Q. Have you testified before? A. No, I have not.

Q. Yes. Let me tell you now, you do not want to get your hands up to your face, because there may be somebody at the rear or the end of this line, that cannot hear all that you may be saying. Now, are you now connected with the Fiedler Corporation? A. I am.

Q. When did that connection end? A. Probably a year and a half ago.

Q. Well, while you were there in 1924, five or six, or twenty-three or twenty-seven, did you have anything to do with any efforts to obtain tenants for the Manufacturers Developing Company, on their property at South Street in town? A. I did.

Q. When was the first— A. In the latter part of 1925, if my memory serves me correctly, as far as the dates are concerned.

Q. I see you have some books in front of you. A. No, over there.

Mr. McGlynn: That is the bible there.

Q. I show you these books, that look something like these small bibles; what are these? A. Those are diaries.

Q. Your diaries? A. Yes, sir.

Q. Kept by you personally? A. Yes, sir.

Q. Memoranda or data of any kind with refer-

ence to the work that you do from day to day? A. Practically everything.

Q. So you are going to be able to tell this jury, the actual dates or days?

Mr. McGlynn: Not if I have any objection.

A. That is right.

The Court: We will take a recess now until two o'clock.

At one o'clock P. M. the Court takes a recess until two o'clock P. M.

After Recess.

CRAIG E. VAIL resumes the stand.

Direct-examination (continued) by Mr. Skinner:

Q. When we took the noon recess, you were just looking at these diaries. A. Yes, they are there, Judge, on the table.

Q. And you were telling us that they had been kept by you. Are those diaries that were kept by you for the years 1925 and— A. No, 1929.

Q. 1926, 1927 and 1928— A. Right.

Q. Have you none for 1925? A. No.

Q. Why is that? A. It hasn't anything—

Mr. McGlynn: Pardon me a second, Judge.

The Court: He has no diary for 1925.

Q. Why is that, not answered. A. Upon trying to refresh my recollection, going back to my diary, I went through 1925, but I could not find anything that was relevant to this—

Q. You have them, however, for the year 1925? A. Yes.

Q. And can bring them, if you need them? A. Be glad to.

Q. But you did not find anything in them that related to this matter; is that right? A. That is right.

Q. Take the diary here, using 1926, for example, I see that the entries, in large part, at least are just the entry of a name? A. That is right.

Q. What was your practice, and how did you keep these?

Mr. McGlynn: If your Honor please, I would like to interpose an objection at this time, my objection to the use of these diaries —I imagine that the diaries, that they will be offered; that they are absolutely self-serving declarations, and it seems to me that they are absolutely inadmissible, and are not to be used—

Mr. Skinner: They are not to be used, if the Court please, only for the purpose of refreshing his recollection.

The Court: And that you would first ask him when he did so and so, and they would fix the date perhaps.

Mr. Skinner: Yes.

The Court: I think that they would be evidential of that. I think he might say, I first saw Mr. Jones on such and such a date, and I have refreshed my recollection from my diary which shows that I had an appointment with him on that date, if that be the fact.

Mr. Skinner: That is the point.

The Court: I think they are evidential of that; I think that he may refer to them for that purpose.

Mr. McGlynn: I disagree with your Honor on that, and I will submit my proposition when the time comes.

The Court: All right.

Q. I am going to ask you then, Mr. Vail, to refer to these diaries, at such time in your testimony as you think there may be something there to refresh your memory on the subject matter that you are questioned about, and then when that time comes, if objection is made, you will wait, before you use them. A. (No answer.)

Mr. McGlynn: Why don't you have them marked in some way so that if he goes to refer to them—

Mr. Skinner: All right; I will have them marked for identification. I do not understand that they are admissible, at this time.

The Court: No; have them marked for identification.

Mr. Skinner: 1926, seven and eight, diaries marked for identification, in that order.

Mr. McGlynn: That will give us something specific that he has referred to in each instance.

The Court: Yes.

Mr. Skinner: All right, yes.

(Diaries referred to are marked Exhibits P-4a, P-4b and P-4c for identification.)

Q. At any time while you were in the employ of

the Fiedler Company did you receive any instruction with reference to the property of the Manufacturers Developing Company; yes or no? A. I did.

Q. And when was that, and from whom? A. In the latter part of 1925, or the early part of 1926, as my memory serves me, and the directions were received from Mr. Fiedler.

Q. From Mr. Fiedler? A. Yes, sir.

Q. What were the directions?

Mr. McGlynn: I object to those instructions, given by the president to this salesman, on the ground of hearsay; I do not think they are evidential against us.

The Court: Well, only to show—I think it is not for the purpose of establishing anything, except what he did, and what he did was in pursuance of the instructions; I think it is evidential of that, and proper. We do not wish you to tell us specifically conversations that you had, but what the instructions were in the general, that way.

Mr. Skinner: That is all, sir.

The Court: You may have an exception.

Mr. McGlynn: All right.

Q. Go ahead. A. My instructions were to go out and procure tenants for the Manufacturers Developing Company property, located at South and Thomas Streets, Newark.

Q. Anything said about the amount of attention you should give to it? A. Yes.

Q. What?

Mr. McGlynn: I object to this, if your Honor please; this is purely a self-serving

declaration, absolutely inadmissible, instructions given to the salesman from the employer.

The Court: No, it is for the purpose of showing what he did.

Mr. Skinner: (After discussion) I will withdraw the question, if your Honor please.

Q. To what extent, after receiving those instructions, did you work upon the matter of the instruction? A. I worked very diligently for a long period of time to make contacts, almost every day.

Q. Very diligently is your way of describing it; to what extent did you give your time to it, roughly? A. A great part of it—a good part of it.

Q. For how long a period? A. For a period extending over possibly a year and a half to two years.

Q. Was there any time when your efforts in that connection ceased? A. No.

Q. Was there any time when they slowed up? A. There was.

Q. When was that? A. If my memory serves me, without referring to my diaries, it is sometime in 1928.

Q. Now, following those instructions, did you see anybody in connection with the Manufacturers Developing Company? A. I did.

Q. By the way, did you see anybody connected with that company at Mr. Fiedler's office? A. I did.

Q. And in conference with whom? A. With Mr. Fiedler.

Q. Can you tell us—well, were you present at the conference? A. I was.

Q. What took place then? A. I was called into

Mr. Fiedler's office, at which time I was introduced to Mr. Lefkowitz, and Mr. Ross and he—what took place was the discussion appertaining to their property.

Q. A discussion appertaining to their property; can you not give us some idea about what was said? A. Discussion about procuring tenants for their property.

Q. Well, can you describe in any way, than that, what was said, tell us it, not describe it. A. Mr. Fiedler introduced me to Mr. Lefkowitz and Mr. Ross, telling me who they were, and said that Mr. Lefkowitz was the president of the Manufacturers Developing Company, and Mr. Ross was associated with him; that they had or owned approximately twenty-one acres of land, down on Thomas Street, adjacent to South Street, also some land on South Street; that the purpose of their visit there to his office was to obtain our services in going out and developing that property; that they had already built one building and one or two companies had leased it, to a concern; the concern had since gone in the hands of the receiver, and that gave them a vacant building, with no income; also, just before the vacancy of this building, that they had started the erection of another building, which was ninety-five per cent. complete; there was no revenue from that; they had twenty-one acres, on which they were paying taxes—

Q. You are referring now to what Mr. Fiedler said, in their presence? A. That is right.

Q. Yes? A. They had twenty-one acres, paying taxes, and had two vacant buildings, he wanted to know what our idea would be of undertaking that, to go out and procure tenants, undertaking that,

to go out and procure tenants for those existing buildings.

Q. Go on; that is just what we want. A. I told him that I would like to make an inspection of the property, I would like to have blue prints; I proceeded to bring in the atlas of the lay-out of the city, to look at the location, to discuss it further, in front of Mr. Fiedler and Mr. Lefkowitz. Mr. Lefkowitz suggested that I draw out the outlines of the property on the city map, and we discussed the possible way of going about to get tenants and so on, et cetera, and that session broke up.

Q. Well, in the discussion of the best way to go out and get tenants, what was said; anything at all about how to do it? A. Mr. Fiedler made a number of suggestions.

Q. Tell us what was said. A. Mr. Fiedler suggested that it would be a rather hard proposition to get tenants for that particular location because of the fact that it was undeveloped; it was off the beaten path at that time—

Q. Yes. A. —The streets were not paved; it was adjacent to a lot of property that was run down; it was not appealing to tenants, and in order to get tenants, we would have to go out and do a lot of hard effort, and expend a lot of hard effort, do a lot of hard work, to sell a possible tenant that location.

Q. I see. Now, following that, what did Lefkowitz and Ross say, in all of this? A. Mr. Lefkowitz offered his services, said that he had gotten out a number of circulars, describing the property, pictures of it, and that he had sent a lot of them out to other manufacturers throughout the city and around in this territory, and he would be glad to furnish me with a number of those circulars; al-

so they were going to cooperate together, if there were any inquiries that came to him, that he would turn them over to me, that I might go out and try and bring them to that property.

Q. Was there anything said about whether there had been any other real estate agents working on the property? A. I think he mentioned the fact, if I recall— In fact, there had been other real estate brokers working on the property, because someone else produced the tenant that had failed, in one of the buildings.

Q. Anything said at all about whether or not others would be working on it, in the future? A. No, he gave us practically verbal exclusive on the property.

Mr. McGlynn: I ask, if your Honor please, that last portion of the answer be stricken out, because I cannot see that that has any evidence value with this case.

The Court: Yes. What do you mean by that?

Q. When you say he practically gave him the verbal exclusive, verbal, what did you mean? A. We discussed with him—

Q. What did he say? A. Mr. Lefkowitz promised verbally that any inquiries that came to him on that property would be turned over to us, which I interpreted to be a verbal exclusive.

Q. I see; that is what you mean. Was there anything said at that time about commissions? A. Yes.

Q. What was it? A. Mr. Fiedler told Mr. Ross and Mr. Lefkowitz, that if we were able to affect any deals there, that the commission would be five per cent. of the rentals involved, in procuring ten-

ants, and five per cent. of any renewals for additional buildings, in other words, using it to develop the tract.

Mr. McGlynn: Let us hear the conversation.

The Court: Not what he thought.

Q. You were telling your thoughts; won't you tell us what was said? A. That was the conversation.

The Court: Was there any objection made when Mr. Fiedler spoke of five per cent. on renewals?

The Witness: No, your Honor.

Q. Was there anything said about it by Mr. Lefkowitz or Ross, for or against? A. There was not anything said about it, for it or against it.

Q. By them? A. No.

Q. Now, after that, did you see Mr. Lefkowitz or Mr. Ross at all, in the course of your efforts? A. I did.

Q. About how many times? A. Almost every day. If I refer to my diaries, I can tell you just exactly what days I saw him.

Q. Almost every day, during what period? A. Starting with this first conference, up until the —sometime in 1928.

Q. Without referring to your diary, can you tell us the date of this first conference? A. No.

Q. By referring to it, can you, do you think? A. I think I can.

Q. Just take one—which is this? A. Here.

Q. What year do you want? A. 1926.

Q. I hand you Exhibit P-4a, for identification—

Mr. McGlynn: May I see that?

Q. Before you say anything about that, just let us see what you are going to do. A. (Witness indicates.)

Q. Now, you are looking at something on the date of, it is Friday, March 12, 1926? A. Yes.

Q. Is there any entry there that you think refreshes your recollection? A. There is.

Q. What is it? Just show us. A. (Witness indicates.)

Q. You point to the words, National Box. A. Yes, that is right.

Q. How does that refresh your recollection; what do you remember? A. Mr. Lefkowitz and Mr. Ross was introduced to me as connected with the National Box & Lumber Company.

Q. At that first conference that has been described? A. At the first conference.

Q. Was there anything said then about the Manufacturers Development Company? A. Yes, there was.

Q. What was it? A. There was mentioned, casually, that the Manufacturers Developing Company owned the property.

Q. Owned what property? A. The twenty-one acres in question.

Q. But they were introduced as officers of the National Box, and you have here the entry, National Box? A. Because that was a going concern and they had an address at that time on South Street; it was a lot better to use that than it was the Manufacturers Developing Company, as no one seemed to know anything about it.

Q. With that reference, in your diary, you fix the date of this first conference as March 12, 1926?

A. Yes, I fix that as the first date, that I came into the picture.

Q. Well, on March, Wednesday, March 17th, appears another entry, National Box & Lumber; what does that recall to you? A. That I called on Mr. Lefkowitz, and Mr. Ross, with reference to their property.

Q. Tell us what you remember of the development, and your work from that point on; what did you do besides?

Mr. McGlynn: What date?

The Court: March, 1926.

Q. Besides seeing many people.

Mr. McGlynn: He has not referred to that, if your Honor please.

The Court: What year?

Mr. McGlynn: I haven't heard him say anything about having seen any people yet.

The Court: I did not hear that.

Mr. McGlynn: My client, he said he saw.

The Court: I did not know who they were.

Q. Well, you spoke of making many calls; who were they upon? A. Upon prospective tenants.

Q. For this very property? A. For this very property.

Q. Now do you remember going to see anybody connected with the Brandes Company? A. I do.

Q. And about how soon after this time when you received your instructions? A. A short while afterwards. I refer to my diary again, I can give you again the approximate date.

The Court: How long would you say; what do you mean by a short time?

The Witness: A month or so.
The Court: Is that clear enough?
Mr. Skinner: Probably, for the present.

Q. At whose suggestion, if anybody's? A. Mr. Hartman.

Q. What did he say to do? A. Mr. Hartman told me to call on Mr. Hall of Brandes, because he had received a telephone call from them, that they wanted to see someone of our organization regarding some property.

Q. Prior to that, do you know whether or not the Brandes Company had had any business relations with Feidler Corporation? A. I had heard the name discussed in the office many times.

Q. Well, now, did you call and see Mr. Hall? A. I did.

Q. Can you tell when that was? A. By using my diary I can tell approximately.

Q. Well, about when? A. Possibly within—

Q. Never mind; can you tell us about when? A. A month or so after this.

Q. Well, put it this way: Do you remember anything of a lease being executed in June, 1926? A. I do.

Q. Now, when, how long was it before that, that you went to see Hall, or after? A. About three weeks, or four weeks, before that.

Q. I see. Now, before that would make it sometime in May, 1926? A. Latter part of April or the first of May.

Q. Yes? A. Or the first part of May.

Q. When you saw him about it, what did you do? A. I called on Mr. Hall, met him for the first time, and he told him—that business was going very rapidly and that they had some plans that would re-

quire more space, additional space, in addition to what they now had at Mt. Pleasant Avenue.

Q. Then, following that, did you see Mr. Lefkowitz and Mr. Ross? A. I did, I was seeing them almost every day.

Q. Did you bring this matter up, the Brandes' desire for space, to their notice? A. I did.

Q. Did you bring to the Brandes Company, to their notice, the fact of the space down there? A. I took Mr. Hall down, showed him the building and property.

Mr. Skinner: Now, then, following that, I can shorten it perhaps there.

Q. Following that, did you see a lease executed some time in June, 1926? A. Yes.

Q. When was that?

The Court: When was the lease executed?

The Witness: In whose presence?

Q. Where? A. On 15 Avenue D, by the Brandes —by the Federal Telegraph Company, but it was not executed by Mr. Lefkowitz.

Q. Then it was never executed by him. Then, that was not the lease of June, 1926? A. No.

Q. But that was a property lease? A. That was the first lease that was executed.

Q. That was executed by the Brandes people, and it was for what property? A. 15 Avenue D, if I have the correct number, the property is on Avenue D; I may be mistaken as to the number.

Q. You say that was not signed by Mr. Lefkowitz? A. No.

Q. Do you know why? A. Mr. Lefkowitz had planned to use the building, one of the buildings that he had erected, the one at 53 Thomas Street,

and was very anxious to get a tenant in the building at 15 Avenue D.

Q. You say he planned and he was very anxious; just tell us what he said. A. Mr. Lefkowitz said he was going to use the building at 350 Thomas Street, which I showed to Mr. Hall, and members of the Brandes Products Company; that building was not acceptable; it was a little too much, so I showed them the building at 15 Avenue D, which seemed to be, to them, very much, because we had many conferences with them about it afterward.

Q. Now, I show you a paper purporting to be a lease, made the blank day of May, 1926—I show you a paper purporting to be a lease between the Manufacturers Developing Company and the Federal Telegraph Company, appearing to bear the signature of somebody or other Stein. A. Stein.

Q. President, and somebody, an inspector, I do not know what this is. However, is that one of the leases you spoke of as having been signed by the Brandes and not by the Manufacturers? A. That is.

Q. All right. That was for what property? A. 15 Avenue D.

Q. Now, then, you say that for some reason, Mr. Lefkowitz did not want that to be leased; he wanted that for himself; is that it? A. He changed his mind after we had entered negotiations.

Q. All right; he changed his mind. A. He changed his mind.

Q. It was either not large enough or too large for the Brandes people? A. It was too large for them when this lease was drawn.

Q. Then that did not become effective? A. That is right.

Q. Another lease was prepared; is that right? A. That is right.

Q. Covering what property? A. 350 Thomas Street.

Q. Anything else? A. That is all.

Q. 350 Thomas Street? A. (No answer).

Q. You say there was another lease made, for what property? A. 350 Thomas Street.

Q. That did not include the premises in the rear? A. No.

Q. Was that signed by the Brandes people, and not by Lefkowitz? A. That was signed by both parties.

Q. Now, that we haven't in our hands, but Mr. McGlynn says when they get that, that will be here any minute.

Mr. McGlynn: It was here all morning, I just sent it down to check up the record.

Mr. Skinner: We can use it when it comes.

Mr. McGlynn: Yes, sir.

Q. Now, what became of that lease? A. The lease of 350 Thomas Street?

Q. Yes. A. That was later superseded by a lease for the same designated number 350 Thomas Street, but it included the erection of a new building in the rear of 350 Thomas Street.

Q. And how soon after that? A. Very shortly after that.

Q. You refer now to the lease of June 16, 1926? A. That is right.

Q. That brought in some other property. Why did that additional space come in? A. Will you repeat the question, Judge?

Q. Why did that additional space come into the second lease? A. Because the Brandes products were changing so rapidly that it was difficult, in

their manufacturers, interested in 22,000 feet. changed to 30,000, then before this lease at 350 Thomas Street was signed, we started to talk about another 30,000, something to be built in the rear of that.

Q. Now, did the lease of June 16, 1926, take in those additional requirements? A. Not to my knowledge. It was a verbal agreement, upon the signing of that lease that Mr. Lefkowitz, the National Box & Lumber or the Manufacturers Developing Company, would build an additional unit in the rear.

Q. But the lease of June 16, 1926, marked D-3, doesn't it, Mr. Vail, take in paragraph two, an agreement on the part of the lessor to erect a new building on the rear of 350 Thomas Street? A. Then I am mistaken about my dates. There was a lease drawn on 350 Thomas Street, an original lease, which was on the premises as they stood, and if I remember correctly, it was drawn for a period of one year, and at the time those negotiations were closed, we started this discussion about building an additional unit in the rear, and subsequent to the signing of that lease, there was plans and specifications drawn, accepted by both sides, and leases prepared, superseding the original lease at 350 Thomas Street.

Q. Now, when the first lease that you have spoken of as being drawn in May, which I have—

Mr. Skinner: Just strike that out, that question out. I have in my hand here this —I have spoken of and used before as, purported to be a lease to the Federal of blank date, 1926, I want to have it marked for identification.

(Marked P-5 for identification).

Q. That P-5 for identification, Mr. Vail,—just look at that,—I have understood from you is the first lease that was drawn, signed by the one side and not signed by the other. A. That is right.

Q. Is that right? A. That is right.

Q. Now, did Mr.— had, before that was signed by the Brandes Company, had Mr. Lefkowitz or anybody in the Manufacturers Developing Company, agreed to sign such a lease? A. They had.

Q. Had the premises all been covered and discussed? A. They had.

Q. And had a copy of that lease been submitted to them? A. That had.

Q. And the only reason for not going through with that was that Mr. Lefkowitz changed his mind? A. That is correct.

Q. Is that right? A. That is correct.

Q. And everybody assented to it—the Brandes people assented to it? A. They couldn't do anything else about it, but accept.

The Court: But they had?

Witness: They did, yes, your Honor.

Q. As a matter of fact, do you know whether or not the Fiedler Corporation got any commission for negotiating that lease? A. Mr. Lefkowitz insisted upon—

Q. Do you know whether— A. I do. Mr. Lefkowitz, if my memory serves me correct again, presented me with a check of $100, which I refused, and he said I must take it to Mr. Fiedler, which I did.

Q. I show you a paper that Mr. McGlynn has kindly handed to me, bearing date, blank date, as the pencil mark is put in, the 24th of May—

Mr. McGlynn: I just got that from the record.

Q. Mr. McGlynn has suggested that that is the correct date, so may I. I ask you to look at it, is that the second form of lease arranged and negotiated by you?

Mr. Skinner: Pardon me, while he is looking at that, may I have one of these marked for identification, and I cannot take it from you?

Mr. McGlynn: May I correct an error, if your Honor please, just as to the date of this lease, the real date of this lease is May 10th.

The Court: Not the 24th?

Mr. McGlynn: Not the 24th; May 10th.

Mr. Skinner: That is the one you have just produced?

Mr. McGlynn: Yes.

Mr. Skinner: The one in the witness' hand, that we understand now is dated May 10th?

Mr. McGlynn: Yes, sir.

Mr. Skinner: Have you any way of telling which is the earlier one, Mr. McGlynn?

Mr. McGlynn: I do not know anything about it.

Q. What do you say? A. This is the second lease.

Mr. Skinner: I ask that that be marked for identification.

Mr. McGlynn: I have no objection to your putting that in evidence.

Mr. Skinner: Or the other?

Mr. McGlynn: The other, you can use as evidence.

Mr. Skinner: All right, we will have them both in evidence.

Mr. McGlynn: Do you want the third one now?

(Marked P-6 and P-5, previously marked for identification, marked in evidence).

The Court: Has June 16th been marked?

Mr. Skinner: No, about to be.

The Court: June 16th was the only one that went into effect and on which a commission was paid; is that correct?

Witness: I am confused in my dates, Judge.

The Court: Well, there are two leases.

Witness: Yes.

The Court: You are referring to the one as the second one just now; then there is one, the 16th of June, which is the basis of this suit; I thought that was the only one that really took effect, and on which commissions accrued, that were paid; is that right?

Witness: I would not say that.

The Court: All right.

Q. You would not say that, you say? A. I may be understood your question wrong, but I have this lease in my mind.

The Court: I cannot state it more clearly.

Witness: I am sorry.

Mr. Skinner: I cannot either.

Q. Just a minute; I want to bring out this fact. I call your attention, Mr. Vail, to the effect that P-5—

Mr. Skinner: Strike that out. I was in error in saying that this June 16th was

about to be marked. I see that it has already been marked as Exhibit P-3.

The Court: Well, that is why I asked the question, because that was my recollection, that it was marked.

Q. I call your attention to Exhibit P-5 and especially to the fact that it is to the Federal Telegraph Company, was that? A. Yes, sir.

Q. For 15 Avenue D, and you have told us that the reason that did not go into effect was because Mr. Lefkowitz changed his mind and the Brandes people accepted the change? A. That is right.

Q. Now the second lease, P-6, I notice is made to the Brandes Products Corporation. A. That is right.

Q. Well, what was the reason for there being two different lessees? A. The reason was, as explained to me by Mr. Hall, that on the outside of the building was the Brandes Products Corporation, they had just taken over some other interest, and it was all one; in other words, the Federal Telegraph Company and the Brandes Products was one and all.

Q. All right. Now, then, preceding this, before the execution of the June 16th lease, that you have described, or said you attended, did you hear anything about a commission agreement? A. Are you talking about the third lease now?

Q. I am talking about—I am afraid we will get mixed up, the numbers. A. I am certain we are, too.

Q. I am talking about the lease of June 16, 1926, the one that was executed; the other two that began, or that became effective—

Mr. McGlynn: That is not true. The one

which you have been calling the second lease, in May, was executed, and the third lease of June superseded the second one.

Witness: That is right.

Mr. Skinner: That is right; I am wrong.

Q. The first then was executed on one side? A. That is right.

Q. Not by them? A. That is right.

Q. The second was signed by both? A. Yes.

Q. One became e ffective? A. That is right.

Q. The other, June 16, 1926, superseded the other two? A. That is right.

Q. Now, in connection with any of these three, did you hear of any suggestion of a commission agreement? A. I did.

Q. One became effective? A. That is right.

Q. From whom? A. From Mr. Hartman.

Q. What did he tell you? Did he give you instructions? A. He gave me instructions to get a commission agreement signed.

Q. Well, what about the agreement itself; did you see it? A. The commission agreement?

Q. Yes. A. I did.

Q. Did you see it, from whom? A. Mr. Hartman handed it to me.

Q. He handed you the drafted agreement, told you to get it signed? A. That is right.

Q. When was that with reference to the signing of the June 16, 1926 lease? A. In the morning or around there, noon time, of June 16th, in the middle of the day.

Q. All right; what did he give you? A. He gave me a commission agreement.

Q. Did you have more than one copy? A. I did.

Q. How many? A. I had an original and a duplicate.

Q. I show you Exhibit P-2 for identification, and ask you if that is the original. A. It is.

Q. And the carbon copy, was there a carbon copy of this? A. There was.

Q. Which is marked now, P-2 for identification? A. That is right.

Q. Tell us what you did with that commission agreement. A. Mr. Hartman handed me the commission agreement, and I immediately read it over --read it to see whether it applied to the particular transaction that we were—to the particular instances, surrounding this manufacturing company, and the Brandes Products; after reading it, I noticed there was one thing left out, which had been in my mind a very important thing.

Q. What did you say, if anything, about it? A. And I brought it to Mr. Hartman's attention.

Q. What was it? A. That is the fact that Mr.—during our negotiations and discussions about locating the Brandes Products on their properties, down there, so on, etc., other properties came up.

Q. Other properties? A. Other properties than the twenty-one acres, and it was necessary—

Q. What did you mean when you say that came up, put it in—you do not mean that they appeared over the horizon, do you? A. No, that is true.

Q. What do you mean? A. There was this twenty-one acre tract, and there was a part of it that was occupied by a lumber concern, handling raw lumber, and there was another part of it that had temporary building, corrugated, on it, occupied by Whittier; and there was another branch on Thomas Street—

The Court: He did not ask you that. He asked you about how it came in, in that dis-

cussion, what was said, I think was the question.

Mr. Skinner: Yes, about other property.

The Court: Yes, what was said about it, why did you call his attention to an omission in the agreement?

Witness: I am trying to explain it, Judge.

The Court: Go ahead.

Q. But do not tell us about Whittier. Is Whittier on the other property? A. No.

Q. We are asking about the other property. A. No, he is a tenant.

Q. You said that you called his attention to the fact, something that had come up, and which had not been covered; you said that other property had come up. Now, what do you mean by that? A. That it might not be possible to satisfy the Brandes Company on the particular spot that we had in mind for that, Mr. Lefkowitz' twenty-one acre tract; Mr. Lefkowitz told me at the time when I told him that that might be the situation that he would go out and buy other property and build for them, in fact, any location that they might choose around the City of Newark.

Q. Yes. Well, had that been the subject of discussion, not only with Lefkowitz, but between you and Mr. Hartman? A. Yes.

Q. Or had you reported that? A. I did not primarily report that, I reported it to Mr. Hartman before that, and he probably had forgotten about it, but when I read this commission agreement, I noticed that something was omitted there, that was the idea, that we wanted it covered, if Mr. Lefkowitz went out and bought a piece of property on Frelinghuysen Avenue—

Q. Did you speak about that? A. I did.

Q. What did you suggest? A. I suggested that he add in something between the lines.

Q. Was that done? A. It was.

Q. Was that in the paper then, when you took it to the place of the execution of the lease? A. Yes, sir.

Q. What happened—you have got—where was it, by the way? A. It was in Mr. Reed's office.

Q. Mr. Hugh B. Reed, an attorney for Mr. Lefkowitz and the Manufacturers Developing Company? A. Yes.

Q. Go ahead; just tell us what took place. A. I had two copies or, rather, an original and a copy of the lease signed by the Brandes Company, including that commission agreement, that original and the copy—

Q. Yes? A. —the leases were signed by Mr. Lefkowitz and Mr. Ross, witnessed, I believe, by Mr. Reed, and that part of the transaction was closed. I handed Mr. Lefkowitz the original and the copy of the commission agreement—

Q. Yes. A. And he read it over.

Q. How do you know he read it over? A. I know he read it, because he held it up in front of him and his lips moved, and he was in the apparent act of reading the document for some time.

Q. Yes? A. After reading it, he reached for Mr. Reed's pen, and started to sign it. Mr. Reed said, "Mr. Lefkowitz, what are you signing?" He said, "I am signing a commission agreement." He said, "May I see it," and he handed it to Mr. Reed. Mr. Reed looked at it, read it, the same as Mr. Lefkowitz had done, and passed it back to him and said, "I would not sign that."

Q. Go on. A. Mr. Lefkowitz answered him by

saying, "That is my understanding, I have promised that to the Fielder Corporation, and I am going to sign it." At that moment, Mr. Reed got up and left the room for some reason or other; upon signing it, he handed it—

Q. Who signed it? A. Mr. Lefkowitz.

Q. He signed it, did he? A. He signed it.

Q. Who was present? A. Mr. Ross.

Q. Yes? A. He handed it to Mr. Ross to sign it. Mr. Ross very carefully read it—

> Mr. McGlynn: Very carefully read it?
>
> The Witness: I would say so. He spent considerable time going over it.

A. (Continuing) He signed it, and handed it back to Mr. Lefkowitz. Just about at that point Mr. Reed returned in the room.

Q. One minute. Did you see any corporate seal? A. At that time, Mr. Reed returned in the room; and Mr. Lefkowitz handed me the commission agreement—

Q. Yes? A. —one copy, the original, which we have here, I looked at it and saw that the seal was missing. I said, "In order to make this thing binding and proper, there should be the seal of the corporation on it, is that right, Mr. Reed?" and he answered in the affirmative. I handed it to Mr. Lefkowitz, and he handed it to Mr. Ross, who placed the seal on it, and handed it back to me.

Q. All in Mr. Reed's presence? A. All in Mr. Reed's presence.

Q. Now, what became of the carbon copy? A. I haven't the slightest idea. I left it with Mr. Lefkowitz.

Q. That is what you did with it? A. Yes.

The Court: Who put the corporate seal on it?

The Witness: Mr. Ross.

Mr. Skinner: Now, I offer this commission agreement, P-2 for identification, in evidence.

The Court: Let it be received.

(Exhibit P-2 for identification is received in evidence and marked Exhibit P-2.)

The Court: Why was it not dated, do you know, Mr. Vail?

The Witness: Why wasn't the commission agreement dated?

The Court: Why wasn't it dated, the commission agreement, do you know?

The Witness: I really don't know; it probably was an oversight.

The Court: Did you know it was not dated?

The Witness: No, not to this date; I do not even know it yet.

The Court: Well, it is not.

Mr. Skinner: But it is signed.

The Court: I beg pardon?

Mr. Skinner: But it is signed.

The Court: Yes, I was asking him just about the date.

Q. Now, following that meeting, did you do anything further towards procuring a tenant?

The Court: Just let me interrupt you, Judge, please. But in spite of its not having a date on it, you identify it as being the one that was signed on the date of the lease?

The Witness: That is right.

The Court: All right.

Q. Was there any other, at any other time? A. Nothing but only the one signed.

The Court: Well, can you say why there was not such a rental agreement signed when either of the other two leases were signed? Do you object to it, Mr. McGlynn?

Mr. McGlynn: No, but I wanted to ask that myself; that was all.

The Witness: Do you mind repeating the question.

The Court: I do not want to earn your fee for you. I will withdraw it and give you the chance. Go ahead, Judge.

Q. Mr. Vail, had anything been said before, or by anybody about a written commission agreement? A. Yes.

Q. Well, by whom? A. Prior to June 16th?

Q. Yes, I mean other than Hartman, in his talk with you. A. Yes, I talked the matter over with Mr. Lefkowitz.

Q. Where? A. At his office.

Q. When? A. During the week previous to that.

Q. Yes; what did you say? A. I told him—

The Court: What did he say is the question.

The Witness: What did he say?

The Court: That is the question.

Mr. Skinner: I asked him first, what did he say, thinking that he was the first one to speak.

Q. You tell the conversation. A. What did I say?

Q. Yes; did you bring up the subject of the commission agreement, or did Mr. Lefkowitz? A. I brought it up.

Q. You brought it up by saying what? A. By reviewing everything that had happened—

Q. What did you say? A. I went—

Q. What did you say? A. What did I say, regarding the commission?

Q. Yes. A. I told Mr. Lefkowitz that we wanted a commission agreement—the Fiedler Corporation—embodying all of the deals surrounding the particular transaction that we were going to close within a few days, at least that was planned to close, this commission agreement, embodying the commission on any leases that we might effect with the Kolster Radio, or any other leases that we might effect with them, upon any renewals that we had negotiated with them, that they might effect, of any leases that they might contract themselves upon his property or any other property that he might acquire.

Q. Did you tell him that, with any attempt to explain why you asked for it? A. Yes.

Q. What did you say? A. When I asked for a commission agreement, he said, "Why do you want it," and I told him that was the reason why.

Q. What did you tell him? A. That it was not necessary, but to have a more clear understanding of what we had discussed and agreed to do.

Q. Yes, what did he say in his conversation? A. "That is perfectly all right, you prepare it, and I will sign it."

Q. You were asked before, by his Honor, why there had not been such an agreement before. Do

you know of any reason why there had not been? A. There should have been one.

Q. Do you know of any reason why there had not been? A. Probably due to my neglect.

Q. Mr. Vail there had been—in the course of your business, before that time, as a broker, or as a salesman for the Fiedler Corporation, had it been your practice to have a written agreement for commission in every instance?

Mr. McGlynn: I object, if your Honor please; I do not see that we are concerned with that, whether they did or did not have a commission agreement prior.

Mr. Skinner: I mean in that conversation at this time when you did not do it on the others.

The Court: I think I will allow it, on that theory.

Mr. McGlynn: May I have an exception?

The Court: You may have an exception.

A. I was usually instructed to get a commission agreement.

The Court: That is not the question.

The Witness: Pardon?

The Court: Read it, Mr. Dye. (Question repeated by stenographer.) The question is: Was it your custom to get a renewal agreement in writing?

The Witness: It was.

Mr. McGlynn: "Commission on renewals" your Honor means?

The Court: Yes, commissions on renewals.

The Witness: Yes.

Q. Had there been any provision for renewal in the preceeding two leases, P-5 and P-6, do you know? A. What is the date and I can tell you.

Q. The trouble is, the two leases, in May 1926, one of which we have the date fixed, second one is May 10th, that can be told by an examination of the leases.

Mr. Skinner: However, without bothering to ask this witness, I will withdraw the question.

Q. Now, following that, I think you said, Mr. Vail, that when you went to Mr. Reed's office, on this date, June 16th, you took with you the lease executed already by the Brandes Products Company; is that right? A. That is right.

Q. They were not then present at that meeting? A. No.

Q. Now, following that, did you go on or do anything more in the effort to procure from the Brandes Products Company leases for additional property of the Manufacturers? A. I did.

Q. Tell us what you did. A. May I refer to my diary?

Q. First, tell us—you only have to refer to your diary for definite dates, don't you? A. From that point on I called upon the Brandes Products and Mr. Lefkowitz, Manufacturers Developing Company, and Mr. Ross, almost invariably every day, sometimes two or three times, from one side to the other, about the erection of additional space for the Brandes Products Company on that property.

Q. That is, the erection of additional buildings? A. That is right.

Q. Were there any plans and specifications prepared? A. There were.

Q. What did you do with them, if anything? A. Discussed them with Mr. Lefkowitz and the Brandes at different intervals.

Q. From whom did you get them? A. James F. Mitchell.

Q. What was he? A. Engineer and builder—designer and building.

Q. Did you ever—did you see Mr. Mitchell at Mr. Lefkowitz' plant, or at the Brandes plant, or either? A. Both places, three places, including Mr. Fiedler's office.

Q. Was Mr. Mitchell employed by you, at all, or the Fiedler Corporation? A. He was not.

Q. Did you hear anything by Mr. Lefkowitz, whether Mr. Mitchell was being employed by him? A. I did.

Q. What did you hear? What was said by him? A. That Mr. Mitchell had already built two buildings, Mr. Lefkowitz said, "If any other buildings is to go up there, Mr. Mitchell was going to build them," and he was very much satisfied with the work he had already done.

Q. So you took to the Brandes people plans and specifications prepared by this man, Mr. Mitchell? A. If I didn't take them myself, personally, Mr. Mitchell took them.

Q. Did you talk with the Brandes people about these plans and specifications? A. I did.

Q. Tell us a little more about what you did in the effort to get them to take further leases. A. Well, the Brandes plans were more or less indefinite.

Q. What do you mean, when you say the Brandes plans, you do not refer to this building plan, do you? A. Yes, their building plans, further plans, as I could understand it, Mr. Hall told me that

plan, that their manufacturing program was indefinite; in other words they did not know whether they needed a hundred thousand more feet, a million feet or a million and a half feet more. Now with this thought, he might need any other space—

Q. Did he say anything about the speed with which their business was growing? A. Yes.

Q. What did he say? A. They said to me, it looks possible, we would have to have a million or three-quarters of a million more feet of space.

Q. Yes; well, was that the basis for any objection to those particular plans which you took up there? A. Not primarily, no.

Q. Well, that is all; did they object to those plans? A. No, they did not object to the plans.

Q. To the Mitchell plans? A. No; they made a criticism. We changed the plans. One time we had plans for a one-story building, rather thirteen thousand square feet, in the rear of 350 Thomas Street, so then, after a conference between Mr. Lefkowitz, Mr. Hall, Mr. Dietrich, Mr. Stevenson, Mr. Mitchell and myself, and probably three other men connected with the Brandes Company, in Mr. Dietrich's office, that it did not work out just the way they wanted—in other words they were still in difficulty about this space, talking about sixty thousand square feet, or less talk about three hundred

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Q. The first unit, was that smaller or greater? A. The first unit was smaller, thirteen thousand square feet.

Q. So they talked about more space, that and other things, made an abandonment of those particular plans and specifications and other plans were then prepared? A. Yes.

Q. Preliminary drawings, I suppose? A. That is right.

Q. How long did that go on? A. For months.

Q. For months? A. Yes.

Q. Without their coming to any agreement on any particular space? A. That is right.

Q. And as they enlarged their estimate of the space they would need, did you—did you tell Mr. Lefkowitz about it—was he present? A. He was present at that time.

Q. And at other times you told him? A. And at other times I told him about it.

Q. Did he do anything at all to keep those changed ideas? A. Apparently he did, because Mr. Mitchell was their office to draw new plans.

Q. Then that kept on for months, without anything being done? A. That is right.

Q. But the Brandes people seem to want the space? A. That is right.

Q. Now, did there come any time when they seemed to have lessened their desire for any more space? A. Yes, there was times that there—there was a time—there was a number of times that there was a letting down in activity in more space, that he was not sure that he wanted to go any further there, and also that the railroads were giving him such bad service. That was their primary factor, for days, talking about something else. It was at that time that Mr. Dietrich requested of me to submit any properties, any plans within a radius, that is this side of the Hudson River, of twenty-five miles in this Metropolitan territory, of anywheres from two hundred to five, six, seven hundred thousand square feet, and I believe it was at that time, if I remember correctly, that Mr. Hall said inci-

dentally, why here is a place, Mr. Vail, that we know something about, one of our customers whom we do business with, that knows someone in the General Electric Plant, that is available on Frelinghuysen Avenue. Do you know anything about it? I do was my answer. He said, well, would you mind driving Mr. Dietrich and I down to look at it. I said, I would be glad to do it and then, if my memory serves me correctly again, it was probably the following day, or two days after that, that I called for Mr. Dietrich, Mr. Hall, and I think Mr. Stevenson went along too, one of the engineers. We drove down to the plant, and immediately upon Mr. Dietrich's seeing Fink & Company next door, he turned it down, because of the possible odors, and the fact that they were employing two or three thousand girls.

Q. And now, then, you have said that Mr. Dietrich said to get them something this side of the Hudson River, or within twenty-five miles of Newark— A. In this territory.

Q. In this territory? A. Another plant that Mr. Hall brought out was the General Motors Plant of Bloomfield.

Q. Will you just keep to my question? A. Yes.

Q. You went on, did you try to get anything for them? A. I did.

Q. I mean in this radius. A. I did.

Q. And show it to them? A. I did.

Q. How many? More than one? A. Oh, possibly six, seven, or eight plants.

Q. Did they express satisfaction with any of them? A. With one, a whole lot of satisfaction.

Q. What was that? A. The Essex Cotton Mills in Passaic.

Q. Well, why didn't they get it? A. Well, after

making fifteen or twenty trips to the Essex Cotton Mills, with all of the engineers of the Brandes Products, spending time, practically the whole day, something again came up in business; they decided they did not want six hundred thousand square feet; the question was again laid over.

Q. This went on for how long? A. Months.

Q. During that time did you refrain from bringing to their attention of leasing the plant of the Manufacturers Development Company? A. I always came back to it.

Q. Came back, how? You mean you rode your automobile through? A. No, talked about it, discussed it, brought it to their attention, if they had any investment, there was the place, and so on, and et cetera, if they wanted additional space, that there was the possibility of building it, that Mr. Lefkowitz was very desirous of building another building.

Q. That reference to the additional space, and the service that they were getting from the Pennsylvania Railroad, did you make any argument to overrule that objection? A. I did.

Q. What did you tell them? A. I told them I could not understand and I was going to do the best I could to probably relieve the condition, and I immediately went to Mr. Lefkowitz and told him about it, because it was his property that the Pennsylvania Railroad was serving, it was his duty to take the matter up with them as the owner of that property, and he should get the Pennsylvania to give better service to the tenants, so that he could keep them there.

Q. Did Lefkowitz say anything about whether or not he would do it? A. He said he would take it up with them.

Q. Did you ever hear anything, that he had? A. No.

Q. Well, now, didn't you sometime later hear that there had been a building erected on the Manufacturers Developing Company, and that the Brandes people had leased it? A. I did.

Q. Did you see the building? A. I did, in the course of construction.

Q. Could you say whether or not it was anything like the building that Mr. Mitchell had made plans of? A. As far as I, as a layman, not as a builder, it looked exactly the same.

Q. Where was it, as to location? A. In the spot that had been discussed many times with the Brandes Products and Mr. Lefkowitz.

Q. The very spot that you had discussed? A. The very spot.

Q. The very spot then that you had brought to their attention or talked with them about, with reference to the plans that Mr. Mitchell had made? A. That is right.

Q. Do you know whether or not Mitchell built that building? A. He told me that he had, that he did not build it.

Q. Well, never mind; you don't know otherwise who built it. A. Yes, I have made inquiries and found out.

Q. Never mind. After you heard this, and saw the building, did you go to Lefkowitz' office? A. I did.

Q. What did you say to him? A. I went there and used the tactics that I did not know what he was building that building for, started to talk to him about the Brandes Products again, and he did not seem very willing to talk to me, so I—

Q. What do you mean by that? A. Well, he did not answer me.

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

The Witness: Well, he did not answer me.

Mr. McGlynn: This witnes is now characterizing the demeanor of a man.

The Court: He said he did not answer. Strike out he did not seem willing to reply. He did not reply; is that right?

The Witness: That is right. He replied with an evasive answer, talked about something else.

Q. Talking about something else? A. That is right.

Q. Did he at that time or any other time, express any dissatisfaction with the work that you had been doing? A. None to my knowledge, and never, to me.

Q. Or work that the Fiedler Corporation had been doing, any of them? A. No, sir.

Q. Did he at any time—I mean now, in the course of your contact with him—object to, make any objection to your showing other buildings to the Brandes people? A. No.

Q. Do you know whether he knew that you were doing it? A. Yes.

Q. How do you know? A. Because we had discussed it.

Q. With whom? A. With Mr. Lefkowitz.

Q. What do you mean by discussing? A. I had told him the fact, in fact, I called on Mr. Hall one day, and he asked me if I knew the Newman Hardware Company plant. I told him yes. He said it had just been offered to them.

Q. That is Mr. Hall, of the Brandes? A. That is Mr. Hall of the Brandes; he said it had been offered to them. I said for what purpose. It was during our negotiation for three hundred thousand—four hundred thousand—six hundred thousand square feet—

Q. Yes? A. He said for manufacturing purposes.

Q. Yes? A. I said, "Have you looked at the plant?" He said, "Yes, I have looked at it." I said, "Who offered it to you," which was the usual question which I usually—

Q. No, not what you usually do. A. He said that Mr. Lefkowitz had offered it to him. He wanted me to make an inspection of it, which I said I would do, and I went down and inspected the Newman Hardware Company plant, and it looked better as a warehouse, with the idea of looking at it, as far as being of use to the Brandes plant, as far as anything—

Q. Yes. A. —I went from there to see Mr. Lefkowitz.

Q. What did you say to him? A. I asked him how he came to offer to the Brandes Products a common hardware plant when we were trying to keep them on his property and building for him—

Q. Yes. A. His answer to me on that question was, well, if I can buy it cheap they will pay 50 cents a square foot, and I can make more money by buying that plant than by building here, and lease it to them, why shouldn't I do so. I told Mr. Lefkowitz, under the circumstances, I had done a lot of work here, I am trying to keep these people on your property here, and you are trying to take them away, where do I fit in? His answer to that was, well, we will have to see. I said, yes, we will

have to see what we are doing, bringing in, I am trying to keep those people on your property—

The Court: When was that?

The Witness: That was the early part of 1926.

Q. Was that long after this June 16th lease was made? A. Yes, it may be in the fall of 1926, around the summer.

The Court: Why did you ask him that? You had an agreement with him?

The Witness: Well, I had possibly forgotten the agreement for the minute.

The Court: Oh.

The Witness: I mean, it would be a natural question, for me to ask upon what his answer was.

The Court: All right.

Q. You have stated before that Mr. Lefkowitz—there had been some discussion before that—of the possibility that Mr. Lefkowitz—buy additional land and building on it for the Brandes people? A. That is right.

Mr. Skinner: Now, may we see the lease?

The Witness: The lease of 1927, Mr. McGlynn?

Mr. McGlynn: Yes, sir.

Mr. Skinner: I have asked for the production of the lease with the understanding—I have said here, it was made in May, 1927. It is produced now by Mr. McGlynn from the files of the Manufacturers Developing Company, and I am going to, with his consent, put it in evidence.

(The same is received in evidence and marked Exhibit P-7.)

The Court: What date is it, Mr. Skinner?

Mr. Skinner: May 24, 1927.

Q. Will you look at that, Mr. Vail, and tell us—well, I think you have said—look at it and tell us whether the property there described is the same as you had been before discussing with them for the location of the building, according to the lay-out plans—there is the blue prints attached to this, that you are turning to—

Mr. McGlynn: That includes more than the leased property; I think it contains a lot of property on which there are properties.

The Witness: It contains 350 Thomas Street, the location of 350 Thomas Street; it includes the Mason Building, I believe the number is 360. It includes the Whittier property across to the Building, all the way back to the railroad, down again to Thomas Street.

Q. Now, then, there is a shaded portion? A. Yes.

Q. Marked off from the rest of it by stripes, or lines. Now, how does that shaded portion compare with the property with which you were acquainted, with reference to the erection of buildings on the leased part today? A. The shaded lines include my original lease, 350 Thomas Street, and the building in the rear of that, also the area that was in discussion with Mr. Mitchell and the Brandes and Mr. Lefkowitz, appertaining to the

three-story building that we prepared plans, and we were practically—

Q. I asked you, how do these shaded lines compare with what you were doing? A. Exactly.

Q. Exactly the same thing? A. That is right.

Q. You have not yet got any commission for your leases, have you? A. I have not.

Q. Did the Fiedler Corporation, so far as you know? A. Not to my knowledge.

Mr. Skinner: I call attention, if your Honor please, of the Court, and the jury to this lease now in evidence, that it is from the Manufacturers Developing Company to the Brandes Products Company, and it is for the term beginning with the substantial completion of the building and terminating June 15, 1936, at the annual rental of $28,500, together with all the water rents to be paid by the lessee.

Mr. McGlynn: Correct, and that rent actually began the 4th of September, 1927.

Mr. Skinner: Without being able to fix the date?

Mr. McGlynn: The 1st or 15th, whatever the date—

Mr. Skinner: That is the rent date, for it?

Mr. McGlynn: There was a couple of days difference adjusted by some arrangement between the parties, September 15th, a couple of days difference between the time the lease actually commenced to operate.

Mr. Skinner: Cross-examine.

Cross-examination by Mr. McGlynn:

Q. Now, on these transactions, Mr. Vail, in which you took part, while a member of the Fiedler organization, you had a personal interest, didn't you? A. I did.

Q. What was that interest? A. I was working for the Fiedler organization on a percentage of the amount of commission that I earned.

Q. How much? A. Forty per cent.

Q. You then have a personal interest in the proceeding arising from this suit, if it be successful? A. I have.

Q. Starting with forty per cent. of any verdict recovered? A. In this proceeding.

Q. Is that right? A. In this amount, in other words, forty per cent. of the verdict, less whatever the—

Q. After the lawyer's bill is paid? A. That is right, which might make a difference.

Q. Might make a lot of difference. Now you have been told by your employer, Mr. Fiedler, and by your superior, Mr. Hartman, that this was a rather important transaction, wasn't it? This was to be a big development, wasn't it? A. I knew that myself.

Q. And you knew it before you were told that by your superiors, you knew what arrangement they were making? A. Pardon me; may I ask a question?

Q. No, sir. A. Oh, I do not understand the question.

Q. How do you know what other proposition your firm had with the owner of this property? Where did you get your information from? A. Mr. Fiedler, Mr. Hartmann, the usual procedure, five per cent. on industrial property.

Q. That was just the usual case, was it? A. As far as commissions are concerned.

Q. I am not interested in that right now. I am interested in knowing what you were supposed to do in this instance. Were you supposed to do just the usual things, to get a tenant for this property? A. I was instructed, and after conferences, that this was a big proposition, and due to the fact that Mr. Ross was a Rotarian, Mr. Lefkowitz had been brought into our offices, that I make an extra effort to produce tenants there.

The Court: Just as one Rotarian to another?

The Witness: That is right.

Q. Then you did the usual effort that you would do in the usual Rotarian case, did you? A. A little bit more in this instance, considerably more.

Q. You started then, you say, on March 12th, is that the date in your diary? A. That is right, I believe, 1926.

Q. The first time you had anything to do, the first time you really started to get a tenant for this property under this arrangement? A. No, I started to get—yes, that is right—you are right.

Q. Can we agree? A. Approximately.

Q. Never mind approximately. I thought you kept a diary. A. All right, I will accept that as the date we started.

Q. No, I do not want that. A. All right; that is the fact.

Q. Can you rely on these diaries? A. I can, in addition to my memory, all right, only for names.

Q. Suppose your memory goes wrong, you have your diary then, on which you would rely? A. (No answer.)

Q. Your memory is not perfect, is it? A. No, sir.

Q. All right. All you have in that diary is a name, is that right? A. That is right.

Q. On each page I find a lot of names? A. That is right.

Q. You say when you started at this proposition you put considerable energy in it? A. I do.

Q. You saw these people sometimes, you say, around at least once a day or sometimes two or three times a day? A. That is right.

Q. Those figures aren't noted in your diary, are they? A. Sure.

Q. All right; you started March 12, 1926? A. That is right.

Q. The next entry in your diary is March 17th? Right? A. I don't know without looking at it; I cannot remember dates that well. What is the date that you mentioned?

The Court: The 17th, St. Patrick's Day.

The Witness: That is right.

Q. All right; what is the next date after March 17th? A. April 12th.

Q. What? April 12th? A. April 12th.

Q. Didn't you make entries with regard to all of the numerous calls you were making between March 17th and April 12th? A. I do not say I was making numerous calls between March 17th and April 12th.

Q. Oh, you do not? A. No.

Q. When did you start this numerous calls business? A. I think it was, according to this book, around April 12th.

Q. Around April 12th? A. Yes; those numer-

ous calls I mentioned, a lot of work, without calling on the owner.

Q. I know, that is what you real estate agents do, don't you? A. What?

Q. You do a lot of calling, preliminarily? A. I do, I might take thirty people to Mr. Lefkowitz' property and submit it to them; there would be no reason why I should see Mr. Lefkowitz, after I got through discussing.

Q. I do not say you should see Mr. Lefkowitz, but I say that is what you have to do, in numerous —in almost every case, to show people about it, on leasing a piece of property, or prospective purchasers, prospective leases also, that is your business to go around and try to get them interested in the property? A. That is right.

Q. Sometimes you do not even get a prospective purchaser, in your office either, do you? A. That is possible.

Q. In other words, you may make a call on a sale or a lease—that is possible? A. That is possible.

Q. That is your business? A. That is right.

Q. While you were handling this proposition, this was not the only thing that you were handling, was it? A. No.

Q. You were handling numerous other propositions, weren't you? A. I would like to know the expression numerous—

Q. Well, many. A. Not many.

Q. Well, how many? A. A few.

Q. What do you call a few? A. Maybe two or three.

Q. From 1926 until 1928, which I understand to be the limit of the time you were working on this thing— A. Yes.

Q. You only handled two or three propositions other than this one? A. At certain intervals I might have prospects today, and only have two tomorrow, or I might have twenty and only be able to take care of one.

Q. I am not talking about prospects of the office; I am talking about the propositions you were handling, the only ones you were really endeavoring to get, lessees or buyers. A. That is right, yes.

Q. Only being two or three? A. We had probably a few, if that is what you are referring to.

Q. You were working on other deals besides this one? A. Yes.

Q. You do not want to give me the impression that all of your time was confined on this proposition? A. Yes, I would like to give the impression that a good part of our time was devoted on that proposition.

Q. Now, starting with April 12th—is that the date? A. I think that is the date.

Mr. McGlynn: Judge, do you mind letting the witness have the diary for a second?

Mr. Skinner: No.

Q. Whom did you see on April 12th? A. J. H. Hall at Brandes place, 1:30; that was the time of the appointment.

Q. Is that the first recollection you have of interviewing anybody connected with the Brandes proposition about a lease down here? A. On this particular property, yes.

Q. April 12th? A. That is right.

Q. And the date you mentioned, the first arrangement was when? A. May, I believe the date was testified here.

Q. May? All right. Did your diary show on what date that lease on Avenue D was executed? A. It does not show that particular record; it shows that I was with both the parties, or all of the parties on that day.

Q. On what date? A. I just put the name down in here.

Q. What was the date for the lease on Avenue D by the Brandes Corporation? A. Avenue D? I cannot recall the date, without looking at the lease.

Q. Won't the diary show that? A. No.

Q. How long a period of time elapsed between the lease on Avenue D and the first lease on Thomas Street? A. Not very long, a couple of weeks, possibly, maybe less than that.

Q. What is that? A. Not very long.

Q. You imagine a couple of weeks? A. It may have been one week; it may have been two weeks. It was thereafter, immediately—the reason for the lease on—

Q. I am not interested in the reason why; I want to know how many days, in my notes. A. All right.

Q. You saw Mr. Hall the first time, of the Brandes Corporation, on April 12th, with regard to the lease down here on Thomas Street and South Street, whatever you want to call it. A. That is right.

Q. On April 12th, the first lease you said that was executed was signed by the Brandes on Avenue D on— A. The Federal Company.

Q. That is the same thing? A. The same thing.

Q. Do you know the date of that? A. Not the exact date; I know it was in May.

Q. Do you know how long it was executed be-

fore the first lease on Thomas Street? A. Not according to the days; maybe it was a few days; maybe it was three or four, five or six days, or two weeks; it was immediately thereafter.

Q. That is a pretty big gap, the difference between two days and two weeks. A. Not in negotiating a lease on—

Q. Well, now, your lease was dated May 10th? A. That is the date the lease was executed, that is the date.

Mr. McGlynn: Second lease, May 10th.

Q. Now, how long before May 10th was the lease on Avenue D executed? A. A few days, maybe a week, maybe two weeks.

Q. More than a week? A. Maybe a week, maybe two weeks.

Q. If May 3rd was that, it only took you from April 12th to May 3rd to get the Brandes proposition, to lease a portion of this property down on Thomas Street; that is right, isn't it? A. That is right.

Q. So that your employer or the head of your firm had told you that he was extremely anxious to get a key tenant down there, didn't he? A. That is right, and he explained what a key tenant was.

Q. Did you assume that this first lease, which you made on Avenue D, was on a key tenant? A. Yes, on a key tenant, but the requirements for that building, at that time, were not key requirements.

Q. Were not key requirements? A. No.

Q. The first lease that you made for this very important tenant was only one year, wasn't it? A. That is right.

Q. And the first lease that you made on Thomas Street, was only for one year, wasn't it? A. That is right.

Q. So that, starting on April 12th, you concluded a lease satisfactory to the tenant— A. Right.

Q. —about a week before May 10th? A. (No answer.)

Q. On May 10th you concluded a lease satisfactory to both the landlord and tenant, and on June 16th you concluded a lease for the same space covered in the second lease, plus additional land in the rear, after the building was to be erected? A. That is right.

Q. And then upon the confirmation of that June 16th lease, you sent a bill on June 18, 1926, to the Manufacturers Development Company, for $6,450? Right?

Mr. Skinner: I suppose you mean the Fiedler Corporation.

Mr. McGlynn: Yes.

Q. Sixty-four— A. Yes.

Q. $6,450, is that right? A. Right.

Q. On that bill your firm gave credit for the hundred dollars which you described to us a little while ago, which was in connection with Avenue D; is that right? A. That is right; it was not necessary, but we felt it was our duty.

Q. In that $6,450 you had a forty per cent. interest? A. That is right.

Q. Now, just turn to your diary, sir—if you will, and tell me how many calls you made between April 10th and June 16th in connection with this lease that was consummated. A. In April, from—

Q. April 12th. A. On April 13th.

Q. On April 13th? A. I called on—

Q. Who? A. Mr. Hall of the Brandes.

Q. Yes? A. On the 14th—

Q. Once or twice that day, or three times? A. Might have been four times.

Q. The diary does not show that? A. Just the name; that is all.

Q. Go ahead. A. By going backwards or forwards, I can almost tell you—

Q. Go forwards; that is the idea; April 13th. A. 14th, I called on Mr. Hall.

Q. Yes? A. On the 15th I called on him.

Q. On the 15th? A. On the 17th—

Q. Yes, sir. A. On the 19th.

Q. Skipped a day? A. Sunday.

Q. Oh, Sunday, didn't call—didn't call on anybody Sunday? A. No, went to church.

Q. Better than I did. How about the 20th. A. No; 21st.

Q. 21st? A. 22nd.

Q. The 22nd seems to have quite a lot of names on, Mr. Vail. A. Yes.

Q. Were they transactions in connection with this property, or other matters which you were working on? Can you tell from looking at the names? A. I can describe them to you.

Q. No, I do not want you to describe them to me; I want to know, from looking at these names, whether you can tell me, whether all of those other people which you called upon, or called up, with respect to these properties on— A. They may have been with respect to various things.

Q. Don't you know now? A. I know they were in connection with this Manufacturers Developing Company property.

Q. With all of the names on that date? A. (No answer.)

Q. With respect to the Manufacturers Developing Company proposition? A. No.

Q. All right. Go to the next day. A. 23rd, 27th, 29th and on the 30th, Mr. Lefkowitz appears.

Q. Is that what your diary says? A. His name appears on that page, which means to me, if my memory serves me correctly, in covering the chronological order of my diary, that I had Mr. Hall and his associates down on Mr. Lefkowitz's property, probably half a dozen times before I could sell them the idea or make that proposition.

Q. My question was, you said his name appears. A. I might have gone to his office, or he may have come to ours.

Q. What is the next date? A. The 1st.

Q. Yes? A. The 3rd.

Q. Does that entry on the 3rd refresh your recollection as to whether the first lease was accepted by the Brandes people? A. No, I haven't anything here to show whether it was executed on that date.

Q. All right; go ahead. A. May the 4th, with Hall and Lefkowitz all day, that is a very plain entry.

Q. I see. A. May 5th, Hall and Lefkowitz; May 6th, Hall and Lefkowitz.

Q. I assume these other entries, do not say all day; do not mean you spent all day with them. A. I can also explain the other entries.

Q. I am asking you a question. A. Yes, sir.

Q. You had—one says all day—you haven't that on the others. Does it mean you spent only a portion of the day? A. The other three people I might have telephoned.

Q. All right, go ahead. A. May 7th.

Q. Yes. A. Hall, Lefkowitz, Mr. Spreckel.

Mr. Skinner: What is it? Speak up.

Q. Lefkowitz and Mr. Spreckel? A. Hall, Lefkowitz and Spreckel. That is the day that I learned that Mr. Spreckel was interested in the company, I put that name down. On the 10th, Reed, Lefkowitz. On the 10th—May 10th—

Q. Reed? A. Yes.

Q. That is the lawyer? A. Yes, that is right.

Q. That is the date of the second lease, or the first lease, I mean on Thomas Street? A. Right.

Q. Is that right? A. It must be; if it is the date of the lease.

Q. All right; go ahead. A. 12th.

Q. Yes? A. Lefkowitz and Hall. 14th—

Q. Yes? A. Lefkowitz. 15th, Brandes, National Box & Lumber Company, same thing.

Mr. Skinner: The same date?

Mr. McGlynn: Yes.

The Witness: Yes.

Q. Yes? 17th, Brandes? A. That covers to June 1st.

Q. From the 17th to June 1st? A. Appears Mr. Reed's name; Mr. Dietrich appears on that date.

Q. What date is this? A. June 1st.

Q. 1st? A. And 2nd and 3rd, 5th and 7th, Hall, or Brandes, appears Dietrick, Lefkowitz; 9th—

Mr. Skinner: Go on.

The Witness: Stick to the question?

Q. The 16th of June I believe the lease was signed, wasn't it? A. If that is the date of it, yes. 14th, 15th, 16th.

Q. What does the 16th say? A. Says Reed, Lefkowitz.

Q. Any notation on that page, June 16th, about the commission agreement? A. No, sir.

Mr. Skinner: Is there any notation about the lease on that page?

The Witness: No.

Mr. Skinner: All right.

Q. Just a moment; put the book aside, Mr. Vail. So you were the man who consummated the lease between the Manufacturers and the Quimby Pump Company? A. I did.

Q. When did you first interview anybody in connection with this lease? A. By refreshing my recollection again, from my diaries, I might be able to tell you.

Q. Now, Mr. Vail, haven't you been over the diaries in preparation of this trial? A. I went over these diaries in preparation of this trial; I have marked the name Lefkowitz, Hall, Dietrich, anyone appearing in this case, or the major ones.

Q. The Quimby lease happened to be dated in August, 1926. A. The first time their name appears in my book is June 18th, 1926.

Q. June 18th, 1926? A. Yes.

Q. The lease was consummated in August, 18th, 1926; is that right? A. Yes, I guess that is the date.

Q. And the commission your firm received for the Quimby lease was $5,531.21, is that correct? A. I cannot remember, as to the exact amount; I know it was around $5,000.

Q. All right. Maybe I have got another bill I can show you. A. All right, yes.

Q. In which you also had a forty per cent. interest. A. I did.

Q. Now, after August 1926—

Mr. McGlynn: No, withdraw that.

Q. When did you first start in negotiations with the Brandes Company or with the Federal Telegraph, either one of them, in connection with the additional lease, other than that described in the lease of June, covering the Thomas Street property? A. Immediately after the close of that lease discussion was started as to additional space.

Q. I understood your direct testimony to say that after some plans, one way or the other, the one that was worked on the next was a very large, serious proposition, which would involve the corner property, which was not owned by this Manufacturers Developing Company; is that right? A. I wouldn't say that. I do not think I said that was worked on next. That was one of the propositions.

Q. That was one of the propositions? A. Yes.

Q. Isn't that the last proposition worked on by you in connection with the Manufacturers Developing Company and Brandes? A. No, sir.

Q. What was the last proposition that you worked on? A. The last proposition that I worked on in connection with Mr. Lefkowitz?

Q. The Manufacturers Developing Company and Brandes or Federal Telegraph, whichever you want to call it. A. The three-story building which was to be built adjacent to the 350 Thomas Street. on the east side, containing sixty thousand square feet.

Q. Isn't that the building that was intended by the parties to include the corner property? A. No, sir.

Q. Now, Mr. Vail, did you give Mr. Lefkowitz or Mr. Ross or Mr. Mitchell, their engineer, any idea of the kind of building that your Brandes Company wanted erected on this particular site? A. I did.

Q. Was it to be the same type of building that had already been erected? A. There was so many different buildings discussed; one was the same type in the rear, another was a 300,000 square foot.

Q. Just a moment. There was another type of building; that was the construction of the rear of 350 Thomas Street, wasn't it? A. That is right.

Q. That was a general factory construction? A. That is right.

Q. A Monitor roof building? (No answer).

Q. And isn't that the same kind of a building that was to be erected on the consummation of those plans? A. One of the proposed plans, or one of the suggested, included a building of that type.

Q. Isn't that the only type of building that was discussed? A. No, there were many types discussed, including reinforced concrete.

Q. Who gave the engineer details with respect to those drawings which you say he prepared? A. Mr. Hall of the Brandes Company, Mr. Stevenson and Mr. Dietrich.

Q. You had nothing to do with that, did you? A. Yes.

Q. What? What do you know about buildings? Did you give him any details? A. Yes, I gave him details.

Q. What do you know about buildings? A. I know this much, that if Mr. Mitchell was busy in New York, drawing a set of plans and I happened to call on Mr. Hall that day and we discussed the proposition, and he said, if I can remember correctly, to put the toilets in the rear of the building, or the chimney in the front, or something of that sort, and I want it changed, so it was my job to go to Mr. Mitchell and deliver the message.

Q. Carried the message on those things as to the character of the building? A. Yes.

Q. What experience have you had in building? A. I haven't much, not in building, but I know factories.

Q. All right. Now you say that these negotiations of yours continued on until 1928. A. That is right.

Q. Whom did you see in 1928 about the proposition, involving the leasing down there? A. Mr. Hall, Mr. Dietrich.

Q. With respect to what? A. To taking additional space down in—in 1928.

Q. That is what you said. I understood your testimony to be you started in '26 and you continued until 1928. A. Yes.

Q. I do not want to be wrong about it; that is what I have got here. A. Yes.

Q. Is that right? A. That is right. Now, if I can use my diary again, I will be able to refresh my memory.

Q. Oh, go ahead, take them. A. May I have that diary please?

Mr. Skinner: You want the '28 diary?
Witness: '27 and the '28, I would like.

A. Negotiations with the Brandes Products lessened up in '28, probably went on until 1928.

Q. You are referring to when? A. In 1928, when I stopped negotiating with Mr. Lefkowitz.

Q. Well, on that date, which is in 1927, is the last that you performed any service in connection with the attempting to get Brandes in connection with the Manufacturers Developing Company? A. I would not say it was the last attempt; there may

have been interviews, but I did not discuss them with Mr. Lefkowitz.

Q. What date in 1927, can you say that was? A. I could not say the exact date.

Q. What is the matter with the diary? A. I do not know whether I told you that I have names in here.

Q. Well, those names to you all mean something, don't they? A. By refreshing my memory; yes, sir; that is right. (Witness referring to Exhibit P-4C for identification). It was in probably the—

Q. Not probably; what does the diary say about it? A. The diary doesn't say anything about it.

Q. What do you mean; no names in the diary in 1927? A. Lefkowitz' name appears in the early part of 1927, which means to me—

Q. What is the last time that Mr. Lefkowitz appears in the diary marked P-4?

Mr. Skinner: Can't we leave that until tomorrow, in going through it?

The Court: It might not take very long.

A. (Witness examines P-4C for identification).

Q. Suppose you adopt Mr. Skinner's suggestion and leave those diaries, find out then the date in '27, especially the last date, which Mr. Lefkowitz' name appears. A. All right.

Q. Let me get down to the question of this commission agreement. Why are you so sure that that interlineation was put in before it was signed? A. Because I suggested that it be put in.

Q. Was it put on in the carbon copy? A. It was.

Q. Sure of that? A. I am not positive.

Q. There is another interlineation with pen and ink, isn't there? A. Sir?

Q. There is another interlineation with pen and ink, isn't there, on the original agreement? A. If it is there.

Q. Isn't there? A. I don't know until I see it.

Q. I point out to you, in the third line, at the top, words in ink, 350 Thomas Street, Newark, N. J. A. That is right.

Q. Whose handwriting is that? A. It looks like Mr. Lefkowitz' handwriting.

Q. Are you sure? A. I am not sure.

Q. You are not sure? A. No, sir; that is the address of the property, however.

Q. Look at Mr. Lefkowitz' signature down at the bottom; then look at that, and tell me again, do you think that is Lefkowitz' handwriting? A. Possibly; I am not an expert.

Q. Look at Ross'. A. It might be Mr. Reed's writing.

Q. It may be anybody's; you do not know, do you? A. I really don't know.

Q. Just look at that agreement, Mr. Vail, if you leave out this interlineation here, that agreement would only refer then to Thomas Street, wouldn't it, the property that was under lease that day? A. What did you say?

Q. If you left out that line, that writing which you say was put in there at your suggestion before this suggested execution, then that agreement only applied to that agreement, which was referred to in pen and ink in the third line as 53 Thomas Street? A. It might be interpreted as that; I am not a lawyer.

Q. But you are a real estate agent, aren't you? A. That is right.

Q. You read that over carefully, before you went over to this meeting, didn't you? A. That is right.

Q. You called Mr. Hartman's attention, that your impression of it, you did not like it, you wanted him to make some interlineations? A. That is right.

Q. And all of those changes, all those interlineations were made at your suggestion? A. That is right.

Mr. Skinner: Pardon me. He says that one of those changes was made.

Witness: I can probably explain the answer to 353 Thomas Street being on it.

Q. No, you cannot explain; I want to know if you know anything about it. A. I do not.

Q. I understood you to say that the reason it was not signed, was not drawn upon the occasion of the leasing of May 10th, was probably due to your carelessness, is that right? A. Probably was.

Mr. Skinner: Speak up.

Witness: Yes.

The Court: Probably was, he said.

Q. What about the other lease on Avenue D; explain that, why it was not done then. A. There was other leases.

Q. But you had completed you say, an arrangement between the landlord and tenant, lease for one on Avenue D, which was to be executed, which was the lease on which this Brandes products was the key tenant; isn't that so? A. That is right, but I don't know it was the key tenant.

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

Q. When did you find that out? A. Through our subsequent negotiations.

Q. Why wasn't there a commission agreement on

that first meeting? A. Probably due to my neglect.

Q. What drew it to your attention, what transpired on the third lease, that you wanted it drawn? A. Because by that time I realized the magnitude of the Brandes product, and the fact that Mr. Lefkowitz had agreed to lease 15 Avenue D, and out of a clear sky had changed his mind, and wanted me to take him from—to go down and switch 350 Thomas Street.

Q. But he had paid your commission on the 350? A. No, he did not.

Q. That is on your receipt. A. With the understanding that when that deal had been consummated it would be credited in the bill, which was done.

Q. He voluntarily gave you $100, for your services, in connection with this lease on Avenue D, did he not? A. I had earned my commission on Avenue D.

Q. But you were not asking for full commission on Avenue D? A. I asked him for no commission.

Q. But he had given you a check for $100. A. He tendered a check for $100.

Q. And you would get your full commission on the second lease? A. I did.

Q. And the third lease? A. Which one are you talking about.

Q. Don't you know the one I mean? A. All right, I believed I would get it, according to the record.

Q. All right. When had you ever discussed with Mr. Lefkowitz or Mr. Ross the question of what the financial arrangement was, or the commission arrangement was between your firm and their firm, with regard to this property? A. When Mr. Hart-

man suggested that I get a commission agreement, I discussed it with him at that time.

Q. At that time?

The Court: The question is, when was that, as I understood it.

Q. When did you have any discussion with them about commissions? A. Around this, after the second lease.

Q. Well, you mean that was when the arrangement was made, after the second lease? A. That is right.

Q. Then there wasn't any commission agreement before that, was there? A. There wasn't—a verbal one.

Q. There wasn't any written agreement until after the third one, was there? A. That is right.

Q. When was the first time that you ever discussed commissions with those two men? A. I discussed commissions the first lease that was made.

Q. With whom? A. With Mr. Lefkowitz and Mr. Ross.

Q. Where? A. At their place of business.

Q. Nobody there but you and those gentlemen? A. There might have been somebody else around, probably some one in his employ, someone sitting in his office.

Q. Did you discuss the commission arrangement question with them before you drew this paper? A. I did.

Q. When? A. Just previous to the signing of that commission agreement.

Q. Where? A. In his office.

Q. Lefkowitz' office? A. Yes.

Q. And the third time was at Reed's office? A.

I do not say that is the third time, but that is a subsequent time.

Q. Was there another time before Reed's office? A. Might possibly have been.

Q. What was the necessity of so many discussions with regard to the commission, if there was an arrangement already made, verbally, as you say? A. Due to the fact that this proposition had large possibilities to me, I knew that possibly the Brandes products might want a million feet, and I discussed it with Mr. Lefkowitz, brought up at the same time in case there is a million more feet built down there, whether or not—do you know how much commission you should pay on the deal

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Q. Hadn't he already voluntarily offered you $100 when the deal did not go through? A. That is right.

Q. Certainly that attitude didn't make you believe that you needed a written agreement, did it? A. No.

Q. Then, what was there that prompted you to discuss the commission so many times? A. Our policy—it is our policy as a broker to discuss commissions every time I get an opportunity to.

Q. Every time you meet a man? A. Not every time I meet a man.

The Court: We will take a recess until Monday morning.

Adjourned until Monday, September 29, 1930, at 10 o'clock A. M.

Second Day.

Monday, September 29, 1930.

Continued pursuant to adjournment.
Present—Counsel as before stated.

CRAIG VAIL, recalled in behalf of plaintiff.

Cross-examination (continued) by Mr. McGlynn:

Q. Mr. Vail, your testimony, I understood you to say that you knew this property had been in the hands of other real estate agents. That is a fact, is it not? A. That is right.

Q. On the occasion of your interview in March, 1926, March 12th, which I understood to be the first time you had discussed this property with anybody on behalf of the defendant, you knew, did you not, that at that time this property was in the hands of Feist & Feist? A. I did not.

Q. Didn't you know at that time that the defendants had placed this property in the hands of Feist & Feist, under an arrangement which called for a thirty-day cancellation clause? A. I did not.

Q. Isn't that the reason why you did nothing from March 12th to April 12th? A. Not to my knowledge.

Q. Did you know, if you had procured a tenant, or did procure a tenant between March 12th and April 12th, that by virtue of this arrangement that the defendant had with Feist & Feist, that you would have had to share your commission with them? A. I did not.

Q. Wasn't that the real reason why you did nothing between March 12th and April 12th, with reference to this proposition? A. It is not.

Q. Have you studied your diary since Friday? A. I have.

Q. Can you give me the last date, in 1927, that your diary contains any mention of a call on Mr. Lefkowitz, or anyone else on behalf of the defendant? A. Do you want the last date in 1927 that I called on him?

Q. Sir? A. Did you ask the last date in 1927 when I called upon Mr. Lefkowitz?

Q. Yes. A. August 23rd.

Q. Then you were mistaken on Friday when you said your calls continued until 1928? A. I do not recall saying that my calls on Mr. Lefkowitz continued in 1928. I must have misunderstood your question if I answer it that way.

Q. I did not ask you if you said it. A. I continued to call on the Kolster Radio or Brandes Products.

Q. What is the last date in 1928 that you called on them? A. I continued to call on them beyond 1928.

Q. No, no; what is the last date in 1928 that you called on them? A. I don't recall.

Q. Doesn't your diary show it? A. It may, but I was not interested in knowing, because I continued to call on them until 1929—1930.

Q. Nothing had happened which interfered with the thought in your mind that you could not interest the Brandes Products in some portion of this property on South and Thomas Street, had it? A. I don't know that it had.

Q. Well, had it? A. At what date?

Q. Why, I understood you to say on Friday, that there was a time in 1927 when you felt that it was useless for you to continue to interest the Brandes in this property of the Manufacturers on South and Thomas Street. A. There was.

Q. When was that time? A. 1927; sometime in April, during April.

Q. Sometime during April, 1927? A. Yes, sir; April or May, 1927.

Q. April or May, 1927? A. (No answer).

Q. Then were those calls in '28 on the Brandes people for the purpose of interesting them in this particular property? A. No, sir.

Q. So that you still felt that you could do business with the Brandes people, notwithstanding what happened in possibly '27? A. I did continue to do business with them.

Q. You did lease real estate to them, didn't you? A. Right.

Q. After April, 1927? A. I believe that is right.

Q. What is the name of that? A. A warehouse on Empire Street.

Q. A warehouse on Empire Street? Were you the broker in connection with that lease? A. I was.

Q. Under the same arrangements as here, you got forty per cent. of the net commissions? A. That is right.

Q. That was after April, 1927? A. I believe it was.

Q. Now, when did you first know that there had been a lease made in '27 between Brandes and the Manufacturers? A. Sometime in the—I had knowledge of it, sometime, possibly in the latter part of June or July.

Q. June or July? A. Yes, sir.

Q. When did you first see this building being erected? A. I don't recall.

Q. Before that? A. Not to my knowledge.

Q. After that? A. I think I saw it afterwards.

Q. Now I understood you, on Friday, in answer to a question of Judge Skinner, when he showed you the lease of 1927, covering the premises at 360

Thomas Street, looking at a blue print annexed to that lease—you said that that lease covered the same property that you had been discussing with the Brandes Company from June, 1926; is that true? A. That is right.

Q. How many different proposed leases did you discuss with Brandes after June, 1926, in connection with the defendant's property? A. I would say, possibly five or six.

Q. Five or six different leases? A. That is right.

Q. Affecting different property? A. Affecting the Manufacturers Developing Company property.

Q. Different sections of that property? A. Different locations of that twenty-one acre tract.

Q. Well, close to them, or a different location? A. I wouldn't say on a different location; different ideas, different types of buildings, on similar locations, or other locations.

Q. Well, the last one that you discussed in '27, just prior to May 24th, what property of the Manufacturers did that include? A. I don't recall which one it included.

Q. Well, how long a lease was that that you were discussing? A. Well, they discussed so many different terms of it, I couldn't say whether it was a five, ten, fifteen, twenty-one or fifty year lease.

Q. Well, have you read this lease of 1927? A. I haven't thoroughly, so far.

Q. Have you read it at all? A. I looked at it.

Q. Have you read it over? A. Parts of it.

Q. What parts? A. The opening paragraph.

Q. Just the names? A. The names.

Q. What else? A. And the street address.

Q. Do you know anything about the rent? A. I understood it is for $28,500 a year.

Q. What was the rent you were discussing in the

last lease, discussing with them prior to May, 1927? A. This pertained to the 60,000 square feet. If it was 250 or a hundred thousand, if it was 300,000, it was on the same pro rata basis.

Q. Well, now, what were you discussing with them prior to May, 1927? The last lease that you were discussing with them prior to the time this lease of '27 was executed? A. The last lease was 60,000 square feet.

Q. How long a term was it to be? A. For ten years.

Q. What was the rental to be? A. Mr. Lefkowitz wanted me to get 50 cents a square foot, and the Brandes Products had a thought that they should get additional space due to the fact they were discussing a three-story building, which was, in their opinion, costing less to build, included less land than the previous building, that they should get it around 45 cents a square foot.

Q. Then you had not had your parties together on the question of the rate then, in this lease, had you? A. To a certain extent.

Q. I understood your answer to the question was the landlord wanted 50 cents, and the tenant wanted to get it for 45. A. That is right. I told both parties that I thought we could compromise, on the same basis of the original lease.

Q. But up to the time that you stopped, you had not gotten them together, had you?

Mr. Skinner: If your Honor please, I cannot see the relevancy of this. I do not understand that it is a part of the broker's work to get the parties together.

Mr. McGlynn: I understood that was what the dispute was about.

Mr. Skinner: Why, we say the very nature of his contract was to bring the parties together, starting on an undeveloped piece, a vacant piece of land, and that bringing them together was complete, when he brought them together, for the purpose of carrying on the question of negotiations; that he did not actually have to bring them to an agreement, that would not be any part of his understanding.

Mr. McGlynn: I do not understand the plaintiff's case, if your Honor please, then. It is my understanding that they were to—

The Court: The Judge's point is that he brought them together. He is entitled to the payment of the commissions even though at the time he brought them together they were not in accord as to the exact details, he would still be entitled to his commission, which he claims, even though they were not at that time ready to execute the lease. He has a man that wishes to lease the property and he brings the customer to lease it.

Mr. McGlynn: Yes.

The Court: Brings them together, letting them discuss as to the exact price. That is his testimony. You may proceed; I will allow it.

Q. You hadn't gotten your parties together on the question of the price, had you? A. Not exactly. That might have come up at any time, something that might change that.

Q. What was the building that the landlord was to erect under your arrangement? A. A three-story building.

Q. How many square feet? A. Approximately 60,000 square feet.

Q. Any discussion of the amount of deposit the tenant was to pay? A. Yes.

Q. How much? A. A year's rent in advance.

Q. Anything else to be advanced by the tenant? A. There was nothing else discussed at that time.

Q. Did I understand you to say that the plans and specifications for this proposed building were discussed, in your presence, between the officials of the Brandes and the officials of the Manufacturers Developing Company? A. Preliminary plans and specifications?

Q. Preliminary plans and specifications. A. Yes.

Q. You have never seen the finished plans and specifications, have you? A. Not to my knowledge.

Q. Did you ever inspect the finished building when it was actually completed? A. No, sir; from the outside.

Q. Well, the outside is exactly the same type of construction as the one which was built in the rear, 350 Thomas Street, and the same color as the one which was built for the Quimby Pump Company? A. I wouldn't say so.

Q. What is the difference? A. One is a three-story; the other is a one-story.

Q. That is the only difference, isn't it? A. No.

Q. What is the other difference? A. The Quimby Pump has continued sash on the side, if my understanding is correct; and the three-story building, for the Brandes Products, has pilasters.

Q. Any other difference? A. I don't know of any.

Q. Did you have any other negotiations with the Quimby Products? A. I did not.

Q. Why not? A. I handled the one that was concluded.

Q. Why didn't you have any others? A. I only handled that one.

Q. Is that the best answer that you can give me? A. That is right; I was instructed to get one.

Q. Now, looking at P-2, Mr. Vail, I show you the line which you say you had called to Mr. Hartman's attention, and had interlined, reading, "On any other property which we may hold," and call your attention to the fact that in the line preceding that—portion of the line preceding and the line ahead of that—this phrase, "Or any other premises we may own." Did you notice that, in that, when you read it the first time, the first phrase in there — A. That is right.

Q. —"Premises we may own"? A. That is right.

Q. Why was it necessary to interline this second phrase, "Or any other property which we may own," if it was in there already? A. Customary, I guess, to put it in that way.

Q. What do you mean, customary to put it in that way? A. Most all of the commission agreements I have ever seen was drawn that way.

Q. What way? A. The same as that one.

Q. Well, your agreement already had the phrase in it, did it not, "Now, therefore in consideration of the services rendered by the Fiedler Corporation, should the within mentioned tenants, their successors or assigns, renew their lease, or extend their occupancy beyond the original terms, or lease additional space on the premises in question or any other premises we may own"—"or any other property which we may own"—didn't you already have the phrase in there, "or any other property

we may own"? A. If it is there; yes, sir.

Q. Why was it necessary for you to insert it the second time? A. It was my interpretation on why this line was inserted in there, due to the fact that it had been discussed with Mr. Lefkowitz, the possibilities of not being able to accommodate the Brandes Products upon the particular property that he owned—

Q. Yes? A. —And he agreed—

Q. Yes? A. —Any number of times to go out and purchase other property. In fact it would have been necessary, discussing one of the propositions, to acquire adjacent land. He owned a piece of property on South Street, bounded by Thomas Street, and the adjacent street running north and south. There was a building discussed on that property of about 600,000 square feet. It would have been necessary, to place that building there, to acquire the adjoining property, owned by a man by the name of Mackay. I was given the job to go out and try to buy it.

Mr. Skinner: Given the job by whom?
The Witness: By Mr. Lefkowitz.

Q. Yes? A. I did not succeed.

Q. Did you buy it? A. I did not.

Q. What has all of that got to do with why you put that phrase in the second time? A. Because he had agreed to go out and buy other property.

Q. You were to get a commission, if he bought, was that what the agreement contained? A. Not to my mind.

Q. That was not the reason why you put it in, was it? A. If he had bought other property, leased it to the Brandes, we would get paid for the leasing of those premises to the Brandes.

Q. Wasn't that already in your agreement? A. (No answer.)

Q. It was already in your agreement, that you were to get a commission on any other property that they might own or lease, wasn't it? A. If it is in there. I am not an attorney, so I cannot interpret—

Q. You certainly were not to get a commission on premises you bought for them, were you? A. I would have gotten a commission from the seller if I had procured it for Mr. Lefkowitz, handled the transaction.

Q. Where and when were all of these things discussed with Lefkowitz? A. They were discussed at his office, sometimes out in the twenty-one acre tract, sometimes at the office of the Brandes Products, various places.

Q. You said something the other day about these Newman Hardware Company plants. A. That is right.

Q. I understood you to say that Mr. Lefkowitz offered that to the Brandes people, is that right? A. That is right.

Q. Do you know about Mr. Hubert, of the Johns-Mannville Company? A. I do.

Q. Don't you know, as a matter of fact, he is the man that offered it to the Brandes? A. I do not.

Q. Didn't you discuss it with him? A. I did not.

Q. Do you know him? Is he here or not? A. There he is.

Q. Don't you recall discussing that proposition with him? A. Not that proposition, no.

Q. Don't you remember that that is the man that offered it to the Brandes? A. I do not.

Q. You have no recollection of that? A. No, sir.

Q. Don't you remember asking him what he was doing in the real estate business? A. I do not.

Q. Don't you know that he is the man that offered it to Lefkowitz?

Mr. Skinner: That is the third or fourth time, that question.

The Court: No, the question is do you know that that is the man that had offered it to Lefkowitz.

A. I do not, sir.

Mr. Skinner: All right.

Q. Will you look at your diary for the date of January 12, 1927, Mr. Vail? A. Yes.

Q. Does the diary show that is the date you went to Passaic with the Brandes people, or one of the days? A. That is one of the days.

Q. Does your diary show who you had up there that day? A. No.

Q. What does it show? A. Says Hall, 9:30 A. M.

Q. What? A. It says J. H. Hall, 9:30 A. M.

Q. I see.

The Court: That indicated that you had an appointment with him at that time?

The Witness: That is right.

Q. I call your attention, Mr. Vail, to the question asked you on Friday by Judge Skinner, on page 38, you were being asked about a conversation you had with Mr. Lefkowitz about commissions, and the question was, "What did you say?

Answer: What did I say about the commission? Question: Yes. Answer: I told Mr. Lefkowitz that we wanted a commission agreement, The Fiedler Corporation, embodying all of the deals surrounding the particular transaction that we were going to close within a few days, at least that was planned to close, this commission agreement, embodying the commission on any leases that we might have with the Kolster Radio, or any other leases that we might have with them, upon any renewals that we had negotiated with them, that they might have, of any leases that they might contract themselves upon his property or any other property that he might acquire." Now, there is nothing in your agreement, is there, Mr. Vail, which says that you were to get a commission on any leases, or any arrangement made between the Brandes Products and the defendant corporation that they worked out between themselves? A. Repeat the question.

Q. (As repeated by stenographer) Now, there is nothing in your agreement, is there, Mr. Vail, which says that you were to get a commission on any leases, or any arrangement made between the Brandes Products and the defendant corporation that they worked out between themselves? A. It doesn't say anything about that.

Q. But you say that was discussed? A. That is right.

Q. What was said about it? A. It was not discussed that they might enter into a deal without me, if that is the question; it was not necessary to discuss that.

Q. It was not discussed? A. No, I did not get any idea that they would ever do it.

Q. It was not discussed? A. No.

Q. The discussion was, as I get it, Mr. Vail, that your concern was to get a commission on any leases between Brandes and the Manufacturers Developing Company? A. That is right.

Q. That you or your office negotiated on Thomas Street? When I say Thomas Street, I mean that tract. Is that your understanding of the arrangement? A. My understanding of the arrangement was that Mr. Lefkowitz, for anything that he might lease, on that property, or any building that the Kolster Radio or the Brandes Products might lease on that property, we would get a commission.

Q. Whether you did any services in connection with it or not? A. That was not discussed.

Q. What was your understanding, that you were to be the agent, that negotiated such a lease, would entitle you to a commission? A. We were entitled to a commission, provided we brought the parties together.

Q. Please. What was your understanding in this particular transaction as to what you were to do in order to entitle you to a commission? A. I was to help negotiate the leases.

Q. But if you were unsuccessful, what were you to get? A. The question of being unsuccessful did not enter into it, to my knowledge.

Q. Was there any discussion about that at all? A. No, not to my knowledge, about being unsuccessful.

Q. And the only discussion between you and the representatives of the Manufacturers was that you were to get a commission, if you negotiated a lease on this particular tract with the Brandes; isn't that right? A. If the Brandes leased any part of that tract.

Q. With or without any effort on your part? A. It didn't make any difference.

Q. It did not make any difference? A. No; I brought them together.

Q. And by bringing them together in the first lease of 1927 you were then in a position to get a commission on any lease that they entered into? A. That is right.

Mr. McGlynn: That is all.

Redirect-examination by Mr. Skinner:

Q. Mr. Vail, I call your attention to this Exhibit P-2. You were asked, and Mr. McGlynn stressed the words as being here, "Or lease any additional space in the premises in question or any other premises we may hold." Now, he stressed and repeated the words, "Or any other premises we may hold." A. Yes.

Q. Do you remember? A. That is right.

Q. Then he asked you if it did not say later on, should they purchase premises, and repeated, or any other property which we may own, called attention to property which we may own, appeared there, too; do you remember that? A. Right.

Q. Asked you whether you could see any reason why that appeared twice. A. That is right.

Q. Do you remember that? You said you could not, or apparently could not. He asked you to look at and notice that it appears first in connection with the lease, and the second time it appears in connection with the purchase; do you see that?

Mr. McGlynn: If your Honor please, it seems to me this is very leading direct examination. I do not see—

Mr. Skinner: This is leading the witness, as to the fact.

The Court: I will allow it. It is—

The Witness: That is right.

The Court: —Obvious, it doesn't make any difference. Judge Skinner could argue that to the jury. It speaks for itself. It doesn't make much difference whether this witness understood just exactly what it meant or not, as far as I can see.

Mr. Skinner: Yes, sir.

The Court: The question is, what does it mean, not what he thinks it means.

Q. Now, Mr. Vail, when you were first told to start on this work of getting tenants, was it—I think you testified—I am not sure that you did—as to whether or not the landlord was to offer—was willing then to offer and authorized you to offer to erect a building for tenants, as they might come along. A. That is right.

Q. Is that so? A. That is right.

Q. And was there any plans of a building that limited you as to what might be offered? A. No, sir.

Q. Was there any specification of it, or description of it? A. No, sir.

Q. What was the building to be, if erected, how was it to be agreed upon? A. It was to be agreed upon as to the requirements of the tenants. In other words, the tenants might have—if I produced a tenant, he may want one story or may want a five story building.

Q. How was it to be fixed as to the fact— A. According to the requirements.

Q. How was it to be ascertained? Were you to

ascertain it, or was it to be done between the owner and the prospective tenant? A. It was to be done between the owner and the prospective tenant.

Q. Or was that what your job was, to go out and get somebody to come in and talk with Mr. Lefkowitz about renting the property, on which a building should be erected, as they might then agree? A. That is right.

Mr. McGlynn: I object, if your Honor please. I think that is very leading. I think that is practically a statement of fact.

The Court: Strike it out. Is the question answered?

Mr. Skinner: Yes.

The Court: He has already answered it. It was a repetition.

Mr. Skinner: Quite right.

Q. Now, that being your original instruction, did you ever receive any different one? A. I did not.

Q. What? A. I did not.

Q. Did or did not? A. I did not.

Q. I think Mr. McGlynn referred to your former testimony as to sometime you found out you could get nowhere in the negotiation between the Brandes Company and the Manufacturers Company. Was there ever any time when you were told by Mr. Lefkowitz to stop your effort? A. There was.

Q. When was that? A. Sometime in February I called on him—I called on Mr. Lefkowitz, and he told me that he was not going to build any more buildings for anybody.

The Court: What year?

The Witness: 1927.

Q. That is what you say he told you in February, 1927? A. February or March, 1927; around that time.

Q. Well, you looked at your diary. What have you in mind there? A. February 14th.

Q. 1927? A. 1927.

Q. And you think that was the date that he told you that? A. Yes.

Q. Now, after that date did you actually do anything in the way of communication between Mr. Lefkowitz of the Manufacturers Developing Company and the Brandes Company with reference to a building on their premises? A. I did.

Q. What did you do and when? A. I called on him again and he practically told me the same thing, to call on Mr. Lefkowitz.

Q. You called on Mr. Lefkowitz? A. Yes, sir.

Q. Well, after that date, did you have anything to do with reference to the plans and specifications or specifications? A. No.

Mr. McGlynn: Was that the 14th of February, Judge?

Mr. Skinner: Yes.

Q. At the time of the original instruction, or at some time you have said—I do not know whether it was at the original instruction or not—that Mr. Lefkowitz said to get—something about getting 50 cents a square foot. A. Yes.

Q. What was it he said about that? A. Mr. Lefkowitz said that he would be willing to put up an ordinary type one-story building, or two-story, or three-story building, providing everything was satisfactory, that the tenant did not want him to put gold plated door knobs on it, or something ex-

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treme for an average price, around 50 cents a foot; that if there requirements were not so strenuous that he might take less.

Q. Do you know how the rental upon the lease of June 16, 1926, was calculated or ascertained? A. 1926? That included—

Q. June, 1926. A. That is one that included 350 Thomas Street?

Q. Yes. A. That was agreed upon—

Q. How was it reached?

The Court: At what rent?

A. I think it was 47½ a foot.

Q. Have you made any calculations of the rate at which the lease of May 24, 1927, was made?

Mr. McGlynn: I object, if your Honor please; the witness said he did not read anything but the first, opening paragraph.

The Court: He what?

Mr. McGlynn: He only read the first, opening paragraph.

The Court: He asked him whether he made any calculation.

Mr. Skinner: I will withdraw the question.

The Court: All right.

Q. Have you made any calculation of the rate of 47—what the rental would be at the rate of 47½ cents on a building having 60,000 square feet? A. I think that figures out, $28,500 a year.

Q. Whether or not that is in the second lease can be ascertained by looking at it? A. That is right.

Q. Now, Mr. Vail, you were asked about whether you had any commission agreement for the com-

missions on the Quimby lease, and you said no written agreement, and you said you had none. Do you know anything about—do you know whether the Fiedler Corporation got paid? A. I think they did.

Q. Now, you said—you referred to some date in your diary—I think it was August 23rd—as being the occasion of the last call upon—was it Lefkowitz or Brandes? A. 1927?

Q. Yes. A. August 23rd?

Q. Let me see the entry.

Mr. McGlynn: I think April was the last one—

Mr. Skinner: Beg pardon?

Mr. McGlynn: I think April was the last one with Lefkowitz.

Mr. Skinner: In this agreement, Mr. McGlynn, he gave August 23rd as the date.

Mr. McGlynn: Brandes or Lefkowitz?

The Court: Lefkowitz.

The Witness: Lefkowitz.

Q. And the name that appears here in your diary on that date is Lefkowitz, is it not? A. That is right.

Q. Does Brandes name appear? A. No, sir.

The Court: That is August '27?

The Witness: Yes.

Q. Do you know from memory—

Mr. Skinner: I will withdraw that.

Q. Do you remember what was the occasion, or what was the business on which you called on Mr. Lefkowitz on August 23rd? A. I think around that time he had made another transaction with

the Brandes Products, and I went down to demand my commission.

Q. Did you demand it? A. And I did demand it.

Q. And was there anything else that was the subject of discussion at that time?

Mr. McGlynn: I object, if your Honor please—

A. (Interrupting) No.

Mr. McGlynn: Oh, he said "No".

The Witness: Right.

The Court: He said, "No."

Q. I think you said that you could not identify the handwriting of the insertion in this P-2, of the description of the property, 350 Thomas Street, Newark, New Jersey; is that right? A. That is right.

Q. You will notice that it is inserted in a blank apparently left for the purpose. A. That is right.

Q. Well, did you know whether it was there at the time that the commission agreement was signed, as you have described? A. It was left in blank in our office, because I did not know the exact description that Mr. Lefkowitz wanted to put in at that particular property. That was inserted the afternoon that the commission agreement was signed.

Q. And where? A. I think it was in Mr. Read's office; I don't know who inserted it.

Q. I show you, Mr. Vail, a printed blank form, and ask you if you have seen that form before.

Mr. McGlynn: Let him answer, just yes or no.

Q. Yes? A. I have.

Mr. Skinner: I ask that it be marked for identification.

The Court: Let it be marked.

(The same is marked Exhibit P-8 for identification.)

Q. And where have you seen it?

Mr. McGlynn: I object. Cannot possibly be redirect at all. I haven't any objection to examining on it, what it is, but—

The Court: Perhaps this is not redirect.

Mr. Skinner: Only it is, that last week Mr. McGlynn called for the production of any similar agreement, and I want to prove what the contents are in this, and this is the same as had been used.

Mr. McGlynn: But that there was a printed blank in use.

The Court: Let him see it, Judge.

Mr. McGlynn: Under those circumstances, why shouldn't I see it?

Mr. Skinner: Sure, but I haven't offered it yet.

Mr. McGlynn: It was only marked for identification?

Mr. Skinner: No, I only marked it for identification.

Mr. McGlynn: (Examining P-8 for identification) May I show it to his Honor so that he can rule on it properly, Judge Skinner?

Mr. Skinner: When I offer it, I will be glad to have his Honor see it, in defense of the offer.

The Court: All right.

Mr. McGlynn: I am going to object to it, because it is not similar to the one that is in evidence here. I will withdraw my objection; let the jury see it, your Honor.

The Court: All right.

Mr. Skinner: The only objection I understand is that it is not the same?

Mr. McGlynn: I have withdrawn my objection.

The Court: He has withdrawn it. That was the purpose of his first objection.

Mr. McGlynn: I will take the expression off the record.

Mr. Skinner: Then, there is no objection to putting that in evidence?

Mr. McGlynn: None at all.

The Court: Let it be marked.

(The same is received in evidence and marked Exhibit P-8.)

Q. I show you now a paper purporting to be a typewritten paper—

The Court: Well, Judge, hadn't you better let him tell us what that first exhibit is? Standing by itself, it doesn't help us very much.

Mr. Skinner: Yes, thank you.

Q. Mr. Vail, you said that you had seen this form before? A. I have.

Q. Where did you see it? A. In the office of the Fiedler Corporation.

Q. In what connection did you see it? A. In connection with commissions, and exclusive contracts.

Q. In connection with commissions and exclusive contracts? A. In connection with leasing property, as regards the commissions.

Q. Do you know whether or not that printed blank was in use in the Fiedler offices? A. It was.

Q. I mean, whether in connection with the leasing of any property, that blank was used and the signature of the party for whom the leasing was to be obtained? A. That form that you have, that printed form was originally used—

Mr. McGlynn: The question was, was it used?

The Court: Was it used?

The Witness: It was used in this respect

Mr. McGlynn: What?

The Witness: It was used in this respect

Q. I asked you whether it was used in connection with the leasing, or the undertaking on the part of the Fiedler Corporation to obtain tenants to lease portions of the premises. A. Premises already there, yes.

Q. Was this agreement, this printed blank, ever used in the Fiedler office when they asked to obtain tenants for property? A. It was.

Q. Once or many times? A. A good many times.

Mr. Skinner: If your Honor please, we have here, ready to produce, a number of actual agreements, executed agreements, drawn and signed, in which this printed form was used, and we would produce them as being an answer to the call that Mr. McGlynn made

last week for instances of similar agreements to the one that is now in dispute. Mr. McGlynn says that he thinks it is just to have the printed form in, with the proof that it was frequently used.

The Court: But he does not say it is similar.

Mr. Skinner: No, he wants to be allowed to differ as to that.

Mr. McGlynn: I want the privilege, your Honor, too, of having Mr. Hartman come back for one or two questions with respect to the use.

Mr. Skinner: Yes.

The Court: All right.

Mr. Skinner: And I take it, it becomes unnecessary for this plaintiff to produce the originals that we have here ready for production.

The Court: That is my understanding.

Mr. McGlynn: That is my understanding.

Q. I show you a paper, a written agreement, purporting to be an agreement for commissions, and signed by Mr.—well, bears the signature of James Southerland; have you ever seen that agreement before? Just say quickly, yes or no. A. No.

Mr. Skinner: All right. Then I cannot—

Mr. McGlynn: I have no objection to putting it in, the same as the other.

Mr. Skinner: Then it will be received in evidence as being an original agreement from the office of the Fiedler Corporation in connection with the commission on the leasing of that property.

The Court: Let it be marked with that understanding.

(The same is received in evidence and marked Exhibit P-9.)

Mr. Skinner: That is all, Mr. Vail.

Recross-examination by Mr. McGlynn:

Q. Mr. Vail, let me get straightened out. February 14, 1927, is the last date, as I understand it, that you called on Mr. Lefkowitz for the purpose of endeavoring to interest his company in a lease with the Brandes Products Company. Is that correct? Or the date on which he told you—A. The date that he told me that he did not want to build any buildings for anybody?

Q. After that date, February 14, 1927, you made a call on him in April, was it, and one in August? I want to just see if I have got those dates straight in my mind. I thought there was a date in April and one in August. A. One in April; that is right.

Q. April what? A. April 11th.

Q. Now what was the occasion for the call on April 11th? A. To ask him whether he had changed his mind or not.

Q. And his reply? A. That he still would not build for anybody else for—

Q. In August, you simply went down there, as you say, to collect your commission? A. That is right.

Q. Did you know in August all of the terms of the lease for which you were claiming a commission? A. No, not to my knowledge.

Q. How much did you claim? A. My claim would be based on the amount of rent that he was

to get for the premises the years that the lease was made for.

Q. You did not know anything about that? A. I did not know anything about the terms, no.

Q. Do you mean to tell me, Mr. Vail, that with respect to this agreement of June 16, 1926, that you did not know the number of the premises you were leasing, the street number? A. In fact, it covers, I believe, you will find three or four numbers.

Q. I did not ask you anything about that; I am asking you if you knew the street numbers on the premises you were leasing.

Mr. Skinner: Counsel does not mean, "That you were leasing."

Q. Well, that you were procuring a lease from the Manufacturers to Brandes. A. I knew the number.

Q. Why didn't you put it in the agreement then? A. Mr. Lefkowitz might have seen fit to use any of the three or four numbers that that property covered. He might have liked to call it 352.

Q. That is the only reason? A. That is right.

Q. Well, do you know who put it on there? A. I do not.

Q. Now, if your own office had a regular printed blank which you used on a number of occasions in connection with the leasing of property, why in the world was it necessary to draw up a separate typewritten agreement in this case? A. Because the printed blank referred primarily, as my understanding is, to loft properties.

Q. What? A. Loft properties and loft buildings. This was an extreme case. We do not have very many of them, where people owning twenty-

one acres, where they were going to put up buildings for their tenants.

Q. Show me what you find on this Exhibit P-8 which indicates that this is used in connection with loft properties. A. This side—

Q. What? A. In other words—

Q. On the front page where the Exhibit number is. A. In other words, pertains, this side will be, lease expires, style of house, in other words, the lease may expire, may be a tenant in there. Now the lease might be expiring six months from now. This is the style of the front—

Q. Yes? A. —which might refer to loft properties, heat, light, gas, railroad sidings, boiler make, elevators, floors, sewers.

Q. Well, that all pertains to the description of the property which you are going to lease, doesn't it? A. That is right.

Q. What about the agreement with the owner, on the back here, why wasn't that agreement used? A. This agreement was not used because—

Q. Why wasn't it used?

Mr. Skinner: He said it was not used because.

Mr. McGlynn: I am not interested in a speech; I want an answer to my question.

A. Because—it was the same agreement, but we had a particular thing that we wanted to cover in that other agreement.

Q. Did you put everything in the agreement, P-2, that is in there? A. I don't know if we did.

Q. Do you know what is in there? A. Partly.

Q. How can you say it did not apply to this case, if you only know partly what is in it? A. I cannot memorize, but I know at the time that there

was discussion about using that form and the written, and we decided to use the typewritten form.

Q. Discussion between whom? A. Mr. Hartman and I.

Q. Not Mr. Lefkowitz? A. No.

Q. Did you know that this agreement had the clause in it providing for the termination of the agreement on notice? A. That is right.

Q. That is this P-2?

The Court: The answer is no. Don't shake your head.

A. No.

Q. Why wasn't that put in there? A. That clause there applies to an exclusive contract.

Q. Wasn't this? A. That sixty-day clause calls for an exclusive contract where an owner signs up that we should have the exclusive sale of his property for a certain period of time.

Q. What is the period in P-2? A. I don't know what you refer to as in P-2.

Q. Well, the agreement which you say you had signed by these people, which you have been looking at in this case. A. That is the commission agreement? That is not exclusive.

Q. Oh, that is the reason there was no cancellation clause put in it? A. That is right.

Q. All right. Let me read you this clause in Exhibit P-8 (reading from Exhibit P-8); why wasn't that put in there?

Mr. Skinner: Do you say it was not?

Mr. McGlynn: I certainly do, not in that language.

Mr. Skinner: Oh, not in that language.

Mr. McGlynn: Absolutely not.

Mr. Skinner: May I call counsel's attention to the expression here, that should they purchase the premises referred to?

Mr. McGlynn: Exactly.

Mr. Skinner: Do you think there is a difference?

Mr. McGlynn: I do.

Mr. Skinner: All right. We will argue that out with the jury.

The Court: What is the answer?

Q. What is your explanation, why it was not put in there?

Mr. Skinner: If your Honor please—

A. (Interrupting) I don't know.

Mr. Skinner: I call the Court's attention—

A. (Continuing) I don't know.

The Court: He said he doesn't know. That is, the reason.

Mr. Skinner: May I call the Court's attention to the language of the agreement?

The Court: I am familiar with it.

Mr. Skinner: All right.

Q. No other reason that you can give me why the printed form was not used? A. I cannot give you any other reason.

Mr. McGlynn: All right. That is all.

Mr. McGlynn: I would like to ask Mr. Fiedler some questions, your Honor.

The Court: All right.

William C. Fielder—Recalled—Cross.

WILLIAM C. FIEDLER, recalled.

Further cross-examination by Mr. McGlynn:

Q. Mr. Fiedler, you recall that on Friday I showed you a letter dated September 22, 1925, which was marked Exhibit D-1, letter from the Manufacturers to you? A. Yes, sir.

Q. I show you, Mr. Fiedler, a letter dated September 28, 1925, on your letterhead, and ask you if you dictated that letter. A. I presume I did. I did not sign it.

Q. Well, is it customary in your office, on the bottom of the letter, to have the initials of the man who dictated it, W. C. F.? A. Yes, W. C. F., but I did not sign it; that is not my signature.

Q. You do not sign all of your mail, do you? A. No, of course not.

Mr. McGlynn: I ask that this be marked for identification.

(The same is marked Exhibit D-3 for identification.)

Q. Isn't that letter, which you have just read, dated September 28, 1925, in reply to the one which was marked the other day D-1 for identification? A. Repeat that, please.

Q. Isn't this letter which I have just shown you a reply to the one which I showed you on Friday? A. I don't know.

Mr. Skinner: Have you got D-1?

A. It doesn't refer to that letter.

Q. No, but it thanks the Manufacturers Developing Company for the confidence reposed on any leasing or for leasing property situated on Thomas Street, doesn't it? A. Yes, sir.

William C. Fielder—Recalled—Redirect.

Q. And Exhibit D-1, which I showed you on Friday, does list with you a piece of property on Thomas Street? A. Yes, sir.

Q. And is dated September 22, 1925? A. Yes, sir.

Q. But you have no recollection of either receiving the one letter nor the dictating of the second one? A. No, sir.

Mr. McGlynn: That is all.

Redirect-examination by Mr. Skinner:

Q. Mr. Fiedler, did you say it was a reply or not, or don't you know? A. I don't know; it doesn't refer to the other letter, so I don't know whether it is a response to that or not.

Q. And the twenty-one acre tract that has been spoken of so many times, had a frontage on Thomas Street, did it not? A. Yes, sir.

Mr. Skinner: That is all.

Mr. McGlynn has asked that Mr. Hartman be here.

The Court: Mr. Hartman?

Mr. Skinner: He is here.

FREDERICK J. HARTMAN, recalled.

Further cross-examination by Mr. McGlynn:

Q. Now, Mr. Hartman, this Exhibit P-8, which has been offered in evidence, was the printed form which your office was using at the time of the first business transaction between the Fiedler Corporation and the defendant in this case; is that right? A. May I see it?

Q. Yes (handing paper to witness). A. Yes, that is the form that we used in our office.

Q. And is that the contract that you had in mind on Friday when you told me that you thought you could go down to the office and find a contract similar to the one marked P-2 in this case? A. One of them.

Q. One of them. You did not tell me then that there was a printed form that you used in the office, on that occasion, did you? A. No, I didn't.

Q. Had you forgotten it? A. No.

Q. You knew it? A. I knew it.

Q. Why wasn't the printed form used in the Manufacturers Developing Company case? A. Because it did not apply to the tract in my opinion.

Q. I see; in what respect? A. In this form we used in giving exclusive listing and authorizations to list. The Manufacturers Developing Company contract was performed after service had been rendered and involved a little different situation, as we were dealing with a large undeveloped tract. This form usually was completed in the case of a building, in a prescribed limit of land, et cetera.

Q. You thought that the Manufacturers case involved a contract to be drawn after a service had been rendered? A. A service had been rendered.

Q. In that respect was it unusual? A. That is with reference to service, for services rendered.

Q. No, when you drew a contract after services had been rendered. A. Was it unusual? No.

Q. I understood you to say that the reason for the drafting of the typewritten contract in this case, the Manufacturers, one of the reasons you gave for dictating a special contract was because a service had already been rendered. A. That is right.

Q. In that respect it was unusual, wasn't it? A. We had a service already rendered when we drew this contract, we were about to begin service.

Q. I see, this form was used before you performed any services whatsoever for the landlord or owner? A. Usually, but sometimes we had performed the service, but not under the exclusive contract, up to the time it was signed.

Q. Well, this other agreement which was produced, are you familiar with the terms of that, P-9? A. I don't sign any of these documents, Mr. McGlynn.

Q. Oh, didn't you witness any of these at the office? A. No, I don't sign any of these.

Q. All right. Suppose you look at P-9. Did you dictate that? A. Yes, sir; I did.

Q. Why wasn't that form used in this case? A. That was also a service that was completed.

Q. That was what? A. That was also a service that was completed.

Q. A service that was completed? A. Yes.

Q. Read the first line. What does the first line say, the first couple of lines? A. Whereas the undersigned acknowledges that the Fiedler Corporation is procuring—

Q. Is procuring? A. Yes.

Q. That doesn't sound as though services had been performed, does it? A. It had been for all purposes in this contract.

Q. But it doesn't say so, does it? A. It doesn't but that is the fact.

Q. Is that the reason that you did not use the form in this case? A. That was a different case. This man had contracted for us to procure the lease, and executed the lease, then he would permit us to do these things. Now, that was after it had

been developed—an entirely different proposition from this of the Manufacturers Developing Company.

Q. So that the reason you give me now that the printed form was not used was because the descriptive portions on the front page of it applies to a different kind of property than this that we are dealing with in this case? A. That is one reason.

Q. And the second reason was that in this case you had already performed some services which were the basis of the new agreement; is that correct? A. That is my understanding; yes.

Q. Any other reason why the printed form was not used? A. Not that I can recall.

Q. You had, I suppose, a very good supply of these printed blanks on hand when you dictated this P-2? A. Probably.

Q. I see.

Mr. McGlynn: That is all.

Further redirect-examination by Mr. Skinner:

Q. Mr. Hartman, will you look at P-2 and tell me if you find anything there providing for the payment of a commission on a lease that may be obtained or a renewal thereof? A. It is also understood and agreed—

Q. You are reading from it now? A. —That should the said Hensell his heirs or assigns, after the making of the original lease, extend the terms of the letting beyond the original term, or lease additional space on the premises in question, or any other premises, the undersigned may hereafter own—

Q. Just that part, I call your attention now to P-2 where it is undertaken by the Manufacturers

Developing Company to pay a commission, using these words, on the letting, that is of this, or greater, lease additional space in the premises in question, or any other premises we may own— A. That is right.

Q. Same language, isn't it? A. Yes.

Q. Now go on— A. Or should the said Hensell, his heirs, et cetera, purchase the demised premises

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Q. Now, the next language in P-2 is, or should they purchase the premises referred to; go ahead. A. —Then in that event the undersigned, or its administrators, executors and assigns agree to pay the additional commission of 5 per cent. of the gross rental on any such extension, or renewals, if any, or five per cent. of the sale price in the event of a sale.

Q. Now, I call your attention again to P-8. You were asked why it was not used and called attention to various things about it as being different from the situation that presented itself when P-2 was being drawn. Look at P-8, and I call your attention to this whole page, beginning at about, in particular, to a description of walls, floors, basements, first floor, second floor, third floor, fourth floor, and other places. What do you understand that related to? A. Well, that was a general form; it could relate to a good many things.

Q. Well, it could relate only to a building? A. To a building, yes.

Q. And various sections of that building? A. Yes, and improved property.

Q. And then it talks about elevators, power, style of front, and so on. Now, can you gather from that form, or from your recollection of the way it was used, as to whether it had any use inthe Fied-

ler office in connection with the letting of factory premises? A. Yes, it could be so used.

Q. And was it so used? A. Yes.

Q. Well, is there anything in this blank that you can look to—point to—as indicating that it was intended to be used, or was used in connection with the leasing, obtaining tenants for unimproved property and buildings to be erected thereon for the tenants? A. No.

Mr. Skinner: That is all.

JAMES F. MITCHELL, sworn in behalf of plaintiff.

Direct-examination by Mr. Skinner:

Q. Mr. Mitchell, are you a little hard of hearing? A. No, I don't believe so.

Q. What is your business? A. Builder.

Q. Builder of what? A. Industrial building.

Q. Where have you been carrying on that business? A. New York.

Q. Any at all in this county? A. Yes.

Q. Where do you reside? A. East Orange.

Q. How long have you been in that business? A. Six or seven years.

Q. Do you know Mr. Lefkowitz of the Manufacturers Developing Company? A. Yes.

Q. Did you ever do any work for him in connection with the plans for the erection of a building on the twenty-one acre tract of the Manufacturers Developing Company, Thomas Street? A. Yes.

Q. Did you actually prepare any plans for the erection of any building or buildings? A. Yes.

Q. During what period did that go on? A. From 1925 to 1920—up to the present time.

Q. Up to the present time? A. Yes.

Q. In 1925 or 1926 did you see Mr. Vail of the Fiedler Corporation? A. Yes.

Q. At any time? A. Yes.

Q. In what connection? A. Representing the Fiedler Corporation.

Q. In what connection; in connection with what business? A. Renting the proposed buildings for the Brandes.

Q. For Brandes proposed building or buildings, did you say? A. Buildings.

Q. Buildings for Brandes, where were they to be? Where located? A. On that property at Thomas Street.

Q. Did you see him and Mr. Lefkowitz at any time together? A. Yes.

Q. In what connection was that? A. Discussing the leases and so on.

Q. The lease that you have just mentioned? A. Yes.

Q. How often was that? A. Very often.

Q. Well, about what? A. Well, sometimes it would be every day, or for a considerable period; and then sometimes it would not be for a week or two.

Q. Over what period did that continue? A. Oh, I should judge two or three years.

Q. Two or three years. I mean the period that you saw Mr. Vail and Mr. Lefkowitz together? Right? A. Yes.

Q. Do you remember whether or not that was occupied later, after the completion, by the Brandes Products Company? A. It was.

Q. After that building was so occupied by the

Brandes Products Company, did you see Mr. Lefkowitz and Mr. Vail together at all? A. Oh, yes.

Q. In connection with the leasing of other properties to the Brandes Products Company? A. Yes.

Q. Was the erection of any other building for the Brandes Products Company the subject of discussion? A. Yes.

Q. At times when you, Mr. Lefkowitz and Mr. Vail were together? A. Yes.

Q. Did you see Mr. Vail—did you see the Brandes people themselves about a proposed building for them? A. Yes.

Q. To be built by Mr. Lefkowitz? A. Yes.

Q. If they entered into a lease? A. Yes.

Q. Was that to be on this twenty-one acre tract? A. It was.

Q. Was the location of it on the tract particularly defined? A. To be in the rear of the original building that I erected.

Q. And was there such a building erected? A. Yes.

Q. By whom? A. Myself.

Q. When was that, with reference to the first building? A. About a year later, I should judge.

Q. When do you think it was that you completed it? A. September, 1926.

Q. Before that time, had the Brandes people gone into possession of the first building on 350 Thomas Street? A. Oh, yes.

Q. After the completion of the building in the rear, did the Brandes people go into possession of it? A. Yes.

Q. After that did you see Mr. Lefkowitz and Mr. Vail together in connection with any other building for the Brandes Products? A. Yes.

Q. Did you see the Brandes people and Mr. Vail together in the same connection? A. Yes, sir.

Q. And did you yourself confer with Mr. Lefkowitz with Mr. Vail being present? A. Yes.

Q. On that subject? A. Yes.

Q. And did you confer with representatives of the Brandes people with Mr. Vail present? A. Yes.

Q. And with Mr. Lefkowitz present too? A. Yes.

Q. About the building? A. Yes.

Q. Was that once or often? A. Many times, I should say.

Q. Many times after September, 1926? Right? A. Yes.

The Court: The answer is yes. Don't shake your head.

The Witness: Right.

Mr. Skinner: Yes.

Q. Did you prepare plans and specifications for another building to be erected for the Brandes people, if any agreement about that one was reached? A. I did.

Q. Did you show those plans and specifications to Mr. Lefkowitz? A. Yes.

Q. What could you say about that, as to whether or not he approved them? A. I don't think he did.

Q. You do not think he did? A. No.

Q. Why did you go to the Brandes people at all with those plans and specifications? What prompted you to do it? Do you understand my question? A. I don't.

Q. When you went to the Brandes people with the plans and specifications— A. Yes.

Q. —Had they been shown to Mr. Lefkowitz? A. Yes.

Q. Do you know whether or not you told him that you were going to show them to the Brandes people? A. I think we went together.

Q. Oh, you and Mr. Lefkowitz went together? A. I think so, yes.

Q. When you went together, whom did you see of the Brandes Company? A. Mr. Hall.

Q. What took place with reference to those plans and specifications? A. Just a general discussion.

Q. No, a little more particular than that. Were they shown? A. Yes.

Q. To whom? A. To Mr. Hall.

Q. Shown to him as being what? Were they shown to Mr. Hall as being plans of a building, or what you proposed to be erected on property on Mt. Pleasant Avenue, Newark? A. No.

Q. No? A. They were plans for a building adjoining an existing building on Thomas Street.

Q. Yes; there were such plans, you say? A. Yes.

Q. I mean, how were they represented or presented to Mr. Hall, as being what? Do you understand that? A. I couldn't—

The Court: What did you tell him, it was a private building for him that you would build, or what?

The Witness: No, it was an additional factory unit on 350 Thomas Street.

The Court: And did Mr. Hall so understand it?

The Witness: I told him so.

The Court: You told him so?

The Witness: Yes.

The Court: All right. Then was the discussion, was it?

The Witness: Yes.

Q. That was in Mr. Lefkowitz' presence? A. Yes.

Q. Then did they discuss further as to whether or not that building would be satisfactory? A. Not to my knowledge, they did not.

Q. Just presented as something that Mr. Lefkowitz was willing to do? A. I believe so.

Q. Did Mr. Hall then say, no, then it would not do, or did he say they would give it consideration or did he just say nothing, and you came away? A. I believe it was just dropped; that was all.

Q. What do you mean by dropped? A. No further discussion about it.

Q. No further discussion; he did not discuss either for or against? A. No.

Q. Was there anything said as to whether you were to come again or Mr. Lefkowitz would come again? A. I believe Mr. Lefkowitz was going to come again.

Q. What? A. I believe it was Mr. Lefkowitz' intent to come again.

Q. I did not ask you his intent; was there anything said there that they might— A. Not that I recall.

Q. Well, did Mr. Lefkowitz say anything to you about going again? A. No.

Q. How did you know about his intent then? A. I believed it or surmised it.

Q. On what did you base any such surmise? A. I thought he was gratified by the outcome of the conference.

Q. Mr. Lefkowitz was gratified? A. Yes.

Q. How could you tell he was? A. By his actions, I would say.

Q. His actions? Yes? A. (No answer.)

Q. Did he express himself at all in words? A. No.

Q. Well, after that time that we have just been hearing about, did you go again? A. No.

Q. No? A. No more.

Q. Can you tell about when that was? A. I believe in March and April of 1927.

Q. March to April of 1927? A. (Witness nods affirmatively.)

Q. Now, up to that time, to what extent had Mr. Vail been present or participating in the— A. Not at all.

Q. Up to what time had he been participating? A. Well, not at all on that particular building.

Q. Had he been participating in any conference? You have spoken of him, I think, as participating in conferences with the Brandes people with Mr. Lefkowitz on the subject of another building. A. Yes.

Q. At those conferences that he participated in, had they not taken the shape—taken definite shape in the preparation of plans? A. They had not.

Q. They had not. The discussion that he participated in was just on the general subject of their taking additional space of buildings? A. That is right.

Q. Up to what time had he continued in the negotiations to that extent? A. Well, just prior to starting on this last building.

Q. Just prior to starting on the last building? A. (No answer.)

Q. You mean starting on its erection or on the plans? A. On the plans.

Q. On the plans, do you remember when that was? A. I think it was in March or April of '27.

Q. Sometime shortly prior to that? A. Yes.

Q. Did you at any time—well, following the time when Mr. Vail no longer participated in the conferences, did you discuss the matter with him? A. No.

Q. Did Mr. Lefkowitz make any request to you with reference to discussion the proposed additional building with Mr. Vail? A. He told me not to.

Q. He told you not to? When was that? A. At the time he told me to prepare the plans and specifications.

Q. Oh, he told you to prepare the plans and specifications? A. Yes.

Q. He told you to say nothing about that to Mr. Vail? A. That is right.

Q. That was sometime prior to March or April, 1927? A. That is right.

Q. Can you recall approximately what Mr. Lefkowitz said? You say he instructed you not to talk to Mr. Vail. Can you give us the language at all? A. I don't quite understand the question.

Q. You have told us that Mr. Lefkowitz instructed you not to speak to Mr. Vail about the proposed new building for which the plans and specifications were being prepared or to be prepared. Can you give us a little more in detail what he said, so that we may tell—the jury can tell—whether it was an instruction of that kind? A. Well, he gave me the instructions to prepare the plans, told me the type of building that he wanted—

Q. Yes? A. —told me to work alone, that is, not to tell Vail or any other realtor of my activities.

Q. Not to tell Vail or any other realtor of your activities? A. That is right.

Q. Did he say why he did not want you to tell Vail or any other realtor? A. No.

Q. At the time he told you not to discuss the plans and specifications with Mr. Vail, were the plans, the building just tentative? A. There were not any plans.

Q. There were not what?

Mr. McGlynn: There weren't any plans.

A. There weren't any plans.

Q. Now, then, you were discussing plans and specifications to be prepared? A. That is right.

Q. Well, after that date, was there any building, after March or April, 1927, was there any building erected upon the site that you had discussed with Mr. Lefkowitz? A. There was.

Q. And for which you had prepared plans? A. That is right.

Q. Was it erected by you? A. No.

Q. By whom? A. A concern by the name of Franks, I believe.

Q. A concern by the name of Franks. Did Mr. Lefkowitz say anything to you about Franks being chosen to build it? A. He did.

Q. What did he say? A. He told me that my price was too high.

Q. Is that all that he told you? A. I believe so.

Q. Did you ever get back the plans and specifications that you had prepared? A. I did.

Q. From Mr. Lefkowitz? A. I did; they were returned to me.

Q. What? A. They were returned to me.

Q. Had you seen the building that was erected

on the site that you made the plans for? A. I have.

Q. How does it compare with the one that you made the plans for, as to area, floor space available for a tenant? A. Essentially the same, I would say.

Q. What? A. Essentially the same.

Q. Essentially the same. How did it compare, in the amount of ground covered by the building? A. Well, it could not be only just so wide, for that particular space.

Q. You mean that yours was a plan for the building to cover the entire width? A. Yes.

Q. Does the building that was erected cover the entire width? A. That is right.

Q. How about the extent of the building, toward the rear? A. It was easily judged, because of the length could be judged by the length of the other building which was right beside it, which I did build.

Q. Well, I am asking you how the building that actually went up compared in its depth and width with the building which you prepared plans on? A. I believe, about the same.

Q. How did it compare in height? A. The same three stories.

Q. Three stories? A. (Witness indicates affirmatively.)

Q. So that your plans were for a building of 60,000 square feet? A. They were.

Q. And this was the same—the building erected was for the same area? A. Yes.

Q. At any time before Mr. Lefkowitz told you that you were not to build the building, your price was too high, had he expressed any dissatisfaction with the plans and specifications?

Mr. McGlynn: I object, if your Honor please. I cannot see the relevancy, and we are not being sued by the architect to recover compensation for the drawing of a set of plans.

The Court: Yes, objection sustained, immaterial.

Mr. Skinner: Cross-examine.

Cross-examination by Mr. McGlynn:

Q. Mr. Mitchell, you erected for the Manufacturers Developing Company the original unit at 350 Thomas Street— A. I did.

Q. —In the front? A. I did.

Q. Then you erected the unit in the rear of that? A. I did.

Q. Pursuant to a contract dated what? (Handing paper to witness.) A. June 16th.

Q. Nineteen— A. Twenty-six.

Q. This is a copy of the contract between you and the Manufacturers for the erection of the unit in the rear of 350 Thomas Street, is it? A. It is.

Mr. McGlynn: I ask that it be marked for identification.

The Court: Let it be marked.

(The same is marked Exhibit D-4 for identification.)

Q. Do I understand that you also erected the building which was later leased by the Quimby Pump Company? A. I did.

Q. That was later than this one described in the contract? A. It was.

Q. Later in the same year? A. I believe it was.

Q. Yes, sir. Now, do you recall receiving a let-

ter from the Manufacturers Developing Company sometime in the fall of possibly '26 with respect to an additional unit, which letter contained a copy of a letter from the Brandes Products to them? A. No, I don't.

Q. I show you what purports to be a copy of a letter to you dated September 13, 1926, and ask you to read it (handing paper to witness). A. (Witness examines paper.)

Q. Do you recall receiving such a letter? A. I do.

Q. Do you recall receiving that letter containing a copy of another letter? A. I do.

Q. I show you another letter dated September 9th. A. I recall that letter, yes.

Q. And ask you if you received a copy of that letter, including the one you had in your hand, of September 16th. A. I do recall it.

Mr. McGlynn: I ask that that be marked for identification so that their continuity will be preserved.

The Court: As one exhibit?

Mr. McGlynn: No, better keep them separate, if your Honor please. September 13th, copy of a letter from Manufacturers to Mitchell.

(The same is marked Exhibit D-5 for identification.)

Mr. McGlynn: Letter dated September 19th, 1926, Brandes to Lefkowitz.

(The same is marked Exhibit D-6 for identification.)

Q. Now, after reading these two communications, does that refresh your recollection, Mr. Mit-

chell, of the kind of a building, et cetera, that you were trying to plan? A. Yes.

Q. That set of plans and specifications, if I understand your direct testimony correctly, never materialized in the erection of any building? A. It did not.

Q. Have you any recollection as to when whatever conferences that were had with reference to this proposed building ceased? A. No, I haven't any recollection.

Q. I show you a letter dated March 24, 1927, purporting to be from the Brandes to the Manufacturers, and ask you if you ever saw that letter. A. Yes, I think Mr. Lefkowitz showed me that letter.

Mr. McGlynn: I ask that that be marked for identification.

(The same is marked Exhibit D-7 for identification.)

Mr. McGlynn: The date of that letter was March 24th, was it, Judge?

Mr. Skinner: Yes.

Q. March 24, 1927, does that assist your recollection as to the conferences on the first building which was not erected, and when the conferences began which brought about the plans on the 60,000 square foot building? A. Well, those conferences were so many, and over such a long period.

Q. Now, the conferences with Mr. Lefkowitz, on the first building, did not commence until after you received that letter, whatever it is, September, 1926, did they? A. No.

Q. And they certainly did not continue after you were shown this letter of March 27th, did they? A. No.

Q. So that some time between September, 1926, and March, 1927, the conferences on the first building which was not erected failed and the conferences on the second plant, on which the plans were for 60,000 square feet began; is that correct? A. Correct.

Q. Did I understand your testimony that Mr. Vail did not in any way participate in any of the discussion or conferences with respect to this second building? A. No, he did not.

Q. That was only discussed? I am correct about that, am I? A. (No audible response.)

Q. The first set of plans that were discussed, concerning which you say you had those conferences what size building was that? A. It varied.

Q. Well, was it smaller or larger than 60,000? A. Larger.

Q. How much larger? A. Oh, 100,000, 200,000, sometimes 300,000.

Q. And the proposition you worked on first was an entirely different one than the one you worked on the second time? A. Yes.

Q. Do you recall when your contract of June 16th, marked Exhibit P-4 for identification, was executed? That was for the erection of the unit in the rear of 350 Thomas Street. A. They were all executed in Read & Reynolds office.

Q. Read & Reynolds? A. Yes, sir.

Mr. McGlynn: I see their name on the back of it.

Q. Have you any recollection as to who was there when this building contract of yours was signed, outside of you and the officers of the Manufacturers? A. No, I cannot.

Q. All right. A. They were, myself always—

Q. No, I want to know whether you have any present recollection as to who was there on the date that this particular contract for the erection of this building was executed. A. No.

Q. Were the plans and specifications there for sometime? A. Yes.

Q. Did those specifications consist of one or more than one page? A. More than one.

Q. How many, would you say? A. A dozen.

Q. How many sets of plans were executed? A. Three.

Q. How many sets of specifications? A. Three.

Q. Were they just looked at, or were they initialed and marked in any way? A. They were initialed.

Q. By whom? A. Mr. Lefkowitz and myself.

Redirect-examination by Mr. Skinner:

Q. Mr. Mitchell, when you had your discussion, or in the discussions that you had with Mr. Lefkowitz as to preparing the plans for another building for the Brandes Products Company, was there anything then definitely ascertaind as to how many square feet it should contain, or was it simply to prepare plans for a building as suggested to them, as a suggestion, I mean, to the Brandes people? A. Of which time are you referring to?

Q. Well, in the discussions that you had with Mr. Lefkowitz after June, 1926, after the first building was completed, say in September, I think, 1926, in that later discussion and negotiations with the Manufacturers Developing Company on what were you talking about, were you talking about a building with a definite height and floor space, and all of that, or were you talking about addition-

al space to be made, to the satisfaction of the needs of the Brandes people? A. It was a general discussion.

Q. General discussion? A. Sometimes it would be for a hundred thousand, sometimes two hundred thousand square feet.

Q. Yes? A. Pretty general discussion.

Q. And then was it that different areas were discussed? A. That I don't know.

Q. Well, did you at any time hear the Brandes people say anything about how much they would need, or whether they knew how much they would need? A. I don't know that I heard them say. They seemed very much in a quandry.

Q. What makes you say they seemed very much in a quandry? A. Well, when they changed their mind a hundred per cent. in twenty-four hours, I thought they were pretty well unsettled.

Q. You mean, changed their minds as to the amount of space? A. Yes.

Q. Did they do that? A. Yes.

Q. But were the changes that you had in mind? A. Well, varying the front of the building, additional space that they might want.

Q. I mean from what size to what size, do you remember? A. Many sizes mentioned, mentioned 100,000, 200,000, even 300,000.

Q. In the letter that Mr. McGlynn showed you of September, 1926, D-6 for identification, they say, we would be interested in taking on an additional lease, for a long term of years of about 180,000 additional square feet, et cetera, adjoining our present Thomas Street plant; was that one of the measurements or capacities of the building that was discussed, that you heard discussed? A. Well, that came in that period.

Q. I mean, 180,000 was one of the statements that they made as to their ideas, requirements? A. Yes.

Q. At any time did you hear them speak of 60,000 as a possibility. A. It is quite possible that they spoke of 60,000, even talked of a smaller unit of 15,000.

Q. In these discussions that you had, what was the effort that was being made by Mr. Lefkowitz and Mr. Vail and yourself, as to the plans for a building? What were you trying to do? A. Trying to get established a definite plan to proceed with.

Q. Were you trying to get established a definite floor space or area that was to be the requirement, that was the requirement of the Brandes? A. I think that was, yes.

Q. And was that definite ascertainment of floor space reached before Mr. Vail faded out of the picture or after? A. I don't think it was.

Q. You don't think it was what? Reached before? A. Yes.

Q. Or reached after? A. (No answer.)

Mr. Skinner: That is all.

BLANCHE SMALLEY, sworn in behalf of plaintiff.

Direct-examination by Mr. Skinner:

Q. Mrs. Smalley, where do you live now? A. I live in Irvington.

Q. Did you at one time work for, or be in the employ of Mr. Lefkowitz? A. Yes, sir.

Q. From what time to what time? A. In Sep-

tember of 1913 until November, latter part of November, 1927.

Q. You are not in his employ now? A. No, sir.

Q. And have not been since November, 1927? A. No, sir.

Q. At the time of your first employment, were you working then for a company of which he was an officer? A. Yes, I was working for the National Box & Lumber Company.

Q. What was his position in that company? A. President.

Q. Where was it located? A. 350 South Street, Newark.

Q. Do you know something of a tract of land at South Street and Thomas Street on which other buildings had been erected? A. Yes, sir.

Q. Was it part of that tract? A. Yes.

Q. Did you hear it spoken of—the tract spoken of by Mr. Lefkowitz as a twenty-one acre tract? A. Yes, sir.

Q. Now, in the course—how were you employed? In what capacity? A. As a bookkeeper and office manager, all general office work.

Q. Bookkeeper and general office work? A. Yes.

Q. Now, during the time of your employment did Mr. Lefkowitz become connected with or an officer of the Manufacturers Developing Company? A. Yes.

Q. And did you work for that company? A. Yes, sir.

Q. From what time? A. From the time of its incorporation in 1920 until 1927.

Q. Now, did you see any meetings of the direct-

ors of the Manufacturers Developing Company held at Mr. Lefkowitz' office?

Mr. McGlynn: I object, if your Honor please. It doesn't seem to me that is the way of proving the meeting of boards of directors.

Mr. Skinner: I am not trying to prove the date; I am trying to prove the fact that there was a meeting, not when it was done.

The Court: I will allow it.

Mr. McGlynn: I will ask an exception.

The Court: You may have it.

Exception noted as ground of appeal.

A. I was never at any meetings of the Board of Directors.

Q. Did he say anything to you about who were the directors of the Manufacturers Developing Company at any time?

Mr. McGlynn: I object; I do not see how he can find out from conversation how that can be binding, on the conversation of the meeting of the board of directors; the fact ought to be easily proved without this sort of testimony. There is no dispute in the case that Mr. Lefkowitz, Mr. Ross, were directors, and I think one other. I have never raised the objection that the agreement was not signed with the authority of the directors.

Mr. Skinner: Who was the other one? Can you tell that?

Mr. McGlynn: Donaldson; is that right?

A Voice: Yes, that is right.

Q. Do you know what Mr. Donaldson was? A. Yes, sir.

Q. What was he? A. He was an employee of the National Box & Lumber Company.

Q. Was he in any way connected with the Manufacturers Developing Company? A. Well, at one time he was the director and secretary, I believe.

Q. Of the Manufacturers Developing Company? A. Of the Manufacturers Developing Company.

Mr. Skinner: We understand then, that the defense interposed in the answer, that the commission agreement being signed, was without the authority of the board of directors of the Manufacturers Developing Company, was withdrawn?

Mr. McGlynn: Correct.

The Court: All right.

Q. Now, Mrs. Smalley, did you see while you were in the Manufacturers Developing Company's employ, or with Mr. Lefkowitz, did you see a building being erected on premises known as 350 Thomas Street? A. Yes, sir.

Q. Did you see a building erected in the rear of that building? A. Yes, sir.

Q. Did you see the Brandes Company come into possession, occupy those? A. Yes, sir.

Q. Did you see any other building begun adjoining that one? A. Yes, sir.

Q. Do you know who subsequently occupied that? A. Yes, sir.

Q. Who? A. The Brandes Products.

Q. Was that before you left Mr. Lefkowitz? A. No—

Q. After?

Mr. McGlynn: No dispute about that.

Mr. Skinner: All right.

Q. In the time, between the completion of the first building, the two buildings that you say were occupied by the Brandes people at 350 Thomas Street, and in the rear, and the occupation by the same company of a building adjoining 350 Thomas Street, did you see Mr. Vail of the Fiedler Corporation at all at the office of Mr. Lefkowitz and in conference with him? A. Yes, sir.

Q. Once or many times? A. Many times.

Q. Did you ever see Mr. Vail and Mr. Mitchell together with Mr. Lefkowitz? A. Yes, sir.

Q. Did you ever see Mr. Vail and Mr. Mitchell and Mr. Lefkowitz and Mr. Hall of the Brandes Company together? A. Yes, sir.

Q. At Mr. Lefkowitz' office? A. Yes, sir.

Q. Now, then, what is the latest that you can remember seeing Mr. Vail present, talking matters over with Mr. Lefkowitz? A. I am not sure; it might have been—

Mr. McGlynn: Now, I don't think she should undertake to guess, your Honor please.

The Court: No, just signify what fixes the date. If you are in doubt, we do not wish your guesses.

The Witness: Well, I am not sure.

Q. How long before you left the employ of Mr. Lefkowitz? Could you say that? A. I believe it was in the spring of 1927.

Q. Were you present at the time of any conversation between Mr. Vail and Mr. Lefkowitz at the Lefkowitz office? A. As a rule, yes.

Q. Where was your desk? A. In Mr. Lefkowitz' office.

Q. Where did these conversations between them take place? A. In the office, in Mr. Lefkowitz' office.

Q. Do you remember one time when Mr. Hall came in? A. Yes, sir.

Q. The first time? A. I won't say it was the first time.

Q. Well, do you remember when he was introduced as representing the Brandes Company? A. Yes, sir.

Q. Was Mr. Vail present at that time? A. I don't remember.

Q. You don't remember. Well, after that time did you see Mr. Vail in there at all? A. Oh, yes.

Q. Talking with Mr. Lefkowitz? A. Yes, sir.

Q. What was the subject of the talk? A. The subject was most generally about getting tenants

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Q. For? A. For leasing space or buildings on that tract.

Q. Did you hear them talking about getting the Brandes Company as tenants?

Mr. McGlynn: These questions are very leading; I object to them on that ground.

Mr. Skinner: All right.

Q. At any time did you hear the name of any possible tenant mentioned? A. I did, after Brandes Products had already signed the first lease.

Q. Yes; after that did you hear anything said about the Brandes Company taking in more space? A. Oh, yes, many times.

Q. Was Mr. Vail present on any of those occasions? A. Yes, sir.

Q. Do you remember any conversation between Mr. Lefkowitz and Mr. Vail in the spring—say in January or February, 1927—any conversation about whether or not he would be interested in putting up additional buildings for the Brandes Products Company? A. Yes, sir.

Q. What did he say—Mr. Lefkowitz— A. What did Mr. Vail say?

Q. Yes—what did Mr. Lefkowitz say? A. Oh, Mr. Lefkowitz said that he would put any kind of building or type of building that they might require.

Q. Yes? A. He said it was just a matter of getting together, deciding just what kind of building they would want.

Q. Is that what Mr. Lefkowitz said on this particular occasion, or had that been said often? A. Oh, that had been said a number of times.

Q. Was there any time when Mr. Lefkowitz said to Mr. Vail anything different from that, about being willing to go on and put up a building? A. Not to my knowledge.

Q. Just before Mr. Vail stopped coming, or did not come so often, did you hear a conversation in which Mr. Lefkowitz expressed himself as to whether or not he would be willing to put a building up for the Brandes Company?

Mr. McGlynn: Your Honor please, it seems to me the witness just answered the question a minute ago.

The Court: I will allow it. You may answer it.

A. Yes.

Q. What was that? A. Well, I cannot recall the exact words—

Q. No? A. —But it was always that he was willing, that was his business; wanted to put up buildings for tenants.

Q. I see. Now, at any time did you hear him say anything to the contrary, or different from that? A. No, sir.

Q. Did Mr.—at the time Mr. Vail seemed to fail to come, or at least—yes—failed to come, the early part of 1927, had any plans been prepared, that you saw, for a building adjoining 350 Thomas Street? A. Yes, sir.

Q. Did you hear Mr. Lefkowitz and Mr. Vail discuss that? A. Yes, sir.

Q. Was there anything said then about who was to be satisfied, who was to be pleased with those plans, whether it was Mr. Lefkowitz—

Mr. McGlynn: Your Honor please, it seems to me that is very leading examination by counsel, very leading putting words in the mouth of the witness, words he wants her to say.

Mr. Skinner: It seems to me that I am entitled to direct the witness to the subject matter. The fact is, it does not suggest the answer.

The Court: What was said about the plans, if anything?

Mr. Skinner: Yes.

The Court: Suppose you put it that way.

Mr. Skinner: I will be glad to.

A. Well, when they went over the plans I was not always there, but there were some suggestions about changes.

Q. Who made the suggestion about changes? A.

Mr. Lefkowitz, he would say Mr. Hall wants this, we may have to change that, and he wants that.

Q. Yes.

Mr. Skinner: I want to—if your Honor please, it seems to me I am permitted to address the witness as to the particular subject matter to ask her whether—

The Court: You may try it; Mr. McGlynn may object.

Q. Mrs. Smalley, was there at any time anything said in your presence by Mr. Lefkowitz to Mr. Vail as to whether or not he would be willing to go on with the discussion and negotiations with the Brandes Company, or whether he was through? A. Well, at one time he was very willing to talk to Mr. Vail about constructing buildings and going ahead, and then later on, why his attitude—

Mr. McGlynn: Now, I ask—

The Court: No, what was said? Not what his attitude was. What was said? That is what the question is, whether there was anything said to that effect.

Mr. Skinner: Yes.

The Witness: At what time?

The Court: At any time.

Q. Later on, you were going to say later on something? A. Oh, later on he said he was no longer interested.

Mr. McGlynn: What was that?

The Court: He said he was no longer interested.

Q. To whom did he say that? A. To Mr. Vail.

By the Court:

Q. When was that? A. Well, shortly before Mr. Vail stopped coming.

Q. In the spring of 1927, you think that was? A. I believe that was it, yes.

Q. Do you remember his business in August, 1927, Mr. Vail's visit? A. No, I don't.

Q. Then you don't remember his coming at all after the spring of 1927? A. No, later on I was transferred from that office into another office, and I probably wouldn't see him.

Q. When was that? A. It may have been August or September, 1927.

The Court: All right.

By Mr. Skinner:

Q. Did you at any time hear Mr. Lefkowitz talking with Mr. Hall of the Brandes Company, as to whether or not he would pay the Fiedler Corporation any commission should a lease be executed to the Brandes Products Corporation?

Mr. McGlynn: I object; if your Honor please, I cannot see how a conversation between Mr. Lefkowitz and Mr. Hall could be put in evidence here.

The Court: Well, I will allow it; it may corroborate Mr. Vail.

Mr. McGlynn: I will withdraw my objection.

A. There was such a conversation.

Q. Yes? A. Mr. Lefkowitz had a copy of the lease—of the new lease—on the new building—on the three-story building—

Q. Yes? A. —And Mr. Lefkowitz wanted to

have inserted in that lease that in case the Fiedler Corporation instituted—

Mr. McGlynn: Now, if your Honor please, I ask that the witness be instructed to give the conversation.

Q. When you say that Mr. Lefkowitz wanted something—

The Court: What was said?

Q. Just tell us what was said. We will tell whether or not he wanted—you just tell what he said. A. Well, I am saying just what the conversation was.

Q. What did he say to Mr. Hall? A. He said to Mr. Hall for him to have a paragraph inserted in the lease, reading that if the Fiedler Corporation insisted on getting the commissions, the Brandes Products Corporation would have to pay that Commission, because at that rental, he couldn't pay a commission to the Fiedler Corporation.

Q. What did Mr. Hall say? A. Mr. Hall said he thought it would be difficult to have that paragraph inserted, but he would try.

Q. Do you remember anything more of what was said at that time? A. No.

Q. Well, did Mr. Hall leave? A. Yes, he left.

Q. What became of the lease? Was it left behind or did he take it? A. He took the leases with him.

Q. Now, after that did you see one executed, the lease of May 24, 1927? A. Yes, sir.

Q. What became of that lease? A. Well, I had them in my office, that is in the office on file for some time. Later on they were taken away, I don't know—

Q. Taken away by whom? A. By Mr. Lefkowitz.

Q. Did you get it back? A. No, sir.

Q. Now, at any time did you—

Mr. Skinner: Withdraw that.

Q. I show you, Mrs. Smalley, a paper which has been used here, and marked Exhibit P-2, and ask you to look at it carefully. A. (Witness examines Exhibit P-2.)

Q. Have you looked at it? A. Yes, sir.

Q. Had you ever seen that, or a copy of it? A. I have.

Q. Where? Was it the original or a copy? A. Well, I have seen a contract that looked very much the same as that; in fact, I think it was the same with Mr. Feick.

Q. Mr. Feick? A. Yes.

Q. Had you ever seen that anywhere else? A. I have seen—I don't know whether it was the same one, it read practically the same—in our office.

Q. In your office, that is in the office of Mr. Lefkowitz, the Manufacturers Developing Company? A. Yes.

Q. Do you remember whether what you saw was signed or not as this was? A. I am not sure.

Q. You are not sure about its being signed? A. (No answer.)

Q. You looked at this one, you see this handwriting.

Mr. McGlynn: That question is objectionable.

Q. Do you see that it is an agreement about commissions? A. About a commission.

The Court: I will allow it.

Q. Upon letting to the Brandes Company? A. (No answer.)

Q. How about the one that you saw, the copy that you saw, how does that compare with this in that respect? A. Very much the same, or the same; I cannot remember the exact words.

Mr. Skinner: "Very much the same or the same, I cannot remember the exact words."

Q. And when was that? A. Yes.

Q. In the office, where? A. In the file of the Manufacturers Developing Company.

Q. What do you mean by the file? A. Well, we had a file where I filed all legal papers of the Manufacturers Developing Company.

Q. All legal papers? A. Yes.

Q. Were the leases in that file? A. Yes.

Q. Did you see this in the same place that the leases were? A. Yes, sir.

Q. Mrs. Smalley, did Mr. Hall—you spoke of Mr. Hall as representing the Brandes Products Company in these negotiations—was he at any time in the employ of the Manufacturers Developing Company?

Mr. McGlynn: I object, if your Honor please. I cannot see that it makes any difference whether he was or was not.

The Court: What difference does it make? What materiality has it?

Mr. Skinner: Well, I want to show payment made to Mr. Hall in the course of these negotiations accompanying the statement by Mr. Lefkowitz that he was no longer interested, and told Mr. Vail while the negotiations proceeded, directly from Mr. Lefkowitz to Mr. Hall.

Mr. McGlynn: Suppose there was, what possible difference can that make?

Mr. Skinner: Will Mr. McGlynn come here, so that I can just tell the purpose, without prejudicing him in the matter, in the eyes of the jury?

Mr. McGlynn: You have said enough.

The Court: I will allow it.

Mr. McGlynn: I will take an exception.

Exception noted as ground of appeal.

A. Mr. Hall was never in the employ of the Manufacturers Developing Company, to my knowledge.

Q. No. Do you know of any payments that were made to Mr. Hall by Mr. Lefkowitz?

Mr. McGlynn: I object. I cannot see the materiality; there is no claim in this complaint, that by reason of any fraudulent conduct of this defendant the plaintiff was deprived of any commissions.

Mr. Skinner: Of course we are not suing for any fraud.

The Court: Your question is with respect to commissions to Mr. Hall?

Mr. Skinner: I want to bring out the character of the payments, from this witness, and I can tell the Court—

The Court: Well, I think I will allow it.

Mr. McGlynn: I ask for an exception.

The Court: You may have it.

Exception noted as ground of appeal.

A. Yes, I have made out checks.

Mr. McGlynn: What is the question, Mr. Stenographer?

Q. (Repeated by stenographer) Do you know of any payments that were made to Mr. Hall by Mr. Lefkowitz? A. I have made out checks to Mr. J. H. Hall, yes.

Q. Do you remember—you were the bookkeeper? A. Yes, sir.

Q. How were those payments charged in the books?

Mr. McGlynn: I object.

Mr. Skinner: I call for the production of the books.

Mr. McGlynn: Never asked for them, never asked me for the books.

Q. Did you receive any instruction from Mr. Lefkowitz as to how your charge was to be made?

Mr. McGlynn: I object to the question as immaterial.

The Court: I will allow it.

Mr. McGlynn: Exception.

The Court: You may have it.

Exception noted as ground of appeal.

A. Yes, sir.

Q. What was that instruction?

Mr. McGlynn: I object.

The Court: Same ruling.

Mr. McGlynn: Exception.

The Court: You may have it.

Exception noted as ground of appeal.

A. He told me to charge that to the construction of the new building.

Q. What is the amount of those checks?

Mr. McGlynn: I object to the question.

The Court: Same ruling.
Mr. McGlynn: Exception.
The Court: You may answer.
Mr. McGlynn: Secondly, they are not the best evidence.
The Court: You may answer.
Mr. McGlynn: Exception.
Exception noted as ground of appeal.

A. Well, they were not all for the same amount.
Q. No, the total amount. A. Total amount?
Q. Do you know? A. About $1200.

Mr. McGlynn: My objection goes to all of this.
The Court: Yes.
Mr. McGlynn: How much was it?
The Witness: About $1200.
The Court: About $1200.

Q. When were those checks—

Mr. McGlynn: I object to the question.
The Court: I will allow it.

A. Why they were in the summer of 1927.
Q. Summer of 1927? A. Yes.

Mr. Skinner: Cross-examine.

Cross-examination by Mr. McGlynn:

Q. All after May, were they? A. I believe so; I am not sure.
Q. When did you first know this law suit was pending? A. 1928.
Q. Was that when you made a statement to Mr. Vail in writing, or to his counsel, regarding what you knew of the facts in this case? A. I don't re-

member the date when I made that statement, whether it was in 1927 or '28.

Q. Was that the first that you knew that this suit was pending? A. Yes, sir.

Q. How did you come to know it? A. Why, shortly after I left the Manufacturers Developing Company, or the National Box & Lumber Company, I met Mr. Vail on Broad Street, and he asked me what I was doing there, at that hour of the day—

Q. Yes? A. —And I told him that I was no longer employed by the National Box & Lumber Company.

Q. When was that? A. Oh, that may have been a month after I had left the employ of the National Box & Lumber Company.

Q. And the date of your leaving was what? A. November, 1927.

Q. This was about a month after? A. Yes.

Q. Was it before you had started a suit against the Manufacturers Developing Company for $2,750.00 which you alleged was due you for back wages? A. Well, I had placed my case in the hands of an attorney right after I had left the Manufacturers Developing Company.

Q. A day or two after you left them? A. Yes, sir.

Q. Did you tell Mr. Vail that you had a suit against them pending? A. I don't remember whether I mentioned—

Q. Did you keep in touch with him then from that time on? A. No, sir.

Q. You say you live in Irvington? A. Yes, sir.

Q. Have you lived there ever since 1927? A. No, sir.

Q. Where else have you lived? A. I have

changed my address a number of times. I have lived at Dewey Street, Hillside, Newark; now I am living in Irvington.

Q. What is the address in Irvington? A. 198 Custer Terrace.

Q. Your suit against the Manufacturers Developing Company was settled, was it not? A. Yes, sir.

Q. You received $1,050.00? A. Yes, sir.

Q. These facts that you have testified to, when did you relate them to Mr. Vail or his counsel? A. Why, shortly after I left the National Box & Lumber Company.

Q. How shortly after you left? A. Oh, I am not sure; it may have been three weeks, a month after I left.

Q. Within three or four weeks after you left? A. I am not sure.

Q. I am not holding you to a day or two, but a short time was it? A. Yes, sir.

Q. After you left the National Box & Lumber Company? A. Yes, sir.

Q. You made a statement to Mr. Vail, or his counsel, giving in detail what you knew about this situation? A. Well, they asked me about it, and I told them.

Q. You made a statement? A. Yes.

Q. In writing? A. I think it was in writing.

Q. Had you read that over on any occasion since then, or before today? A. Yes, sir.

Q. When did you read it last? A. Friday in court here.

Q. Friday. And is your testimony, of your present recollection, based on what happened back in 1926, or '27, or on reading over this resume or statement of facts that you gave him? A. Why, I

remember that very well from what actually happened.

Q. Remember it all? A. Yes.

Q. Did you see the correspondence which passed between the Brandes and the National, or the Manufacturers Developing Company in connection with these two propositions which were under discussion after June, 1926, and up to the early part of '27? A. Well, I have seen some correspondence.

Q. Well, you thoroughly read most of these things that were in this file, didn't you? A. Yes, I had charge of the contents of the file.

Q. I appreciate that. Did you read the mail? A. I had charge of the opening of the mail.

Q. Did you read the outgoing mail also? A. No, sir.

Q. Didn't you read everything in this file, with respect to this? A. No, there were a good many things I was familiar with.

Q. How did you come to read this agreement which you say looked like the one produced here? A. Because letters would be filed in the letter file, papers like that would be filed in the legal file, and I had charge of all of the legal papers.

Q. I show you a letter purporting to be dated March 25, 1927, and ask you if you ever saw that before, or did you see the original before it was made? A. I don't think I ever saw this letter before.

Mr. McGlynn: May I have that marked for identification?

(The same is marked Exhibit D-6 for identification.)

Q. Now, you recall, don't you, Mrs. Smalley, that in the early part of 1927, in March, you heard

some conversations in the office with regard to the fact that the lease which had been under discussion with the Brandes was not going through, didn't you? A. Not about a lease not going through.

Q. You don't remember that? A. No.

Q. Don't remember that they had been discussing from September on a possible lease on a new building? A. Oh, yes, they had been discussing a lease, yes.

Q. Wasn't that discussed in the spring, that that lease was not going through? A. No, sir.

Q. It wasn't? A. I didn't hear the discussion.

Q. Didn't you hear conversations then between Mr. Lefkowitz and Mr. Mitchell and Mr. Hall with regard to an entirely different proposition involving a building which was eventually built? A. Yes.

Q. And didn't you hear Mr. Lefkowitz in those discussions say that he was going on with the negotiations with the definite understanding that there were to be no agents or brokers in the matter? A. I never heard that.

Q. But you did hear a conversation between Mr. Hall and Mr. Lefkowitz, in which Mr. Lefkowitz wanted inserted in that lease of 1927 the fact that there were no tenants or broker, that the Manufacturers Developing Company would not be responsible for commissions, didn't you? A. If I remember correctly, Mr. Hall brought these leases; whether they were executed or not, I don't know; it was then that Mr. Lefkowitz asked Mr. Hall to have that inserted in the lease.

Q. That there was to be no brokerage paid by the Manufacturers Developing Company, and the reason for it was that he could not—the price of

the building, et cetera—add the brokerage on the top of it; is that right? A. Yes.

Q. Isn't that what he said? A. Well, he said, I remember the words quite plainly, he said to the effect, that to put in that if the Fiedler Corporation insisted on getting a commission in this new building, the Fiedler Corporation—or the Brandes Products will have to pay that commission, because at that rental, I cannot afford to pay Fiedler Corporation a commission.

Q. All right. When was the first time that you saw this paper, marked P-2, which was shown to you a few minutes ago, which you said you saw in Mr. Feiks office? When was the first time you saw that? A. You mean the one in our office?

Q. No, I didn't ask you that. When was the first time you ever saw the paper marked P-2? A. Oh, that? Well, the day I was in Mr. Feick's office, the day I made the statement.

Q. How long ago was that?

Mr. Skinner: I can give you the exact date, Mrs. Smalley, if you want it.

A. I don't know the exact date, but it was about a month after I had left the employ of the National Box & Lumber Company.

Q. That was in the fall of 1927? A. (No answer.)

Q. You say that you were transferred in the office from one department to another one? A. After I came back from my vacation, which was probably the end of August or the early part of September.

Q. End of August or the early part of September? A. Yes.

Q. The new building at 360 was not then com-

pleted, was it? A. It was in the course of construction at that time.

Q. It was not completed? A. No, sir.

Q. You were then transferred to what department? A. To the order department.

Q. So from that time on you had nothing to do with the Manufacturers Developing Company property? A. No, sir.

Q. Nor their files? A. Yes, sir.

Q. So that if you saw any papers at all with reference to this particular property, or these leases, it was before you left on your vacation? A. Yes, sir.

Q. Just where did you see this paper which you said you saw in your office? A. Well, in the files where I kept all legal papers.

Q. What is that, an open file or an envelope, or what? A. No, I had a compartment in the safe where I kept all of these papers.

Q. You say all of these papers; what do you mean? A. Well, leases, tax bills—

Q. Yes? A. —Mortgages—

Q. Yes; what else? A. —Contracts.

Q. Contracts for what? A. That commission contract.

Q. You are not sure you saw that in there, are you? A. Oh, yes, I am.

Q. Positive now? A. I saw that once or twice.

Q. Saw what? A. The commission contract.

Q. What did it say? A. I can't repeat the exact words, but if you show me a copy of it, I will see if that is just what I saw.

Q. Oh, just because you saw a copy of it? A. It is difficult to remember, word for word.

Q. Where did you see the original that you saw

in November, 1927? A. I saw the original in Mr. Feick's office.

Q. Yes, when did you see the copy last? A. I saw it many times.

Q. How many times? A. Oh, every time I had to go to that file for documents or something.

Q. How long was it in your office? A. Oh, it might have been in the office for about a year.

Q. What? A. About a year.

Q. Well, when was the lease signed? A. Which lease are you speaking about, Mr. McGlynn?

Q. The paper you say was there, in there, referred to more than one lease? A. No, I don't understand you, Mr. McGlynn.

Q. Did the paper that you saw with the leases, it referred to more than one lease? A. I don't remember just how many leases it referred to. I don't know whether it referred to more than one lease. I don't remember.

Q. You don't know whether it referred to one lease? A. It referred to a commission.

Q. It referred to a commission; is that all you knew about it? A. Yes.

Q. Do you remember what property? A. Yes.

Q. What property? A. It stated 350 South Street or any other property that they may lease.

Q. 350 South Street? A. Or Thomas Street.

Q. Well, now, which one did it refer to? A. Thomas Street.

Q. Sure of that? A. Yes, sir.

Q. Where was that? A. Where was what?

Q. Where was 350 Thomas Street in the agreement? A. There was a blank space there.

Q. Blank space? A. Yes.

Q. How do you know it referred to 350 Thomas

Street? A. In the blank space was inserted, I believe, in Mr. Ross' handwriting—

Q. Sure of that? A. Well, it looked like Mr. Ross' handwriting.

Q. It looks like it? Which, on the copy or the original? A. Well, I guess—

Q. You guess what? A. On the original.

Q. How about the copy? A. Well, it must have been the same handwriting.

Q. Why do you say it must have been? A. (No answer).

Q. Was the blank filled in? A. It was.

Q. Are you sure? A. It was, sure.

Q. Typewriting or handwriting? A. Handwriting.

Q. How? A. In pen and ink.

Q. In pen and ink. Was the copy signed? A. I don't remember.

Q. Or sealed? A. I don't remember.

Q. On which side of the page was Mr. Lefkowitz's name? A. On the righthand side.

Q. Sure of that? A. Almost sure.

Q. You are just saying that because that is where it usually appears, aren't you? A. I don't know whether it usually appears on that side.

Q. Just let me show you the original. Is that on the righthand side, Mr. Lefkowitz's name? A. Well, I said righthand side, but I meant this side, lefthand side.

Q. Oh, you mean the lefthand side. Well, the other document that you saw in that safe, on which side of the paper was Mr. Lefkowitz's signature on, right or left? A. I don't remember.

Q. How is it that you remember seeing this paper in that safe which you say is a copy of this one, marked P-2? A. I can't remember on what side of the paper people sign their signatures, but—

Q. Why did you answer me then when I asked you? A. Because I just happened to see that one here.

Q. You saw what? A. That document you just showed me.

Q. I am asking you, Mrs. Smalley, what was in the paper, in the safe, that leads you today, three years or four years afterwards, to tell me that it was a copy of this one? A. The handwriting of it.

Q. What did it say? A. Five per cent. commission on the rentals.

Q. Rental of what? A. Rental of 350 Thomas Street.

Q. Was this filed in a separate envelope? A. No, it was just filed, and put in with a lot of other papers.

Q. What paper was it with? A. Leases.

Q. What leases? A. All of the leases.

Q. Were they altogether? A. Yes, sir.

Q. Couldn't have been inside of more than one, could it? A. We had more leases than one; we had a lease with the Quimby Pump Works, Whittier and a lot of other tenants.

Q. Were there copies of other papers in there besides those leases? A. Anything pertaining to legal matters; yes, sir.

Q. Any other papers in there? A. Yes, sir.

Q. Do you know what they referred to? A. Yes.

Q. What were they? A. Mortgage papers, tax bills.

Q. When was the first time you ever saw the copy of this paper you say you saw? A. I don't remember when it was, the first time.

Q. When was the lease first in the office after its execution? A. The first lease, you mean?

Q. The June, 1926, lease. A. Mr. Lefkowitz handed me the lease.

Q. Are you sure of that? A. Yes, sir.

Q. Or was it mailed to you by the lessee, who drew it? A. No, Mr. Lefkowitz handed it to me, and he seemed to be quite pleased about it too, and he talked about it.

Q. I see; when was this? A. I don't know whether it was the day it was executed or a little after.

Q. In 1926? A. In 1926.

Q. What else did he hand you? A. Oh, I think it was a bill from the Fiedler Corporation, if I am not mistaken.

Q. He handed you that too? A. Yes.

Q. Did that come by mail? Did he have it mailed to him? A. Well, he explained the matter to me; I don't know whether he just handed me the bill or what.

Q. He handed you the bill? A. Yes, told me to pay it.

Q. What else did he have to hand you at that time? A. At that time he just had the lease and the bill, if I am not mistaken.

Q. How do you account for this copy of P-2 getting into the file which you say you saw, if he had handed it to you on the day he came back from the lease? A. I don't know—oh, I didn't get that with the lease.

Q. How did it get in there, do you know? A. Well, it must have been handed to me, and I just—

Q. How did it get in there, do you know? A. I don't remember, but it was there.

Q. Was it handed to you? A. I don't remember, but it was in the file.

Q. When did you first read it? A. Many a time I had to refer to that file.

Q. When did you first read that paper, please? A. I don't remember.

Mr. McGlynn: That is all.

Redirect-examination by Mr. Skinner:

Q. Mrs. Smalley, when you found this commission agreement that you say you saw, or a copy of it, was it inside of the lease or separate? A. I really don't remember.

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

Q. You do not say it was inside the lease, do you? A. No, I don't remember.

Q. Now, you spoke of having been transferred to another department. A. Yes, sir.

Q. After that transfer, did you have anything to do with the making out of checks? A. No, sir.

Q. If checks were drawn after your transfer, who would they be drawn by? A. Mr. Hornby.

Q. Then those checks that you spoke of giving to Mr. Hall were before your transfer? A. Yes, sir.

Mr. McGlynn: I object to the question. Same line of objection, on the same grounds, and on the further ground it is not redirect.

The Court: I will allow it.

Mr. McGlynn: Exception.

The Court: You may have it.

Exception noted as ground of appeal.

Q. After your transfer did you continue—did you have occasion and did you go to the filing, to the point where the legal papers were filed? A. No, sir.

Q. Now, what was the time you were transferred? A. Well, it was either the latter part of August or the early part of September, 1927.

Mr. Skinner: That is all.

By the Court:

Q. Was there anything about that rental—that commission agreement that impressed itself upon your mind? A. Well, matters of that kind would have to impress themselves upon my mind, because I had to know when a bill came whether it was all right for me to enter on the books.

Q. Then it did impress itself on your mind? A. It did.

Q. In what way? A. Well, if a bill came along for—if this is what you mean—one thing I was interested in really was when I was given a bill that that was to be paid, so that I would know how to charge a bill in case it did come through.

Q. Did you ever speak to anybody about it? A. No, sir.

Q. Did you ever show it to anybody? A. No, sir.

The Court: That is all.

By Mr. Skinner:

Q. Well, didn't discuss it then with Mr. Lefkowitz? A. No, sir.

Q. I show you P-2 and call your attention now to the words in pen and ink, 350 Thomas Street, Newark, N. J.; I think you said something about that, as to whose handwriting that appeared to you to be. A. It looks very much like Mr. Ross' handwriting.

Q. Do you know anything about Mr. Ross' handwriting? A. Mr. Ross is treasurer of the company, and I had occasion to see a good deal of his handwriting.

Q. That is, he was treasurer of the Manufacturers Developing Company? A. Yes, sir.

By the Court:

Q. At the time when you heard Mr. Lefkowitz tell Mr. Hall to insert a clause in the contract to the effect that if the Fiedler Company wanted a commission, the Brandes Products would have to pay it, didn't you at that time recall this agreement that you had previously seen, and did you not at that time take it up with Mr. Lefkowitz? A. No, I did not.

Q. Didn't you connect the two at that time in your mind? A. No, I did not.

Q. That was a violation of that agreement, was it not? A. It seems so now.

Q. Didn't you think so at the time? A. I never thought anything about it.

The Court: All right; that is all.

Recross-examination by Mr. McGlynn:

Q. What happened afterward that brought this thing to your mind, this paper? A. Well, probably this suit; I don't know.

Q. Well, did Mr. Vail specifically call your attention to the fact that there was a copy and that you had seen it, when you discussed the matter with him? A. No; when Mr. Feick showed me that there, I said, "Oh, I remember seeing a paper like that in our office."

Mr. McGlynn: I see, that is all.

Plaintiff Rests.

Mr. McGlynn: If your Honor please, I desire to move for—

The Court: I will excuse the jury until two o'clock.

Mr. McGlynn: —a non-suit.

The Court: Just a moment.

Mr. McGlynn: Yes, sir.

The Court: Before further discussion, suppose we take a recess until two o'clock.

At one o'clock the Court takes a recess until two o'clock P. M.

After Recess.

(The jury retires.)

Mr. McGlynn: If your Honor please, I respectfully move for a nonsuit. The reading of the complaint will disclose, I think, that the first, second, third and fourth counts are really out of the case, because, in the first place, the plaintiff has dropped the first count voluntarily. The second, third and fourth counts deal with the alleged renewal of the lease of June, 1926, concerning which, as I remember the testimony, there is nothing in the case. The fifth count then brings into play Exhibit P-2, and the sixth count is based on a quantum meruit, on the same facts alleged in Paragraph 7 of the agreement. First, I take it, there can be no recovery by the plaintiff because in this case he elects to recover on an agreement that is the basis of his services and the basis of his claim; and if he fails on that proof, he cannot come in on quantum meruit, so it seems to me that brings us down to just one single issue before this jury, and that is the question of whether or not the plaintiff can recover a commission of five per cent. on the lease of May 24, 1927.

Now, the only consideration for the alleged

agreement, P-2, is a past consideration. As your Honor will recall, the very opening, of the working of the agreement—I am quoting from a copy attached to the complaint—say, "Whereas, the undersigned acknowledge that the plaintiff procured"—"now, therefore in consideration of the services rendered." Now, they had been, or were paid in full for the services rendered by them in the procuring of that lease, whatever five per cent. of that lease amounted to. Now, I take it from the cases, that in a given case, where services are performed, and fully paid for, and then those same services are used for the basis of a new agreement, that is past consideration.

If the arrangement had been that for the procuring of the tenant at 350 Thomas Street, Fiedler Corporation was to be paid not only five per cent. for procuring that lease but also in addition thereto five per cent. of any lease, and so on, that would make it a good agreement, but I contend that the only consideration which is described in the agreement, and which has been testified to here has a past consideration for the making of the promise to pay.

I will read the agreement further. I fail to see, if your Honor please, how this is an agreement. I cannot see one single thing in this agreement which provides for anything to be done by the Fiedler Corporation. I take it that a reasonable construction of this agreement would lead one to believe that the Fiedler Corporation, after its execution, could sit in its office, without the doing of one single thing. For how long? Forever. The agreement is not dated, has no limitation or term, provides for no cancellation or termination. Therefore, a reasonable construction of this agree-

ment, it would seem to me, is that this plaintiff could recover for commissions on any sales or leases made by the owners, or the Brandes Company, from the time of its execution forever. There is not one single thing in there that the Fiedler Corporation agrees to do. I take it that an agreement must be bilateral; there must be something to be done by both parties—one party must be in the same position to sue the other for a breach. What possible claim could the defendant corporation have against this plaintiff for breach of this agreement? What is there in this agreement that shows what the Fiedler Corporation would agree to come in on, or agree to do? When does a unilateral, or one-sided contract, become bilateral? There is no such terms set forth in this agreement; there is nothing said, in here, that the defendant would, if the Fiedler Corporation produced or procured a tenant for any additional space, it would pay a commission. That is not what it says. I think that is a reasonable construction of it, but that is not what the agreement says. And I take it that the Court, on a motion, must consider the agreement and add surmise to it. I say that the contract is void because it lacks mutuality. I say, further, that it lacks validity, because it is based on a past consideration. I say that a reasonable construction of this document is in line with our cases, and an opinion specially by Judge Dungan, reviewed by the Court of Errors and made its opinion in the case of Meyer Appelbaum, 104 N. J. Law, Page 664, which I understand to be the law, not that a broker can introduce a prospective tenant, or a prospective purchaser, to a landowner and then sit down and let the parties conclude ne-

gotiations into a written lease or into a sale and then claim a commission.

But what do we have here? Take the testimony most favorably to the plaintiffs' case, their testimony is that starting June 16, 1926, Mr. Vail commenced negotiations with the Brandes Company, in the leasing of premises known as either 350 or 360 Thomas Street, and he kept up those negotiations, but up to the time he stopped, to the time he left, there had been no arrangement, no agreement, made between these parties, and there had been no meeting of the minds with respect to space, to rental, or to all of the numerous other terms that would go into a lease. He said he stopped, why? Because on February 14, 1927, the president of the defendant corporation told him that he would not continue to erect buildings for the Brandes Products Company and lease them to them. Now, I say that alone, standing by itself, when we read this agreement, this undated agreement, with no limitation of time, certainly the parties to this contract had a perfect right to cancel it, and I think that is another reason for my non-suit. Assume this contract was, not what I describe to your Honor, but assume it was a legal contract, when did this contract terminate? Didn't the defendant corporation have a right to say on February 14, 1927, "We are through, there being no negotiations now which have resolved into a contract, with either the landlords or the tenant, and we want to stop," which they did in March, according to the plaintiff's own testimony and Mr. Mitchell's, and negotiations were commenced for a brand new lease, a brand new proposition, involving 60,000 square feet of floor space, which culminated in an agreement, a lease, of May 24, 1927, not part of

which lease, or no term of which lease, not the slightest, did this plaintiff have anything to do with?

Under these circumstances, I fail to see under this testimony, or taking the contract in the most favorable light, how the plaintiff can be said to have been the procuring and efficient cause which created this tenancy between the landlord and the Brandes Products Corporation and is entitled to recover any commission.

On all of those grounds I respectfully move for a non-suit.

The Court: (After extended argument of counsel) I have very little doubt, in this motion, that this motion should be denied. I have been of that opinion for some little time, before the argument, at any rate, but I have a little doubt about this proposition of your being able to maintain your suit on both, part on the one and part on the other, and I will reserve decision on that, and we will go to the defense, and I may, upon further reflection, reverse myself on the main thing, because there is considerable force in what Mr. McGlynn says, considerable force in the proposition that this contract is lacking in mutuality. There is no time limit; there is nothing more to be done on the part of the broker. Apparently, he is entitled to have commissions on any renewals of this lease from then on until doomsday, if this corporation, its successors and assigns, continued to renew the lease, under that agreement he is entitled to commission, on renewals; he is entitled to the commission, if they rent him something else, on property that the owner might then have or afterwards acquire, and he is not obligated to do a blessed thing with respect to bringing the parties

together. I think it is a beautiful agreement, as far as the broker is concerned; I do not think they left anything out. But, on the other hand, on the quantum meruit, the proofs, if they be maintainable, the proofs do show that Mr. Vail did undertake to bring these people together, and that raises —and if that is maintainable—that raises a question of fact as to whether he did do that, whether it was because of his procuring a customer that the lease was negotiated or whether the negotiations stopped in their entirety, because, clearly, under the Meyer Appelbaum case, if that be the fact, the broker could not recover. In other words, there must be no hiatus in the time—I mean, a serious hiatus—if the customer that the broker brings does not come to terms and the deal is off, and then he went to the man, days afterwards, and they get together and negotiate a lease, well, I think the broker is out. The Court of Errors and Appeals said so in that Appelbaum case. That raises a question of fact for the jury, on the question of quantum meruit. The plaintiff is entitled to recover a commission—I am just giving you the mental process I have, so that you may see what I am a little in doubt about, which I shall try to clarify in my own mind tonight. So if you have any cases on the quantum meruit, and the contract being maintainable in one suit, in the alternative, like in a tort suit, you see, in which I was either knocked down by A or B, I do not care against which I recover—say my leg was broken, and now somebody is asked to pay, whichever one that is,— if A is guilty, a judgment against him, and I charge you that he is responsible; or, on the other hand, in the alternative, with regard to B, if you find A is not responsible, then it is up to B. Now,

this is a little different proposition, and I do not think it is quite analogous to that, and there must be some law on the subject.

Mr. Skinner: Oh, yes.

The Court: I do not off-hand recall it, to put my fingers on it.

Mr. McGlynn: If your Honor please, before I forget it, may I have an exception to your Honor's ruling?

The Court: You may have an exception.

Mr. McGlynn: May I ask for a ruling, on the 2nd, 3rd and 4th counts?

The Court: As I see the case now, the question is with respect to recovering for the negotiation of the last lease, either on the ground of quantum meruit or the contract.

Mr. Skinner: I think that is all there is in the case, in its present state, and all I can say on that, would be to suggest this, that your Honor may perhaps be justified in deferring disposition of the motion, as to this question, until he closes the case.

The Court: I haven't any doubt about it, but I think that is the situation, and I do not think it will be changed.

Mr. Skinner: It may be affected by something that Mr. Lefkowitz may say.

The Court: I will grant the motion at this time, and grant you an exception.

Mr. Skinner: As to those counts?

The Court: As to those counts.

I will deny Mr. McGlynn's motion tentatively.

Bring in the jury.

(Thereupon the jury was recalled.)

FERDINAND A. HUBERT, sworn in behalf of defendant.

Direct-examination by Mr. McGlynn:

Q. Mr. Hubert, what is your business? A. I am in the—

Q. What company? A. Johns-Mannville Company.

Q. Do you recall, back a year or two ago, talking to somebody up at the Brandes Products about a piece of property here in Newark? A. I do.

Q. Owned by the Newman Hardware Company? A. I do.

Q. Whom did you talk to up there? A. Both Mr. Hall and Mr. Stude.

Q. Do you remember speaking to Mr. Lefkowitz of the National Box & Lumber Company about the same property? A. I do.

Q. Before or after you spoke to the Brandes? A. After.

Q. (After discussion between Court and counsel) Do you recall discussing this property with Mr. Vail? A. I do.

Q. Do you know Mr. Vail? A. I do.

Q. Where did your discussion with him take place about it? A. At the Brandes lobby, in the waiting room, while I was waiting to go in to see Mr. Stude.

Q. What did he say to you? A. We were having a general discussion, and he remarked that it was rather strange that I was doing something in the brokerage line, because I had gone previously with in on another piece of property. He asked me whether I was in the brokerage business. I told him I was not, but where I could bring a customer to a client, bring them together, I was only

too glad to do it. He said, you had better let me handle it for you, because they may do you out of a commission, not being a broker. I said, there is no necessity of that. Mr. Fold, who had the property, he simply asked me if I knew anybody, and I remembered the Brandes were looking for more space, so I got in touch with them and told them—in fact, took them down there in my own car.

Q. What do you recall about the time this was? A. About September, October, about the latter part of 1927, that part of the year.

Mr. McGlynn: That is all.

Cross-examination by Mr. Skinner:

Q. Mr. Hubert, you did bring this matter in some way the notice of the Brandes people? A. Yes, sir.

Q. Mr. Vail asked you whether you were going into the real estate business? A. Yes, sir.

Q. And that is about all there was to it? A. Well, we just had a little further discussion, and he even told me then that Mr. Fold could do me out of my commission on the thing, he could even go and sell or lease it—

Q. Who is Mr. Fold? A. He is the man that has charge of the disposition of the property; they were moving away, and he had—

Q. This all related to some property other than the twenty-one acres? A. Oh, yes, it was on St. Francis Street, near East Ferry.

Mr. Skinner: That is all.

SECOND DAY.

Monday, September 29th, 1930.

Continued pursuant to adjournment.
Present, counsel as before stated.

CHARLES LEFKOWITZ, sworn.

Direct-examination by Mr. McGlynn:

Q. Mr. Lefkowitz, you live in Newark? A. Yes, sir.

Q. How long have you been in business down on South and Thomas Street? A. Since 1911.

The Court: A little louder.

Q. A little louder, the gentleman on the end here wants to hear. A. Since 1911.

Q. How long have you had an interest in this property, this real estate down there? A. Well, since 1911.

Q. How many acres does your company own or control down there? A. About seventeen or eighteen acres.

The Court: Keep your voice up. They cannot hear you.

A. About seventeen or eighteen acres; seventeen acres to be more exact.

Q. That is generally in the vicinity of South, Thomas and Jefferson Street, is it, and what street? A. Pacific.

Q. When is the first time that you recall having any business transactions with the Fiedler Corporation, about when? A. Well, about 1925 or 1926.

Q. Do you recall going up to Mr. William Fiedler's office as the result of a request by your associate, Mr. Ross? A. Yes, sir.

Q. And he was with you, was he, when you went to Mr. Fiedler's office? A. Yes, sir.

Q. And you saw Mr. Fiedler there? A. Yes, sir.

Q. Who was there? A. Mr. Fiedler, Mr. Ross and Mr. Vail.

Q. Now, do you recall what the conversation was about?

Mr. Skinner: When have you fixed, fix the time, please.

Mr. McGlynn: He said sometime in '24, five or early six.

Mr. Skinner: Can't you make it more definite than that?

Q. Can you make it more definite than that? A. I cannot remember the dates; I couldn't possibly think of the—

The Court: And we cannot possibly hear you, Mr. Lefkowitz.

Q. Let me ask you this, with reference to the date. Do you recall whether, before you went up to see Mr. Fiedler on this occasion, you had listed any of this property with his organization or not? A. Yes, sir.

Q. You had already listed or you do not recollect? A. I do not know whether it was before or after.

Q. I see. A. Because we sent out a general letter to every real estate broker in Newark.

Q. For what purpose? A. For the purpose of

renting some of our buildings that we were putting up there.

Q. In this tract on South Street, Newark? A. At Thomas Street, South Street or Adams Street.

Q. I show you a copy of a letter which has been marked D-1 dated September 2, 1925, and ask you if you are familiar with the fact that that letter was sent to Mr. Fiedler personally. A. Mr. Ross sent it.

Q. Were you familiar with the fact that it was sent? A. Yes, sir.

Q. I think it was marked in evidence the other day, with your consent, Judge, instead of being marked for identification, wasn't it?

Mr. Skinner: What letter is it?

Mr. McGlynn: September 22, 1925.

Mr. Skinner: The one?

Mr. McGlynn: The one marked here.

Mr. Skinner: Well, if Mr. McGlynn says it was—

The Court: I think he is right about it, Judge.

Mr. Skinner: I know there was such a conversation; whether it was then or later, I am not certain.

The Court: I am not sure, but if it is marked D-1, it was.

Mr. McGlynn: May I read this letter to the jury?

The Court: You may.

(Exhibit D-1 in evidence read to the jury.)

Q. E. E. R., are Mr. Ross's initials? A. Elmer R. Ross.

Q. I show you Exhibit D-3 for identification and

ask you if you saw that letter come in from Mr. Fiedler to Mr. Ross. A. I did.

Mr. McGlynn: This has not been marked in evidence; I would like to offer that.

(Same is received in evidence and marked Exhibit D-3.)

(Exhibit D-3 read to the jury.)

Q. You say you are not quite sure whether the conference you had with Mr. Fiedler was before or after these letters, is that right? A. I believe it was after the letters were started, corresponding with Fiedler Corporation, and I first met them.

Q. Now, at this conference with Mr. Fiedler, was there anything said about commissions? A. No, sir.

Q. Well, what was the general topic of the conversation? A. I was in the office with Mr. Ross, and Mr. Ross and Mr. Fiedler sat opposite one another talking about it, and I sat on the side—

Q. Listen; do you mind my interrupting you. I am rather anxious to get through with this thing. A. Yes.

Q. I asked you what was the topic of the conversation. A. Mr. Fiedler was telling Mr. Ross about some earache he had, couldn't hear very well

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The Court: No, no; what was said about the—

Q. Real estate.

The Court: —real estate, not about their ears.

Q. No, or anything else. A. Well, there was nothing much said about real estate at that time.

Q. Nothing much said about it? A. No, sir.

Q. Did you go back there with Ross to see Mr. Fiedler? A. Yes, sir.

Q. On how many other occasions did you see Mr. Fiedler? A. Once more, one more trip.

Q. One more trip? A. Yes.

Q. Now, on that occasion was there anything said in your presence by Mr. Fiedler with reference to commission? A. No, sir.

Q. What was the general topic of that conversation? A. We were talking about building some large building and Mr. Fiedler trying to give us, to assist us in financing it.

Q. Nothing to do with listing—

Mr. Skinner: Oh, don't lead him.

Mr. McGlynn: I won't lead him.

Q. What else was said about it? A. Well, I don't remember what was said.

Q. All right. Now, when was the first time that you recall that anyone in the Fiedler organization brought to your attention the fact that they had a possible tenant for any portion of this space in your property? A. I believe it was sometime in 19—well, 1926.

Q. '26? A. When we had the first building finished.

Q. What year? A. Building finished; after that letter that Mr. Fiedler was sending.

Q. What was the location of that building? A. 350 Thomas Street.

Q. Was that in the front or the rear? A. In the front.

Q. Now who, do you recall, came to see you from the Fiedler organization with respect to that building which you say was finished? A. Mr. Vail.

Mr. Skinner: If your Honor please, I object, because the question assumes that somebody from the Fiedler Corporation came to see him; he has not said that at all.

The Court: I think that is correct, Mr. McGlynn. He has not said that.

The Witness: I said Mr. Vail.

The Court: Mr. Vail, he says now.

Mr. McGlynn: He said before.

The Court: Well, if he did, I did not notice it.

Q. Now, when Mr. Vail came to see you about this building which you say you had just finished, what did you tell him with respect to it? A. Well, I told him that we had—he said that he had a prospective tenant for the building, thirty-thousand square feet; I told him that at that time we had an option with Feist & Feist, they had an option.

Q. Feist & Feist had an option? A. Yes, that it would be advisable for him to go over and see Mr. Flesher, of Feist & Feist, and work with him.

Q. What did Vail say then? A. Well, he said he did not know whether he would—

Q. Well, was there anything else said about this option, that you say Feist & Feist had? A. Well, later on we wrote Feist & Feist a letter—well, they —and cancelled the option.

Q. Cancelled the option? A. That is right.

Q. How long did it take you to cancel the option? A. About thirty days.

Q. Thirty days?

Mr. Skinner: About thirty.

The Court: About thirty days.

The Witness: Yes.

The Court: A little louder.

Q. Did Vail see you in between the time he saw you first and this cancellation of the option, when was this? A. I couldn't tell you that.

Q. Well, did you see Vail again? A. Yes.

Q. What did Vail first talk to you about leasing, to this prospective tenant, and do you recall the location, designation? A. That was 350 Thomas Street.

Q. What about this location, 15 Avenue D that he was talking about; do you know anything about that? A. Well, when he came down there, that building was not he asked me if he had any more buildings.

Q. No, no; wait a minute; what about 15 Avenue D; did he talk to you about 15 Avenue D? A. He may have talked to me about it; I do not remember exactly.

Q. Did he sign a lease with your company for 15 Avenue D? A. I don't remember signing any lease.

Q. All right. What is the first lease you do remember signing? A. 350 Thomas Street.

Q. This was with the Brandes Company? A. Yes.

Q. This was for the building standing in the front, am I correct? A. That is right.

Q. Did you see Vail after that lease was signed in May, 1926? A. I believe I did.

Q. Did you execute a second lease with the Brandes for another portion of this 350 Thomas Street? A. Yes, certainly; shortly after the first one.

Q. Shortly after the first one; was that the one which—

(Question withdrawn.)

Q. Do you recall, Mr. Lefkowitz, the execution of the lease dated June 16, 1926, between the Manufacturers and the Brandes? A. Yes, sir.

Q. Do you recall where it was executed? A. At Reed & Randall's office.

Q. Do you recall who was there? A. Yes, I was there; Mr. Ross was there and Mr. Mitchell was there and Mr. Vail was there.

The Court: And Mr. Reed?

A. Mr. Reed.

Q. Where had the lease been signed as far as the tenant was concerned; do you recall? A. Well, I believe that we signed our part, and they took it to the Brandes office and Mr. Vail took it to the Brandes office, and he had them look it over and examine it by their attorneys and made corrections, and then brought back.

Mr. Skinner: Made corrections, did you say?

Mr. McGlynn: Made corrections, and then brought back.

Q. Was it an understanding, when you were in Mr. Reed's office, on this occasion, talking about the lease which had already been signed twice by the Brandes—

Mr. Skinner: He said that he could not answer (interrupting)

A. I couldn't remember; I had signed it first.

Q. Now, previous to the execution of this lease in Mr. Reed's office, had you, as an officer of the Manufacturers Developing Company, had you had any conversation with Mr. Vail with regard to commissions? A. No, sir.

Q. Had he discussed with you, in your office, pri-

or to the execution of this lease, an agreement under which your company was to pay five per cent. commission on any lease made with the Brandes, any renewals of that, or any lease on any other properties you might then, or might thereafter own? A. I do not remember of him talking about any.

Mr. Skinner: You do not remember?

The Witness: I do not remember, no.

Q. Did he ever discuss commissions with you? A. No, sir.

Mr. McGlynn: May I have P-2?

Mr. Skinner: Yes (handing paper to counsel).

Q. I will just clear up one thing first. The lease of June, 1926, as I recall it, leasing to 1931, provides for a five year renewal? A. Yes, sir.

Q. Has the tenant ever notified you in writing of its desire to renew that lease? A. No, sir.

Q. Now, I show you Exhibit P-2, Mr. Lefkowitz, and ask you if this is your signature on the lower lefthand corner. A. It looks like my signature.

Q. Now, is it? A. I guess it is.

Q. Is that Mr. Ross' over there on the righthand side? A. Yes.

Q. And that is the seal of the Manufacturers Developing? A. That is right.

Q. Do you recall executing this paper? A. No.

Q. Do you recall having seen a carbon copy of it? A. No, sir.

Mr. Skinner: What?

The Witness: No, sir.

The Court: No, sir.

The Witness: No, sir.

Q. When was the first, after June 1926, that you saw the original? A. At Mr. Feikes' office.

Q. After having received a letter from Mr. Feikes, or the firm of Pitney, Hardin & Skinner. A. Yes, Pitney, Hardin & Skinner.

Q. And you went up there? A. And I went up there, and they were kind enough to show it to me.

Q. Now, have you looked yourself, and caused your people that work for you, et cetera, to look through your files and records to see if there is any carbon copy of any such paper as this in your files? A. We have searched the whole office over and over again, couldn't find a thing.

Q. Never found anything like it? A. Never saw it, no.

Q. Do you recall, at Mr. Reed's office, Mr. Vail handing you this paper that I have just shown you together with a carbon copy of it, and you read it over very carefully? A. No, sir.

Q. You do recall handing it to Mr. Reed, your attorney, who also read it over very carefully, and then said to you, "I would not sign that paper"? A. No, sir.

Q. Do you recall saying to Mr. Vail, after Mr. Reed said don't sign it, "Yes, I am going to sign it; this is what I agreed to do with the Fiedler people"? A. No, sir.

Q. Did you ever make such an agreement with anybody in the Fiedler Corporation? A. Never made any agreement that I know of with the Fiedler Corporation nor any other company.

Q. What did your company do with payment of commissions on the Quimby lease? A. Paid it; they sent us a bill and we paid it.

Q. Why did you give Mr. Vail a hundred dol-

lars after this arrangement he discussed with you on Avenue D?

Mr. Skinner: Why don't you ask him if he did?

Q. Did you? A. I did.

The Court: I guess there is no doubt about that.

The Witness: Yes, I did.

The Court: He said he paid a bill, which shows a credit on it.

Q. Why was that hundred dollars paid? A. I couldn't remember; possibly for something that he did with the drawing up of the other lease, with Kolster, or something like that.

Q. I see. A. I have no recollection of that.

Q. Now, after this lease of June 16, 1936, did Mr. Vail discuss with you the possibility of another lease with Brandes on some other space? A. Yes, sir.

Q. What was the discussion; tell us what the discussion was with you. A. He came in one day, in the office, and he said that the Brandes Products were very anxious to get a great big building up. I said, well, how big? Oh, he said 200,000 feet, maybe 225.

Q. Wait a minute there, that doesn't mean anything to me; I just want to know what 200,000 square feet of space means; what does that mean? A. 200,000 square feet would be about at least four stories and 50,000 square feet to a floor.

Q. That would be how big a building in width and length? A. Well, possibly 200 by 300—250.

Q. Well, approximately, using the same type of construction that they were using down there, what

would that involve in the way of expense, about? A. Oh, it would involve close to a million dollars.

Q. 200,000 square feet? A. 200,000.

Q. What? A. About 700—close to a million dollars.

Q. About 700,000 for 200,000 square feet? A. That is right.

Q. Just simple factory construction? A. Well, that was not simple factory construction; they wanted a concrete building, reinforced concrete.

Q. What did you do when Vail called your attention to the fact that they wanted additional space? A. Well, we had Mr. Mitchell and myself, got together, and we drew up some sketches and plans, and we went to the Brandes office, and talked about the possibility of erecting it, providing they would furnish us the money.

Q. What happened to that proposed building? Was it erected? A. Just dropped it, that is all; they did not do it.

Q. Now, I show you a letter dated September 9, 1926, marked Exhibit D-6 for identification; do you recall receiving that letter from the Brandes Products? A. Yes, sir.

Q. Now, have the contents of that letter alluded to the proposed building you are just discussing, that Vail brought to your attention, or still another one? A. That is another one.

Q. That is another one? A. That is another one; that is a later one.

Q. As the result of the receipt of this letter from the—

Mr. McGlynn: Withdraw that.

Q. Who is the Mr. Gilbert whose name is signed to the letter? A. He is an officer of the company.

Q. Do you recall what officer? A. I believe he was their secretary.

Q. Do you know? A. Secretary or treasurer; I don't know.

Q. I see; as a result of their letter, what if anything did you do? A. Well, I—we drew up more sketches for them.

Q. I know, but whom did you communicate— A. Mr. Mitchell.

Q. —the desire of the Brandes, with respect to the nature of the building, the size, et cetera, that they wanted? A. Mr. Mitchell.

Q. Mr. Mitchell was the man who was on the stand this morning? A. That is right.

Q. The engineer? A. Yes, sir.

Q. Did you reply to Mr. Gilbert's letter? A. Yes, sir.

Q. And the two papers that you have in your hand now are what? A. Our reply to Mr.—

Q. Gilbert? A. —Gilbert, and to Mitchell.

Mr. McGlynn: I desire, if your Honor please, to put the letter marked D-6 for identification in evidence.

The Court: Let it be received; no objection to this?

Mr. Skinner: No, sir.

(The same is received in evidence and marked Exhibit D-6.)

Mr. McGlynn: And D-5 and 9.

(The same are received in evidence and marked, respectively, Exhibits D-5 and D-9.)

(Exhibits D-5 and D-9 read to jury.)

Mr. McGlynn: Another letter—I have got the other one—that has not been marked, just an acknowledgment of Mr. Gilbert's let-

ter of September 9th, to complete the chain, that is all. Mark this, Mr. Stenographer.

(The same is received in evidence and marked Exhibit D-10.)

(Exhibit D-10 read to jury.)

Q. Now, was the building, which is described in these three letters, which I have just read, ever built? A. No, sir.

Q. Was any arrangement ever made with Brandes with regard to leasing any such building? A. No, sir.

Q. Now, I show you a letter of March 24, 1927, from Brandes to you, marked D-7, and ask you if that was the next proposition that was taken up with you with regard to leasing. A. Yes, sir.

Q. And who took that up with you, Mr. Vail or the Brandes Products? A. Brandes direct.

Mr. Skinner: What was the date of those letters you spoke about?

Mr. McGlynn: September 9th was the letter from the Brandes, and I think the 13th

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The Court: 26th?

Mr. McGlynn: 26th, yes, sir.

Mr. McGlynn: This is not marked, D-7 for identification; I would like to now offer it in evidence.

(The same is received in evidence and marked Exhibit D-7.)

Mr. Skinner: The original?

Mr. McGlynn: Yes, that is the one you had this morning.

Mr. Skinner: Yes.

Mr. McGlynn: The letterhead of the

Brandes Products Company, March 24, 1927.

(Exhibit D-7 read to jury.)

Q. Now, did you reply to that letter? A. Yes, sir.

Q. What is the date of your reply? A. March 26th or 25th.

Q. March 25, 1927, and that is the reply? A. Yes, sir.

Mr. McGlynn: That has been marked D-9 and I now offer it; you have already marked it, Mr. Stenographer.

(Paper referred to is received in evidence and marked Exhibit D-9.)

(Exhibit D-9 read to jury.)

Q. Now, as the result of these two letters, one from Brandes to you and one from you to the Brandes, did you have conferences with them with regard to building additional buildings? A. Yes, sir.

Q. Eventually, did these conferences result in that lease which has already been marked in evidence here, dated in May, 1927? A. Yes, sir.

Q. What was in the lease with respect to assistance by the tenant to the landlord in erecting this building? A. Well, it was in discussion.

The Court: No, what was in the lease, not in the discussion, in the lease.

The Witness: A year's rent, the last year's rent in advance and a year's rent in the way of notes—they gave us notes for the first year.

Mr. Skinner: I understand Mr. McGlynn wants to shorten things.

Mr. McGlynn: Yes.

Mr. Skinner: You can read what you want to call his attention to, if you want to call his attention to it, if you like.

Q. I call your attention to paragraph eight of the lease, on page ten—

Mr. McGlynn: Shall I read it, Judge?

Mr. Skinner: Yes.

Q. (Paragraph eight of the lease read to witness.) Is that right? A. Yes, sir.

Q. So that the tenant advanced under the lease the total of $557,000, one-half of which is security, to remain until the end of the lease, and the other half was taken out on the first year; is that right? A. That is right.

Q. Now, had any such terms ever been discussed with Vail by you? A. No, sir.

Q. And that building, I understand, was completed about September 15, if I remember rightly? A. About that.

Q. Yes. When did you first hear from Vail or anybody in the Fiedler organization that they claimed a commission in connection with that lease of 1927? A. He came in sometime in early December or late November, in the office, and he sat down by me, and he said that I see you built a building for Brandes. I said we did. He said, well, why didn't you come in and tell me; you knew I knew that they needed space very, very badly.

Q. This is Vail talking to you? A. Yes, Vail talking to me.

Q. Keep up. A. That he could have gotten at least 60 cents a foot for me. So I said why didn't

you get that before. He said that before there was more places and they didn't need it as bad as they needed it then. I asked him—I mentioned about him taking Brandes to Passaic, trying to sell them a great big building. Well, he said they sent for me, and they wanted to concentrate the whole works, move from Thomas Street and Mt. Pleasant Avenue, wanted to move to Passaic, and they were trying to negotiate the deal, and for some reason or other it fell through. I had not seen Vail after that or before that for three or four months.

Q. Did he make any claim on you for commission? A. Did not say a word, did not ask me for anything at all.

Q. Did he mention to you the fact on June 16th, 1926, you had executed any kind of a writing, that is regarding a commission? A. Never mentioned a word to me about any writing.

By the Court:

Q. What you were asked was when you first heard of any claim for commission. You said it was either late in November or early in December when Mr. Vail called upon you. Did he at that time make a claim for a commission? A. No, sir.

Q. Did he ever mention the claim for a commission? A. (No answer.)

Q. Why did you answer that way, in answer to the first question, of the claim for a commission—when did he claim a commission? A. He had the attorneys—they sent us a letter—they wrote us a letter and said unless we pay them—I don't know how many thousand dollars—commission for renewals and so on, they will start suit immediately.

Mr. Skinner: Have you got that letter?

Mr. McGlynn: I have got a copy of it, Judge.

Q. Then, what is the significance? What do you mean by this visit of Vail in early December or late November? Nothing different in that visit from the visits of some months before, were they? A. No different.

Q. Except that at that time he talked to you about the—about the new building you had built; is that all? A. That is right.

Q. Well, in the three or four months prior to that time, when he called on you, did he say anything about the new building? A. Not about this building.

Q. Well, that was being built then, wasn't it? A. He wasn't around.

Q. You said he had been in three or four months before November or December the last time? A. The building was then—had been started and completed—it took us about sixty or seventy days to complete the building.

Q. I thought you said it was completed in September.

Mr. McGlynn: Yes, that is what he said sixty or seventy days before November when they had completed it.

The Court: Then he said three or four months before that, was the last he had seen him. I am asking him now, when he was in three or four months before September or November, whether the building was not then being built.

The Witness: He never mentioned anything.

The Court: Did not mention it; all right.

By Mr. McGlynn:

Q. Did Vail ever call on you for any other purpose than discussing the Brandes lease? A. Yes, a number of times.

Q. For what? A. To tell us some land, other factories.

Q. Now, do you recall any conversation with him early in September, 1927? A. (No answer.)

Q. I think he said, February 14th, if my memory serves me right, when you had a conversation, that you said that you would not build any more buildings for Brandes. A. I don't remember that.

Q. Did you ever tell him that you would not build any more buildings for Brandes? A. No, sir.

Q. He said that he was at your place of business after June, 1926, and up until the early part of 1927, almost every day, sometimes three and four times a day; have you any recollection of any such number of calls? A. He may have been there a few times, but he was not there every day; there wasn't any necessity for him to be there every day.

Q. Never mind the necessity; was he there every day? A. Not that I know of.

The Court: Don't you remember, that on the 23rd of August, 1927, Mr. Vail called on you and demanded a commission for this new building?

The Witness: No, sir.

The Court: You say he did not then or any time?

The Witness: He never asked me for commissions. If he sent a bill in regular form we would send a check.

The Court: But you did not send him a check when he sent you the bill in regular form, did you?

Mr. McGlynn: By arrangement.

The Court: No, he said if he sent him a bill in regular form he would send him a check.

Q. Did you have any agreement with Mr. Fiedler or somebody there, with respect as to how you were to pay these bills that you did receive, totaling something like $12,000? A. When the buildings would be completed—

Q. No, no; listen. Did you have an arrangement with him, how you were going to pay? A. Yes, verbal agreement.

Q. What was the agreement? A. That we would pay it monthly.

Q. Did you pay it that way? A. Yes, sir.

Q. Until it was all paid in full? A. Until it was all paid in full.

Q. I show you a copy of a letter, which we are going to show, from Pitney, Hardin & Skinner; is that the letter that you have been referring to as having been received from the lawyers? A. Yes, sir.

Mr. McGlynn: I will mark it, but I am not going to read it.

The Court: What is the date of it?

Mr. McGlynn: November 10, 1928.

(The same is received in evidence and marked Exhibit D-11.)

Q. Did you ever offer the Brandes Products the Newman Hardware Company? A. No, sir.

Mr. McGlynn: Cross examine.

Cross-examination by Mr. Skinner:

Q. Mr. Lefkowitz, you spoke of this tract down there at South Street as seventeen or eighteen acres; we have been talking about twenty-one acres. Hasn't it sometimes been spoken of as the twenty-one acre tract? A. No, not that I know of.

Q. You haven't any idea yourself that it was twenty-one acres? A. I did not speak of it in acres; we spoke of it in land, lots, footage.

Q. You had that tract before 1925 and '26 how long? A. Well, we had been buying land down there since 1911.

Q. Had you had this particular tract from say five to ten years before 1926? A. Well, I would say about, complete, about maybe six years or seven years before.

Q. Then there was—at the time that you first saw this—first call that you spoke of at Mr. Fiedler's office, had you already two buildings upon the property? A. Oh, we had a number of buildings on the property.

Q. New buildings or old? A. New ones, we were building them right along.

Q. More than two in 1925 and '26? A. That is right.

Q. And had you tried to rent them? A. Yes, sir.

Q. Had you also tried to rent portions of the property to people who would agree to pay rent if you would put a building up for them—

Mr. Skinner: I will withdraw that.

Q. Besides renting to this one or that one? A. Yes.

Q. More space in the building that you had up,

did you not also try to develop the property by getting tenants for whom you should erect the building and they would pay rent? A. Yes—well, that is what we did with the other people what the tenants rented, for the people.

Q. That had been your policy right along? A. That is right.

Q. Of the buildings which you had, what tenants did you have in 1930, when you first called on Mr. Fiedler those times? A. We had the Whittier, American Gross Arm, a number of lumber companies in the yard—lumber people.

Q. Lumber people, not occupying buildings, were they? A. Sheds.

Q. Well, never mind the sheds; just buildings? A. American Ambi, a German concern that had a great big place, about 26,000 square feet there.

Mr. McGlynn: What is the name of that company? American Ambi?

The Witness: American Ambi.

Q. What is it?

Mr. McGlynn: Chemical?

A. No, no; they make tile, roofing tile.

Q. All right. You did call upon Mr. Fiedler, didn't you? A. Yes.

Q. Twice? At his office? A. Yes.

Q. What for? A. Well, once to take up the matter of a loan that he sent us a letter—or that there was a circular letter, that they had a Finance Department, and I went up there to discuss the possibility of it with Mr. Fiedler.

Q. What did you—the possibility of Mr. Fiedler financing, in erecting a large building where—

on what—on this eighteen— A. On this eighteen tract, yes.

Q. Is that all you talked about? A. That is about all, about the money.

Q. Didn't you, at that time, tell him that you wanted to get tenants on that tract? A. Certainly, that is what we were going to build it for.

Q. You told him that? A. Yes.

Q. Besides—well, didn't you want anybody to help you get tenants? A. Well, every real estate agent in Newark helps us—

Q. Yes? A. —All we have to do is to build a building, notify them, and they gladly help us.

Q. For helping, they expect to get paid a commission, don't they? A. That is right.

Q. Usually they want pay? A. We gladly pay them.

Q. Now, then, when you went to call on Mr. Fiedler, you knew this was the kind of business, didn't you, getting people to buy or lease property? A. Yes, and to finance; I went there on financing, not selling anything.

Q. You didn't say anything to him about getting tenants for the business? A. I don't remember anything—I didn't have anything to rent, so what is the use of talking about it?

Q. Didn't you say anything about, you were going to have a building erected, and you would want to have tenants, and you wanted him to get somebody to take the building? A. No.

Q. You never said anything like that? A. No, nothing to Mr. Fiedler.

Q. Whom did you say that to? A. I haven't said it to anyone. We were sending out generally circular letters, to every real estate agent in New-

ark, with photographs of the building, after we had the building complete.

Q. At the time you called on Mr. Fiedler did you have one of those letters with you? A. Mr. Fiedler—we may have had one—I didn't have it with me; I showed him circulars.

Q. Had you sent that letter to him? A. Yes.

Q. Then the first time, I understand, you did not talk about anything but about financing? A. That is all.

Q. This time, you did not ask him to do anything about your proposed building, except to finance it? A. We didn't have any building.

Q. Well, your proposed building—what was it that was going to be financed? A. I went up there to ask him, whether he would finance an industrial property, and about what he could do, we were talking about, how much money he could raise, and we would build those buildings according to the amount of money we could get.

Q. Did he say anything about how those buildings were to be completed and made profitable? A. I suppose maybe we did; I don't remember; I didn't ask him about tenants.

Q. Have you any doubt, that you told him that you wanted to get tenants for the building when it was built? A. Well, I don't remember.

Q. It would seem rather, now, looking back on it, rather reasonable that you did that, wouldn't it? A. Well, maybe I did.

The Court: We will take a recess now until tomorrow morning.

Adjourned until tomorrow, Tuesday, September 30, 1930, at ten o'clock A. M.

THIRD DAY.

Tuesday, September 30, 1930.

Continued pursuant to adjournment.
Present, counsel as before stated.

CHARLES LEFKOWITZ resumes the stand.

Cross-examination (continued) by Mr. Skinner:

Q. Mr. Lefkowitz, when court adjourned yesterday you were beginning to recall, I think, that on your first call upon Mr. Fiedler at his office you did talk about the Fiedler Company getting tenants for your building when it was built; do you remember that? A. Well, I said that Mr. Fiedler was talking to Mr. Ross. There was no discussion of renting or leasing or anything else. There was nothing.

Q. There wasn't? A. No, sir.

Q. You mean you heard what he said to Mr. Ross? A. Well—

Q. You mean you heard what he said to Mr. Ross? A. Yes, I was sitting in the room.

Q. And what Mr. Ross said to him? A. Well, they were talking about—

Q. You heard it, did you? A. Yes, sir.

Q. And nothing was said by you or by Mr. Ross about wanting the Fiedler Company or Mr. Fiedler to look after getting tenants for building or buildings when you were erecting them; nothing said about that? A. Not at that time.

Q. Now, that is what you said, I think, at first—no—I have before me your testimony of yesterday, and on page 29 this question was asked you: "Didn't you at that time"—that is the occasion of the first call I understand—"tell him that you

wanted to get tenants on that tract," not that you wanted him to get them, see, but you wanted to get tenants on that tract? Answer: "Certainly, that is what we were going to build it for." That is what you said then and you told him that? A. Yes.

Q. Now, a little later, at the top of page 30, having asked you if you did not know that the Fiedler Company's business was leasing property for owners and expecting to be paid a commission, you said you now call on Mr. Fiedler on financing and not selling anything—"Question: You didn't say anything to him about getting tenants for the business? Answer: I don't remember anything." You meant, I suppose, that you did not remember anything on that subject, is that right? A. Right.

Q. "I didn't have anything to rent," your answer was, "so what is the use of talking about it?" Do you remember saying that? A. Yes.

Q. At that very time you were planning to erect a building, were you not? A. I believe we were, yes.

Q. And the financing that you spoke of was the raising of the money with which to build the building? A. That is right.

Q. And when built you wanted to get tenants for it, didn't you? A. I guess we did.

Q. So although you didn't have anything then to rent, you were expecting or hoping soon to have something to rent, weren't you? A. Yes.

Q. Didn't you talk to Mr. Fiedler, or Mr. Ross in your presence, about that wish of yours? A. Not with Mr. Fiedler nor Mr. Ross at that time. We sent him a notice, a general notice to all the real estate people.

Q. I asked you, "Didn't you say anything about,

you were going to have a building erected, and you would want to have tenants, and you wanted him to get somebody to take the building? Answer: No." Do you remember that? A. I did not ask Mr. Fiedler to—

Q. No, no. Do you remember saying that yesterday? A. Yes.

Q. Do you say now that you did not tell him that you wanted him or his company to get somebody to take the building you were thinking of erecting? A. Well, I possibly did. I don't remember that.

Q. You possibly did? A. Yes.

Q. Can't you be sure of that? A. No, I am not so sure of that.

Q. You are not at all sure that you did not, are you? A. Sir?

Q. You are not at all sure that you did not say it, are you? A. No.

Q. And a little further down on the page you said—here on the next page I asked you, "Did he say anything about how those buildings were to be completed and made profitable? Answer: I suppose maybe we did; I don't remember; I didn't ask him about tenants." Then I asked, "Have you any doubt, that you told him that you wanted to get tenants for the building when it was built?" and you said, "Well, I don't remember." And then I asked, "It would seem rather, now, looking back on it, rather reasonable that you did that, wouldn't it?" "Answer: Well, maybe I did." Now, having read that to you and recalled what you said yesterday, you have had the night to think it over, I ask you now, do you not remember that you asked Mr. Fiedler to use his efforts and the efforts or

services of his company for obtaining tenants for your building when erected? A. No, sir.

Q. You don't remember? A. I didn't ask Mr. Fiedler to procure tenants. We sent a general circular letter out to the entire real estate board —everyone had the letter—and that is what we wanted all the real estate fellows to do.

Q. Yesterday you were being asked, Mr. Lefkowitz, about this particular meeting and what was said at Mr. Fiedler's, and before the Court rose you had said, "Well, maybe I did,"—that is, did ask Fiedler to look after tenants? A. I did not ask Mr. Fiedler.

Q. Do you want to take that back now? A. I can't remember what was said, but nevertheless we did not go up there for that purpose.

Q. You can't remember what was said? A. No.

Q. Is that right? A. That is right.

Q. Is your memory pretty good, Mr. Lefkowitz? A. Sir?

Q. Is your memory pretty good? A. Well, I don't know.

Q. What? A. I haven't got a long memory.

Q. Have you any clear recollection of what took place on June 16, 1926, at the office of Reed & Reynolds? A. Yes, sir.

Q. Why a clear recollection of that and not of this other at Mr. Fiedler's office? A. Well, I had nothing to do in Fiedler's office. I only came up there—Mr. Ross took me up there and introduced me to Mr. Fiedler, and Mr. Ross was sitting there talking to Mr. Fiedler about lots and lots of things, and I sat there for about fifteen or twenty minutes, and then the meeting broke up and we walked out. There was nothing said to Fiedler. Mr. Fiedler never spoke of renting. We knew he has got an

office that rents buildings. He rented it, paid him the commission, so what else is said to Mr. Fiedler? I only met Mr. Fiedler twice in his office in my life. We dealt with all the agents in the City of Newark before.

Q. Oh, by the way, you had dealt with Feist & Feist before, hadn't you? A. Yes.

Q. And following sometime, sometime after this you told yesterday that an option Feist & Feist had was cancelled. Do you remember that? A. That is right.

Q. They had been looking for tenants for you, had they not? A. That is right.

Q. And when you speak of cancelling, do you mean that you notified them to no longer look for tenants? A. No, they had an option on a certain building for a month or two months, and when they tried hard to rent the building—they had a number of tenants down there, and they have almost rented it—when Mr. Vail came over and he, on the strength of the circular, said that he had someone to rent the building.

Q. Mr. Vail? A. Mr. Vail, and I told Mr. Vail that Feist and Feist had an exclusive option on the rental, that he better go over there and see Feist.

Q. Well, when you say that they had an exclusive option, don't you mean that they had exclusively the charge of renting that building? A. That is right.

Q. It was not an option to buy the property, was it? A. It was no option to buy it or sell it.

Q. You mean that they were the exclusive agents for the renting of that building? A. That is right.

Q. And you cancelled that exclusive agency and

gave to Mr. Vail, or Mr. Fiedler, the renting of that very building, didn't you? A. No.

Q. What? A. We said to Vail to go up there. I said to Mr. Vail, "Go up to Mr. Feist." And then after that he did not show up for thirty days. I expect maybe he called up; and I wrote the Feist people a letter asking them to please cancel it because there is other agents for the tenants that they might rent, and they gladly cancelled it.

Q. So I am asking you then, you did cancel that agency which had been exclusive? A. Yes.

Q. And you then dealt with Mr. Vail of the Fiedler Corporation, didn't you? A. That is right.

Q. Thereafter it was Mr. Vail that was looking for tenants, instead of Feist & Feist, wasn't it? A. Oh, no. Feist & Feist continually looking for tenants. We had other real estate people collected commissions after Mr. Vail made the deal.

Q. Why did you cancel the option, as you call it? A. Well, when I went up to Mr. Feist, or Mr. Flaster's office and told him that there is somebody wants to rent the building, see, and I said, "You had it long enough." They worked hard enough, and I said, "They have a tenant. I can't afford to have it idle, and they wouldn't work with you." So he said, "All right. Go to it." So they cancelled it.

Q. Now, after that—that is, after you had gotten rid of the exclusive agency that Feist & Feist had, Mr. Vail did come to see you frequently, did he not? A. Yes, sir.

Q. And he came to see you about the possibility of renting for you, leasing for you portions of the building that was to be erected, or that you had already erected? A. He rented the building that we had already erected; yes, sir.

Q. And what was that building? What number? A. 350 South Street, or 350 Thomas Street, pardon me.

Q. That was, you mean, the leasing to the Brandes Company? A. Yes, sir.

Q. You got that through Mr. Vail, didn't you? A. Yes, sir.

Q. He brought you and the Brandes people together, didn't he? A. Right; yes, sir.

Q. And he brought you together in order that you might negotiate with Brandes for the terms of the lease, didn't he? A. Yes, sir.

Q. And you did negotiate, didn't you? A. Yes, sir.

Q. And Mr. Vail assisted in those negotiations, didn't he? A. Well, to what extent?

Q. Well, to any extent did he? A. Well, he came over to me and he said, "There is a tenant. We draw up papers."

Q. No, no. After he came to you and said, "There is a tenant, he introduced you, did he not, to somebody connected with the Brandes people? A. Yes, sir.

Q. Who was it? A. I really can't remember right now. He had so many people he brought down there. They brought down there a number of men to try out first whether they could get help in the building.

Q. He brought a number of men? A. He did not bring them down. The Brandes people brought some employment agents down there to try to get —to see whether they could get help down there.

Q. You mean that the Brandes people came down with a number of men? A. Well, before they rented the place.

Q. Now, did Mr. Vail—you say he was present

some time; he was around. You had conferences, didn't you, with representatives of the Brandes people?

Mr. McGlynn: I do not know, but it seems to me we can save a lot of time. This is about the lease concerning which I understand there has been no question. I am wondering why we should take so much time going over that.

Mr. Skinner: My reason is I have this gentleman admitting that Mr. Vail procured that lease.

Mr. McGlynn: We admit it.

Mr. Skinner: I want to bring out the fact as to the kind of service Mr. Vail rendered in order thereafter to draw a parallel in that and what he did on this occasion.

The Court: Very well.

Q. At that time the building wasn't up, was it? The 350 Thomas Street building wasn't up, was it? A. Yes.

Q. Finished? A. Finished.

Q. There wasn't anything then to do about altering or fixing it to suit the Brandes people? A. Well, there may have been some little alterations.

Q. Were there? A. I don't remember. I mean there may have been little alterations. I don't remember.

Q. Before the June 16th lease was signed, the Brandes people had proposed, had talked about taking another building after you had built one in the rear, hadn't they? A. No, they haven't said a word about another building.

Q. Did that come later? A. Sir?

By the Court:

Q. The question is did that come later. A. Yes.

By Mr. Skinner:

Q. It came after the June 16th lease, didn't it? A. Yes.

Q. But before the June 16th lease, they had talked about it, hadn't they? A. No.

Q. Well, the May 16th lease—the May lease I mean—have you got a copy of that? A. Have I got a copy of it? No.

Q. Do you remember whether it covered anything more than 350 Thomas Street? I am looking at Exhibit P-6, and Mr. McGlynn says that the date he thinks he fixed before is May 10, 1926.

Mr. McGlynn: That is correct.

Q. (Continuing) Can you tell from looking at that whether it covered anything but just 350 Thomas Street?

The Court: This is the one that was superseded by the June 16th lease?

Mr. McGlynn: Yes, sir.

A. There is a building in the rear.

Q. It is mentioned there, isn't it? A. I guess it does.

Q. I want you to see. A. I can't find it in there.

Q. You can't find it? A. It must be. It is a building in the rear of 350 Thomas Street. That was the second lease, a few months after.

Mr. McGlynn: That lease covers the building in the front, 350 Thomas Street.

Mr. Skinner: Mr. McGlynn and I agree it is only for 350 Thomas Street.

Mr. McGlynn: The building in the front.

Q. Between that and June 16th there was an expression from the Brandes people of a desire for more space, wasn't there? A. No. There has not been anything for a while, because Mr. Vail negotiated the deal for us for the Quinby Pump Company after the first lease with Brandes, and made a lease, that is, with the Quinby Pump, and it took him about, oh, possibly thirty days to get this lease made up, and then later on they spoke about additional space.

Q. The Quinby lease was made in August, wasn't it? A. Sometime in August, I guess.

Q. I am talking to you now about from May, this May 10th—there was only then a lease of 350 Thomas Street, but did not Mr. Vail and you and the Brandes people, between that time and June 16th of the same year, talk about a building to be erected in the rear for the Brandes people? A. Yes, sir.

Q. And Mr. Vail went back and forth between you and the Brandes people on that subject, didn't he? A. He came over and he asked me whether we wouldn't erect a building for the Brandes Company.

Q. He told you that they wrote they might rent additional buildings? A. Yes, they wanted additional space. They wanted a building exactly the same as they had in the front.

Q. At that time did he not tell you that they would probably, after they got that building, want more? A. Well, I don't know as he said that.

Q. You don't know as he said that? A. No. Even if he did, we could not build as much as anybody wanted, you know. We were limited to—

Q. No, no, but I do not say you would be obliged to build it, you know, but didn't he tell you that they wanted more? A. He may have said that they wanted more, but I don't remember that.

Q. Didn't he tell you that the business was expanding very rapidly? A. He didn't speak about the business—

Q. What? A. He did not speak about the business expanding.

Q. Only that they might want more space? A. Possibly.

Q. So in the June 16th lease, by that time it had been agreed that a building should be erected in the rear of 350 Thomas Street, hadn't it? A. That is right.

Q. And that had been brought about by Mr. Vail, hadn't it? A. Right.

Q. What? A. That is right.

Q. And then when that lease was signed, did not Mr. Vail continue to tell you—to hold out the hope to you that the Brandes people might want more space? A. No, sir. He never said any more of any more space for Brandes.

Q. He did not? A. No.

Q. Now, following June, 1926, didn't you actually make plans or have them made and go up and have conferences with the Brandes people? A. Yes.

Q. Yes? A. Well, he may have come over—

Q. No, didn't you? Not "they may have." Didn't you? A. Yes, I did.

Q. Then why did you say that there was never after that any more talk about additional space? A. Well, they came over—Mr. Vail came over—

Q. Why did you say that? Was it because you had forgotten? A. Well, I don't know. I have

not said—I wanted to tell you that Mr. Vail came over.

Q. No, I wanted you to just answer my question, please; that is all, and I am giving you a chance. You have said that there was nothing more said about more space, and I call your attention to the fact, which you admit, that you had plans prepared for another building. A. Yes. Well, I wanted to tell you just how those things came about. Mr. Vail came over and he said to me, he said that the Brandes Company may want a large plant built, see, and he and Mr. Mitchell took it up and they made some sketches, and I looked at it and I said, "My God, it will cost about almost a million dollars." And I said, "Well, we could not raise enough money. We could not do anything with it." With that it was dropped.

Q. That did not mean that you would not be unwilling to build a building if it cost a good deal less than a million dollars and was within your means, did it? A. Well, I might have built a building, yes.

Q. And you might have said so to Mr. Vail? A. Possibly.

Q. There must have been something of that kind said because you did actually prepare plans or have them prepared or talked them over with the Brandes people; is that right? A. Yes.

Q. Those plans were not for a building to cost a million dollars, were they? A. Pretty near.

Q. They were? A. Yes, sir.

Q. The plans—now we are talking about those made by Mitchell after June 16, 1926. A. Well, Mitchell made a number of plans for me, you know. I can't tell you just what—

Q. We have been talking about one particular

set of plans made by Mitchell for you following the lease of June 16, 1926, right after it too, don't you remember that? A. Well, right after that, then we made a plan for the Quinby Pump Company at that time.

Q. I know, but didn't you make a plan for the Brandes people? A. I don't remember making any—just talked about it and made sketches.

Q. What was it you went up to see them about, you and Mitchell and Vail? Why do you hesitate, Mr. Lefkowitz? A. I am just thinking. I was up there so many times. I don't know just when I went up there with Vail and Mitchell.

Q. There were so many times you went up there that you can't remember this particular time? A. No. Maybe it is—I went up there with Mr. Vail and Mitchell once or twice.

Q. It wasn't so many times then that you can't remember, was it? Well, now, the times you did go up with Vail and Mitchell, the object of your visit was to talk with the Brandes people about their taking space in a building that you should erect for them if they were to agree, wasn't it? A. Yes, sir.

Q. And do you remember what the size of the building was that you talked about? A. Well, they spoke of tremendous big size, up to thousands of feet.

Q. Well, whatever they said, Mr. Lefkowitz, you prepared plans, or had them prepared. Now, were the plans you had prepared by Mitchell for a building containing such a vast quantity of space? A. Yes, sir.

Q. Didn't Mitchell prepare plans right shortly after June 16, 1926, for a building to contain 60,000 square feet? A. Yes, sir.

Q. And didn't you go up with Mr. Vail and Mr. Mitchell to the Brandes place to see if they would not take a lease for a building of that kind if you built it? A. Not for 60,000 square foot building.

Q. Well, Mitchell, you say, prepared plans for such a building? A. That was a long time after that.

Q. How long? A. Oh, possibly a year and a half, a year.

Q. All right now. I asked you distinctly whether shortly after June 16, 1926, that was not done, and I understood you to say it was. A. It was 1927.

Q. Did you think I said June, 1927? Did you? A. Yes.

Q. You did? You say that you thought I said June, 1927? And your answer was yes, because you thought that was what I had said, is that right? A. That is right.

Q. And you knew when you said it that the very building that was planned and built for the Brandes people, they took it under a lease made on May 24, 1927; didn't you know that? A. 1927?

Q. Yes. A. That is right.

Q. Before the June that you say when the plans were prepared? What? Were you wrong about your dates? Yes or no. Were you wrong about your dates? A. Wrong about the dates.

Q. And the error was that the plans you speak of as having been prepared for the 60,000 square foot building were shortly after June 16, 1926, wasn't it? Wasn't it? A. 60,000 square feet? In 1927.

Q. Then what about 1926? Wasn't there one in 1926 of about that size? A. No, sir.

Q. How is it you remember this so well? There

were so many of these plans, you say. How can you be sure that one of them was not for 60,000 square feet earlier than you say? A. I am sure that there was not any.

Q. Mr. Mitchell ought to know, ought he not? A. Yes, he ought to know.

Q. Now, on June 16, 1926, when that lease was signed, the lease of that date, you were then hoping, were you not, to get the Brandes people to take additional space?

Mr. McGlynn: I object, if your Honor please. I do not see how hope has anything to do with this proposition. I think this is a law suit.

Mr. Skinner: It may have a lot to do with it.

The Court: Only with respect to what they had in mind with respect to the contract which wasn't made. On that theory I think it is proper.

Q. What do you say? A. You say that after they signed the lease?

Q. I say that at the very time, I ask you if at the very time you signed the June 16th, or the very time it was being talked about in Reed & Reynolds' office on June 16, 1926, you then had the hope of being able to rent more space to the Brandes people? A. Not that I know of. They did not ask for it. I mean that they just made a lease for a building that we had already erected. They never said whether they wanted more or less. They took the building and we signed a lease and nobody said a word to me about it, nor I said anything to them.

Q. Do you mean that it would be unnatural that they should have any idea of more space right then when they were signing?

Mr. McGlynn: I object to that. I think this discussion has gone too far afield as to the mental attitude of the people.

The Court: Objection sustained.

Q. Well, Mr. Lefkowitz, you had known before that that following the lease of May 10, 1926, their desire for space had expanded and that had been told to you, hadn't it? You had had an increase come suddenly after the making of one lease, is that right? A. Had a what? An increase?

Q. A call for increased space came right after the making of the lease. A. Yes, for another building the same as the one they had.

Q. Didn't you at the time of the making of it, June 16, 1926, think that it was quite possible that they might want something more still?

Mr. McGlynn: I object. I cannot see how this man's mental processes are evidential in this case.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I did not think so, because they had a big plant of their own on 200 Mt. Pleasant Avenue.

Q. They had had that all along, hadn't they? A. Well, they had had that all along, and they had only taken temporary space, and it finally busted up anyhow.

Q. Well, at any rate, there must have been some-

thing said by Mr. Vail to make you think that they would want more space, because you went ahead and had plans prepared and went up and talked over them? A. I can't remember what Mr. Vail told me. He said many things to me. I can't remember what he said.

Q. Well, he may have said that to you, may he not? A. He may not; he may; yes. He may not. I don't remember.

Q. You can't remember who, if anybody else, said anything more about the Brandes people wanting more space, can you? A. No.

Q. Now, Mr. Lefkowitz, I show you Exhibit P-2. You have seen that before, haven't you? A. The only time I saw it was in the lawyer's office. That is the only time I have seen that original. I never saw it before, only the time I went up to see it in Feick's office.

Q. You must have seen it when you signed it, or did you put that on in your sleep, that signature? Can't you tell me? A. Well, I can't tell you how they got the signature there, but nevertheless it is there.

Q. Do you think that you did not make it? A. I think I did.

Q. You think you did? A. Yes.

Q. Now, you say that you think you made it? A. You asked me whether it is my signature. I said yes, I think it is my signature.

Q. But you can't tell how they got that there? A. That is right.

Q. Do you mean by that that they drugged you? A. No, not necessarily.

Q. All the time during that meeting of June 16, 1926, you were in full possession of all your faculties, weren't you? A. I hope I was.

Q. Well, I hope so too but I don't know and I just ask you. You are sure you were, aren't you? A. Yes, sir.

Q. And so was Ross, wasn't he? A. Yes.

Q. And both of you have fairly capable faculties; right? A. I think so.

Q. You are pretty apt to know what you sign, aren't you? A. That is right.

Q. You are pretty apt to know what you are doing when you put the corporate seal on a paper, aren't you? A. That is right.

Q. And when it comes to you signing and Ross signing and the corporate seal being put on, it is pretty likely, and we are justified in concluding, are we not, that you must have known what you were doing? A. Let me explain this—

Q. No, answer this and then I will let you explain. (Read by stenographer) And when it comes to you signing and Ross signing and the corporate seal being put on, it is pretty likely, and we are justified in concluding, are we not, that you must have known what you were doing? What do you say to that? A. Yes, I wanted to—

Mr. McGlynn: Answer questions, Mr. Lefkowitz, please.

Q. Well, then, Mr. Lefkowitz, in the light of your last answer that you must have known what you were doing, don't you want to tell this jury that you did see that original before you came to the office of Pitney, Hardin & Skinner? A. Never saw it before, only in Pitney, Hardin & Skinner's office.

Q. Well, have I got to go through that again, Mr. Lefkowitz? Surely you must have seen this if you signed it, knowing what you were doing. How

could you help seeing it? A. Well, on that day we have signed about 500 papers like that, and it might possibly be we signed something we didn't know.

Q. Well, that is just a guess; isn't it? A. If they asked me to sign anything like that—

Q. It is just possible that you may have seen something that you did not know, but you have just told this jury that you must have known.

Mr. McGlynn: No, he did not, if it please the Court.

The Court: Not quite.

Mr. McGlynn: He answered the question whether it was not a justifiable conclusion.

Mr. Skinner: I will change it then.

Q. You just told this jury that it is a justifiable conclusion that you did know what you were doing when you signed it. Now, along with that do you say that you signed over 500 papers and therefore this you may not have seen or known what you were doing? A. That is right.

Q. Which of those theories as to your signing of this do you want the jury to take, the justifiable conclusion or your suggestion that there were so many you might not have known? A. So many that I might not have known.

Q. Now, of course, that would depend on their being so many, wouldn't it? A. That is right.

Q. 500 or so. That is what that guess of yours is based on, isn't it? A. Yes.

Q. Now, there weren't 500, weren't there? A. Well, there were plenty.

Q. No, there weren't anything like 500, were there? A. There were contracts, duplicates, duplicates, specifications.

Q. Well, contracts and specifications were all in triplicate, were they? A. Yes.

Q. And a lease in triplicate? A. Yes.

Q. And a commission agreement in triplicate? A. We haven't seen no commission agreements.

Q. Well, take the contracts for building in triplicate. That is three, and the specifications? A. Yes.

Q. Were they signed? A. Yes, sir.

Q. You remember that, do you? A. Yes, sir.

Mr. Skinner: That is six.

Mr. McGlynn: I beg your pardon. Specifications would not be one page.

Mr. Skinner: Well, I do not understand that they would be signed on every page.

Mr. McGlynn: Your witness Mr. Mitchell said so.

Mr. Skinner: I see. I had forgotten. I don't remember that, Mr. McGlynn.

Mr. McGlynn: I think he said initial, if my memory serves me correctly.

Q. Well, then, that is your guess, is it, that in signing these papers you did not see what this P-2 was? Do you say that now? A. Yes, sir.

Q. Of course it was very different in appearance, wasn't it, from the specifications? A. It looks about the same paper as the specification papers and the contract papers. It don't look any different to me.

Q. The contract papers and the specifications were each of them many sheets, weren't they? A. Yes.

Q. And this was just one single sheet, complete in itself? A. That is the way I see it.

Q. Was this signing done in Mr. Reed's pres-

ence? A. Well, I can't remember ever seeing it signed. I mean nobody ever saw it there that I know of. You would have to ask Mr. Reed that.

Q. You can't remember seeing Exhibit P-2 signed; what do you mean, Mr. Lefkowitz? A. You asked me whether that was signed in Mr. Reed's presence.

Q. That is what I said. A. You would have to ask Mr. Reed, because I—whether it was in his presence or not, because it wasn't signed. I don't remember signing it.

Q. It wasn't signed? Then that is not your signature? Do you want to say that now? A. Yes, it is my signature.

Q. Then it was signed, wasn't it? A. Right.

Q. Then why did you say just now that it wasn't signed? A. You asked me whether it was signed in Mr. Reed's presence.

Q. I did, and you said it wasn't signed. A. Well, it wasn't signed in his presence.

Q. You remember that, do you? A. I don't remember anything about the signing of the agreement.

Q. Then why did you say it wasn't signed in his presence? A. Well, I am sure it wasn't signed there. I don't remember signing it anywhere else.

Q. That is it. If you don't remember signing it anywhere else it must have been signed there, must it not? Yes or no? A. No.

Q. Where do you think it was signed if not there? A. God knows. I don't know.

Q. God knows? A. I can't remember where it was signed.

Q. Then don't you want to take it back what you said about you must have known what you were doing when you signed it? Don't you want to

take back what you said that it is a justifiable conclusion that you knew what you were signing? A. No, I never remember signing it.

Q. You don't want to take back that other statement? A. What statement?

Q. That it was a justifiable conclusion that you must have known what you were doing when you signed it? A. Now, I have never seen that paper before in my life, only in your office, see; never saw it; did not know how Mr. Vail got that paper; never asked him for any commission agreement; never said a word to me about it. We paid him his commission; never said a word. It was never necessary, and no one else that we ever done business with ever got any commission agreements. They rent the place; we pay them some money. They send us the bill. Whatever agreement is made about the payments, we pay them the money, and it was never necessary to have any agreements.

Q. Is that all you want to say about that? A. That is all I want to say about that.

Q. Do you want to say anything more now as to whether or not you knew what you were signing when you signed it? Are we through with that? A. I don't remember signing it.

Q. Well, isn't that because you can't remember after the lapse of four years what took place there? Isn't that your reason? A. No. We would remember it if we signed any agreement like that. We would remember it. We would have copies of it. We would remember it.

Q. I ask you, Mr. Lefkowitz— Well, let that rest. I call your attention to the words "350 Thomas Street, Newark, N. J." Is that Mr. Ross' handwriting? A. I don't know.

Q. You don't know; you are thoroughly famil-

iar with Ross' handwriting, aren't you? A. To a certain extent.

Q. He is the secretry-treasurer of the Manufacturers Developing Company, isn't he? A. That is right.

Q. And he has been for many years? A. Yes.

Q. You have seen his signature many times to letters and papers and all that? A. Yes, sir; his signature. Didn't see him write 350 Thomas Street, Newark, N. J. I mean handwriting. There is his signature right there.

Q. You have seen his signature many times? A. Yes, many times.

Q. You have seen his handwriting, whether in a signature or in some other form, many times, haven't you? A. Well, I couldn't tell you whether it is his writing or not. Anybody could write like that.

Q. I do not say that it is, you know. I am just asking out of your familiarity with Ross' signature and handwriting whether that is in his handwriting. We would like to know who put it in. A. Well, I don't know.

Q. You just said, Mr. Lefkowitz, that you never signed any other commission agreement than this. Do you remember? A. That is right.

Q. Is that the fact? A. Yes.

Q. Didn't you sign one with Feist & Feist? A. No, sir. No commission agreement. They have got an exclusive renting.

Q. Exclusive renting? A. Yes, exclusive renting of that building. They have made photographs of it, sent it out to all the agents in Newark and Jersey City, New York and everywhere. That wasn't an agreement.

Q. Did you give all the agents in Newark an exclusive agency? A. No.

Q. Only Feist & Feist? A. Well, at that time on that one particular building they asked me for it. They said they were going to photograph it.

Q. Mr. Lefkowitz, you were asked on your direct this question, referring to Mr. Vail, "Had he discussed with you in your office prior to the execution of this lease an agreement under which your company was to pay five per cent. commission on any lease made with the Brandes, any renewals of that, or any lease of any other properties you might then or might thereafter own?" And your answer was, "I do not remember of him talking about any." Do you remember that? A. We never spoke about commissions because we know it. We pay it. We understand it, that a man brings a tenant and negotiates a deal with us, we are glad to pay him his commission.

Q. When you say "brings a tenant," you don't mean that you expect only to pay the commission if he brings a man who is ready then and there to sign a lease, do you? You mean, do you not— A. That is right.

Q. (Continuing) That if he brings a man with whom you get the chance to talk about it and bring about an agreement then he gets his commission? A. When he negotiates the deal the same as any other broker would, he gets paid for it.

Q. But don't you mean by that that he negotiates it if he has brought the party with you and given you a chance to agree with him about the terms of the lease; don't you mean that? A. Yes, sir.

Q. Now, Mr. Lefkowitz, you say that you saw this commission agreement at the office of Pitney, Hardin & Skinner. Was that after suit was begun? A. Yes, after suit.

By the Court:

Q. After suit was begun, is that right? A. After I got a letter from them. I don't know whether it was suit; when they sent us a letter that they were going to sue us we went up there, me and Mr. Ross went up there.

By Mr. Skinner:

Q. Before suit was begun? A. Possibly before. We received a letter from your office and we went up there to see.

Q. Mr. Lefkowitz, when suit was begun you went to an attorney, did you not, Mr. McGlynn, I take it? A. Yes, sir.

Q. And you told him what had taken place between you and Mr. Vail, did you not? A. Yes, sir.

Q. I call your attention to the fact that in the answer filed by your attorneys this defense is set up to this agreement. One, the alleged agreement, copy of which is annexed to the complaint, is void and of no effect as to this defendant because the execution thereof was induced by fraudulent representations of the agents of the plaintiff. Do you remember saying that in there?

Mr. McGlynn: I object, if your Honor please. I can't see what materiality it has.

Mr. Skinner: I will finish.

Q. (Continuing) Who represented that the same was a commission agreement for procuring the lease described in count No. 1.

Mr. McGlynn: I object to that again.

The Court: What difference does it make?

Mr. Skinner: I want to ask did he not give that statement.

The Court: Well, ask him that.

Q. Did you not give that statement of how you came to execute this commission agreement, to your attorney in order that he might prepare your defense? A. I can't remember that.

Q. Don't you remember telling him that the agents of the plaintiff told you that it was an agreement for the payment of commissions on the lease of June 16, 1926? Don't you remember telling him that? A. No, sir.

Q. You mean that you can't remember what you did tell him? A. After they brought in your letter, you know what I mean, that was in all the letters we had. That is all. That was up to Mr. McGlynn to worry about.

Q. Well, do you say that any such representation was made as is set up here in your answer as made?

Objected to.

Objection sustained.

The Court: He has already answered it. He says he does not remember. He says no such conversation took place, that nothing was said about commissions.

Q. I am asking you, perhaps I did not make it clear, aside not from anything you said to your attorney, I am asking you now, in the presence of this jury, do you say that there was any representation by the agents of the plaintiff that this commission agreement was one for the payment of commissions for procuring the lease of June 16, 1926? A. No, sir.

Q. You don't say that. You understand? A. Yes.

Q. You don't say that?

Mr. McGlynn: I still want to argue that defense.

The Court: I understand that he says there was nothing said in Mr. Reed's office or at any other time between Mr. Vail and him about commissions, and he never consciously signed an agreement for commissions, and there was never any conversation about it.

By the Court:

Q. That is your story, as I understand it, is that correct? A. That is right.

Q. And that you always paid commissions; you expected to pay commissions; you expected to get a bill for commissions, but that nothing was said about it and you never signed the agreement. A. No, sir.

The Court: I am just trying to summarize what he said on that point as I understood it.

Mr. McGlynn: Adding the word "consciously" to your last sentence.

The Court: Yes, of course.

Mr. Skinner: Pardon me, may I ask this? Do I understand that counsel intends to argue what is set forth in this defense, that the agreement was signed induced by fraudulent representations?

Mr. McGlynn: If counsel wants a statement from me at this time I will say to your Honor, I am glad to say, that I intend to ar-

gue, as I brought out on cross-examination, or attempted to, of plaintiff's witnesses, that if you read this paper which is in evidence, Exhibit P-2, and if you take out the line that was inserted, I say on the construction of that you could read it as a commission agreement for the lease on what was up there. That is what I say.

Mr. Skinner: And that is all that you intend to set up under that third defense, or under any of the defenses?

Mr. McGlynn: Yes, sir.

By Mr. Skinner:

Q. Now, Mr. Lefkowitz, I show you a letter of September 9, 1926, Exhibit D-6, signed Brandes Products Corporation. Do you remember getting that letter? A. Yes, sir.

Q. Do you see the date? A. Yes.

Q. At that time was Mr. Vail still working with you? A. No, sir.

Q. How do you remember that? A. Well, I remember that he quit sometime before that. After the Quinby job was done I have not seen Vail for a long time.

Q. Do you mean that you did not see him at all after August, 1926? A. Well, I might have seen him, but not in reference to any business transactions; meet him in the street.

Q. Well, did you not see him at your office? A. I might have seen him in the office.

Q. And you might have seen him in the Brandes office? A. No, I have not seen him in the Brandes office.

Q. And if you saw him at your office, do you remember what it was about? A. He came in to see

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me at different times on different propositions.

Q. Weren't some of these propositions connected with the leasing to Brandes of additional space? A. No, sir.

Q. When were those plans prepared by Mr. Mitchell that Mr. Vail and you talked over with somebody in the Brandes place? When were they prepared? A. I can't remember. It must be in 1926 or 1927.

Q. The latter part of 1926 or the early part of 1927? A. It might have been.

Q. Don't you remember that it was? A. No.

Q. I call your attention to Exhibit D-7, a letter of March 24, 1927, from Brandes Products Company, signed by J. H. Hall. A. Yes.

Q. Do you recall that letter? A. Yes, sir.

Q. That speaks of "confirming our conversation of the other day, we are desirous of renting the three-story building containing 60,000 square feet." What was the other day referred to? How long before? A. Possibly a day before.

Q. He might just as well have said, "confirming our conversation of yesterday"? A. Well, maybe it was two days before.

Q. Now, that letter was written to you by Mr. Hall for the Brandes Company. At that time did you have any idea that the Fiedler Company might claim a commission for a building that you might erect, such as was requested here? A. Did I ever know what?

Q. (Read by stenographer) At that time did you have any idea that the Fiedler Company might claim a commission for a building that you might erect, such as was requested here; that is, for the renting of such a building. A. No.

Q. You didn't have that idea. Well, did you

ask Mr. Hall to write that letter to you? A. No, sir.

Q. Did you have any conversation with Mr. Hall after that time or before that time about the Brandes Company paying a commission for the renting of the 60,000 square foot building if any should be claimed by the Fiedler Company? A. At about the time when Mr. Hall wrote—asked if we would start to build a new building for him, Mr. Hall had taken—Mr. Vail had taken Mr. Hall and members of the Brandes Company to sell them a place in Passaic, and that was sometime before that, and he was taking them and we have not seen Vail for months, and he told them,—he told the Brandes that we were no longer interested in building buildings.

Q. "He." Wait a minute. Mr. Vail did that? A. Yes.

Q. How do you know? A. Well, because they told me so.

Q. Who told you so? A. Some members of the

Q. Who? A. Mr. Gilbert.

Q. Mr. Gilbert? A. Yes.

Q. Anybody else? A. Mr. Hall.

Q. Mr. Hall is in court, isn't he? A. Yes.

Q. Is Mr. Gilbert here? A. I don't know if Mr. Gilbert—no.

Q. I asked you whether you did not, at the time of writing this letter, have an idea that the Fiedler Company might claim commissions should a building be erected by you for the Brandes Company and rented to them? What do you say to that? Yes or no. A. No.

Q. You didn't have any such idea? A. No.

Q. Later a lease was prepared, wasn't it? A. Yes, sir.

Q. Who prepared it?

Mr. McGlynn: Do you mean a lawyer or who?

Mr. Skinner: No, which end.

Q. (Continuing) Which end of the transaction? Did you prepare it or the Brandes people? A. Both of us.

Q. Both of you? A. Yes. I prepared it probably.

Q. Well, you mean that you had it typed in your office? A. Oh, no. In a lawyer's office.

Q. Did you ever discuss with Mr. Ross this commission agreement Exhibit P-2 at any time? A. In Mr. Feick's office.

Q. Not at any other time? A. Not any time before or after. I mean we talked about it after we saw it. It was a big surprise to both of us.

Q. Not before? A. Not before.

Q. You remember that, do you? A. Yes, sir. I remember we never said a word. We never knew anything until we went up to Mr. Feick's office.

Q. And it was because you say you never knew anything about it that you think you must never have said anything about it? A. Never said anything to Mr. Ross before.

Q. You say that because you say and think that you did not know anything about it. A. That is right.

Q. You are not speaking from memory because that is the reasonable inference, you think, from the fact that you know you could not have talked about it? A. That is right.

Q. You said, Mr. Lefkowitz, that you don't remember paying a hundred dollars to Mr. Vail. Think. Do you remember that? A. Well, I don't

exactly know. We paid a lot of money to the Fiedler Corporation and to Vail, you know what I mean. We sent over lots of money.

Q. Then you said that you supposed it was something he did about drawing up the Kolster lease. Do you remember that? A. He never drew any leases for Kolster.

Q. Do you remember saying that? A. Well, maybe it was. I don't remember now.

Q. You now say that maybe it was for something he did drawing up the Kolster lease? A. Yes; I can't remember that it was for drawing up a lease that he would get a hundred dollars. He didn't draw up a lease.

Q. What Kolster lease did you refer to? A. I don't know anything about what he said about Kolster.

Q. What did you mean when you said that it might have been for drawing up the Kolster lease? A. I did not say anything about Kolster and I did not say anything about him drawing up a lease for a hundred dollars.

Q. You mean you did not say anything in court here about it yesterday? A. Yes.

Q. Have you made other buildings or had buildings built for the Brandes people since May 24, 1927? A. No, sir.

Q. None? Sure of that?

Mr. McGlynn: Since when?

Mr. Skinner: Since May 24, 1927.

A. Three-story building. That is the last building we built.

Q. You mean the building described in the May 24th lease, or built on the premises described in the

May 24th lease? A. Well, the last building was in '27, I think; 1927.

Q. Well, since that time have you made any other leases with them? A. No, sir. They are busted anyhow, so what is the use of worrying about it?

Redirect-examination by Mr. McGlynn:

Q. You say that the Brandes Products Company, and the name Kolster was mentioned a couple of times. What is the connection between Kolster Radio and Brandes? Is it the same company? A. I think it is the same company now.

Q. Who is occupying these buildings now? A. The Brandes, or the Kolster Brandes.

Q. The company themselves? A. Well, the receivers.

HUGH B. REED, sworn in behalf of defendant.

Direct-examination by Mr. McGlynn:

Q. Mr. Reed, you are a member of the Bar of the State of New Jersey? A. Yes.

Q. You have been for how long? A. '94.

Q. Admitted in 1894? A. Yes.

Q. You represented the Manufacturers Developing Company in the drawing of the lease which you have before you, which has been marked in evidence in this case? A. Yes. I see some of mw handwriting on this lease. I must have.

Q. Dated I think June 16, 1926, is that right? A. 16th. It must be the date, 16th of June, 1926.

Q. Do you recall whether any other papers were prepared and executed on that same day? A. I don't recall what other papers were executed on that day.

Q. I show you Exhibit D-4, I think it is, Mr. Reed, dated June 16, 1926, and ask you if there is anything about that paper that indicates it was prepared in your office and executed on that same day as the first? A. Well, that was a contract for building. Yes, I remember that now that you call my attention to it.

Q. Have you any recollection who was in your office on the date of the closing of this transaction? A. Well, as I recall it, this lease was executed in my office, but I can't positively say that that was so after this lapse of time. I remember seeing Mitchell preparing this paper, and very probably that was executed in my office. I think it was. But it might not have been signed by both there.

Q. Have you any recollection of specifications being either prepared or examined by the parties in connection with that building contract which you are looking at? A. Mr. Mitchell executed two or three contracts there, as I recall it, with Mr. Lefkowitz, and in each case it is my recollection that there were specifications that were filed. I don't remember that on that day there were specifications.

Q. Now, I show you Exhibit P-2 in this case, which I showed you the other day when you were here waiting to be called, and ask you if you have any recollection of that paper being in your office on June 16, 1926. A. I am sure that I did not see it.

Q. Sir? A. I am sure that I did not see that paper on that day if it was in my office. I did not prepare it or see it.

Q. Have you any recollection of Mr. Vail, Mr. Craig Vail?

Mr. McGlynn: Mr. Vail, will you stand up?

(A man stands up in the court room).

Q. (Continuing) Have you any recollection of Mr. Craig Vail being in your office on that occasion? A. I know Mr. Vail very well, and he was there on one occasion at least when a lease was executed. My impression was that that was in May.

Q. Well, I will show you the May lease. I show you the lease of May 10, 1926—at least it is a copy of it. See if that will help you to refresh your recollection. A. Well, yes. That lease was drawn in our office, and I believe executed there, and I am sure that Mr. Vail was present that time. Now, whether he was present on June 16th or not I am not sure.

Q. Have you any recollection of this situation, of asking Mr. Lefkowitz, on seeing him preparing or starting to sign a paper, "Mr. Lefkowitz, what are you signing?" of Mr. Lefkowitz saying, "I am signing a commission agreement," and you saying, "May I see it," and Mr. Lefkowitz handing it to you, your looking it over, reading it, passing it back to Mr. Lefkowitz and saying, "I would not sign that"? A. No.

Q. Do you think if that had happened you would have some recollection of it? A. Yes, I do, especially if this was P-2, or the paper referred to, I am sure I would.

Q. Why do you say that? A. Well, it is rather a remarkable paper, in my estimation. I am sure I would not have let him sign it without a very strong protest, if it had been shown to me.

Q. Do you recollect Mr. Lefkowitz, after the dialogue that I have just repeated to you, which is

supposed to have taken place in your presence,—have you any recollection of Mr. Lefkowitz saying, "That is my understanding. I have promised that to the Fiedler Corporation, and I am going to sign it"? A. No.

Cross-examination by Mr. Skinner:

Q. Mr. Reed, you are being asked now about something that took place over four years ago? A. June, 1926; yes, sir.

Q. Of course it is the fact, is it not, that yours was a busy office then and has been since, and you have many meetings with clients where papers are being executed? A. Yes, I think so.

Q. You don't attempt to remember the details of those meetings, do you, after the lapse of four years? A. No, not all of them.

Q. So that when Mr. McGlynn asked you not what took place, but asked you whether you remembered, if you recall this taking place, and your answer was that you did not—you remember that, that your answer was that you did not recall it? A. What paper are you referring to now?

Q. Now I am saying that he asked you at various times in the direct-examination in that form, "Do you recall this? Do you recall that," and you said no, and I am asking you didn't you mean that you don't recall much, if anything, of what took place on that day, as a matter of memory? A. Well, much of what took place? I remember, I assume, the essentials of what took place on that day. I don't remember much of the conversation that may have gone on around me.

Q. When you say you assume the essentials, do you not mean this, that when shown a paper that

you recognize as having been prepared in your office, you feel justified in saying that it was one of the papers signed that day if it bears upon that lease? A. Yes, one of these papers I noticed I have written something on. I recognize my handwriting; my initials are on it. So I must have been there.

Q. Exactly, and that is what I mean. Your statement as to what took place is largely, as is often the case, the reasoning process,—you must have been there as an inference from things that you see on these papers; isn't that right? A. I remember that lease after seeing it and seeing my handwriting on it. I remember that I prepared it for Mr. Lefkowitz at his request. Those things I remember without any question.

Q. And you don't remember protesting against the signing of this Exhibit P-2; is that right? A. I don't remember protesting.

Q. But you say that if you had seen it you would have protested? A. I am sure of it.

Q. So that if you saw it it would be very likely that you would say, "Don't sign it"? A. It is very likely that I would have made a stronger request than that; yes, sir. That, however, is suppositious.

Q. You spoke of this as being a rather extraordinary paper, and that that would have impressed itself on your memory. What do you mean is extraordinary about it? A. Well, it provides that if the tenants renew their lease, or lease additional space, or should they purchase the premises referred to, or any other property "which we may own, we agree to pay the Fiedler Corporation a commission of five per cent." I assume that that would mean any time from the day of the paper, or the

time of signing the paper, until Judgment Day. I think that that is—

Q. And it is the undertaking to pay for all eternity or to Judgment Day, that makes you call it extraordinary? A. Yes, sir.

Q. You would not then call it extraordinary if it provided for those very same payments to be made within a reasonable time after the execution, would you? A. I probably would not have felt the same about it.

Q. As a matter of fact, don't you know that it is the custom in this community, the general custon —we have had evidence to that effect here—that a real estate broker who effects a lease will be entitled to commissions on the renewals thereof?

Mr. McGlynn: I object, if your Honor please. I can't see how it is proper cross-examination to ask Mr. Reed whether he is familiar with the custom.

The Court: Oh, I will allow it. It has already been so testified, I think, by others; it is just cumulative. He may or may not know.

Q. (Continuing) I only wanted to ask you on top of that if that was brought to your attention. A. I have heard real estate agents claim that.

Q. You said you were quite sure that Mr. Vail was present on the occasion when the May 10th lease was executed. You can't remember sure, can you, that he was not present on June 16th? A. I am not sure that he was not present on June 16th.

Q. Do you remember at all anything about the details of the signing, whether all were present at the same time, whether you saw them all sign, or

went in and out of the room? A. I am not sure that I saw them all sign.

Q. For all that you know, they may have been brought there signed, may they not, some of them? A. No. They were not brought there signed. I am quite sure of that. You are referring now to the lease of June 16th.

Q. You mean not brought there signed by either party? A. No. My impression is that both parties were there, or their representatives. Now, whether they all signed at that time, whether all the signatures were there I cannot recall.

Q. It is your impression that the Brandes people were represented by somebody at that meeting, is it? A. Yes, sir. That is my recollection.

Q. That may have been on the occasion of the May lease, may it not? A. That may have been.

Q. Instead of this one? A. Possibly.

Redirect-examination by Mr. McGlynn:

Q. Mr. Reed, this paper that you looked at this morning, marked P-2 in this case, and the circumstances connected with the execution of the lease in your office on June 16, 1926, were they brought to your attention before today by Mr. Lefkowitz and myself? A. P-2. Let me see it again.

The Court: That is the agreement.

A. (Continuing) I think the first time I saw that Mr. Vail spoke to me about it, and that was within a short time, I think, before suit was brought.

Q. That is what I mean. The circumstances connected with this document and the execution of these papers in your office on June 16, 1926, were brought to your attention before today? A. Oh, yes, yes.

Q. It is not a matter of four years' memory? A. I had some talk with Mr. Feick about it, as I recall it.

Q. And some with me too, didn't you? A. Yes, some with you.

Q. Also Mr. Lefkowitz? A. Also Mr. Lefkowitz. I think I saw you after the suit was brought, though.

Mr. McGlynn: Yes, I think you are right about that.

Recross-examination by Mr. Skinner:

Q. Mr. Reed, when you say Mr. Vail spoke to you about it, about P-2— A. Well, yes, my impression is that he was in my office some shortly before the suit was brought. He certainly came to see me about commissions.

Q. Did he not ask you if you remembered about this paper P-2? A. Yes. It is my recollection he did.

Q. Did you not tell him then that you didn't know anything about it? A. I told him I had never seen it, as I recall it.

J. HOLLIS HALL, sworn in behalf of defendant.

Direct-examination by Mr. McGlynn:

Q. Mr. Hall, you live where? A. Hackensack, New Jersey.

Q. Were you connected with the Brandes Products Company? A. Yes.

Q. In what capacity? A. Assistant to the president.

Q. When did your connection commence? A. First business day of January, 1923.

Q. Are you with them now? A. No.

Q. When did your connection cease? A. 1st of October, 1928.

Q. Will you give us very briefly—the Brandes Products, was that the original company? A. No. The original company was C. Brandes, Inc., of New York, which caused to be formed Brandes Products Corporation, a New Jersey corporation, for the purpose of manufacturing for it, and in 1922, I believe it was, the Brandes Products Corporation purchased this plant at 200 Mt. Pleasant Avenue.

Q. In 1922 you say they purchased the land? A. I believe it was in 1922. In the early part of 1923 they erected the other building that stands there. I believe it was in 1924 or 1925 that they entered into contracts with Federal Telegraph Company of California to manufacture under their patents and licenses certain radio receiving sets.

Q. Up to that time they had been manufacturing what? A. Loud speakers and ear phones principally, and we started work on that contract in our Mt. Pleasant Avenue plant, which was the only plant we had at that time. We had given up the plant in New York. And a year following that we continued under similar arrangements. In the meantime talk of a merger between Federal Telegraph and the Brandes Company, and so forth, had been talked of.

Q. Was it consummated? A. It was consummated about November of 1928, I believe.

Q. Where does the Kolster Radio come in? What is that? A. At the time this merger was consummated there was caused to be organized a

company known as the Federal Brandes, which was a Delaware corporation and which purchased all of the common stock of the Brandes Companies, and the majority of the common stock of the Federal Telegraph Company, and that company later, I believe it was in 1927—I think it was in the Spring of 1927—changed its name to Kolster Radio Corporation. It was not a reorganization. It was simply a change of name.

Q. Now, in your discharge of your duties as assistant to the president, did you have anything to do with leasing or possible purchase of real estate for corporate purposes? A. I did.

Q. During what years? A. From 1925 up to the time I severed my connection with them.

Q. Did you know the Fiedler Corporation? Did you know of them? A. At the outset I knew of them. I knew that they had been the agents who negotiated the sale of the original Mt. Pleasant Avenue plant.

Q. So you knew who they were? A. Yes.

Q. Now, when did you first have any acquaintance with the Manufacturers Developing Company or Lefkowitz and Ross, not specifically the date, but about when? A. It was early in the year 1926.

Q. Did you have anything to do with the negotiations that later consummated themselves into these two leases we have here of May and June? A. I did.

Q. Who was the broker who brought about the execution of that lease between the Manufacturers Developing Company and the Brandes? A. Fiedler.

Q. Who was the salesman or agent? A. Vail.

Q. Now, following the lease of June, 1926, what

is your recollection as to what, if any, efforts were made by Mr. Vail to interest your company in connection with further leases on this property of the Manufacturers Developing Company? A. Mr. Vail interested himself in leasing us further space, only when we asked him a question, or asked him did he think we could rent this, that or the other thing. He never came to us and said that, "Here is a good chance for you to get a building down there. Why don't you go in there and get it even though you don't need it?"

Q. The application for buildings, space or what not would emanate from you? A. Yes.

Q. In that connection you called up the Fiedler organization, I understand? A. Yes.

Q. The Fiedler Corporation, as I understand it, did your real estate work? A. Yes.

Q. Immediately following the June, 1926, lease, did you take up with Mr. Vail the question of any leases on additional space? A. My recollection is that we did not.

Q. Were you familiar with the letter of September 9, 1926, signed by Mr. Gilbert of your company? A. Yes.

Q. Do you know whether the fact that your company was in the market for additional space at that time was brought to Mr. Vail's attention by you or your company? A. It might have been.

Q. Well, as a result of this letter, do you have any recollection of any conferences at your plant between Mr. Lefkowitz and his engineer, Mr. Mitchell? A. Yes.

Q. Were they many? A. Quite a few.

Q. Why was that? Why were there so many? A. Well, at that time we did not know exactly what we wanted, what our plans would be. You

see that was in the fall of 1926 when the final terms for the merger of the companies were being talked of, and just how big the company would grow to be could not be determined at the moment precisely. Every day we had an idea we would be a little bigger than we were the day before, and as I recall it there were—well, it distinctly stands out in my mind about plans which were discussed.

Q. About plans? A. Yes, of buildings, very large buildings, which were discussed.

Q. When you use the word plans do you mean by that a preliminary sketch showing the outlines of the building or do you mean the minute details? A. No. The preliminary sketch showing the first floor, and then typical floors thereafter if it is a multi-story building, a front elevation, and such things as that. They are just merely sketches.

Q. But you used the word plans to describe them? A. Yes.

Q. Have you any recollection that Mr. Vail participated in any of the conferences or interviews or what not that resulted from this letter of September 9, 1926? A. Well, I guess he must have, because he was around the plant a good deal of that fall.

Q. In the conferences which followed this letter of September 9, 1926, was there ever any discussion of a building or a possible building with an area of as small as 60,000 square feet? A. I don't recall that.

Q. Did these negotiations result in any lease being executed by Brandes with the Manufacturers Developing Company? A. No, sir.

Q. Now, do you recall when the conferences regarding this proposed building stopped; about when? A. Well, I think it was sometime in De-

cember, possibly January. I don't remember. It was the latter part of the year.

Q. Have you any recollection at or about that time or immediately following that, interviews with Mr. Vail with regard to possible additional space to be procured by your company, and where? A. After that?

Q. Yes. A. Well, I recall that we communicated with Mr. Vail, I believe it was in the fall of 1927, in regard to some warehouse space which resulted in our renting—

Q. I did not want to make such a jump in time unless it is absolutely necessary. I was trying to go along chronologically. I understood you to say that probably in the latter part of 1926 or the early part of 1926 these conferences with regard to the space mentioned in this letter of September 9th sort of dropped off. A. That is right.

Q. I want to know whether, immediately following that, did you go anywhere with Mr. Vail to look at any other sites or building? A. I can't recall exactly whether it was after that period or just prior to that period that we saw other sites.

Q. Let me show you a letter, Exhibit D-7, dated March 24, 1927. That letter is written by you? A. Yes.

Q. Do you recall what prompted that letter?

Mr. Skinner: I object to this as entirely immaterial to any issue in this case.

Mr. McGlynn: I think it is very important.

Mr. Skinner: I do not see why we should be taken through what Mr. Vail did with reference to showing some other property.

Mr. McGlynn: It seems to me it is quite important.

The Court: Yes. I will allow it.

Q. Do you recall the circumstances that prompted that letter? Just yes or no. A. Yes.

Q. After looking at this letter of March 24, 1927, will you tell me whether Mr. Vail at any time between September 9, 1926, and March 24, 1927, ever said anything to you about the Manufacturers Developing Company's desire to either continue to build or not to build for your needs. A. I can't recall.

Q. Did he ever tell you anything about whether they would continue to build buildings for your use or not? A. My memory is confused; if you will permit me to answer this.

Q. Surely. A. My memory is confused because I knew that to a certain extent the Manufacturers Developing Company did not have sufficient finance to erect a very large building without considerable aid from ourselves.

Q. How did you get that information? Tell us that. A. Well, now, I don't recall whether I got it from Vail or I surmised it from various talks that I had had with Mr. Lefkowitz, or how. That is why I say my memory is confused.

Q. Now, do you remember Mr. Vail showing you specifically any property? Can you recall any definite piece of property that he showed to you? A. Yes.

Q. Which? A. I believe it was called the Passaic Worsted Mills of Passaic.

Q. Anywhere else? A. I believe we looked at the General Motors plant up here.

Q. Bloomfield Avenue? A. Yes, Bloomfield Avenue; and we looked at the General Electric plant on Frelinghuysen Avenue.

Q. Looking at this letter of March 24, 1927, did Mr. Vail have anything to do with the negotiations which either preceded or followed that letter with respect to the space described in that letter? A. No, sir.

Mr. Skinner: May I ask this? The question calls for a conclusion on the part of this witness, and he should be limited to his own observations.

The Court: Oh, yes, only so far as he knows of his own knowledge.

By the Court:

Q. That is all you mean? A. Absolutely.

Mr. McGlynn: That is what I meant with my question.

Mr. Skinner: He says he did not have anything to do with what?

Mr. McGlynn: With the conferences which either preceded or followed that letter dealing with the specific space mentioned in that letter, which I think is 60,000 square feet.

By Mr. McGlynn:

Q. Am I right? A. That is right.

Q. Did you personally participate in the conferences which followed that letter? A. I did.

Q. Who represented the landlord, or who was there on behalf of the landlord in these conferences? A. Mr. Lefkowitz.

Q. Anyone else? A. Mr. Mitchell may have been, and a fellow by the name of Jack Franks perhaps.

Q. Was a lease actually drawn and executed be-

tween your company and the Manufacturers Developing Company? A. It was.

Q. That is the lease which we have in evidence, Exhibit P-7, dated May 24, 1927? A. Yes, that is the lease.

Q. I think we called it 360 Thomas Street; is that right? A. Yes.

Q. Do you recall receiving Exhibit D-9, dated March 25, 1927? A. Yes.

Q. Something has been said here, Mr. Hall, about your having been at any time employed by the Manufacturers Developing Company. Were you ever so employed? A. No, sir.

Q. Were checks paid to you by the Manufactur- Developing Company? A. Yes, sir.

Q. When? A. Beginning about, I believe, June 23, 1927, and extending over a period of a few months thereafter.

Q. And the aggregate amount of these checks was how much? A. About $2000.

Q. What were you told those checks were given to you for? What were the checks for? A. They were a gift.

Q. From whom? A. Manufacturers Developing Company, Mr. Lefkowitz.

Q. Did Mr. Lefkowitz tell you why he was giving them to you? A. Yes.

Q. What did he tell you? A. He said that I had been very helpful to him in negotiating this lease and spent a great deal of time on it, and so forth and so on, that I had been the means of securing a building permit for him, which he had a great deal of difficulty in getting; he felt that I was entitled to a gift from him.

Q. Prior to the execution of the lease dated May 24, 1927, was there any agreement between the

Manufacturers Developing Company and you to pay you any commission or give you any gift for your services? A. Absolutely none.

Q. Was there any conversation at all prior to the execution of the lease with regard to any payment of any money? A. None at all.

Cross-examination by Mr. Skinner:

Q. But you had been helpful in negotiating the lease, he said? A. Certainly. I represented the Brandes Products Corporation, and I spent a great deal of time, nights, Sundays, and so forth, that is not required of me.

Q. To whom had you been helpful, Mr. Hall, the Brandes Products Corporation or Mr. Lefkowitz? A. Both.

Q. How had you helped Mr. Lefkowitz? A. I had suggested certain things to Mr. Lefkowitz that he perhaps had no thought of in arrangements for financing the building, and I had spent extra time with him—that is, outside of business hours if he was busy otherwise. I spent my evenings talking this thing over with him, or Sundays.

Q. Didn't you do all that on behalf of the Brandes Company? A. I did it on behalf of both.

Q. What reason did you have for doing anything on behalf of Mr. Lefkowitz? A. Because I was anxious to secure this space for my company.

Q. Then it was because of your interest in your company and wish to help it that you did what you did with Lefkowitz? A. Naturally the thing had to be mutual.

Q. Why, the Brandes Company had entrusted you with the negotiations with Lefkowitz, hadn't they? A. Yes.

Q. And your interest in the matter was single and you were single-minded about it, working for the Brandes people? A. Absolutely.

Q. Anything you did to bring about the result of a lease was done for the Brandes people, wasn't it? A. Yes.

Q. There was therefore no occasion, was there, for Mr. Lefkowitz to make a present to you of $2000? A. There was no occasion for him to compensate me. He may have felt that he could give me a gift because I did spend—I was very willing to go out of my way to discuss this thing. You know a great many people under similar circumstances would talk about a thing between nine and five and that would be the end of it, but I did not.

Q. And the fact that you talked about it at other hours than between nine and five did not constitue in your mind any claim on the Brandes people? A. No.

Q. It wasn't done in the course of your duty to the Brandes people? A. To some extent, but I had no claim against them for it.

Q. Well, between nine and five you represented Brandes, didn't you? A. I represented them at all times while I was in their employ.

Q. After five did you represent Brandes too? A. Certainly.

Q. Working in their interest? A. Certainly.

Q. This $2000 that you got did not go into the treasury of the Brandes Company, did it? A. No.

Q. You kept it? A. Certainly.

Q. It didn't come in one check, but in several? A. That is right.

Q. So there were several occasions when Mr. Lefkowitz felt grateful? A. No, there was one occasion only.

Q. Why was there more than one check? A. Because on the occasion that he felt grateful, which was after the signing of the lease and the securing of the building permit, he said to me that he would like to make me a gift of around $2000, and that as his money came in, or his various projects, he would pay it to me. He couldn't afford to give it to me at once. So that was the occasion of his gratefulness.

Q. So it was out of the money that he was receiving from this lease with Brandes that you were receiving money? A. I have no knowledge of that.

Q. Well, you said that. A. As his money came in from leases and other projects, I said.

Q. The services for which he was grateful were all prior to the execution of the lease, weren't they? A. No. Securing of the building permit came after the execution of the lease naturally.

Q. Well, but the conversation at which he told you he was going to make you a present was when with reference to the execution of the lease? A. After.

Q. When and where? A. I don't recall where. I believe it was probably around the middle of June.

Q. And at that time were the Brandes people in possession? A. No. The building had not been built.

Q. At that time was it then that you got the building permit? A. Prior to that.

Q. You said Vail had nothing to do with the execution or the signing of the May 24, 1927, lease? Do you remember? A. That is right.

Q. As a matter of fact, Mr. Hall, Vail had been a good deal around the Brandes plant and passing back and forth between the Brandes company and

Lefkowitz in connection with leasing of property down at Thomas Street, hadn't he, at one time and another? A. Yes.

Q. And the Brandes Company had delegated or had designated the Fiedler Company as their agents to look after anything they had to do in the way of getting real estate? A. There was no formal designation of it. It was simply that we knew the firm and so long as their services were satisfactory we continued to deal with them.

Q. Why do you say there was no formal designation? A. I mean we never declared ourselves that Fiedler we were going to deal with, and no one else.

Q. But Fiedler was going to deal with them and you wanted them to look for you for certain properties? A. We asked them what they had. We might have gone to another agent and asked them, if Fiedler had not satisfied us.

Q. As a matter of fact, you did not go to other agents, did you? A. No, I can't recall that.

Q. As a matter of fact, when the Brandes Company wanted more space, you talked it over with Vail? A. As a general thing.

Q. That was true right straight along until May 24, 1927, wasn't it, and when you talked with Vail about more space you could not always be definite about how much you wanted, could you? A. No.

Q. Because as a matter of fact your plans were quite indefinite? A. That is right.

Q. The need for the space was due to the expansion of your business, isn't that right? A. That is right.

Q. And it expanded very rapidly? A. At times.

Q. And at times you thought it was going to ex-

pand very rapidly, and you couldn't tell how many thousand square feet you would want, couldn't tell that ahead, could you? There were times when you were uncertain? A. There were times when we could not come to an agreement amongst ourselves as to what we wanted to do.

Q. That is, in the Brandes Company? A. Yes.

Q. Some thought that you were going to need more than somebody else thought? A. Yes.

Q. As a matter of fact, you personally came to the belief that you would want a large quantity of space, didn't you? A. I was always the one to bring forth the idea of concentrating the plant in one location.

Q. So really the getting more space was tied up, or the plan of getting more space was tied up with two elements, influenced by two elements, the expansion of your business and then the question of concentrating in one place? A. Naturally.

Q. Of course if you concentrated in one place, that would mean giving up the Mt. Pleasant Avenue plant unless that was the place of concentration, wouldn't it? A. Yes.

Q. So that was what? A pretty large plant? A. Mt. Pleasant Avenue?

Q. Yes. A. No, it was a plant of eighty some odd thousand square feet.

Q. Now, there was a time when you were thinking of a possibility or the possibility or desirability of acquiring space to the amount of two or three or four hundred thousand square feet, wasn't there? A. That is right.

Q. And at that time were any plans for space of that kind of the Lefkowitz property talked of at all? A. As I mentioned before, there were.

Q. There were? A. I answered Mr. McGlynn on that subject before.

Q. You mean by that that Mitchell prepared plans, didn't he? A. I don't know who prepared the plans. I know Mitchell did and I believe someone else did.

Q. Do you know what plans Mitchell prepared? Did he have some for a building of about 60,000 square feet, or don't you remember? A. He did have plans for a building of 60,000 square feet in connection with the lease of—what was it—May, 1927.

Q. How long before May 24, 1927, did you see those plans of Mitchell's? A. I can't recall specifically, but I guess it was just prior to that time.

Q. You guess that? A. Well, I would say plans prepared for the building which was covered by that lease. They must have been just prior to that time.

Q. Don't you know that the building covered by that lease was not built by Mitchell? A. Certainly I know. Mr. Mitchell bid on that building as well as others.

Q. Do you understand that the building that was built, the one called for in that lease, was built according to plans prepared by Mitchell? A. I don't know whose particular plans it was built according to.

Q. You are sure you don't know that? A. I know that plans were submitted which were satisfactory to us.

Q. The Mitchell plan? A. Well, the Mitchell plan was identical with the plan that the building was prepared against, built against.

Q. So that the building that went up was iden-

tical with the one described in the Mitchell plan? A. Yes.

Q. Now, the building which went up was a 60,000 square foot one, wasn't it? A. Yes.

Q. And the Mitchell plans then called for a 60,000 square foot one? A. Yes.

Q. Now, do you recall whether or not, in connection with those very plans, Mr. Mitchell and Mr. Vail attended or came to the Brandes office? Do you remember that? A. I do not.

Q. Do you recall that they did not, or is it simply that you don't recall one way or the other? A. They could not have, because Vail was not in the transaction.

Q. Well, now, I am asking you not to answer by reasoning processes, but do you remember whether or not Mitchell and Vail attended at the Brandes office at any time in connection with those plans for a 60,000 square foot building? A. I don't recall that they did.

Q. But you can't say that they did not, can you? They may have? A. No, they did not.

Q. Why do you say that? A. What?

Q. Why do you say that? A. Because I associate the thing in my mind and recall my memory that they did not.

Q. And your memory is that Vail had nothing to do with it? A. With those particular plans.

Q. Was that talked over at all between you and Mr. Lefkowitz? A. The 60,000 square feet?

Q. No. The fact that Vail should not have anything to do with it. A. Why, certainly. Mr. Lefkowitz wrote me that letter and said there were no agents in the transaction.

Q. And after that you did not let him? A. No.

Q. I mean by that, you did not have any control

over him and you carried on the negotiations with him? A. Certainly. I had no reason to tell him.

Q. You had told him before that, hadn't you? A. Let me make myself clear on that point, if you will.

Q. I wish you would. A. When we wanted space which we did not know where it was available, we went to Vail. If we knew where space was available we would look and go directly, naturally. We would do that, of course, because we didn't want to pay indirectly the agent's commissions.

Q. Did you have to pay agent's commissions when you were the tenant? A. Indirectly I said.

Q. How indirectly? A. A greater amount of rent.

Q. So that you felt if the landlord had to pay a commission it was after all a disadvantage to the Brandes people? A. Exactly.

Q. If they did not have to pay that you would get cheaper rent? A. Exactly.

Q. But Mr. Lefkowitz and you discussed that? A. Exactly.

Q. Lefkowitz said he wanted to do that without any agent, for he would be able to give you cheaper rent? A. That is right.

Q. Do you remember what the rates of renting had been before that? How much per square foot for the other buildings? A. The first building at 350 Thomas Street was rented to us for 45 cents a foot. The addition thereto was rented on the basis of 50 cents I think, and the three-story building at 360 was rented at 47½ cents a square foot.

Q. At any rate we can look at the leases and see. Well, never mind. I will withdraw that. Mr. Hall, you say that when you knew where the property was you did not go to Vail or the Fiedler

Company? Do you remember that? A. Yes.

Q. And this lease of May 24, 1927, was an occasion where you knew where the property was that you wanted? A. Certainly.

Q. You knew that through Vail, didn't you? A. Through the original lease.

Q. You knew of that property through Vail? A. If you want to make a fine point of it, we did not.

Q. I would like to make a fine point of it. Now, you tell me why you did not. A. Mr. Vail took us down and showed us the property at 350 Thomas Street. To all intents and purposes that was the only property available. That was all he showed us. We subsequently found out ourselves there was further property available.

Q. Do you mean to say that after the making of the lease of 350 Thomas Street, nothing passed between you and Mr. Vail, or you and Mr. Lefkowitz in Vail's presence, about there being other property available for you for the Brandes Company? Do you say that? A. No.

Q. As a matter of fact, then something did pass from Lefkowitz to you or from Vail to you calling your attention to additional property down there that Lefkowitz would be willing to let you have, didn't it? A. Quite possible; exactly.

Q. Well, it is so, isn't it? A. Yes.

Q. Well, then, this very property on which the building was erected, the one called for in the May 24, 1927, lease, is property to which your attention had been called by Mr. Vail, isn't it? A. In a general way, yes.

Q. In a general way. And as a matter of fact you were diverted—I mean your company was diverted from consideration of that property because you had plans for or thought you might have plans

for a very large expansion; right? A. In discussing those plans for the large expansion, that is the way—the intimation was given us that there was further space available.

Q. Didn't you ask Mr. Vail to bring to your notice large properties, big plans, existing plants not requiring the waiting for the erection of a building? A. I believe we did. Yes, we did.

Q. Don't you believe that you did ask him that? A. Yes.

Q. Or someone connected with your company? And it was at your request that he took you around to the Passaic Place and the General Motors, and so forth, wasn't it? A. Quite possible. Yes, he did.

Q. Then following that you got back to consideration of the Lefkowitz property? A. We did of our own accord.

Q. Yes, you did of your own accord by arrangement between you and Lefkowitz, didn't you? A. No.

Q. You agreed with Lefkowitz to have it done without the agent, and he said, "Don't tell Vail," didn't he?

Mr. McGlynn: If your Honor please, I object to this question for this reason. I can't see how this testimony is important to the issues in this case. There is no charge here, there is no count here that we fraudulently with Brandes brought about this lease.

The Court: This goes right to the question as to whether Mr. Vail was the controlling and procuring agent, or whether he was not. Based on that point it is admissible.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Now, then, Mr. Vail, having learned of the Manufacturers Developing Company tract, having made a lease in May, 1926, you knew where that property was, didn't you? A. Certainly.

Q. And you say that the reason why the May 24th lease was made without Vail's participation was because when you knew where the property was you went there without having any agent, but in June, 1926, although you knew where the Manufacturers Developing Company property was, you went to that property and made another lease and made it through Vail, didn't you? A. June, 1926?

Q. Yes. A. May I explain the circumstances?

Q. May I ask you to answer that question first? A. No.

Q. You did not do it? A. No.

Q. You did not go there at all through Vail? A. No.

Q. Why do you say that? A. Will you permit me to explain?

Q. I asked you why did you say that, and that gives you, I think, the chance to explain. A. We first called in Mr. Vail in the early part of 1926, told him what we wanted, and he showed us various places, and finally took us down to 350 Thomas Street. The building as a building was exactly what we wanted, exactly what we had in mind. We wanted additional space for the Federal Telegraph Company. At that time it was an independent company for warehousing of a product which we would manufacture there. That resulted in the—

Q. No, wait. You wanted and that resulted, is quite a gap. How did it result? A. Through Mr. Vail, took us there and showed us the, I believe it was, the plant that was occupied by the American Ambi Company, which was the plant on, what is it? Jefferson Street or Avenue D, the Avenue D which has been talked of in the trial before. That lease was drawn up and I recall very distinctly having it executed over in Grand Central Station by Mr. Stone, who was the president of the Federal Telegraph, and he was leaving for the Pacific Coast on that day. The lease was brought back to the Manufacturers Developing Company, later explained that they could not lease us that building because it interfered with other plans they had, and that resulted in the erection of the addition to 350 Thomas Street in order to take the place of the building on Avenue D which we did not get.

Q. What? A. In order to take the place of the building on Avenue D which we did not get. Even though that lease was taken in the name of Brandes Products Corporation, the arrangements were made whereby Federal Telegraph had the benefit of it.

Q. You were undertaking to tell me why it was that you said— A. It was all one transaction.

Q. No, but my question was, didn't you go to Vail about this June 16, 1926 lease, after the May one? A. I am saying that is all one transaction practically, even though there may be a lapse of time.

Q. All the one transaction? A. Principally so as far as the negotiations and the talk over it were concerned.

Q. You mean, then, that you regard all that took place between you and the Manufacturers Devel-

oping Company as being a continuing transaction beginning in May, 1926? A. I do.

Q. And ending in May, 1927? A. No.

Mr. McGlynn: I object, if your Honor please. Counsel goes far afield.

A. (Continuing) I consider the action from, I believe it was—

The Court: He has answered it.

The Witness: I beg your pardon?

The Court: I think you have answered it.

The Witness: Excuse me a minute, but I think I answered perhaps before the question was fully asked. Will you read it back?

The Court: There is no question pending.

Q. Mr. Hall, did you not have the assistance of Mr. Vail with reference to leasing additional property in the Manufacturers Developing Company plant between May, 1926, and June, 1926, after the May lease? A. Between May and June, 1926?

Q. Yes. A. Yes.

Q. He was present at the execution of the June, 1926, lease, wasn't he, or weren't you? Perhaps you were not. A. I guess he was. I can't recall.

Q. Were you? A. I believe so.

Q. At the office of Redd & Reynolds? A. No, I don't think so. I think our part was executed in our offices.

Q. Do you remember whether or not Mr. Vail brought the leases up to be executed? A. I don't remember, but he probably did.

Q. Then he was participating in that negotiation? A. I admitted that before, that it was a continuing negotiation.

Q. You did not go over his head then or behind his back because you already knew where the property was that you wanted, did you? A. It was one negotiation. Perhaps you don't see it that way but I do. In other words, Mr. Vail had failed to deliver us the lease on the Avenue D property. So naturally we said, "Well, Vail, what can you do in place of it?" And that resulted in this thing coming about. In the meantime we had gone ahead.

Q. You naturally said to Vail, "Vail, what can you do about it?" Do you remember saying that? A. Well, words to that effect.

Q. But what you really said meant, "Well, Vail, what can you do about it on the Manufacturers Developing tract?" didn't it? A. All right, yes.

Q. Although you knew about it, you asked what Vail could do about it to get a substitute, is that right? A. That time Vail had been to the Manufacturers Developing tract, yes.

Q. Is that true, that it was Vail that you asked and went to for the substitute? A. Yes.

Q. You said that, I think—now, I am not sure of this— that the lease of May 24, 1927, did not result from anything that Vail had done; something to that effect? A. That is right.

Q. Don't you mean that you and Mr. Lefkowitz had tried to bring about the result privately or without Mr. Vail knowing about it? Isn't that what you mean? A. I mean that he did not bring about the result.

Q. And you did it as a result of a plan made up between you and Lefkowitz to keep Vail out of it?

Mr. McGlynn: There is no such evidence.

The Court: He is asked whether that is a fact.

A. I did it at the request of Mr. Lefkowitz as evidenced by his letter that he would not countenance any broker in this particular transaction.

Q. And it was after that that you received this gift of $2000 from Lefkowitz, wasn't it? A. Quite some time after that.

Q. How long a time was it?

Mr. McGlynn: I object, if it please the Court. This has all been gone over in detail three or four times. He testified on two occasions it was the middle of June, 1927.

The Court: I think that is what he said.

Q. What did you mean by quite some time? A. I meant several months.

Q. How many months? A. Several is more than two.

Q. Can't you tell us what you meant by that more definitely than that, more than two? A. Well, it was more than two; that is all. I can't recall exactly.

Q. Three? A. It might have been three; it might have been four; it might have been five.

Q. It might have been six? A. Possibly. I don't think it was, though.

Q. You were paid on June 23, 1927? A. About that time.

Q. And the lease was executed on May 24th? A. Yes.

Mr. McGlynn: That was not the question. Counsel has directed a question about when this negotiation started, how long after. Now he asks about the date of the lease.

Q. When did the negotiations start? Now, can

you fix that? A. I believe they started some time in February.

Q. February, 1927? A. Yes.

Q. How did they start? A. They started by me being told by my employers that they were probably going to need more space, more quantity of space, I should see what could be done.

Q. Hadn't you been told by your employers that same thing, or that more space would be needed before that? A. Very large space. That was abandoned.

Q. Hadn't you been told that space would be needed? A. Yes.

Q. And then came the discussion of how much space? A. Yes.

Q. And there was a difference of opinion in your own ranks as to how much space there should be? A. Yes.

Q. And you couldn't tell from day to day what it might be? A. That is right.

Q. And it was sometimes discussed as small and sometimes as large? A. It was always discussed as a large unit at that time.

Mr. McGlynn: Do we have to go all over this again?

The Court: It might be repetition, but it seems to me it might be important as to what gap there was between the break-off of negotiations, which he has said was in December, 1927, and the beginning of the new negotiations, which he now for the first time said what was in February. Is that not so?

Mr. McGlynn: I don't think it is the first time at all because the letter is in evidence in March. It says, "Concerning our conversation."

The Court: Three days previous does not bring it to February. That is why I made the note, because I wondered and have been wondering how much of a gap there was between the breaking off of the old negotiations and the new.

Mr. McGlynn: Your Honor misunderstood it. I did not say that. I said the negotiations of this new one. I did not say anything about what he testified about when the old ones broke off.

The Court: I did not understand that the new negotiations, until this morning, began as early as February.

By Mr. Skinner:

Q. That is correct, though, isn't it, Mr. Hall? A. I said they may have begun.

Q. You had some reason for saying it? A. I knew they started sometime around the first part of the year, early part of the year.

Q. It may have been January? A. I can't tell. My memory does not serve me correctly.

Q. How is it that you still had Mr. Vail acting for the Brandes Company, getting large space for you, but shut him off on the getting of a small space on the Manufacturers Developing Company?

Mr. McGlynn: I can't see the relevancy of this examination on the complaint filed in this case, with due reference to your Honor's ruling that it does have some bearing on the question of fraud. I fail to see it.

The Court: I will allow it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. (Read by stenographer) How is it that you still had Mr. Vail acting for the Brandes Company, getting large space for you, but shut him off on the getting of a small space on the Manufacturers Developing Company? A. Because the large space probably involved some financing, would involve financing, considerably more than either Mr. Lefkowitz or the Manugacturers Developing Company or the Brandes Products Corporation would care to entertain, and as one of Fiedler Corporation's activities, the procuring of mortgage money, and so forth, is part of their business, they might be helpful there.

Q. But you did take space in the Manufacturers Developing tract in May? A. Of what year?

Q. 1927. A. Yes.

Q. 60,000 square feet? A. Yes.

Q. And that was the end of negotiations that had begun early in the first part of the year 1927? A. Between Mr. Lefkowitz and myself.

Q. But not between Vail and yourself or Vail and Lefkowitz and yourself, and I am asking you why it was that then you did not have Mr. Vail act for you in connection with the larger properties and not this? A. I explained to you why.

Q. Only because of this understanding you had with Mr. Lefkowitz, isn't it? A. What understanding?

Q. The understanding that you should not tell Mr. Vail anything about it, keep it from him, is that right? A. That is true.

Q. In order that between you a commission might be saved to Lefkowitz; right? and in order

that the Brandes people might get the property at a lower rental? A. Right.

Q. What was the lower rental at which they got it? How much lower was it? A. About 2½ cents lower than it would have been if there were a broker.

Q. How do you know it would have been? A. We figured costs and we figured what the brokerage would have been on that particular rental.

Q. So that when the rental price was actually made up between you and Lefkowitz, you reached it by figuring cost, including in the cost what the commission to the agent would be, and then deducted that commission, is that right? A. I believe that is the method that was used in figuring.

Q. And the commission that you figured was five per cent., wasn't it? A. Which on that price is equivalent to 2½ cents.

Q. Five per cent. of the gross rentals for the period that you proposed to lease? A. Yes.

Q. May 24th lease. You said, Mr. Hall, that the reason why you did not go to Vail— You said that the large space leases that were talked of involved finance, and you did not go to Lefkowitz for that reason because it involved finance; right? A. I said that we went through Vail because it did involve finance, and I knew that he would probably be helpful.

Q. Went through Vail because it did involve finance. Now, the lease of May 24, 1927, involved financing, didn't it? A. Not to a great extent.

Q. But to some extent? A. Yes.

Q. Why didn't you go to Vail for that then if it involved financing and he could be of assistance? A. Because it wasn't financing to the extent that it was necessary to obtain outside assistance.

Q. The lease of May, 1926, did not involve any financing, did it? A. It did to the extent that we paid the last year's rent in advance.

Q. Oh, well; that is all? A. And I presume that Mr. Lefkowitz arranged for a mortgage on it.

Q. But you went to them for that, didn't you? No question about that? A. We went to Vail in order for Vail to secure the property for us. We did not know of the existence of the property.

Redirect-examination by Mr. McGlynn:

Q. Mr. Hall, did you occupy a position with the Brandes Products Company which enabled you to assume the responsibility for the acceptance of the terms of this lease? A. I did not.

Mr. Skinner: I object to that as calling for a conclusion both in law and fact.

The Court: He has answered it. I will let it stand.

Q. Who were the officers of the Brandes Products who finally had to pass on the question of the acceptance of the terms of this lease of May 24, 1927? A. Mr. Dietrich was the principal officer.

Q. Whom are you with now? A. I am working with Mr. Dietrich.

Q. The same man who was then president of the corporation? A. Yes, sir.

ELMER E. ROSS, sworn in behalf of defendant.

Direct-examination by Mr. McGlynn:

Q. Mr. Ross, where do you live? A. Newark.

Q. What is your business now? A. I am president of the Positive Lock Washer Company.

Q. You were formerly connected with the Manufacturers Developing Company? A. I was.

Q. When did your connection first commence there? A. At the beginning of the company, 1920 about.

Q. How long have you been with them? A. Until about February, 1928.

Q. And you were, in addition to being an officer, a stockholder in that company? A. I was.

Q. Have you any stockholding interests now? A. I have not.

Q. You knew Mr. William C. Fiedler, did you not? A. I did.

Q. Did you at any time arrange for an interview between Mr. Fiedler and Mr. Lefkowitz? A. Yes.

Q. Did you attend that meeting? A. Yes.

Q. I show you a letter dated February 22, 1925, and ask you if you recollect the man who wrote that letter. This is a carbon copy, Mr. Ross, marked Exhibit D-1. A. Yes.

Q. Do you recall that letter? A. I do.

Q. I show you Exhibit D-3 and ask you if you recall receiving that reply from Mr. Fiedler. A. Yes, I do.

Q. So far as you know, was there any other correspondence between your letter of September 22nd and his letter of September 28th? A. No, I don't recall any.

Q. You consider this September 28th letter an acknowledgment of yours? A. I certainly do.

Q. Now, what is your recollection as to whether the conference that you arranged with Fiedler was before or after this letter of September, 1925? A. I am qnite certain it was after that letter.

Q. Do you recall the general nature of the business part of the conversation which occurred at that meeting, in a general way? A. Well, it was mostly an introductory meeting. There was not a great deal of details gone into. I believe Mr. Lefkowitz was meeting Mr. Fiedler for the first time. I had known Mr. Fiedler for a number of years, and it was more of a get-together.

Q. Did you discuss this property of your company's down there on South and Thomas Streets? A. Why, I am quite sure we did.

Q. Did you have another meeting after that? A. I recall, I think, another meeting, at least one other.

Q. And you were there, were you? A. Yes.

Q. What was discussed at that second meeting? A. Well, there was more detail. It had mostly to do with what Mr. Fiedler might be able to do in a general way for the company with regard to financing, and, rather, a detailed going over of what they had down there to offer.

Q. What you had what? A. What we had down there to offer in the way of properties.

Q. Now, was anything said at either one of these two meetings in your presence that you can recall now with reference to the payment of commissions? A. I don't recall any reference to that.

Q. Would you say that at either one of these conferences or as a result of what was said at both of them, whether there was any agreement between you two—Fiedler on one side and you and Lefkowitz on the other—with reference to the payment of commissions? A. No, sir.

Q. Do you recall Mr. Vail calling at your place of business down on South Street? A. Occasionally.

Q. I assume he was down there for the purpose of trying to rent some of the property, wasn't he? A. I suppose so, yes.

Q. Did you discuss from time to time that situation with him, or did Lefkowitz discuss it with him? A. I believe I did.

Q. Did you ever hear any conversation, or did you ever participate in any conversation with Vail either down there or anywhere else which went into detail as to the question of commissions? A. I did not.

Q. Were commissions ever discussed with Vail to your recollection? A. I haven't any recollection of any discussions.

Q. Sir? A. I don't remember that in any discussions.

Q. What was your idea about the payment of commissions to Fiedler? A. Well, if they did anything they get paid the regular rates, which are five per cent. on industrial property.

Q. Were you at Mr. Reed's office on June 16, 1926? A. Yes.

Q. Do you recall the occasion? A. Yes, sir.

Q. Do you recall who was there? A. Pretty much. Mr. Reed, Mr. Lefkowitz, Mr. Vail, myself.

By the Court:

Q. No one there from the other concern, the Brandes concern? A. I don't recall exactly on that, but I don't think so.

By Mr. McGlynn:

Q. How about Mitchell, the engineer? Do you remember whether he was there? A. I believe he was there; yes, sir; that is correct.

Q. Now, I show you Exhibit P-2 and ask you if

that is your signature on the righthand side at the bottom of that paper. A. That is my signature; yes, sir.

Q. Have you any conscious recollection of signing such a document? A. I have not.

Q. Have you any recollection of any discussion by anybody connected with the Fiedler Company, either Mr. Fiedler himself, Hartman or anybody else, of terms similar to the terms contained in that paper? A. Absolutely no recollection.

Q. Have you any recollection of a conversation in Mr. Reed's office on that day between Mr. Vail and Mr. Lefkowitz and Mr. Reed, Harry B. Reed, in which Mr. Lefkowitz reached for Mr. Reed's pen and started to sign a paper, and Mr. Reed saying, "Mr. Lefkowitz, what are you signing?" Mr. Lefkowitz said, "I am signing a commission agreement." Mr. Reed said, "May I see it?" Lefkowitz handed this paper to Mr. Reed. Mr. Reed looked it over, read it, looked at it, read it the same as Mr. Lefkowitz had done previously thereto; Reed passed it back to Lefkowitz and said, "I would not sign that"? A. I don't recall any of that, sir.

Q. Do you recall Mr. Lefkowitz saying in answer to Mr. Reed's last statement, "That is my understanding. I have promised that to the Fiedler Corporation and I am going to sign it"? A. No, I don't recall it.

Q. When after the meeting of June 16, 1926, was the first time that that paper now before you was shown you again? A. In the attorney's office of Pitney, Hardin & Skinner.

Q. Do you recall how soon after receipt of a letter by the company with respect to a demand for commissions—I do not mean do you know whether

it was within a day or two—was it within a short time after or a long time after that letter was received, if you know? A. I do not get the question.

By the Court:

Q. How soon after you heard from Pitney, Hardin & Skinner that commissions were being sought did you go to their office and see this paper for the first time? A. Rather shortly after I would say.

Q. A matter of days? A. I would think so.

By Mr. McGlynn:

Q. Whom did you go up there with? A. Mr. Lefkowitz.

Q. Whom did you see up there? A. Mr. Feick I think.

Q. Did you look at that same paper that is in front of you now? A. This is the paper, yes.

Q. What was your recollection then, which was in the fall of 1927, as to any conscious recollection of having signed such a paper? A. I was very much astonished to see it. I did not expect to see that they had an instrument like that.

By the Court:

Q. You were surprised that they were claiming commissions, you say? A. No. I was surprised to see my signature on that piece of paper, and Mr. Lefkowitz too.

By Mr. McGlynn:

Q. Your business experience prior to 1926 was how many years? How long have you been in business, Mr. Ross, about? A. Oh, fifteen or twenty years.

Q. Had you in the discharge of your duties in

this corporation read contracts over and leases and other documents? A. Yes, sir; always had in that capacity.

By the Court:

Q. You always thought you had; is that what you mean? You had not this time, had you? A. I had not read that over; no, sir.

By Mr. McGlynn:

Q. Why do you say that, that you had not read that over? A. I certainly would not have signed it if I had read it over.

Q. Why not? A. Because it was not—it is simply unreasonable; that is all; any property that the company would ever own.

At one o'clock, P. M., the court takes a recess until two o'clock P. M.

After Recess.

ELMER E. ROSS resumes the stand.

The Court: You are through, Mr. McGlynn?

Mr. McGlynn: Yes, sir.

The Court: All right. Cross examine.

Cross-examination by Mr. Skinner:

Q. Mr. Ross, you are no longer with Mr. Lefkowitz, are you? A. No, sir.

Q. Have you any interest whatever in the outcome of this suit? A. Absolutely none, that is, no financial interest.

Q. No financial interest I mean. A. No, sir.

Q. You sold your stock? A. Yes, sir.

Q. Did you have any understanding with Mr. Lefkowitz at any time that you should bear your part of any demands that might come in against the company— A. No, sir.

Q. —Or of any judgments against the company —— A. No, sir.

Q. A clean cut severance? A. Absolutely.

Q. You have no further interest in the outcome of this suit, whether it be for or against it? A. Right.

Q. Right. Now, you said that you arranged with Mr. Fiedler for the first interview with him, do you remember? A. Yes.

Q. And that that was mostly an introductory meeting? A. That is my recollection.

Q. Or a get together meeting, you said, you and Mr. Lefkowitz wanted to get together with Mr. Fiedler, didn't you? A. Yes.

Q. You were hopeful that he might think well of a suggestion to take charge of the renting of your property down there, at South Street and Commerce Street, weren't you? A. I don't think we were interested so much in that.

Q. I did not ask the extent of your interest, but you did have some expectation that that might result, didn't you? A. There had not been any meeting at all between Mr. Lefkowitz and Mr. Fiedler before that. I was really in a position to bring them together by reason of my double acquaintanceship, you see.

Q. I do, but did you not bring them together with a view to having some arrangement with the Fiedler Corporation for the taking care of your land— of the renting of your property down there? A. That was not the reason for the interview.

Q. Wasn't that brought up in the course of the interview? A. I don't recall that; no, sir.

Q. Do you mean that you talked of nothing—no —nothing but just pleasant exchange of acquaintances, first acquaintance? A. That was the chief part of it. It was a general discussion, much as we would have had with any other real estate agent, only in this case there was the element of acquaintanceship which gave us another good—

Q. Yes? A. —Outlet for talking of a probable connection.

Q. The fact that you and Mr. Fiedler knew each other in the Rotary made a friendly basis for the interview? A. That simplified it.

Q. Now, would you have called at any other real estate agent's office except for that same friendly basis? A. Yes.

Q. If you called at any other real estate agent's office, presumably it would be to discuss the possible renting of your property, wouldn't it? A. I don't think that in the other cases we might have called there. Mr. Fiedler is a pretty busy man, and rather to tell him to come down there, we were out around town every day or so, and dropped in his office.

Q. I understand that you dropped in. A. Well, we went in.

Q. Isn't it a fact that you went there with an idea that by going to Mr. Fiedler you could bring about some adjustment, some arrangement between him and Mr. Lefkowitz, or the Manufacturers Developing Company, by which the Fiedler Corporation should look after the renting of the company's property? Didn't you have that in mind when you went there? A. No, sir, not specifically.

Q. You just went there on a friendly call, and to talk about finances? A. That is all.

Q. You went to a real estate agent to get that real estate agent to put up money to help you develop your property; is that what you mean by financing? A. Well, that was one of the departments of his business, and knowing Mr. Fiedler rather well, I thought that he would be able to make a special effort possibly in behalf of our holdings down there, the same as I would of anybody, where I felt I had that contact.

Q. But you did not think anything at all of his making any efforts in connection with the leasing of the property; that was not in your mind at all? A. At that time, I don't think so.

Q. It did not later get into your mind? A. Well, it developed, yes.

Q. When? Was there a second meeting? A. Later on there was another meeting, later on.

Q. At the second meeting? A. I think so, yes.

Q. Now, going to this second meeting, you said that there was more detail as to what Mr. Fiedler might be able to do for the company. Do you mean that there was more talk about what he might be able to do in the way of renting the property, wasn't there? A. No, I mean by that, that there was some discussion on the matter of just what we had, of just what we had to offer.

Q. Was there anything said at that second interview about Mr. Fiedler or his company looking after the obtaining of tenants for the property? Yes or no. A. I believe there was; yes, sir.

Q. What was it? A. I don't recall in detail, except that he was to—what we would say to any other agent.

Q. You mean that? A. We had property for

leasing, we had ground for building property on it.

Q. Let us save time; I don't want to ask you to speculate or to guess about what took place there. Rely upon your memory. A. Yes.

Q. Did you or did you not talk with Mr. Fiedler about his, or his company's looking after the renting of that property? A. When you say looking after, may I ask do you mean to the exclusion of everybody else?

Q. Well, I will say did you ask him to make any effort or have anything to do with the renting of your property? A. Why, I think I did, yes.

Q. Do you recall what was said? A. Not exactly, no, sir.

Q. Well, approximately. A. Well, it was understood by reason of the meeting that if he could —if he acted for us he would be recompensed for it, and the object of the meeting was to bring out the material that we had for him to work on.

Q. Wanted it understood that he was to work on it? Wasn't it understood? A. Yes, or we would not be there, if it was not for that.

Q. You would not be there before that, if that were not your understanding, that he was to work on it? A. Certainly, he was to work on it; we wanted him to work on it.

Q. You said that if anything had been said about a commission at that meeting, or either of them, it would have been that Mr. Fiedler would get paid at the regular rate; is that right? A. Yes, sir.

Q. Was that said? A. I don't recall anything —any conversation about that.

Q. Well now then, going to the meeting at Mr. Read's office, when a lease was to be signed, June, 1926, I show you P-2, and call your attention to

the signature at the right. Is that yours? A. Yes, that is my signature.

Q. As secretary and treasurer of the Manufacturers Developing Company? A. Yes, sir.

Q. And at the left, is that Mr. Lefkowitz' signature? A. Yes, sir.

Q. And this is the corporate seal, isn't it? A. Yes.

Q. Is that your handwriting up here, the words, No. 353 Thomas Street, Newark, N. J.? A. I am not sure.

Q. It may be? A. It might be.

Q. Don't you know? You would know your signature, Mr. Ross? A. I think I would, ordinarily, but I can't be sure of that, sir.

Q. Does it look like it? A. It might be.

Q. It resembles it enough for you to feel doubtful whether it is or is not? A. I have no doubt about my signature.

Q. Yes. You say that you don't remember signing that? A. Yes, sir.

Q. You haven't any doubt that you did, have you? A. No doubt.

Q. It is one of the things you have forgotten, isn't it? A. Certainly is.

Q. You don't remember anything you did four years ago, do you? A. Not by a long shot.

Q. Not by a long shot. You don't remember every paper you signed, do you? A. Pretty well, in this matter.

Q. Pretty well in this matter? Why in this matter rather than any other? A. A good sized deal.

Q. Well, you had other good sized deals, didn't you? A. Not very often, like that.

Q. Now, Mr. Vail was present at the Read office,

wasn't he, when this—when the lease was signed, June 16th? A. That is my recollection.

Q. He had brought your company and the Brandes Company together, hadn't he? A. Originally; yes, sir.

The Court: Keep your voice up, Mr. Ross, please.

Q. "Originally; yes, sir."

The Witness: Originally; yes, sir.

Q. In connection with this very lease, or rather, the one of May 10th, 1926, preceeding— A. Yes, sir.

Q. The building lease of May 10, 1926, there was a cancellation of it, wasn't there? A. I believe so; yes, sir.

Q. And the lease of June was substituted for that? A. Yes, sir.

Q. And contained many more feet than from what had been in the May lease? A. Yes, sir.

Q. And Mr. Vail had been working for the Fiedler Company between you and the Brandes Company in procuring that substitution, hadn't he? A. I think so; I wasn't always present at all conferences in reference to—

Q. Whenever you were, did you see Vail present? A. Yes, I think I did.

Q. Conferences with Mr. Mitchell over plans, do you refer to? A. I mean that Mr. Lefkowitz might have discussions on the matter where I was not always present. I mean I was not a shadow, by any means, of Mr. Lefkowitz.

Q. But you were present on occasions when Mr. Lefkowitz, Mr. Vail and you were talking about how to get the Brandes Company to take additional space, weren't you? A. Occasionally.

Q. Yes, and that lasted for a considerable length of time? Months, didn't it? A. I don't recall exactly.

Q. You can't say whether it was six months or a year or a year and a half? A. No, I wouldn't say.

Q. May have gone on until January or February of 1927? What do you say? A. I am trying to recall. It may have.

Q. Don't you think it did? A. Well, the only thing I can check that by would be my recollection of seeing Mr. Vail at the office. I don't remember seeing him there very often, in the latter part, or the early part of 1927.

Q. After the early part of 1927? A. Yes.

Q. You did see him though sometimes after the month of January, 1927; right? A. I don't recall seeing him after that.

Q. You don't recall when it was, but you know you saw him? A. I can't say that I know I saw him, because I don't recall that I did.

Q. When did you leave, sever your connection? A. In February, '28.

Q. February, '28; up to the time you left, had you not continued to see Mr. Vail from time to time at the office? A. No, there were times when I wasn't at the office. I was at that time engaged in some other activity which took me away quite a little.

Q. Well, you were present at conferences when Mitchell and Vail were both present, weren't you? A. I may have been; I am not clear on that. I don't remember very well on that.

Q. After June 16, 1926, did you see P-2, this commission agreement again before being at the office of Pitney, Hardin & Skinner? A. I never

saw that agreement until I was up in the attorneys offices.

Q. Do you mean to say you did not see it down at Mr. Read's office? A. No, sir.

Q. What? What do you mean, that you signed this with your eyes shut? A. I don't recall signing that at all.

Q. I didn't ask you what you recall; do you mean to sit there, under oath, Mr. Ross, and say that you never saw the paper that bears your signature? A. I will have to say that, sir, because I cannot remember seeing it.

Q. And when you don't remember, will you deny the evidence of your own signature, as you see your name there? Will you do that? A. I don't deny that my name is there.

Q. Will you deny that you put it there? A. I can't do that; that is my signature.

Q. Sure. Then you must have signed, mustn't you? Yes or no. A. I must have thought of something else or I certainly would not have signed.

Mr. McGlynn: What is that?

(Answer read by stenographer.)

The Court: Is that the correct answer?

The Witness: Yes, sir.

The Court: I understood him to say I must have thought it was something else, but the correct answer as the stenographer has it is, "I must have thought of something else."

The Witness: No, my intention was to say that, in explanation how I could possibly have signed this thing, the only reasonable explanation is that I thought it was something else at the time, something that it

was inconsequential for me to sign without giving any thought to.

Q. Something inconsequential enough for you to sign without giving it any thought? A. Yes, I mean to say, in either one of these signatures, initials, checking up taking place, in negotiating a lease, and contacts, and checking specifications, and that sort of thing.

Q. Now, you mean that, then, that you must have thought that it was something that was involved in the making of the lease or in the specifications or contacts, right? A. (No answer.)

Q. What do you say, Mr. Ross? A. I can't say how that paper could ever be signed, and I can only guess, if that is what you want me to do, that it was signed at a time when there was no particular—well, when was a lot of signing going on, checking.

Q. I will take this, may I do it, from you, that your explanation of this is based entirely on guess, is that right? A. What can I do on an instrument that I would not sign now, or an instrument that I would not have signed then, except guess.

Q. That is all that you are doing, by saying that it must have been something else, guessing at it? A. I signed it; I admit my signature.

Q. Who put the corporate seal on? A. I haven't the slightest idea, I may have put it on or I may not have put it on.

Q. Well, either you or Mr. Lefkowitz? A. Well, if I put the seal on, the chances are I put it over here on the left side, over my own signature.

By the Court:

Q. You do not carry the seal all of the time, do you? A. No, sir.

Q. The only occasion you would carry the seal is when you have occasion to use it for signatures? A. Yes, sir.

Q. Did you carry it to Mr. Read's office? A. It had been carried there that day or earlier; it is my recollection that it was at his office.

The Court: Very well.

Mr. Skinner: That is all.

Redirect-examination by Mr. McGlynn:

Q. You said that there were a lot of papers that day in Mr. Read's office. Have you any recollection now of having checked up the specifications attached to—on that contract—on that day? A. Yes, sir.

Q. What did you discover upon checking up those specifications, do you recall, something that you discovered in checking up the specifications that day before they were signed or initialed, when you read them over? A. I believe there was an amendment made.

Q. Do you recall what it was that you discovered? A. I am not clear; I don't remember that.

Mr. McGlynn: That is all.

By the Court:

Q. Did you have access to the files of the concern where the papers were kept, legal papers? A. Yes.

Q. Did you ever have occasion to go to them—the leases? A. Yes.

Q. And other legal papers? A. Yes, sir.

Q. Did, on any of the times that you went there, did you see this, a copy of this agreement? A. No, sir.

The Court: All right.

Recross-examination by Mr. Skinner:

Q. Mr. Ross, do you mean to say—or would you not say that it may have been there although you did not see it? A. Speaking of this paper in the files?

Q. Yes. A. No, I wouldn't say that.

Q. Well, how many papers were there there? A good many, weren't there? A. It was a file that I didn't take charge of.

Q. But there were a good many papers there, weren't there? A. Quite a number, yes.

Q. When you went there, you would go for some particular thing, wouldn't you? A. Yes.

Q. You would not be there for the purpose of going through it, paper by paper, and seeing what was there, would you? A. No.

Q. When you would find what you were looking for you would stop looking, wouldn't you? A. Yes.

Q. Therefore this might have been there beyond the point where you had reached what you were looking for? A. All I say, I wouldn't go there, particularly to look for that.

Q. What is that? A. All I say, I wouldn't go there particularly to look for that.

Mr. Skinner: All right.

The Witness: All?

The Court: That is all.

RULIF L. HORNBY, sworn in behalf of defendant.

Direct-examination by Mr. McGlynn:

Q. Mr. Hornby, you are connected with the Manufacturers Developing Company now? A. Yes, sir.

Q. Have been since when? A. Well, I first went with the National Box & Lumber Company, and the Manufacturers Developing Company in October, 1926.

Q. As I understand it, the National Box & Lumber Company is a Manufacturers concern, controlled by Mr. Lefkowitz, in which Mr. Ross had an interest at the same time as he has been talking about here? A. Yes, sir.

Q. The Manufacturers kept their records, et cetera, right in the same office? A. That is right.

Q. No separate place of business? A. No, sir.

Q. When was it you started, October, 1926? A. October, 1926.

The Court: A little louder, Mr. Hornby.

Q. Speak as though you were speaking to the last man over there, and not as if you were looking at me. A. All right.

Q. Are you an officer of the Manufacturers now? A. I am at the present time; yes, sir.

Q. Now, when you went down there in October, 1926, who, from that time on, had charge of the files, with regard to the documents of the company? A. I did.

Q. Did Mrs. Smalley have anything to do with them after you went there? A. She was not supposed to.

Q. Whether she was supposed to or not, did Mrs.

Smalley have anything to do with them after you got there? A. Well, she might possibly have had access to them, but she was not supposed to, particularly of the documents.

Q. I see. Where were the documents kept, the leases and contracts? A. In the safe files.

Q. Now, by reason of any instructions given to you by Mr. Lefkowitz after your being down there, did you search through the files and safes and desks around there to ascertain if there was a copy of this agreement, marked P-2 in evidence? A. Why—

Q. Don't tell us what your instructions were, you cannot tell us that, Mr. Hornby; you must only answer my questions. A. I had looked through all of those documents, that was what I was supposed to do, from that time up—well almost every day—I went through those documents, because I was supposed to familiarize myself with all those papers, and from that time up to the present time I suppose I have gone through them at least twenty times—

Q. Yes? A. —through every paper in that place.

Q. In going through all of those papers did you ever come across a carbon copy of this paper which you are now holding in your hand, marked P-2? A. I never saw any such paper.

Q. What was the actual date of the Brandes—that the Brandes commenced to pay rent under the lease of May 24, 1927? A. September 15, 1927.

Mr. McGlynn: That is all.

By the Court:

Q. Did I understand you to say that in pursu-

ance of instructions after you started, you looked particularly for that paper? A. No, when I first went in, my instructions were to install a new bookkeeping system.

Q. I didn't ask you that; you have told us that. Were you ever asked to see whether you could find such a paper? A. No, sir.

Q. Didn't Mr.—your employer, when he came back from Pitney, Hardin & Skinner's office, ask you whether you could find such a paper or whether you couldn't find it, and didn't you then make a search for it? A. No, sir.

The Court: All right.

Cross-examination by Mr. Skinner:

Q. When was it you went there? A. October, 1926.

Q. And when was it you first went through the files? A. I began to go through them within a few days after I was there.

Q. Well, that took sometime, Mr. Hornby? A. It would.

Q. There might be some weeks before you would get through on particular file, or went through a part of the file? A. I wouldn't say a week, I would go through them all.

Q. No, not what you were going to do, but with what you had to do at the time, did that cover any period of time? A. No, sir; I kept going through them for familiarizing myself.

Mr. Skinner: That is all.

Defendant Rests.

James Mitchell—Rebuttal—Direct.
James Mitchell—Rebuttal—Cross.

JAMES MITCHELL, recalled in behalf of plaintiff in rebuttal.

Direct-examination by Mr. Skinner:

Q. Mr. Mitchell, do you remember, or do you not, that there was a contract and some specifications prepared with reference to a building to be erected in the rear of 350 Thomas Street? A. I do.

Q. Did you see those specifications after the contract had been signed? A. My copy.

Q. One copy only? A. My own copy, yes.

Q. Had each page of the specifications been signed? A. No.

Mr. Skinner: No. That is all.

Mr. McGlynn: No questions.

Q. Well, were they signed at all? A. Yes.

Q. At the very end? A. Yes.

Mr. Skinner: That is all.

Cross-examination by Mr. McGlynn:

Q. Do you recall, Mr. Mitchell, Mr. Ross going over those specifications on that occasion and discussing something rather important in connection with the specifications that had been omitted, something about a wall? A. Yes, I do.

Mr. McGlynn: That is all.

The Court: Anything more?

Mr. Skinner: Nothing. We rest; the case is closed.

Plaintiff Rests in Rebuttal.

Defendant Rests.

Defendant's Motion for Direction of Verdict.

Mr. McGlynn: I desire, if your Honor please, to make a motion for a direction of a verdict, without repeating the grounds mentioned in my motion for a non-suit, the same grounds as set forth in my motion for a non-suit.

The Court: The motion is denied and an exception allowed.

Mr. Skinner: If your Honor please, I desire to make a motion for a direction of a verdict. Shall it be in the presence of the jury, or shall they withdraw?

The Court: Supposing the jury retire for a moment.

(The jury thereupon retired.)

Mr. Skinner: As I see it, if your Honor please, this controversy has narrowed down to the claim for commission upon the making of the lease of May 24, 1927. It is uncontradicted, however, that there was a written agreement. That agreement has been presented and is in evidence. There is no question as to the genuineness of the signature. There is no attack upon the agreement as having been obtained by fraud. There is nothing but the suggestion in the testimony—the suggestion that the signer, in one case, did not know what he was signing, and from the other signer, the suggestion, which he admits is a guess, that he could not have known what he was signing, or he would not have signed it.

Now, I respectfully submit that, under that state of facts, there is nothing left of defense to this action, upon the written contract. The written contract is clear, unmistakable, legible. The people who signed it were in possession of their faculties and were business men of experience, and I say that it is the settled law—I think I can re-

fer your Honor to cases, settled law in this state that in a court of law a party who makes such a contract will be held answerable under it, without regard to any contingents on their part that they did not read it, or did not know what they were signing. In other words, that the law does not protect, as the guardian would a child, from the consequences of their own acts, done with full understanding of the fact that they were signing a paper.

There is no room in a court of law for that defense. "I signed it; yes, it is mine. It is a corporate deed, the corporate agreement, under the corporate seal, but I have no recollection of it, and I must conjecture that I did not know about it, or I would not have signed it. I have no recollection of it."

It cannot be that a forgetful or poor memory can be a defense in a court of law, on an undisputed contract.

The Court: Motion denied; grant you an exception.

Mr. Skinner: Yes.

The Court: I think that if the contract was not brought to the minds of the contracting parties, it was not a contract; if there were some interlineations made in it afterwards which changed the contract from its original condition that, of course, would void it. I think the premise of law is that it was a contract, as it purports to be, but I think that that may be overcome by the testimony, and where there is some testimony, as is here, from which an inference might be drawn, I think it becomes a jury question. That is my theory, and it is on that theory that I shall charge the jury with respect to that contract.

Plaintiff's Motion for Direction of Verdict.

I shall instruct the jury that if they find that was not the contract that they signed, then it was void. If it was a contract, then it means what it says and they are bound by it. That is my theory. I think it is only fair to you, at this time, to tell you what my conception of the issues in this case is, so that you may be somewhat in accord with the Court, if you wish to, in your summation. Then, in addition to that, and beyond that, I shall define to them quantum meruit, and instruct them that, irrespective of that contract, if they find the element present of the quantum meruit, there can be a recovery on either that or the contract.

Mr. McGlynn: I was going to ask, if your Honor please, in this case, in view of the fact that there are two counts on which the plaintiff now rests its case, in view of the apparent inconsistencies of the two claims, that the plaintiff be required in this case to give me an opening, before the summation.

The Court: I suppose Judge Skinner will have no objection to that.

Mr. Skinner: To what?

The Court: Opening to the jury so that Mr. McGlynn may know what you are relying on; is that what Mr. McGlynn asks?

Mr. McGlynn: Yes.

The Court: Just briefly explain to the jury and to him just what you are relying upon.

Mr. Skinner: Yes.

The Court: Bring the jury back.

(Thereupon the jury was recalled.)

Mr. Skinner opens in behalf of plaintiff.

Mr. McGlynn sums up in behalf of defendant.

Mr. Skinner sums up in behalf of plaintiff.

Adjourned until tomorrow, October 1, 1930, at ten o'clock A. M.

Charge of the Court.

October 1, 1930; 10:00 A. M.

The Court charge the jury as follows:

PORTER, *J.*

Gentlemen of the Jury:

You have been impaneled to try an issue of fact, or issues of fact, which are raised in a suit brought by Fiedler Corporation against the Manufacturers Developing Company. It grows out of an arrangement that was made with respect to the leasing of property owned by the defendant.

The judge is the judge of the law, and you are the judges of the facts, and it is because there are facts in dispute in this controversy that the matter is being submitted to you for your determination, and any motions that may have been made—and there were motions addressed to the court, with respect to the law—were decided by the court, and you may know how they were decided from the newspapers, or otherwise, although they were argued out of your presence. They did not concern you and must not influence you in any way. The questions that were then presented were decided by the court, purely on questions of law, and suffice it to say that the court considers there are questions of fact here which require your determination. That is why it is before you.

The suit is for commissions and it narrows down now, on the proofs, whether or not there should be commissions paid the plaintiff for the rental that is involved in the lease of May 24, 1927, made by the defendant corporation to the Brandes Products Corporation for an annual rent of $28,500.00 and for a period of eight years and nine month, as I recall it. That is the question that now presents

itself to you, whether or not the plaintiff is entitled to five per cent commission on the aggregate amount of rent.

The rental began on the 15th of September, 1927, when the commission, if any was due, was due; and if you find a verdict, it will be on the gross amount of the rental with interest from that date, September 15, 1927, the exact figures of which I will give you later.

Now, the plaintiff contends that it is entitled to this commission on two theories. First, that it had a written contract, undated, but which was executed on June 16, 1926, at which time another lease was entered into between the defendant and the Brandes Products Corporation, and that agreement, says the plaintiff, bound the defendant to pay a commission at the rate of five per cent. on any leases that might be made between the Brandes Corporation and the defendant on any property that it then owned or any property that it might in the future obtain. The plaintiff says that that contract was entered into because it was its customer, that it had procured the tenant, and that a lease on that day would not have been made if the plaintiff company had not found this tenant, and so it says, "You pay us five per cent. commission on this lease; and if there should be a renewal of this lease, you also pay us five per cent. commission, and if you lease any other property which you now own, or which you may afterwards acquire, to this, our customer, you also pay us a commission on the same basis."

That is what the plaintiff says was the contract which was signed, and so the plaintiff says, on that basis, it is entitled to this commission because

a year later—less than a year later—on May 24, 1927, another lease was negotiated between the parties, and under the terms of that contract says that it is entitled to a commission on that lease.

Now, the plaintiff also says that if it be true that this contract did not exist legally, if it be true that there had been interlineations in it that changes it after it was signed, or that it was procured by fraud, or that it is no contract because they did not know, there was no meeting of the minds, they signed it inadvertently without knowing what it was, thinking it was a specification or something else, then the plaintiff says, "We are still entitled to our commission on that May 24, 1927, lease on what, in law, is known as the *quantum meruit,* that is, for the reasonable value of our services," that is, on an implied contract; and the law says that where one performs services for another, at his request, but without any agreement or understanding as to remuneration, the law implies a promise on the part of the party requesting the services to pay a just and reasonable compensation. So the plaintiff says, on that theory, "If you disregard that contract, for the reasons stated, we still are entitled to a commission because, at the request of the defendant, we did something for which we are entitled to be paid; they received the fruits of our labors and we are entitled, then, to be paid the reasonable compensation for that, what is customarily paid in transactions of that kind, which, under the testimony, is five per cent. of the gross rental," and so the plaintiff says, "If we are not entitled to receive this compensation for the reasons stated, if you so find on the written contract, on the written agreement, we are on this implied contract, if you find that we were the pro-

curing cause of this lease," which, after all, is the gist of the services or work in a suit of this kind, whether the action of the broker was the procuring cause for the entering into of a lease.

Now, that raises the issues, because the defendant says, first, that there was no contract. It says, "We do no deny that we signed this Exhibit P-2 and that our corporate seal was attached, but there was a mass of papers signed on that day; and we do not know, we have no recollection of it, we were not given a copy, and we have no recollection of it whatever, and our theory is that it was signed by us, with those other papers, by mistake; it was not brought to our attention, our minds did not meet on the proposition, we knew nothing about it, and, therefore, it is not binding, it is not a contract, there was no meeting of the minds."

And then they say, on this *quantum meruit* proposition, "It is true that after the lease of June 16, 1926, commissions on which were paid in full, and there has been no renewal of that lease and therefore there are no commissions due on that lease for renewals, Mr. Vail did continue negotiations attempting to bring us together on another lease, and he sought to have us build a building for this tenant, the same tenant, but those negotiations fell through; we were all over that phase of the matter, those negotiations did not bear fruit, we stopped, and then we took up with the tenant directly, and without the intervention of the agent, another proposition, distinct and different, at a subsequent time, and we have distinctly arranged between us, or understood between us, that there were to be no commissions." Of course, that did not bind the Fiedler Corporation, if the Fiedler

Corporation was entitled to commissions, but they say, "We negotiated the lease of May 24th without the intervention of Mr. Vail or anyone for the Fiedler Corporation; they had nothing to do with it, they were not the procuring cause."

And if you should eliminate the contract, then it becomes very important as to whether or not Mr. Vail, the agent for the Fiedler Corporation, was the procuring cause of the lease of May 24th. Was it the result of his negotiations that that lease was entered into, or not? Was there a breaking off? So you have those questions of fact to determine.

If there should be a recovery, the amount is fixed, and I wish one of you might write down these figures. It is five per cent. of the total rental, and my calculation—and counsel agree with me—is that the commission amounts to $12,468.75, with interest for three years and a half a month, and that I figure to be $2,275.53. Now, if the verdict be for the plaintiff, it must be in the aggregate of those two amounts—I have not added them up; and if it be for the defendant, your verdict must be no cause for action. There can be no other verdicts except those two, either for the sum total of those two items that I have given you, in favor of the plaintiff and against the defendant, or nothing.

Now, I am requested by counsel to charge you various things, and I do charge you as follows, on behalf of the plaintiff first.

No. 1: If you find that there was a verbal authorization to Fiedler Corporation, or to Mr. Fiedler or Mr. Vail, to procure tenants for any part of the twenty-one acre tract owned by the Manufacturers Developing Company, and that

Fiedler Corporation did procure the Brandes Products Corporation as such a tenant, on terms which Manufacturers Developing Company accepted, Fiedler Corporation is entitled to commissions on the gross rentals for the full term of the lease made to Brandes Corporation or Federal Telephone Company, together with the gross rentals of any renewals thereof, if there was a renewal.

Now, of course, there isn't any significance, I take it, to the Federal Telephone Company, under the proofs as they now exist. This was probably prepared before the case got that far, because, I repeat, the only question now in the case is the one lease in which the Federal Telephone Company was not involved.

No. 2: A broker is entitled to commissions when he has procured a tenant able and willing to enter into a lease on terms on which the broker was authorized to act.

Of course, this is not very important, because, in this case, there was a lease. It was not a question of being able to do it. It did do it. It entered into the lease, I mean to say, on the lease of May 24, 1927, the only lease in question.

No. 3: A broker is entitled to commissions if he is requested to bring a tenant who will lease on terms to be agreed upon between the owner and tenant and thereafter brings to the owner a tenant who enters into such a lease as a result of the negotiations initiated by him.

In other words, there need not be, at the beginning, detailed instructions to the agent. The owner may say, "I want a tenant, you bring me a tenant, and if he and I can get together on the period of the tenancy and the rent, of course, you will

get a commission; you bring me a customer and I will sew him up and have him sign on the dotted line." Now, if that happened, the broker has made his commission. If, on the other hand, there are terms in the contract that have not been complied with, then, of course, the broker is not entitled to his commission unless he does that for which he is hired. Here it is the contention of the plaintiff that the job that the broker had was to procure a tenant suitable to the owner, that the owner would close with and make a lease, particularly, says the plaintiff, as the buildings were not even in existence, because, on this contract, that they were not only finding him a tenant but were finding a tenant for a proposed building.

No. 4: You should award the plaintiff commissions on any or all leases as to which you find the plaintiff was the procuring cause.

Well, of course, on that again the only question here is as to this one lease, on May 24, 1927.

No. 5: It is not contradicted that after the lease of June 16, 1926, was made the Fiedler Corporation brought Brandes Corporation and defendant together in further negotiations for another lease on terms to be agreed upon between them. If, as a result of those negotiations, a lease was entered into on May 24, 1927, and plaintiff was the procuring cause, plaintiff cannot be deprived of its commissions though that result was reached without its further participation of knowledge.

Of course, that begs the whole question. I mean by that, the plaintiff says that is what happened. "It was as a result of our negotiations that this lease of May 24, 1927, was entered into, therefore we are entitled to commissions, we were

the procuring cause," and the defendant says, "Oh, no, that was our job and our negotiations that brought that about; you were through, your negotiations had ceased, therefore you were not the procuring cause." You see, that is one of the questions of fact.

No. 6: The plaintiff is entitled to recover commissions from the defendant under the commission agreement of June 16, 1926, for the lease made by the defendant with Brandes on May 24, 1927, unless you find that the plaintiff procured the execution of the commission agreement by the defendant through fraud.

I have already covered that. In fact, there is quite a little repetition. I have already covered, more or less of these, in my own way, in my own language, but I am covering them again because counsel has requested me to cover these points, and for fear I have not clearly pointed them out, in all fairness to both sides, I am guilty of taking your time and perhaps repeating, more or less.

No. 7: The amount of commissions to which the plaintiff is entitled, if you find in its favor, is five per cent. on the gross rental under the lease of May 24, 1927, with interest from September 15, 1927. It is admitted that their gross rental is $249,375.00, so that the commission is five per cent. on that amount, or $12,468.75, with interest at six per cent. from September 15, 1927.

No. 8: The defendant is bound by the written agreement made on June 16, 1926, and which it admittedly signed unless this agreement was procured by actual fraud. The fact that the defendant did not choose to read the paper before signing or did not know its contents at the time, will not

relieve it from its obligations in the absence of actual fraud.

No. 9: The fact that the defendant admittedly signed the written agreement of June 16, 1926, creates a presumption, except as against fraud, that the defendant read, understood and assented to its terms.

No. 10: The burden of proving that the written agreement of June 16, 1926, covering the payment of commissions to the plaintiff by the defendant was procured by fraud is upon the defendant, and the defendant must establish such fraud by clear and satisfactory proof.

Now, I charge you these requests, on the part of the defendant, as the law:

1: There is no similarity legally between a renewal of an existing lease and an entirely new lease covering different property although it may be between the same parties. Evidence of a custom under which real estate brokers are entitled to a commission on a renewal of a lease is not proof that they are entitled, in the absence of an express agreement, to commission on an entirely new lease, even although between the same parties, which covers different premises. In order for a real estate broker to recover for commission on an entirely new lease, such as has been described, he must prove either an express agreement under the terms of which a landlord agreed to pay him a commission, or an implied agreement, in which event the proofs must show that he performed services at the request of the landlord and that he was the efficient procuring cause of the lease.

2: While it may be true that a broker can recover damages from a landlord because of his interference in pending negotiations by the broker, which might have culminated in a lease between the landlord and tenant, still in the case now being tried, there was no allegations in the complaint under which the plaintiff in this case can recover on any such alleged cause of action, and any proofs which were permitted in this case dealing with any such alleged interference, were not permitted for the purpose of proving any such cause of action, but were merely allowed on the part of the plaintiff to show the extent of the services performed by it under its claim on an implied contract.

3: Unless a broker is given the exclusive right to act, one employing a broker to sell or lease property, may, notwithstanding, negotiate a sale or lease himself, and if he does so without the agency of a broker, and before the latter has procured a purchaser or lessee, he is not liable to the broker for a commission provided such sale or lease is not made in bad faith for the purpose of defeating the broker, in procuring his commission.

4: There can be no implied contract where there is an express contract between the parties in reference to the same subject matter.

In other words, to amplify that, the plaintiff contends that there is both, but it says, "If you say there was no written contract, we then say we are entitled, under an implied contract, and we say there was an implied contract, and, alternately, we also say, that if there was no express contract, if this was fraudulently procured, in other words, if this was not the contract that was intended to be signed, if there were certain mistakes that render-

ed a void contract, then, and only then, do we say there was an implied contract. We do not say that they were both to do the same thing." That is what this means, or, at least, if it doesn't mean that, I charge it to mean that.

5: The plaintiff is limited in its recovery by the allegations in the complaint filed by it when this suit was instituted. The only allegation in plaintiff's complaint which deals in any way with an implied contract or claim under *quantum meruit* is the sixth count, which contains the following allegation:

> "During the years 1926 and 1927 the plaintiff, at the request of the defendant, performed services for the defendant as agent and broker in the leasing of premises of the defendant on Thomas Street and Avenue C in the City of Newark, which resulted on or about May 24, 1927, in a lease between the defendant and Brandes Products Corporation for a portion of said premises for the period of nine years, from June 15, 1926, at an annual rental of $28,500.00."

Under the allegation just quoted from plaintiff's complaint, in order for the plaintiff to recover, you must be satisfied by a fair preponderance of the testimony that the plaintiff performed services for the benefit of the defendant and that such services were the efficient procuring cause for the execution of the lease between the defendant and the Brandes Products Corporation dated May 24, 1927.

In other words, that is another way of saying what I have already said two or three times, I think.

Mr. McGlynn: Now, the next one, you have covered that; you may omit that.

The Court: No. 6, I have covered it.

(Continuing) Now, there you have the situation. The case has been very ably tried; the case has been very thoroughly and ably summed up to you. It is an important case. It involves a large sum of money. The issue is rather a narrow one. I have tried, in my own way, to point it out to you, the issue. Your duty is to decide those questions of fact, without fear and without favor, according as you find the true facts, and you must find those facts from your recollection of the testimony rather than from mine. Counsel have quite thoroughly and minutely discussed all of the testimony. I have just touched some of the high spots, and there is no significance in my not having gone into the testimony more in detail than I have. You must consider it all. If, in anything I have said, about the testimony, I made any errors, you will disregard any such erroneous statements that I have made as being the testimony and depend on your own recollection of what the testimony was, rather than mine.

The judgment should be in favor of the plaintiff, and against the defendant, for the amount that I have stated, if you find for the plaintiff, either on the contract expressed or the contract implied. If, on the other hand, you find for the defendant, on the theory that there was no such legal contract as relied upon, and, further, that the negotiations which were culminated in this lease were not by Mr. Vail or any one for the Fiedler Corporation, and that they were not the procuring cause, then, of course, your verdict will be for the defendant,

and in that event your verdict must be no cause for action.

You may retire.

(The jury retires.)

DEFENDANT'S EXCEPTIONS.

Mr. McGlynn: Your Honor, allow me an exception to your Honor's charging the plaintiff's requests Nos. 1, 2, 3, 4, 5, 6 and 8, and remarks of your Honor following those requests. I think you made some remarks, after each request, and to those I would like to take exception.

Exceptions noted as ground of appeal.

Mr. McGlynn: Also your Honor's remarks after reading the defendant's request to charge No. 4.

Exception noted as ground of appeal.

P2 Ev.

WHEREAS the undersigned acknowledges that the FIEDLER CORPORATION procurred as tenants in our premises located 350 Thomas St., Newark, N.J. the Brandes Products Corporation and the Federal Telegraph Company,

NOW, THEREFORE, in consideration of the services rendered by the Fiedler Corporation should the within mentioned tenants, their successors, or assigns renew their lease, or extend their occupancy beyond the original term, or lease additional space in the premises in question or any other premises we may own; or should they purchase the premises referred to, or any other property which we may own we agree to pay the Fiedler Corporation a commission of five (5%) per cent. on the gross rentals involved in such renewals, additions, or extensions of the lease; or if a sale is made as beforementioned a commission of five (5%) per cent. of the gross sale price.

The said commission to be due and payable upon the date of execution of the leases or contracts of sale.

MANUFACTURERS DEVELOPING COMPANY,

Chas Pfleiaitz Res

Edwin E. Ross
Sec'y Treas

Date 19

In consideration of services rendered and expense incurred by the Fiedler Corporation and which it may hereafter render and incur, the undersigned hereby constitutes and appoints it sole sales and renting agent for the premises known as No.

more fully described on the back of this agreement, which description is made a part hereof, and agree to pay said Fiedler Corporation upon the undersigned contracting to sell, lease, or exchange the same, or upon it procuring a customer willng to contract to purchase, rent or exchange on terms which are named on the back hereof and made a part hereof; or upon such terms the undersigned may later agree to accept, the following rate of commission, i. e.:

For the sale or exchange thereof per centum on the first $
and per centum on all sums in excess thereof.
Where property is taken in exchange, the amount on which the commission shall be based shall include the value at which said property is taken in exchange by the undersigned.

For the renting thereof per centum on the gross rental for the first years of the term, and per centum on the gross rental for the balance of the term.

Should any tenant procured by Fiedler Corporation,or the successors or assigns of such tenant renew their lease, or extend their occupancy beyond the original term, or lease additional space in the premises in question from the undersigned, whether before or after the termination of this agreement, the said Fiedler Corporation shall be entitled to and the undersigned agrees to pay it an additional commission based on the same rate as herein provided for in the original letting, and the said Fiedler Corporation shall for all intents and purposes be deemed and recognizezd as the duly authorized agent who effected said renewals and leases.

In the event that any tenant procured by Fiedler Corporation or the successors or assigns of any such tenant purchases the property which is the subject matter of the lease from the undersigned, whether before or after the termination of this agreement the undersigned for all intents and purposes will recognize Fiedler Corporation as the duly authorized agent who effected said sale and secured said purchaser, and agrees to pay it the full commission upon the purchase price according to the customary rates provided for in the event of a sale.

The undersigned may terminate this agreement after days from the date hereof by serving upon Fiedler Corporation written notice of such termination at least days prior to the date when the termination is to be effective. Such termination, however, shall in no way effect the right of Fiedler Corporation to commission on leases or sales made to customers procured by it prior to such termination, though said deals be consummated thereafter.

(L.S.)

(L.S.)

CLASS | MATERIAL | FOUND'TN | ROOF | BLDG. H'GHT.

FLOOR DESC'T'N	SIZE	LOAD	LEASE EXP.	C'LG-HG'T	Col. C'nt.	No. AND KIND ROOMS AND APARTMENTS
BASEMENT						
FIRST FLOOR						
SECOND "						
THIRD "						
FOURTH "						
OTHER "						TOTAL No. ROOMS

ELEV'T'RS | BOILER MAKE H. P. | ENGINE MAKE H. P. | R. R. SIDING | TANK PUMP | WELL

POWER | LIVE STEAM | SPRINKLER | HEAT | LIGHT | GAS

RESTR'T'NS | ZONE | HEAT-LIGHT FURN. BY | AGE BLDG. | FLOORS

STYLE OF FRONT | MAT. FRONT | JANITOR HALL SERV. | PAVEMENT

GARAGE DRIVEWAY | GARAGE HEAT | OTHER OUT BLDGS. | GAS RANGE ICE BOX

ASSESSED | RATE | FLAGGING | SEWER

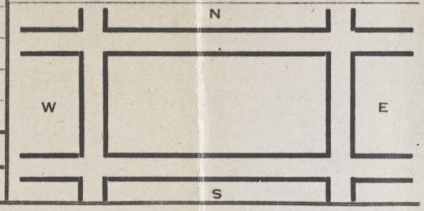
SIGN | KEY AT | PHOTO No | FIRE-PLACE

CANCEL. CLAUSE | EXCHANGE FOR

INCLUDED IN PROPERTY SALE { GAS RANGE—LIGHTING FIX.—SHADES—SCREENS / AWNINGS—STORM SASH—ICE BOX

LISTED BY | DATE | EXCLUS | EXP.

SIZE LOT



OWNER | REACHED AT | PHONE

No. | CITY

PRICE $ | TERMS

MORTGAGES	AMOUNT	DUE	%	HOW PAYABLE	HELD BY	ADDRESS
FIRST						
SECOND						
OTHER						

GROSS INCOME	$
GROSS EXPENSE	$
NET INCOME	$

INSURANCE		EXPIRES
FIRE	$	
LIABILITY	$	
ELEVATOR	$	
COMPENSATION	$	
PLATE GLASS	$	
BOILER	$	
RENT	$	

INCOME	EXPENSES	LEASING DEPARTMENT
BASEMENT	INTEREST	RENTAL TERMS
STORES	TAXES	
	WATER	
UPPER FLOORS	COAL	LENGTH OF LEASE
	INSURANCE	
	HELP	
GARAGES	LIGHT & POWER	
ROOF	REPAIRS	POSSESSION
LAND	VACANCIES	
		CANCELLATION
TOTAL	TOTAL	SECURITY

REMARKS

S | SL | L

Stipulation as to Exhibits.

NEW JERSEY COURT OF ERRORS AND APPEALS.

FIEDLER CORPORATION, a corporation, Plaintiff-Appellee, vs. MANUFACTURER'S DEVELOPMENT CO., a corporation, Defendant-Appellant.	Action at Law. On Appeal. Stipulation.

It is hereby stipulated and agreed by and between Messrs. Pitney, Hardin & Skinner, attorneys for the plaintiff-appellee and Messrs. Stein, McGlynn & Hannoch, attorneys for the defendant-appellant, that the state of the case to be used on appeal be abridged in the following respects, to wit:

1. That in place of printing the four leases which were offered in evidence and marked Plaintiffs Exhibits P-3, P-5, P-6 and P-7, there shall be printed brief abstracts of said leases as set forth in the schedule annexed hereto and made part hereof.

PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiff-Appellee.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant-Appellant.

New Jersey State Library

SCHEDULE.

Exhibit P-3.

A lease between Manufacturers Development Company as lessor and Brandes Products Corporation as lessee dated June 16, 1926 covering premises known as No. 350 Thomas Street, in the City of Newark, New Jersey, having a frontage of one hundred and fifty two feet on Thomas Street and a depth of four hundred and three feet, with the buildings erected and to be erected thereon, and the use of the railroad siding, said lease being for a term beginning June 15, 1926 and ending June 15, 1931 at noon, at an annual rental of $13,500.00 until a new building is erected, and $28,500.00 thereafter, payable in equal monthly installments in advance on the fifteenth day of each month, with an option of renewal for five years from June 15, 1931 at annual rental of $28,500.00. Said lease was executed by both parties.

Exhibit P-5.

A lease between Manufacturers Development Company as landlord and Federal Telegraph Company as tenant, dated May 1926, covering premises known as No. 15 Avenue D, being property situate two hundred feet, more or less south of Thomas Street on the easterly side of Avenue D, in the City of Newark, New Jersey, together with the land having a frontage of two hundred feet and depth of two hundred and fifty feet, more or less, for a term commencing May 15, 1926 and ending May 15, 1927, at the annual rental of $9,000.00 payable in equal monthly installments in advance

on the fifteenth day of each month, which said lease was executed by the Federal Telegraph Company but not by the Manufacturers Developing Company.

Exhibit P-6.

A lease between the Manufacturers Developing Company as landlord and the Brandes Products Corporation as tenant, dated May 24, 1926, covering premises known as No. 350 Thomas Street, the said building being a one story building of monitor type having a frontage of one hundred fifty feet and a depth of two hundred feet, including the use of the siding of the Pennsylvania Railroad, for a term commencing May 15, 1926 and ending May 15, 1927, at the annual rental of $13,500.00, payable in equal monthly installments in advance on the fifteenth day of each month, which said lease was executed by both parties.

Exhibit P-7.

A lease dated May 24, 1927, between Manufacturers Developing Company as lessor and Brandes Products Corporation as lessee, covering premises therein described by metes and bounds consisting of a tract of land fronting on Thomas Street, forty feet westerly from Adams Street, one hundred thirty five feet front by one hundred ninety five feet in depth, and a building to be erected thereon, as more particularly set forth in said lease, for a term beginning with the substantial completion

of the building and terminating on the fifteenth day of June 1936, at an annual rental of $28,500.00, payable in equal monthly installments in advance on the fifteenth day of each month, together with water rents, said lease having been executed by both parties. Privilege of renewal for this lease and lease between the same parties dated June 16, 1926 (Exhibit P-3) for a further period of ten years beginning June 15, 1936 at annual rental to be agreed upon, with provision for arbitraton to determine rental, the finding of the arbitrators to be conclusive. With further option to rent all or part of certain adjoining land for the period of this lease and any renewal, the rental for such additional land to be determined by actual agreement or by arbitration the finding of the arbitrators to be conclusive. With further option of a further renewal for said additional land.

Exhibit D-1.

Sept. 22nd, 1925.

Mr. William Fiedler,
c/o Fiedler Corp.,
14 Park Place,
Newark, N. J.

Dear Bill:

We are at present erecting on our Thomas Str. property a new and strictly up to date one story brick factory building, steel sash, monitor roof, cement floor, Pennsylvania and Lehigh Valley R. R. siding, about 200 x 150 or 30,000 sq. ft. on one floor.

Exhibit D-1.

The building faces on Thomas Str. near the corner of Adams Str., is splendidly located from the industrial standpoint, being but one block in from South Str. which as you know is the main highway to Port Newark.

We expect that same will be completed on or before October 15th, as the steel roof girders have all been set, and we would entertain a proposition to lease same for a term of years at .50 cents per sq. ft. per annum.

As in alternative to the above, we would be willing to lease out the building at present occupied by the National Box & Lumber Co. at 350 South Str. This is of two story brick construction, about 14,000 ft. floor space, faced on South Str. and extends through to the rear on Clifford Str., with ample yard space in rear. No railroad siding.

Please list both of these propositions and get in touch with us at once if you have any present prospects.

With kind personal regards, I am

Yours very truly,

Treasurer.

EER:ECS

Exhibit D-3.

Real Estate Mortgage Loans Insurance.

FIEDLER
CORPORATION

Fiedler Bldg.—14 Park Place—Newark, N. J.
Next Door to the Newark Athletic Club.
Phones Mulberry 4424-5-6-7

September 28, 1925.

Manufacturers Developing Co.,
352 South Street,
Newark, N. J.

Attention Mr. E. E. Ross

Dear Elmer:

We thank you for confidence reposed in listing with us for lease property situated on Thomas Street, and assure you our best efforts will be directed to find satisfactory tenants for you.

Yours very truly,

FIEDLER CORPORATION
by WM. C. FIEDLER.

WCF/B

Exhibit D-4.

THIS AGREEMENT, made the sixteenth day of June, in the year nineteen hundred and twenty-six, by and between THE MANUFACTURERS DEVELOPING COMPANY, a corporation of New Jersey, with principal offices at 348-356 South Street, Newark, New Jersey, hereinafter called the OWNER and JAMES F. MITCHELL trading as JAMES F. MITCHELL COMPANY, with offices at 30 Church Street, New York City, hereinafter called the CONTRACTOR,

WITNESSETH:

That the Owner and Contractor, for the considerations hereinafter named, mutually agree as follows:

ARTICLE 1—The Contractor agrees to provide all the materials and to perform all the work shown on the drawings and described in the specifications entitled

ADDITION TO FACTORY BUILDING FOR MANUFACTURERS DEVELOPING COMPANY, NEWARK, N. J.

prepared by James F. Mitchell Company, New York City, and identified by the signatures of the parties hereto, and to do everything required by the General Conditions of the Contract, the specifications and the Drawings.

ARTICLE 2—The Owner agrees to pay the Contractor, in current funds, for the performance of the Contract, the sum of Sixty-Eight Thousand Four Hundred ($68,400) Dollars subject to additions and deductions as provided for in the General Conditions of Contract and to make payment on account thereof as follows:

Exhibit D-4.

1. When the foundations are complete	$4,000
2. When all walls are up ready for roof trusses	6,000
3. When roof is on, windows and doors installed, so that building is wind and water tight	8,000
4. When cement floor is laid, boiler installed, water installed and connected, heater set, sprinkler system in, and plumbing work complete	5,000
5. When building is complete according to plans and specifications	cash 5,400
	$ 28,400

And Forty Thousand Dollars, in promissory notes of Manufacturers Developing Company, endorsed by Charles Lefkowitz and Elmer E. Ross, individually to the order of James F. Mitchell Company, and so arranged as to be payable, $1,250. per month until the entire sum of $40,000 is paid.

ARTICLE 3—The Owner and the Contractor agree that the General Conditions of the Contract and the specifications as explained by the Drawings, together with this agreement, form the Contract, and that they are as fully a part of the Contract as if hereto attached or herein repeated; and that the following is an exact enumeration of the Specifications and Drawings, and the General Conditions of Contract—

SPECIFICATIONS are entitled "Specifications addition to Factory Building for Manufacturers Developing Company, 326 Thomas Street, Newark, New Jersey"

DRAWINGS are entitled in addition to "Fac-

tory Building for Manufacturers Developing Company, 326 Thomas St., Newark, N. J., James F. Mitchell Co., Engineers & Contractors, 30 Church Street, New York City."

GENERAL CONDITIONS OF CONTRACT are entitled "General Conditions of Contract, Factory Building, for Manufacturers Developing Company, Newark, N. J." sheets 1, 2, and 3.

If the Contractor should neglect to prosecute the work properly or fail to perform any provision of this contract, the Owner, after three days' written notice to the Contractor, may, without prejudice to any other remedy he may have, make good such deficiencies and may deduct the cost thereof from payment then or thereafter due the Contractor.

If the Contractor should be adjudged a bankrupt, or if he should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of his insolvency, or if he should, persistently or repeatedly, refuse to fail to supply enough properly skilled workmen or proper materials, or if he should fail to make promptly any payment to subcontractors or for material or labor, or persistently disregard laws, ordinances, or otherwise be guilty of a substantial violation of any provision of the contract, then the Owner may, without prejudice to any other right or remedy and after giving the Contractor seven days' written notice, terminate the employment of the Contractor and take possession of the premises and all materials, tools and appliances thereon and finish the work by whatever method he may deem expedient. In such case the Contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the contract price shall exceed the expense of finishing the work, such excess shall be paid

to the Contractor. If such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner.

If the work should be stopped under an order of any court, or other public authority for a period of three months, through no act or fault of the Contractor or of any one employed by him, or if the Owner should fail to pay to the Contractor, within seven days of its maturity and presentation, any sum due or awarded by arbitrators, then the Contractor may, upon three days' written notice to the Owner and the Architect, stop work or terminate this contract and recover from the Owner payment for all work executed and any loss sustained upon any plant or material and reasonable profit and damages.

If either party to this contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of any one employed by him, then he shall be reimbursed by the other party for such damage.

The Contractor shall at all times keep the premises free from accumulations of waste material or rubbish caused by its employees or work and at the completion of the work it shall remove all its rubbish from and about the building and all its tools, scaffolding and surplus materials and shall leave its work "broom clean" or its equivalent, unless more exactly specified. In case of dispute the Owner may remove the rubbish and charge the cost to the contractor.

The Contractor agrees to complete building so that it is wind and water tight on or before the 15th day of September, 1926 and to complete the building in every respect according to plans and specifications on or before the 15th day of October, 1926.

If Contractor shall fail to complete the

building, so that it is wind and water tight as above defined by said 15th day of September, 1926, he shall pay to the Owner $100. for each day that shall elapse after that date until such completion, as liquidated damages, and such sum may be deducted from any payment due the Contractor.

If said building is so completed before September 15th, 1926, the Owner shall pay the Contractor $40.00, in addition to the contract price for each day that shall elapse after such completion and before September 15th, 1926.

The Contractor agrees that upon the completion of the building, so that it is wind and water tight, the tenant of the Owner may enter into possession thereof, and that the Contractor will complete the remaining work in such a manner as to cause no unnecessary inconvenience to tenant.

"Wind and water tight" is construed to mean that the walls, floors and roofs of said building shall be complete. The windows, doors and other openings shall be closed, wind and water tight, and the lighting system shall be installed.

The Owner and the Contractor, for themselves, their successors, executors, administrators and assigns, hereby agree to the full performance of the covenants herein contained.

Exhibit D-4.

In Witness Whereof, they have executed this agreement the day and year first above written.

Manufacturers Developing Company,
By Chas. Lefkowitz, Pres.

Attest:
Elmer E. Ross,
Secretary.
(Corporate Seal)

James F. Mitchell Company,
By James F. Mitchell.

Witness:
Muriel W. Shaw.

(Endorsed)

AGREEMENT

Between
Manufacturers Developing Company,
and
James F. Mitchell Company.

Dated: June 14, 1926.

Reed & Reynolds,
Counselors-at-Law,
810 Broad St.,
Newark, N. J.

Exhibit D-5.

Sept. 13, 1926.

Mr. J. F. Mitchell,
30 Church St.,
New York City.

Dear Sir:

We are enclosing herewith copy of letter of Sept. 9th received from Mr. Charles Gilbert of the Brandes Corp., regarding another 180,000 sq. ft. of factory and office space, also a copy of our reply.

Please look into the matter thoroughly from all standpoints, taking plenty of time to arrive at your conclusions as befitting a proposition of this magnitude. We believe you understand.

We have not committed ourselves in any way so far on the matter, and in any interview you may have with Mr. Gilbert, we request that you make no agreements or committments for yourself or us, without our approval.

Yours very truly,

MANUFACTURERS DEVELOPING COMPANY,
President.

CL:ER
Enc.

Exhibit D-6.

BRANDES PRODUCTS CORPORATION
200 Mount Pleasant Avenue, Newark, N. J.

September 9th, 1926

Mr. Charles Lefkowitz,
c/o National Box & Lumber Co.,
350 South Street,
Newark, N. J.

Dear Sir:

We would be interested in taking on an additional lease for a long term of years on about 180,000 additional square feet of factory and office space, adjoining our present Thomas Street Plant if suitable terms could be arranged with respect to the rental, etc.

We would be interested in getting particulars from you as to just what space is available, location of same, price per square foot, rapiditiy with which the buildings could be erected for occupancy, etc.

A conference on the subject would be advisable as soon as you have collected sufficient data to discuss the matter in detail.

Yours very truly,

BRANDES PRODUCTS CORP.

CHAS. GILBERT.

CG*ED

Experts in radio acoustics Since 1908

Exhibit D-7.

BRANDES PRODUCTS CORPORATION
200 Mount Pleasant Avenue, Newark, N. J.

March 24, 1927.

Manufacturers Developing Co.,
South Street,
Newark, N. J.

Attention: Mr. Chas. Lefkowitz.

Gentlemen:

Confirming our conversation of the other day, we are desirous of renting a three story building containing 60,000 square feet, this building to be erected along side of the building now occupied by us facing on Thomas Street and extending back from Thomas Street a distance of about 200 feet, the distance between buildings to be in the neighborhood of about 35 feet. The present railroad siding is to be moved over and extended almost to Thomas Street so that it will run between the two buildings.

The lease on this three story building we would like to have run concurrently with the present lease, that is, for a term of four years from June 1927 with an option for renewal for a further period of five years. We would like to have this building ready for occupancy as soon as possible and not later than May 15th.

Regarding the rental to apply to this building, we understand that at this time you are unable to determine just what the figure will be as it will be necessary for you to have definite plans of the building in order to secure proper cost figures. Will you kindly have Mr. Mitchell call on us as

Exhibit D-7.

soon as possible so that we may explain to him exactly what is wanted.

Yours very truly,

BRANDES PRODUCTS CORP.
J. H. HALL.

JHH/TF

Experts in radio acoustics Since 1908

Exhibit D-9.

March 25, 1927.

Brandes Products Corp.,
200 Mt. Pleasant Ave.,
Newark, N. J.

Att: Mr. J. H. Hall.

Gentlemen:

We have yours of March 24th setting forth your desires for a sixty thousand (60,000) square foot building of three stories, to be located alongside your present Thomas Street plant.

There is, of course, a great deal of detail in connection with same, and we have asked Mr. Mitchell to submit plans, etc., as quickly as possible, in order that we may have definite figures on which to base any proposition we may make you.

You will appreciate that at this writing, we are not certain as to how we can finance the project. We are, however, sure that it would not be possible to arrange it on the basis of a four year lease as suggested. A straight eight year lease would probably be necessary, together with some assistance from yourselves in the shape of a two year rent

pre-payment, or something similar that would enable us to swing the proposition.

We would also point out that if we could get you the building by July 1st, it would be very quick time.

If we can get together on this matter, it is understood that there are to be no agents or brokers included; in other words, the deal is to be a direct one.

We very much appreciate your interest in putting this proposition before us, and we will get our information together as quickly as possible in order to give you a definite proposal.

Yours very truly,

MANUFACTURERS DEVELOPING COMPANY,

President.

CL:ER

Exhibit D-10.

Sept. 13, 1926

Mr. Charles Gilbert,
c/o Brandes Products Corp.,
200 Mt. Pleasant Ave.,
Newark, N. J.

Dear Sir:

Responding to yours of the 9th inst. as to the possibility of leasing an additional 180,000 sq. ft. adjoining your Thomas Street Plant, we are referring the matter to Mr. Mitchell, our Engineer, who will make a study of the available plots on our

property from the standpoint of the best location, type of construction, etc., and he will get in touch with you direct regarding same.

Yours very truly,

MANUFACTURERS DEVELOPING COMPANY,

President.

CL:ER

Exhibit D-11.

Copy of letter received from Pitney, Hardin & Skinner.

Prudential Building,
Newark, N. J. November 10, 1927.

Manufacturers Developing Co.,
18 Avenue D.,
Newark, N. J. Attention Mr. Lefkowitz

Gentlemen:

Fiedler Corporation have placed in our hands their claim against you for commissions on the rental of your properties on Thomas Street to the Brandes Products Corporation. On June 16, 1926, you agreed, in writing and in consideration of services rendered by Fiedler Corporation in leasing to Brandes Products Corporation your building at 350 Thomas Street, and also securing the Federal Telegraph Co. as tenants, to pay a commission of 5% on any renewals or leasing of additional space in this building, or any other premises owned by you, or in the event of a sale this commission to be due and payable on the date of execution of such leases on contracts of sale.

Exhibit D-11.

We understand that some time in May or June of this year a lease was made between you and the Brandes Corporation for a new building to be erected by you in the rear of or adjoining your building on Thomas Street occupied by them under the lease procured by Fiedler Corporation in June 1926. Under your written agreement Fiedler Corporation is entitled to a commission of 5% on the gross rentals under this lease. We also understand that the lease of June 1926, which contained an option for a five year renewal, has been renewed and Fiedler Corporation is entitled to the 5% commission on the rentals for the renewal period. The amount of commissions which they claim on the new lease is $12,825 based on a gross rental of $28,500 per year for nine years. They are entitled to a commission of $7,125. on the renewal of the lease of June 1926 based on the gross rental of $28,500 a year for five years. In addition to this there is a balance due for commissions in connection with the original leasing of $4025. The commissions on this lease have been paid by you in monthly installments.

We have been instructed to institute suit unless satisfactory arrangements are made by you for the payment of these commissions. We understand that you have refused to recognize your obligations under your commission agreement.

We trust that you will reconsider this and it will be unnecessary for us to institute suit.

Will you please let us hear from you by not later than Tuesday November 15th.

Very truly yours,

PITNEY, HARDIN & SKINNER.

CAF:KS

Exhibit P-9.

WHEREAS the undersigned acknowledges that the Fiedler Corporation is procuring Leon Henschel of West Orange, N. J., as a tenant for premises we are about to purchase and improve, situate #81-83 Main Street, West Orange, N. J.

NOW, THEREFORE, in consideration of the services rendered and to be rendered by the Fiedler Corporation.

First—should the within mentioned tenant, his heirs, successors or assigns enter into the said lease, the undersigned agrees to pay the Fiedler Corporation a commission of five (5%) percent on the gross rental involved. The said commission to be due and payable upon the date of receipt of payment of loan.

Second—It is also understood and agreed that should the said Henschel, his heirs, successors or assigns after the making of the original lease extend the term of the letting beyond the original term or lease additional space on the premises in question or any other premises, the undersigned may hereinafter own or should the said Henschel, his heirs, etc. purchase the demised premises, then in that event, the Undersigned or its administrators, successors and assigns agree to pay the additional commission of Five (5%) percent on the gross rental involved, any such extensions and renewals if any, and Five (5%) percent of the sale price in the event of a sale.

JAMES SUTHERLAND,

(Signed) JAMES SUTHERLAND.

F. R. SANDFORD, JR.

32 MAY.T.1931

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

New Jersey Court of Errors and Appeals

FIEDLER CORPORATION, a corporation, *Plaintiff-Appellee,* *vs.* MANUFACTURER'S DEVELOPING COMPANY, *Defendant-Appellant.*	*Action at Law.*

BRIEF OF PLAINTIFF-APPELLEE.

The appeal brings up for review a judgment entered in favor of the plaintiff against the defendant for $14,744.22, on a verdict of a jury at the Essex Circuit of the New Jersey Supreme Court. The amount of the judgment is for a commission of five per cent., with interest, on the gross rentals under a written lease made by the appellant with Brandes Products Corporation dated May 24, 1927 for a period beginning with the completion of a building to be erected by the appellant and terminating June 15, 1936 at an annual rental of $28,500.00, payable monthly (Ex. P. 7; R. p. 359, l. 30). The building was completed on September 15, 1927 (R. p. 117, l. 32).

Other claims for commissions were included in the complaint but these commissions had either been paid before the action was tried or in the cases where they were based on renewals of leases, the proofs failed to show that the leases had been renewed and the claims in that respect were not pressed. This applies to the first, second, third and fourth counts of the complaint. The fifth and sixth counts of the complaint relate

to the claim for which judgment was entered (R. pp. 1-7).

Facts.

In 1924 or 1925 appellant placed with the appellee, a well-known real estate firm in the City of Newark, a tract of some twenty-one acres of land in the City of Newark for the purpose of securing tenants. The property was mostly unimproved and the matter involved its development by the erection of buildings for tenants procured by the appellee (R. pp. 22-27, 46, 47). Appellee brought to the appellant the Brandes Products Corporation, a concern for whom appellee had previously negotiated real estate transactions (R. p. 28, ll. 18-33, p. 47, l. 10, p. 48, ll. 3-11, p. 87, l. 31 to p. 89, l. 10, p. 234, ll. 29-40). After extensive negotiations a lease was made in May 1926 for a building on the appellant's tract at No. 350 Thomas street for a period of one year, or until May 1927 (Ex. P. 6, R. p. 359, l. 10; R. pp. 88, 89, 90, 91, 234, 235). Negotiations were continued and on June 16, 1926 a further lease was executed superseding the lease of May 24, 1926 for the same premises and an additional building to be erected by the appellant adjoining the building at No. 350 Thomas street, for a five-year term at an annual rental of $28,500.00 (Ex. P. 3, R. p. 358, l. 1, p. 89, l. 30 to p. 97, l. 20, p. 234, ll. 27 to 40). Appellant paid appellee the five per cent. commission on the gross rentals under these leases, part being paid before the suit was instituted and the balance before the case came on for trial.

William C. Fiedler, the president of the appellee, testified that at the time of the original discussion with the appellant at which the property was placed with the appellee for the purpose

of development and securing tenants, the matter of commissions to which appellee would be entitled was discussed and agreed to and was five per cent. on the lease entered into and five per cent. on subsequent renewals or extensions or subsequent deals (R., p. 27, l. 33 to p. 28, l. 10). Craig E. Vail, a salesman for the appellee in charge of these negotiations with the appellant and Brandes, testified that the commissions were discussed during the negotiations leading up to the execution of the lease of June 16, 1926 (Ex. P. 3), and commissions of five per cent. on any leases upon this property negotiated with Kolster (Brandes) or any renewals or any leases that Kolster (Brandes) might contract upon appellant's property was agreed to (R. p. 84, l. 35 to p. 85, l. 20, p. 103, l. 20 to p. 104, l. 40, p. 151 to p. 152, l. 11). Appellant denies that commissions were discussed previous to the execution of the written commission agreement on June 16, 1926 (R. p. 231, l. 18, p. 235, l. 35 to p. 236, l. 20; p. 321, ll. 30 to 38, p. 322, ll. 10 to 30). At the time of the execution of the lease of June 16, 1926 the written commission agreement was executed by the appellant (Ex. P. 2, R. opp. p. 357). (The photostat in the State of Case does not show the corporate seal but the corporate seal is affixed to the original agreement.) (R. p. 236, l. 31). Mr. Lefkowitz and Mr. Ross, the president and treasurer and secretary respectively of the appellant, admit that they executed this agreement but have no recollection of it (R. p. 236, ll. 25 to 35, p. 268, l. 15 to p. 274, l. 30, p. 322, l. 40 to p. 323, l. 12, p. 330, ll. 1 to 35).

It is admitted that following the execution of the lease of June 1926, Mr. Vail, for the appellee, carried on further extended negotiations for a further lease with the Brandes Products Cor-

New Jersey State Library

poration of an additional building or buildings on the premises of the appellant. Several plans were prepared for buildings of different dimensions (Vail, R. p. 106, l. 30 to p. 117; p. 130, l. 10 to p. 133, l. 20; p. 141, l. 37 to p. 146; p. 154 to p. 155; Smalley, R. pp. 194-196; Mitchell, R. pp. 175 to 182).

In February or March 1927 before this further new lease was executed, Vail was told by Lefkowitz to stop his efforts; that he, Lefkowitz, was not going to build any more buildings (R. p. 154, l. 28 to p. 155, l. 23; p. 163). Blanche Smalley, a bookkeeper then in the employ of the appellant, testified to the same effect (R. p. 198, l. 12 to p. 199, l. 8). Lefkowitz told Mitchell, the architect preparing the plans, in March or April 1927, to say nothing to Vail about the further plans and specifications which Mitchell was asked to prepare (R. p. 181, ll. 10 to 20). Mrs. Smalley also testified that she heard Lefkowitz tell Hall, the representative of the Brandes Corporation, that he could not afford to pay Fiedler the commission at the rental which they were discussing and asked Hall to see if he could have a clause inserted in the lease whereby Brandes would pay any such commissions (R. p. 199, l. 37 to p. 200, l. 28, p. 209, l. 37 to p. 210, l. 13).

Appellant in the spring of 1927 made various payments to Hall, employed by the Brandes Company, aggregating about $2,000.00 (R. p. 203, l. 15 to p. 205, l. 30). This is admitted by Hall who testified that they were a gift to him because he had been helpful in negotiating the new lease made with Brandes in May 1927. Hall was the representative of the Brandes Company and entrusted by that company with the negotia-

tions for a new lease for additional space (R. p. 299, l. 12 to p. 302, l. 30).

On May 24, 1927 a further lease between the appellant and Brandes Products Corporation was executed for an additional building to be erected by appellant for a term beginning with the completion of the building and terminating on June 15, 1936 at an annual rental of $28,500.00 (Ex. P. 7, R. p. 359, l. 30, pp. 115, l. 30 to 117, l. 10). The premises covered by this lease, Vail testified, were the premises with reference to which he had been negotiating with the Brandes people for the appellant subsequent to the lease of June 16, 1926 until the time that Lefkowitz told Vail not to do anything further in February or March 1927 (R. p. 116, l. 11 to p. 117, l. 10). The building with reference to which Vail negotiated between June 1926 and February or March 1927 comprised sixty thousand square feet (R. p. 183, ll. 29 to 38; p. 28, ll. 8 to 30; pp. 112, 116, 130 156, ll. 18-40). The building covered by the lease of May 24, 1927 comprised sixty thousand square feet and was practically identical with the plans made by Mitchell (R. p. 280, ll. 20 to 35; p. 183). The rental paid was the same rental paid under the lease of June 16, 1926 admittedly negotiated by Vail (R. p. 156, ll. 18 to 40; Exs. P. 3, P. 7, R. pp. 358, 359). It is for commissions on this lease of May 24, 1927 that the appellee was awarded a judgment from which this appeal is taken. The verdict of the jury, as conceded by the appellant in its brief, is conclusive upon the appellant as to the disputed questions of fact. In connection, however, with the appellant's contention that the court below should have granted the appellant's motion for a non-suit or a direction of a verdict on the ground that the commission agreement (Ex. P. 2)

was without consideration to support it; that it was a unilateral and not a bilateral contract and should have been read out of the case and that the appellee was not the procuring cause, the facts surrounding the execution of the commission agreement and relating to the negotiations with reference to the lease in question are important. Appellant in its brief has omitted many of these and we have therefore stated them more fully.

ARGUMENT.

POINT I.

There was no error in the refusal of the court below to grant appellant's motion for a non-suit or a direction of a verdict on the ground that the commission agreement (Ex. P. 2) was (a) not supported by any consideration except a past consideration, and (b) that it lacked mutuality in that it was a unilateral and not a bilateral agreement.

Appellant in this connection argues that the agreement was an unusual one. It is submitted that the court is not concerned with whether this agreement was unusual or not. The fact that an agreement is unusual is no ground for setting it aside unless there was fraud.

Appellant admittedly executed the commission agreement (Exhibit P. 2; R. p. 357) and, in the absence of fraud, conclusively bound itself as assenting to its terms.

Lambert v. *Cahill,* 2 N. J. Misc. Rep. 826; 128 Atl. 434 (Sup. Ct.);

Fivey v. *Pennsylvania R. R. Co.,* 67 N. J. L. 627.

There is no contention that the appellee procured the commission agreement by any misrepresentation or fraud and even if that contention had been made, those issues would have been for the jury and cannot avail the appellant on this appeal. Appellant in its answer pleaded three affirmative and separate defenses to the commission agreement (Answer, R. p. 10). These were (1) that the agreement was not authorized by the board of directors, (2) that there was no consideration and (3) that the execution was induced by the fraudulent representations of the agents of the appellee that it was a commission agreement for the payment of commissions for procuring the earliest lease with the Brandes Products Corporation. The defense that the agreement was not authorized by the board of directors of the appellant and the defense that the execution of the commission agreement was procured by fraud, were not supported by proof and were expressly abandoned by the appellant, leaving only for the consideration of the jury the defense that the agreement was not supported by any consideration.

It is submitted, however, that under the circumstances the commission agreement in suit was not unusual but was entirely fair. The appellant had a tract of considerable size, some twenty-one acres, which it desired to develop by securing tenants for buildings to be erected by it as the tenants were secured. The property was not centrally located. The matter required much more on the part of the real estate agent than in the usual case of securing a tenant for one building already erected. It was in fact a development project. The appellee had a prospect, the Brandes Products Corporation, who, by reason of the growth of its business, was requiring

more and more space. Appellee realized that if it brought this prospect to the appellant, it would result in all probability in not only one lease for the building at 350 Thomas street, which was then already erected, but in the leasing of additional space from time to time and the erection of further buildings. This is exactly what happened.

The two points now urged by appellant in support of the contention that the commission agreement was not binding upon the appellant are (a) that it was supported only by a past consideration and (b) that it lacked mutuality.

(a) Appellant bases its argument that the consideration for the commission agreement (Ex. P. 2) was a past consideration upon the fact that under its terms nothing further was to be done by appellee towards securing further leases.

William C. Fiedler, president of the appellee, and Craig E. Vail, appellee's salesman in charge of the negotiations, testified that, previous to the making of the commission agreement, the matter of commissions had been discussed and it was agreed by the appellant to pay a five per cent. commission on any leases procured by the appellee or any subsequent renewals or additional leases made by the Brandes Company for additional space (Fiedler, R. p. 27, l. 33 to p. 28, l. 10; Vail, R. pp. 84, 85, 103, 104, 151, 152).

Vail testified that he neglected to get the written agreement until June 16, 1926.

While this is denied by the appellant it nevertheless made it a disputed question of fact for the jury.

The rule is that the consideration supporting a written agreement may always be inquired

into. An agreement is valid even though it does not recite any consideration if in fact it appears that there was a consideration moving from one party to the other. A written agreement which recites one consideration can be supported by proof of another consideration even though not recited in the written agreement.

> 13 *C. J.* 367, par. 241. Contracts.
>
> "Most courts hold that the consideration may be different from that expressed in the agreement."

> 22 *C. J.* 1157. Evidence.
>
> "As a general rule the recitals of a written instrument as to the consideration are not conclusive and it is always competent to inquire into the consideration and show by parol or other extrinsic evidence what the real consideration was. Thus it may be shown that the real consideration was in fact greater than that which is expressed in the instrument or that there was some other consideration in addition to that set forth."

> *Morris Canal & Banking Co.* v. *Ryerson,* 27 N. J. L. 457;
>
> *Voigt* v. *Dowe,* 74 N. J. E. 560;
>
> *Silvers* v. *Potter,* 48 N. J. E. 539;
>
> *Peoples National Bank* v. *Schepflin,* 73 N. J. L. 29.

If the fact was that an oral agreement was made for the payment of commissions previous to the execution of the written agreement, then the written agreement merely expressed in writing the earlier oral agreement on the strength of which earlier agreement the appellee acted and the written agreement is supported by the consideration of the services rendered by the appellee in negotiating the leases of May 1926 and of June 16, 1926 at which later time the commission agreement was executed.

An executed consideration is a sufficient consideration to support a subsequent agreement if it was induced by a request.

13 *C. J.* 360, par. 221. Contracts.

"An executed consideration, given on a request of such a nature that if complied with the law would imply a promise to pay, will sustain a promise founded on it. But if no promise could be implied from the request, as where the services were understood to be gratuitous, then a subsequent express promise is without consideration. And if the express promise is different from what the law would have implied it is not enforceable. In an early leading English case it was laid down broadly that a past consideration will support a subsequent promise if the consideration was given at the request of the promisor; but the modern authorities which speak of services rendered on request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and 'do not mean that, what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for.' The jury may imply a previous request from the fact that the service was beneficial to the promisor, when there is no evidence expressly negativing the request."

Atlantic Pebble Co. v. *Lehigh Valley R. Co.,* 89 N. J. L. 336 (E. & A.);

Holt v. *United Security Life Insurance Co.,* 74 N. J. L. 795;

Conover v. *Stillwell,* 34 N. J. L. 54;

Winch v. *Farmers Loan & Trust Co.,* 32 N. Y. S. 244;

Hurst v. *Cresson & C. Coal Co.,* 86 Hun. 189, 33 N. Y. S. 313;

Addison on Contracts, Am. Ed. Vol. 1, p. 24, par. 11.

In *Atlantic Pebble Co.* v. *Lehigh Valley R. Co.,* this court stated the rule in the following language (at p. 342):

> "The broad doctrine upon this point may be stated to be that the executed consideration for a promise is sufficient, if, induced by the request expressed by, or properly implied from, the promise, it be a benefit to the promisor or a detriment to the promisee."

While the general rule is that a broker to earn his commissions must be the procuring cause, the parties may, by special agreement, so limit the operation of the rule as to make this application depend upon the happening of some other event. So that the fact that under the agreement in suit appellee became entitled to a commission on any future leases made with the Brandes Products Corporation, even though it did nothing further, does not make the agreement one without consideration.

This question has been before the courts in this state numerous times.

Cruse v. *Ferber,* 91 N. J. L. 470;

Stevenson Co. v. *Oppenheimer,* 91 N. J. L. 479;

Dresser v. *Gilbert,* 81 N. J. L. 358.

In *Cruse* v. *Ferber,* the plaintiff, a real estate broker, was authorized for a specified period to secure a purchaser for property in consideration for which he was to be paid a commission of two per cent. on the purchase price regardless of who sold the property during the period. In the court below a non-suit was requested, on the ground, among others, that the contract was without consideration. On appeal the Supreme Court held that this ground was unsubstantial.

In *Stevenson Co.* v. *Oppenheimer,* defendant had contracted in writing with the plaintiff, a broker, whereby plaintiff was authorized to sell certain property as the sole selling agent and defendant agreed to pay a commission of five per cent. "whenever the said property should be sold." Plaintiff advertised the property and expended money and time in negotiating for its sale. Defendant then sold the property himself. Judgment was entered for plaintiff in the District Court. On appeal the Supreme Court affirmed the judgment.

At p. 480:

> "While the general rule is that a broker to earn his commissions must be the procuring cause of the sale, the qualification has been imposed upon the rule by repeated adjudications in this state, that the parties may by special agreement so limit the operation of the rule as to make its application depend upon the happening of some stated certain event."

Nor does the fact that the written agreement recites the consideration in the past tense necessarily show that it is a past consideration.

> 13 *C. J.* 365, par. 236. Contracts.
>
> "The fact that the consideration is expressed in a written contract in the past tense does not necessarily show that it is a past consideration."
>
> *Winch* v. *Farmers Loan & Trust Co.,* 32 N. Y. S. 244;
>
> *Haigh* v. *Brooks,* 10 A. & E. 309, 37 E. C. L. 180, 113 Eng. Repr. 119.

In the *Haigh* case the suit was upon a written guaranty which recited the consideration in the following language:

> "In consideration of your being in advance to Messrs. John Lees and Sons in the sum

> of 10,000£. for the purchase of cotton, I do hereby give you my guaranty for that amount (say 10,000£.) on their behalf."

It was contended that the guaranty could not be enforced because it was for a past consideration. The court said:

> "In the first place, this is by no means clear. That 'being in advance' must necessarily mean to assert that he was in advance at the time of giving the guarantee, is an assertion open to argument. It may possibly have been intended as prospective. If the phrase had been 'in consideration of your becoming in advance,' or 'on condition of your being in advance,' such would have been the clear import. As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it."

Furthermore, there was ample evidence of actual consideration moving from the appellee to the appellant after the agreement of June 16, 1926 was executed. From that time on Vail continued his negotiations for additional leases with Brandes until he was called off by Lefkowitz in March 1927 (Vail, R. pp. 106 to 117; 130 to 133; 141 to 146; 154, 155; 194 to 196; 175).

These services alone constituted sufficient consideration to support the agreement of June 16, 1926.

It is submitted that under the above principles there was no error in the refusal of the trial court to grant appellant's motion for a non-suit or direction of a verdict on the ground that the commission agreement was without consideration.

(b) The same argument applies in answer to the appellant's contention that the written agreement (Ex. P. 2) is unenforcible because it lacked mutuality. As pointed out above, there was a valid consideration moving from the appellee to the appellant to support the commission agreement by which appellant agreed to pay commissions to appellee on any subsequent leases which the tenant procured by the appellee might make and the appellant became obligated to that extent. The fact that nothing further was required from the appellee to entitle it to such commissions makes no difference. As we have stated above, the general rule is that a broker to earn his commissions must be the procuring cause but the parties may, by special agreement, so limit the operation of this rule as to entitle the broker to his commissions upon the happening of some other event. It is submitted that clearly under the commission agreement in suit appellee became entitled to commissions on the subsequent lease made by the tenant procured by it irrespective of whether or not appellee was the procuring cause of that subsequent lease.

But aside from such a construction of the commission agreement, appellee contends that it is entitled to commissions on the lease of May 24, 1927 because it was the procuring cause of that lease and counsel for appellant, in making the statement on p. 10 of their brief that the case was tried on the theory that plaintiff did not have to do anything in order to become entitled to payment entirely misapprehends the position taken by the appellee in this respect at the trial. Appellee also contended at the trial that it was the procuring cause and was therefore entitled to commissions.

A broker is the procuring cause where he brings about an introduction of a buyer and negotiations, resulting in a purchase or lease, ensue on that foundation. The owner and buyer cannot, by any arrangement, disappoint the claim of the agent for remuneration.

Somers v. *Wescoat,* 66 N. J. L. 551;
Vreeland v. *Vetterlein,* 33 N. J. L. 247;
Crowley v. *Myers,* 69 N. J. L. 245;
Weeks v. *Smith & Sons,* 79 N. J. L. 388;
Ryer v. *Turkel,* 75 N. J. L. 677, at 687.

The evidence on behalf of appellee was that it procured the Brandes Products Corporation as a tenant under the earlier leases of May and June 1926 which is admitted; that it continued negotiations with this tenant for additional space after the making of those leases and until February or March 1927 when appellant told Vail to do nothing further; that appellant then entered into the lease of May 24, 1927 (Ex. P. 7) with this tenant for a building with reference to which appellee had been negotiating with that tenant.

It was admitted in this connection that appellant, through its President, Lefkowitz, paid some $2,000.00 to Hall, the agent of Brandes who was entrusted by Brandes with the negotiations for the additional building (Hall, R. p. 299, l. 18 to p. 302, l. 30). It appears that Lefkowitz asked Hall to secure a clause in the proposed lease by which Brandes would undertake to pay any commissions to which Fiedler was entitled (Smalley, R. p. 200). It appears that Lefkowitz told Mitchell, the architect employed by the appellant to prepare the plans and specifications for these buildings, that he, Lefkowitz, did not want anything said to Vail about the plans (Mitchell, R. p. 181, l. 10 to p. 182, l. 10). It appears that Lefkowitz told Hall, the representative of

Brandes, that he did not want the subject of the new lease mentioned to Vail (Hall, R. p. 307, l. 20 to l. 30; p. 309, l. 25; p. 317, l. 30 to p. 318, l. 2).

It is submitted that appellee's right to commission cannot be defeated by appellant by breaking off the negotiations for the purpose of defeating this claim and then later closing with the tenant procured by the appellee.

Whether, under all the facts, the appellee was the procuring cause of the lease of May 24, 1927 was a question of fact for the jury.

Clark v. *Griffin,* 95 N. J. L. 508;
Littman v. *Slack,* 103 N. J. L. 459;
Weeks v. *Smith & Sons Co.,* 79 N. J. L. 388;
Queen v. *Jennings,* 93 N. J. L. 353.

POINT II.

Under the evidence the question of whether the appellee was the procuring or efficient cause of the lease of May 1927 between the appellant and Brandes Products Corporation, was a question for the jury and the court below properly denied appellant's motion for a non-suit or a direction of verdict.

We refer the court to the testimony of Vail, Mitchell and Smalley, more particularly referred to above, from which it appears that subsequent to June 16, 1926 when the commission agreement was made, Vail continued his negotiations for the leasing of further space to Brandes Products Corporation. It appears that these negotiations were continued right down to February or March 1927. Various propositions were discussed among which was a building having sixty thou-

sand square feet on a location adjoining that of the building covered by the lease of June 16, 1926. The rental discussed was in the neighborhood of 47½ cents a foot. The lease made in May 1927 covered practically the same building and on the same location which was the subject of these negotiations by Vail and was at a rental of 47½ cents a foot amounting to $28,-500.00, the same rental provided for in the lease of June 16, 1926. It appears that in February 1927 Lefkowitz told Vail to do nothing further; that he told Mitchell, the architect employed to draw the plans, that he did not want Mitchell to say anything to Vail about these plans; that Lefkowitz attempted to secure a clause in the proposed lease by which Brandes would undertake to pay any commissions to which appellee was entitled; that he told Hall, the representative of Brandes, that he did not want the subject of the lease mentioned to Vail and that the understanding between Lefkowitz and Hall was that they should keep this from Vail in order that between them a commission might be saved to Lefkowitz (R. p. 317, ll. 35 to 40); that subsequently Lefkowitz paid Hall, the representative of Brandes, the sum of $2,000.00.

It is respectfully submitted that under the evidence it became a question of fact for the jury as to whether or not the appellee was the procuring cause of the lease in question and in this connection it was for the jury to determine whether the negotiations conducted by the appellee were honestly terminated and later new negotiations were initiated without the intervention of the appellee resulting in the lease of May 1927, or whether the appellant broke off the negotiations for the purpose of defeating

appellee's right to commissions and then closing with the tenant.

Clark v. *Griffin,* supra;
Littman v. *Slack,* supra;
Weeks v. *Smith & Sons,* supra;
Queen v, *Jennings,* supra.

In *Queen* v. *Jennings,* a broker sued to recover commissions on the sale of stock. Defendant claimed that he had discharged the broker before the sale was made. This the broker denied. On an application for a new trial on the ground that the verdict was against the weight of the evidence, the court held that the question of whether the plaintiff had been discharged and if so whether such discharge was in good faith, was properly left to the jury.

At p. 356:

> "The jury had the benefit of seeing both parties. This testimony raised a jury question. The jury found the fact in favor of the plaintiff and against the defendant's claim of discharge. This question was clearly and properly left to the jury to say whether the plaintiff, Queen, was discharged, and if discharged, whether such discharge was in good faith, the trial judge saying: 'Now, in determining this question, you must do as I have said, search the facts diligently and find out what the actual truth is.' "

POINT III.

The court below did not err in permitting plaintiff's case to go to the jury on two theories, express contract and quantum meruit.

The fifth count of the complaint is on the written commission agreement and the sixth count is on quantum meruit, for the reasonable value of the services rendered (Complaint, R. p. 5).

Appellant moved for a non-suit and for a direction of verdict on the ground that appellee had alleged and proved an express agreement, could therefore not recover on a quantum meruit, that the express agreement was without consideration and there could therefore be no recovery on it (Motion for non-suit, R. p. 219, l. 15; motion for direction of verdict, R. p. 34, ll. 1 to 10).

Certainly appellant does not contend that the two counts are inconsistent and that therefore there could be no recovery on either one. We take appellant's argument to be that the court below should have required the appellee to elect between these counts.

Appellant made no request to the court to require the appellee to elect and in the absence of such a request, assuming for the purpose of argument that a proper case requiring an election was presented, there was no error on the part of the trial court in not requiring an election.

But aside from this and assuming that a request to compel an election was made to the trial court, it would have been properly denied.

The appellee was entitled to have its case go to the jury on both theories, express contract and quantum meruit.

A plaintiff is entitled to join a count on a quantum meruit with a count on an express contract.

> *Supreme Court Rule 37, Practice Act of 1912, P. L. 1912,* p. 391; *Supreme Court Rules, 1913, Rule 53:*
>
> "Plaintiff may claim alternative relief based upon an alternative construction or ascertainment of his cause of action."

Practice Act of 1912, P. L. 1912, p. 380, Sec. 19:

"The court may reserve any question of law and may submit the case to the jury upon alternative propositions of law in respect to the right to relief or damages. In either of such cases, judgment shall be entered (and if appealed shall be dealt with) according to the right as it shall be finally determined."

We know of no rule or principle which, under the modern liberal practice, requires a plaintiff in such a case to elect, assuming that a motion is made to compel him to elect.

9 *Cyc. Contracts,* p. 749:

"Under the code system of pleading, the plaintiff may sometimes allege the same cause of action in two counts, one on the special contract and the other on a quantum meruit, so as to meet any possible state of the proof, and where this is permitted, a plaintiff cannot be compelled to elect on which he will go to the jury."

Abbott on Civil Jury Trials, 3rd Ed., p. 117:

"The better opinion is that where a plaintiff has really two distinct and separate grounds for claiming the relief demanded in the complaint and states each one therein separately and plainly, or where he is somewhat uncertain as to the exact grounds of recovery the proof may afford, he may frame a complaint for the recovery of a single claim in several distinct counts or statements and the court will not compel him to elect between them."

It is the common practice where there is a doubt as to an express agreement to declare on the express agreement and also on an agreement implied by law and to have the case submitted to the jury on both theories. It is merely

setting up two theories entitling to a recovery based on the same facts.

The inconsistency which is ground for compelling election is an absolute incompatibility in the facts alleged, not a mere superfluity in grounds for recovery nor a mere alternative in legal results arising in such doubts as it may be a part of the object of the trial to investigate and determine.

Abbott on Civil Jury Trials, 3rd Ed., p. 117.

As an example of this the author cites the case of a claim under a count for performance of a contract and a claim under a count on quantum meruit, where plaintiff cannot be compelled to elect.

We fail to see the application of the cases of *Voorhees* v. *Executors of Woodhull,* 33 N. J. L. 494, and *Osterling* v. *Cape May Hotel Co.,* 82 N. J. L. 650, cited by appellant in this connection. In both of these suits the declarations were on quantum meruit and not in the alternative on express contract. There were express contracts covering the identical subject matter of the suits. It was held that where that is the case no promise will be implied in law. The action must be on the express contract and there can be no recovery on quantum meruit.

Of course where there is an express contract covering the identical subject matter, the suit must be on the express contract. But where the express contract is denied, or claimed to be not binding upon the defendant, the plaintiff has the right to plead in the alternative so that if the court should rule or the jury find that there was no express contract, or that there can be no recovery upon it for the claim in suit for one

reason or another, the plaintiff would have the right to have the jury consider his claim on a quantum meruit. It is only where there is a binding express contract covering the identical subject matter that there can be no recovery on a quantum meruit, but where there is no express contract or one that is not binding upon the defendant, there is no bar to a recovery on a quantum meruit if the facts warrant this.

POINT IV.

There was no error in the admission of testimony.

The first error as to the admission of testimony argued by appellant under Point IV of its brief, relates to permitting the witness, Hartmann, to answer a question as to what was the custom of the real estate business with reference to the payment of a commission where parties are brought together and it afterwards turns out that a lease is actually made (R. p. 74). Appellant's objection is not that Hartmann was not qualified as an expert (R. p. 75, ll. 3 to 10), but that the question called for a conclusion, bringing into the case a custom of the real estate business which had nothing to do with the issues inasmuch as the plaintiff claimed commissions by reason of an express or implied contract not based on custom.

It was strenuously contended by appellant's counsel that the commission agreement in suit was most extraordinary and unusual and a great deal of time was devoted in his cross examination of Hartmann for the purpose of establishing this (R. p. 64, l. 30 to p. 67, l. 23; p. 71, l. 10 to p. 72, l. 20; p. 169, l. 30 to p. 172, l. 20).

The question objected to was asked of Hartmann on re-direct, in the light of the cross examination of this witness by appellant's counsel and in rebuttal of the contention of appellant's counsel that the agreement was extraordinary, and it was admitted by the trial court for those reasons (R p. 74).

Appellee in no respect relied upon this custom for its right to recover. The basis upon which appellee rested its right to recover was clearly and intelligently outlined to the jury in the court's charge.

It is submitted that the ruling of the trial court was correct. Furthermore, the ruling of the trial court in this respect, if erroneous, was entirely harmless.

The next error in the admission of testimony urged by the appellant relates to the testimony of Mrs. Smalley, the bookkeeper of the appellant, that appellant had made payments to Hall, the employee of the tenant, in connection with the lease of May 1927 (R. pp. 202, 203, 204, 205), the objection being that the admission of this testimony was prejudicial to the appellant and was immaterial and irrelevant. That these payments were made was admitted by Hall on his direct examination by appellant's counsel (R. p. 299, ll. 12 to 40).

One of the grounds urged by appellee entitling it to recover was that it was the procuring cause of the lease in question. This appellant denied and in support sought to prove that the negotiations conducted by appellee for another lease were broken off by appellant in February or March 1927 before the lease was made, contending that therefore appellee was not the procuring cause.

In reply to this appellee contended that the negotiations were not honestly terminated by appellant, but were terminated for the purpose of defeating appellee's right to commissions, appellant later closing with the tenant procured by the appellee. This presented a question of fact for the jury and it was for the jury to determine under all the evidence whether the negotiations were terminated honestly by the appellant or merely to avoid liability for commissions.

It is respectfully submitted that the fact that these payments were made by appellant to Hall, the representative of the tenant, was entirely relevant and competent on this issue of whether the appellee was the procuring cause and whether the negotiations were broken off by appellant honestly or for the purpose of defeating appellee's claim for commissions, as showing the relations existing between Lefkowitz and Hall and the circumstances relating to the breaking off of negotiations and the subsequent execution of the lease. It will be remembered that Hall testified Lefkowitz told him not to say anything to Vail about the lease; that he had an agreement with Lefkowitz not to tell Vail in order that between them a commission might be saved to Lefkowitz (R. p. 309, l. 25; p. 313, l. 35 to p. 314, l. 10; p. 317, l. 30 to p. 318, l. 2).

What inference was to be drawn from these payments and what construction was to be placed upon them was a matter properly for the determination of the jury.

Appellant in its brief concedes that if there had been a proper allegation in the pleading, then this testimony would have been entirely relevant and admissible. We cannot follow this argument. The question is one of proof and not of pleading.

Under the complaint, and under the theory on which the case was tried, one of the issues was whether the appellee was the procuring cause so as to entitle it to compensation for its services. In reply appellant contended and sought to prove that appellee was not the procuring cause and in this connection to show that appellant had terminated the negotiations in February or March 1927. Under the principles contended for by appellee, if the negotiations were broken off not honestly but for the purpose of defeating appellee's right to commissions and later the lease for which appellee had been negotiating was made, appellee was nevertheless the procuring cause and entitled to its commissions. Appellee was clearly entitled, in rebuttal of appellant's contention, to prove that the negotiations were broken off for the purpose of defeating its claim without the necessity of affirmatively pleading this. Nor did appellee's answer call for any such allegation (Answer, R. pp. 8 to 10).

It is submitted that this evidence was entirely competent, relevant and material and its admission by the trial court correct.

POINT V.

There was no error in the trial court's charge to the jury.

The first error in this respect argued by appellant is the court's charging appellee's second request to charge and the remarks of the court following this request (R. p. 349, ll. 20 to 30).

This request was as follows:

> "A broker is entitled to commission when he has procured a tenant able and willing to enter into a lease on terms on which the broker was authorized to act."

As conceded by appellant, this is a correct statement of the law.

Under the proofs it was a question for the jury to determine whether appellee had (1) procured a tenant (2) able and willing to enter into a lease and (3) on terms on which it was authorized to act. These terms might be specific terms or such terms as were acceptable to the appellant.

We cannot follow appellant's argument that the remarks of the court following the charge of this request necessarily implied that appellee was entitled to commissions. What the trial court clearly meant and what it said following the charge of this request was that so far as the tenant being able and willing to enter into a lease this was not important because the tenant and appellant did enter into the lease. It still left to the jury the question of whether the broker had procured this tenant and on terms on which he was authorized to act. No such implication can possibly be drawn from this charge and the following remarks of the court, either standing alone or taken in the light of the entire charge of the court.

The next error assigned by appellant is with reference to the court's charge of appellee's third request to charge and the remarks of the court following it. This request was as follows:

> "A broker is entitled to commissions if he is requested to bring a tenant who will lease on terms to be agreed upon between the owner and tenant and thereafter brings to the owner a tenant who enters into such a lease as the result of the negotiations initiated by him" (R., p. 349, l. 30).

As conceded by appellant, this is a correct statement of the law.

Appellant does not in its brief point out the exact language of the court as to which error is assigned, nor in what respects the language of the court is erroneous. We assume that appellant refers to the language of the court at p. 349, l. 35 to p. 350, l. 20 of the Record.

We fail to see how there is any error in this charge. We submit that this is a correct statement of the law taken in connection with appellee's third request to charge and in the light of the entire charge.

The next error urged by appellant is with respect to the court's charge of the appellee's sixth request to charge (R. p. 351). Appellant's contention here is that the written agreement (Ex. P. 2) should have been ruled out of the case, one of the grounds urged by appellant as error in the refusal of the trial court to grant the motion for a non-suit. This has been argued fully above and it is respectfully submitted that the charge of the court in this respect is a correct statement of the law, taken in connection with the entire charge.

The next error assigned by appellant in the charge of the court is the court's charging appellee's eighth request to charge. Appellant's brief does not specify the particular language of the charge to which error is assigned nor the respects in which this charge is erroneous.

This request charged by the court (R. p. 351, l. 35) is as follows:

> "The defendant is bound by the written agreement made on June 16, 1926 and which it admittedly signed unless this agreement was procured by actual fraud. The fact that the defendant did not choose to read the paper before signing it or did not know its contents at the time, will not relieve it from

its obligations in the absence of actual fraud.''

This, it is respectfully submitted, is a correct statement of the law.

The next error urged by the appellant in the charge of the court is with reference to the remarks of the court following its charge of appellant's fourth request. Appellant fails to state the exact language of the court in respect to which error is alleged. We assume it refers to the language of the court on p. 353 of the Record, l. 30 to p. 354, l. 8.

It is respectfully submitted that these remarks of the court correctly amplified appellant's fourth request under the facts in the case and the court's charge in this respect and in the light of the entire charge was entirely correct.

It is respectfully submitted that the judgment in the court below in favor of the appellee should be affirmed.

Respectfully submitted,

PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff-Appellee.

CARL A. FEICK,
Of Counsel.

32 MAY.1.1931

New Jersey Court of Errors and Appeals

FIEDLER CORPORATION, a corporation, Plaintiff-Appellee, vs. MANUFACTURER'S DEVELOPMENT CO., a corporation, Defendant-Appellant.	Action at Law.

BRIEF OF DEFENDANT-APPELLANT.

Facts.

This is an appeal from a judgment of $14,744.22 in favor of the plaintiff, entered on a verdict of a jury, after trial in the Essex Circuit (Hon. Newton H. Porter presiding).

Plaintiff company was in the real estate business, engaged among other things, in the leasing and selling of real estate for commissions.

The defendant company was the owner of a tract of land located on Thomas and South Streets, in the industrial section of Newark, on which it was desirous of erecting buildings for manufacturing concerns willing to locate in Newark.

About September, 1925 some of the officers of the defendant corporation discussed with the president of the plaintiff corporation the possibility of the plaintiff procuring for the defendant, tenants for its property. Although the plaintiff attempted in the early stages of its case to establish the fact

that the defendant had engaged it to act in some sort of a capacity different than that of the ordinary real estate agent or broker to procure tenants, it is apparent from admissions made by practically all of the plaintiff's witnesses familiar with the facts, that the real relationship between the parties was only that of the ordinary real estate agent or broker engaged to procure tenants.

(See State of Case, page 35, lines 31 to 38; page 82, lines 37 to 40; page 83, lines 1 to 2; page 119, lines 1 to 2.)

Actual and real efforts on the part of the plaintiff to procure tenants were practically all handled by one of its salesmen, Craig E. Vail, and commenced on March 12th, 1926. (State of Case, page 119, lines 23 to 26.)

Nothing much of any consequence was done, however, until April 12th, 1926. (State of Case, page 120, lines 18 to 30.)

On May 3rd, 1926 a lease was executed by a tenant procured by the plaintiff, but as this lease was not satisfactory to the landlord, the defendant herein, it was not consummated. However, on May 10th, 1926 a lease actually procured by the plaintiff, was executed by the Brandes Products Corporation as tenant and the defendant as landlord. (Exhibit P-6, State of Case, page 359.) This lease covered premises known as No. 350 Thomas Street, Newark, for a one year term from May 15th, 1926 to May 15th, 1927. This lease was merged into another lease also actually procured by the plaintiff between the same parties, dated June 16th, 1926, (Exhibit P-3, State of Case, page 358) for a five year term from June 15th, 1926 to June 15th, 1931, with a five year option of renewal on the part of the tenant at an annual rental of $13,500.00, until a new building was erected by the landlord,

at which time the rental was to be increased to $28,500.00 per year. These two leases, (Exhibits P-6 and P-3) were considered by the plaintiff and the defendant as one lease so far as commissions were concerned, and on June 18th, 1926 the plaintiff sent the defendant a bill for $6,450.00 commissions, (later increased to $6,937.50) which the defendant agreed to pay and did pay.

On August 18th, 1926 another tenant was procured by the plaintiff for the defendant landlord, for another portion of defendant's property. This tenant was the Quimby Lumber Co. and the commissions for procuring this lease amounting to $5531.25, were eventually paid by the defendant. As to the items of commissions just described, there was no dispute. Whatever allegations were contained in the plaintiff's complaint as to either of them, were abandoned at the trial.

Plaintiff, in its complaint, also contended that it was entitled to a commission because the renewal privilege contained in the lease (Exhibit P-3) had been exercised by the tenant, but no proof was offered at the trial as to this item and it was removed by the Trial Court from consideration by the jury at the close of the plaintiff's case. (State of Case, pages 3 and 4, 3rd and 4th Counts of plaintiff's complaint; also page 225, lines 15 to 38).

The plaintiff's case finally concerned only one item of commission and that was in connection with a lease made by the Brandes Products Corporation as tenant and the defendant as landlord (Exhibit P-7, State of Case, page 359). This lease was dated May 24th, 1927 and covered premises on Thomas Street, Newark (not included in lease Exhibit P-3) generally known as No. 360 Thomas Street. This lease was for a term beginning with the substantial completion of a contemplated building to

be erected by the landlord, which was finished September 15th, 1927, and the lease by its terms ended June 15th, 1936. The annual rental was $28,500.00. The commissions claimed by the plaintiff in connection with this lease were $12,468.75, which, with interest represents the amount of the judgment now under review.

Plaintiff did not claim that it was the procuring or efficient cause of this lease, but rested its right to commission on a written agreement (See 5th Count of Complaint, State of Case, page 5; and Exhibit P-2, State of Case, between pages 356 and 357).

Because of its importance in the issues of this appeal, a photostatic copy of the agreement was placed in the State of Case.

Plaintiff, in the sixth count of its complaint, (State of Case, pages 5 and 6) claimed to be entitled to this same amount of commission because, at the request of the defendant it had performed services for the defendant, as agent and broker, which resulted in the lease just referred to, to wit: (Exhibit P-7, State of Case, pages 359, 360).

The drafting, execution and delivery of the agreement, (Exhibit P-2) were coupled with some most peculiar, if not mysterious, circumstances, some of which will now be related.

Up to June 16th, 1926, the date of the execution of the lease (Exhibit P-3), the parties apparently had been satisfied to deal with nothing but oral agreements as to commissions. On the date set for the execution and delivery of the lease, (Exhibit P-3) a Mr. Hartman, who seemed to be in charge of the salesman Vail, drafted an agreement, (Exhibit P-2), admitted by him to be an unusual agreement. (State of Case, page 65, lines 6 to 10). This was drafted after a discussion with no one else but Vail. (State of Case, page 65, lines

11 to 15). Hartman had no discussion with the defendant as to the necessity for, or as to the contents of this so-called agreement. (State of Case, page 66, lines 28 to 38). Hartman stated that he made a carbon copy, but the carbon was not given to Vail, although the original was. (State of Case, page 58, lines 10 to 20; page 67, lines 17 to 24). Strange to say, however, Vail testified that he had both the original and the carbon, (State of Case, page 97, lines 38 to 40; page 100, lines 16 to 20).

He further testified that the carbon copy was delivered by him to an officer of the defendant corporation, (State of Case, page 101, lines 36 to 40).

The conscious execution and delivery of this paper was most vigorously denied by the officers of the defendant corporation whose names were signed to it, and practically all of the circumstances of its execution, related by Vail, were denied by the same two men, and by Mr. Hugh B. Reed, an attorney of high standing and long practice, in whose office the lease transaction had been consummated.

We assume, however, that the verdict of the jury on this question of fact precludes us from arguing on this point, but the circumstances are important to remember in construing the document.

Appellant contends that this is one of the most peculiar documents of its kind ever exhibited in court by any litigant. The Trial Court in describing it, said, (State of Case, page 223, lines 29 to 40; page 224, lines 1 to 3)

> "There is no time limit; there is nothing more to be done on the part of the broker. Apparently, he is entitled to have commissions on any renewals of this lease from then on until doomsday, if this corporation, its successors and assigns, continued to renew

> the lease, under that agreement he is entitled to commission, on renewals; he is entitled to the commission, if they rent him something else, on property that the owner might then have or afterwards acquire, and he is not obligated to do a blessed thing with respect to bringing the parties together. I think it is a beautiful agreement, as far as the broker is concerned; I do not think they left anything out."

Mr. Hugh B. Reed, a lawyer having considerable experience, especially in real estate matters, said, (State of Case, page 286, lines 35 to 39):

> "Well, it is rather a remarkable paper, in my estimation. I am sure I would not have let him sign it without a very strong protest, if it had been shown to me."

Plaintiff's contention under the fifth count of its complaint, to which reference has already been made, was that it was entitled to a commission on any lease executed between the defendant the Brandes Products Corporation irrespective of whether the plaintiff had anything to do with procuring the lease; irrespective of the time when the lease was entered into; irrespective of where the property covered by the lease was located. This was disclosed in the testimony, (see testimony of Hartman, State of Case, page 71, lines 32 to 40; Vail, page 104, lines 14 to 28; page 151, entire page; page 152, lines 1 to 11) and was stated by plaintiff's counsel, (see State of Case, page 144, lines 1 to 14).

Plaintiff's contention under the sixth count in its complaint, to which reference has already been made, was that if the undated express contract (Exhibit P-2) did not legally exist, then it was entitled to reasonable compensation for its services performed at the request of the defendant, because,

as it contended under this count, the plaintiff was the procuring cause of the lease of May 24th, 1927 (Exhibit P-7).

Attention is especially directed to the fact that there was no allegation in the plaintiff's complaint that it had procured a tenant, ready, able and willing to execute a lease with the defendant as landlord, and that the landlord defendant had, by its actions, interfered with, or made it impossible for the plaintiff to procure such a lease. However, it will be noted in the testimony offered by the plaintiff, that there was not only an intimation, but practically a charge that the plaintiff, through its agent, had commenced negotiations with the Brandes Products Corporation as a prospective tenant for additional space, (that is, other than that described in leases Exhibit P-3 and P-6), and that the defendant had either interfered with these negotiations, or had actually ordered the plaintiff to cease its activities, and then had, by direct negotiations with the prospective tenant, concluded the same prospective lease that the plaintiff had been working on. Along this very same line, the plaintiff offered over the defendant's objection, proof of money amounting to $1200.00, paid by the defendant to one Hall, an employee or officer of the prospective tenant.

Defendant contended at the trial as has already been intimated, that the paper marked Exhibit P-2 was not a contract because it had not been consciously executed or delivered; also, that it was the duty of the court to construe the exhibit, and as part of such duty, to find that the co-called contract was not a contract because it lacked mutuality, as it was unilateral and not bilateral; that it was void because there was nothing but a past consideration to support it; also, that the plaintiff could not maintain its action on the fifth and sixth

counts of its complaint at one and the same time, because, if its claim was based on an express contract, it could not recover under the *quantum meruit* count, to wit: the sixth count.

The defendant moved for a judgment of non-suit and for a direction of verdict, both of which were denied, and proper exceptions taken.

Defendant also took two exceptions to rulings on evidence and some exceptions to the charge of the court. Defendant will argue for a reversal of the judgment now under review, on the following grounds:

1: The judgment of non-suit or the direction of a verdict in favor of the defendant should have been granted, because the agreement, Exhibit P-2, was invalid as a matter of law, for the following reasons:

a—There was no consideration to support it, except a past consideration;

b—The agreement lacked mutuality in that it was a unilateral and not a bilateral agreement.

2: Under the sixth count of plaintiff's complaint, (*quantum meruit*), it was necessary for the plaintiff to prove that it was the procuring or efficient cause of the lease between the defendant and its tenant, and there was no proof of any facts to support such a claim, and therefore the judgment of non-suit or for a direction of verdict, should have been granted.

3: The trial court erred in allowing plaintiff's case to go to the jury on two inconsistent theories; to wit: express contract and *quantum meruit.*

4: The trial court erred in the admission of testimony.

5: The trial court erred in its charge to the jury.

POINT 1.

As has already been pointed out in the Statement of Facts, appellant seriously questions the legality of the so-called agreement, Exhibit P-2. The opinions of the trial court and of Mr. Hugh B. Reed as to the unusual character of this paper were alluded to merely to show that others besides appellant, believe that this paper was of a most unusual character.

A reading of it will show the following extraordinary characteristics:

1. It is undated.

2. It has no time limit or termination date, nor provision for cancellation.

3. The only consideration recited was that of services already rendered, for which compensation in full had been fixed and paid.

4. It provides for commissions on unlimited renewals of the lease already procured.

5. It provides for commissions on occupancy by tenant in lease already procured, beyond the original term.

6. It provides for commissions on lease by tenant for additional space in premises in question (350 Thomas Street, covered by lease Exhibits P-3 and 6.

7. It provides for commissions on lease by tenant for any other premises that landlord may own.

8. Provides for commission if tenant purchases premises referred to (undoubtedly means 350 Thomas Street) although it was probably plaintiff's intention to include everything.

9. Provides for commission if tenant purchases any other property that landlord may own.

Strange to say, there is not a single word mentioned as to anything the broker was to do in order to become entitled to commissions under the numerous contingencies just described. As has already been pointed out, it was the plaintiff's contention, and the case was tried on that theory, that under this agreement plaintiff did not have to do one single thing in order to become entitled to payment upon the happening of any of the contingencies just described.

Plaintiff further contended that once it had brought the defendant and the tenant together, as it had in connection with the leases P-3 and P-6, its work was completed, and irrespective of the time or expense incurred or expended by the defendant and the tenant Brandes Products Corporation, in consummating any further leases or sales as set forth in Exhibit P-2, it automatically became entitled to the commission named in that contract.

Appellant contends that this agreement P-2 should have been ruled out of the case by the trial court, upon its motion for a judgment of non-suit, or upon its motion for a direction of a verdict. It will be noted that the motion for a judg-

ment of non-suit was only denied tentatively, (State of Case, page 225, line 38) but was renewed at the close of the case on the same grounds. But this motion was again denied, (State of Case, page 342, lines 25 to 26).

The attack on this agreement is made on two different theories:

a. There was no consideration to support it, except a past consideration;

b. The agreement lacked mutuality in that it was a unilateral and not a bilateral agreement.

In addition to what has already been said on the subject of the consideration recited in the agreement, an analysis of the testimony in the plaintiff's case will disclose little if anything to add to the subject.

Mr. W. C. Fiedler, president of the plaintiff corporation, testified, (State of Case, page 27, lines 34 to 39):

"Q. What did you state to them about the commission?"

A. The commission, five per cent, on the lease entered into, five per cent on subsequent renewals or extensions, or deals made with successors or assigns of the original concern."

Also see page 33, State of Case, entire page.

Mr. Vail, the salesman, testified, (State of Case, page 84, lines 37 to 40; page 38, lines 1 to 20) on this same subject, but it will be noted that this witness used the words "if we were able to effect any deals".

See also same witness, (State of Case, page 100, line 40; page 101, lines 1 to 8; page 104, lines 14 to 38).

It will be noted again in this last testimony, the witness again used the words "leases that we might effect".

Note also the cross-examination of this witness on pages 150, 151, 152.

Clearly from this testimony, it is apparent that no one on behalf of the plaintiff had ever discussed or explained to the defendant any such details as are contained in the remarkable document, Exhibit P-2, and therefore it cannot be said that the consideration for obtaining the lease, Exhibit P-6, was to include the possible payment of all the items described in the commission agreement. It will be noted that there is not a single word in the agreement as to the payment of commissions by the defendant to the plaintiff for effecting the lease dated June 16th, 1926, (Exhibit P-6), which is the lease admittedly delivered the day the Exhibit P-2 was supposed to have been executed. This proves conclusively that the defendant had agreed to pay and the plaintiff had agreed to accept as full compensation for the services connected with the procuring of the lease (Exhibit P-6) the usual and regular commission of five per cent. of the aggregate rental for that lease. And this was paid. Therefore, what was the consideration for the agreement contained in Exhibit P-2? Clearly, not any service which the plaintiff was to perform in the future, for the agreement mentioned none, and as has already been pointed out, witnesses and counsel for the plaintiff claimed that the plaintiff was entitled to commission on the lease of May 4th, 1927 (Exhibit P-7), without the rendition of any further services. To support this argument, we respectfully refer to the following authorities:

We first desire to point out two definitions by

well known text book writers, which we think are helpful:

Page on the Law of Contracts, Vol. I, Sec. 514;

"A definition of valuable consideration, which has been quoted frequently and with approval by English and American Courts, is as follows:

"A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit, accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

This definition, as is indicated elsewhere, has been repeated by courts which have insisted, at the same time, that a consideration which moved to the promissor was insufficient unless it moved from the promisee. *This definition has been repeated, literally or substantially, and it has been said again and again that a consideration is a benefit to the promissor, or a detriment to the promissee."*

Note: Italics in above ours.

Williston on Contracts, Vol. 1, Sec. 142;

"The term, past consideration, or executed consideration, is self-contradictory. Consideration, by its very definition, must be given in exchange for the promise, or at least in reliance upon the promise. Accordingly, something which has been given before the promise was made and, therefore, without reference to it, cannot, properly speaking, be legal consideration. As a general principle this is well recognized and illustrations might easily be multiplied to show it. Thus a warranty made after a sale has been completed is invalid. * * * *

A promise made, after a sale or a contract of service to pay a larger price than had been

> *originally agreed upon,* a promise by a lessor, after a lease has been entered into, to make repairs, or to abate a portion of the rent, a promise by a vendor to pay for a deficiency in the acreage of land sold as compared with what it was supposed to contain, are similarly invalid; *and generally the doctrine that past consideration is no consideration is well recognized and universally enforced. This has been law from a very early day.*"

Note: Italics in above ours.

We now refer to the following cases:

> Sharp v. Hoopes, 74 N. J. L. 191 (N. J. Sup. Ct. 1906, Reed, *J.*)

Hoopes without authority of Sharp, owner of a house for rent, secured a tenant who rented the house directly from Sharp. Subsequently Sharp told Hoopes that Mrs. Sharp would pay the commission, or if not, that he himself (Sharp) would have to pay it. The Trial Court instructed the jury that the only point was whether or not, subsequent to the renting, Sharp had ratified Hoopes' act and agreed to pay the commission. There was a verdict and judgment for Hoopes, but judgment was reversed on the ground that there was no consideration for Sharp's promise, if any promise was made. The Court said, at page 192:

> "The language, if it amounted to a promise to pay at all, which is not admitted, did not ratify any contract, but was a new promise to pay Hoopes for service previously rendered, without any request, expressed or implied. Such a promise was devoid of any consideration to support it."

> Mayer v. Penfield, 134 N. Y. S. 762; 150 App. Div. 66; (Supreme Court, App. Div. 1912)

The defendant had agreed in writing to pay the plaintiff $1,000 commission for procuring a purchaser for his property. The plaintiff did procure a purchaser, the N. Y. Central Realty & Terminal Co., whose directors were authorized to sign the agreement of purchase. All that remained for the defendant to do was to go to the offices of the purchasing company, sign the contract and get the first payment on the purchase price. Nevertheless he offered to increase the plaintiff's commissions to $3,000 if the plaintiff brought about a closing of the matter within a certain time. This the plaintiff did and sued to recover on the basis of the subsequent agreement. The jury allowed a recovery on that basis, but the judgment of the lower court was reversed on appeal, the ground being that there was no consideration for the subsequent agreement. The Court said at pages 764-765:

> "Assuming that the plaintiff's testimony is true, it seems to me clear that the evidence that there was any consideration for this supplemental agreement, signed on the twenty-third of November, 1907, was not sufficient to justify a verdict for the plaintiff.
> * * * *
>
> "There was no consideration for the promise, and no services rendered for which the plaintiff was entitled to compensation, and which entitled the plaintiff to receive the extra $2,000—and the verdict therefore was not based on an enforceable promise."
>
> Randall v. Simmons, 134 N. Y. S. 523 (not officially reported) (Supreme Court, Appellate Term, 1912).

The plaintiff assigned to the defendant for $100 an option which he had upon certain patents. Subsequently, the defendant wrote to the plaintiff,

"*In consideration of your having assigned to me* and placed in escrow with Mr. Charles C. Gill, the carburetor patents for England, Germany, Austria, Belgium, France and Italy, for a period of six months at a net price of $10,000 I hereby agree to pay over to you, if a sale is made by me of any or all of said patents, one-third of the cash profit from such sale as and when received by me." The defendant sold his option for $1,000 and the plaintiff sued under the above agreement for his share of the $900 profit. The court denied the plaintiff's recovery on the ground that the consideration of the above agreement was past.

The Court said at page 524:

> "*It appears, however, on the contrary, that such an assignment was made and executed prior to the writing of the letter, and that the phrase in the letter relating to the matter referred, 'not to a future, but to a past act. Under these circumstances, however, it is quite clear that there was no consideration for defendant's promise in the letter, and the judgment for the plaintiff must be reversed, and a new trial ordered, with costs to appellant to abide the event.*"

See also

> Phillips' Executor v. Rudy, 146 Ky. 780; 143 S. W. 397; (Court of Appeals of Kentucky, 1912)

We also desire to refer to an opinion of Justice Depue in the case of

> Conover v. Stillwell, 34 N. J. L. 54; at pages 56, 57:

> "The validity of the contract sued on is denied for the want of a consideration to support it. * * * *

"The consideration to support a promise, may be either a benefit accruing to the promiser, or a loss or disadvantage to the promisee.

"A consideration emanating from some injury or inconvenience to the one party, or from some benefit to the other party, is a valuable consideration. (Story on Contracts, 429; I Parsons on Contracts 431.) But to give a consideration value sufficient for the support of a promise, it must be either such as deprived the person to whom the promise was made of a right which he before possessed, or else conferred upon the other party a benefit which he could not otherwise have had. Thus, part payment of a debt overdue is not a valid consideration for an agreement to postpone or discharge the payment of the residue. * * * *

"So a promise to pay increased compensation for services which the party was under a prior legal obligation to render, is not valid. Stilk v. Myrick, 2 Camp. 317; Harris v. Cater, 3 E. & B. 559; Voorhees v. Woodhull's ex'rs., Court of Errors, March Term, 1869, 4 Vroom, 494."

On the question of this agreement being invalid because it lacked mutuality, being a unilateral and not a bilateral contract, we have already pointed out the peculiar wording and terms of Exhibit P-2. There is nothing in the agreement which provides for anything to be done by the plaintiff. It merely describes what has already been performed by the plaintiff, for which full consideration was paid. Appellant's idea of a bilateral agreement is one under which either contracting party would have a right of action if the contract was breached by the other contracting party. We fail to see how the defendant in this case, would under any circumstances, ever have any such remedy against

the plaintiff. Apparently, the defendant did not either have the right to cancel or terminate the agreement with the plaintiff.

13 Corpus Juris, 331, Sec. 179; Contracts Mutuality - In General.

> "Mutuality of contract consists in the obligation on each party to do, or to permit something to be done, in consideration of the act or promise of the other. Contracts lacking in mutuality are often termed unilateral contract. Mutuality of obligation is an essential element of every enforceable agreement. Mutuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only. And, conversely, a contract is not unilateral where it contains mutual obligations binding on both parties."

Appellant therefore respectfully and strenuously contends that for the reasons advanced under this point, the Trial Court should have either granted the motion of non-suit or the motion for a direction of a verdict on the grounds that the so-called agreement, Exhibit P-2, was invalid; that the plaintiff was not entitled to recover any damages under the terms of the so-called agreement.

POINT 2.

Under the sixth count of plaintiff's complaint, (*quantum meruit*), it was necessary for the plaintiff to prove that it was the procuring or efficient cause of the lease between the defendant and its tenant, and there was no proof of any facts to support such a claim, and therefore the judgment of non-suit or for a direction of verdict should have been granted.

A great part of plaintiff's case dealt with an alleged attempt on its part to prove that it was the procuring cause of the lease dated May 24th, 1927, (Exhibit P-7). Appellant respectfully contends that when the plaintiff closed its case, its evidence giving it the benefit of every possible inference, fell far short of proving that the plaintiff was the efficient and procuring cause of the lease (Exhibit P-7) under which it was claiming commission.

As has already been alluded, the plaintiff injected into its case an element which was entirely outside of the issues raised by the pleadings, and which incidentally was extremely prejudicial to the defendant, to wit, the idea that the defendant had interfered with the plaintiff's efforts in procuring the consummation of a lease between the defendant and the Brandes Products Corporation, which the plaintiff claimed was the identical lease which the parties eventually executed, and which became Exhibit P-7. This is contained in the following testimony:

> Frederick J. Hartman, State of Case, page 63, lines 8 to 40; page 64, lines 1 to 20; page 73, lines 10 to 13.

See also testimony of

James F. Mitchell, State of Case, page 181, commencing with line 10.

Also testimony of

Blanche Smalley, State of Case, page 198, lines 30 to 40.

It may be that the plaintiff in the trial of its case thought the testimony just referred to was relevant on the question of whether or not it was the procuring cause of the lease in question. But it is respectfully urged by appellant that the testimony just alluded to, had no probative force along such lines, but absolutely injected into the case an issue which was not there, and the only effect of which was to confuse the minds of the jurors.

We will now endeavor to point out what in our opinion was the only testimony in the plaintiff's case which in any way tended to prove that the plaintiff, through its agent, had anything to do with the lease of May 24th, 1927 (Exhibit P-7).

Frederick J. Hartman, State of Case, pages 54 to 57;
Craig E. Vail, State of Case, pages 106 to 117.

However, in this connection it is most important to examine the cross-examination of this same witness Vail. It will be noticed that the last time he called on the defendant for the purpose, so he claims, of endeavoring to procure a lease between the defendant and the Brandes Products Corporation, was February 14th, 1927. See

(State of Case, page 154, lines 28 to 40; page 155, lines 1 to 10).

The only two calls that he made after that was

April 11th, 1927 when he called to find out if Mr. Lefkowitz, of the defendant corporation, had changed his mind, (State of Case, page 163, lines 20 to 30) and in August, 1927, when he went there in an attempt to collect his alleged commission, (State of Case, page 163, lines 33 to 35).

It will also be noted in the cross-examination of Mr. Vail, that it was apparent that although he may have commenced some negotiations with reference to a possible lease with the Brandes Products Corporation for some other portion of the defendant's property, exclusive of that already leased, his negotiations at no time definitely crystallized into any agreement. Apparently the size of the proposed building, the length of the lease, the amount of the rental, and a great many other details had not been agreed to by the intending contracting parties.

It is also apparent that in February, 1927, Mr. Vail was definitely told by the defendant corporation that he should cease his efforts to procure any further lease with the Brandes Products Corporation. (See State of Case, pages 154, lines 28 to 40; page 155, lines 1 to 10). Up to that time nothing definite had apparently materialized except a vague idea that the prospective tenant might need or want some additional space. This is substantiated by a reading of some of the exhibits, to wit: D-5, D-6, D-10, State of Case, pages 369, 370, 373. These letters undoubtedly refer to the unsuccessful negotiations which were definitely ended and terminated on February 14th, 1927.

Nothing further was done by any one until March 24th, 1927, when the Brandes Products Corporation, of its own accord, wrote a letter to the defendant, (See Exhibit D-7, State of Case, pages 371, 372) commencing for the first time negotia-

tions for a definite amount of space at a definite location for a definite term.

This was followed by a letter from the defendant, (Exhibit D-9, page 372, State of Case), in which letter the defendant emphatically said as follows:

> "If we can get together on this matter, it is understood that there are to be no agents or brokers included. In other words, the deal is to be a direct one."

As a result of these negotiations, and admittedly without any aid or effort on the part of the plaintiff, the defendant and tenant consummated the lease of May 24th, 1927, (Exhibit P-7).

Appellant contends that this proof, positively did not prove that the plaintiff was the procuring cause of the lease for which it was claiming commissions.

Appellant takes the position that in March, 1927, it had a perfect legal right to take up negotiations with the Brandes Products Corporation (incidentally, commenced by that company) and to state then that if a lease was consummated, it would be with the distinct understanding and agreement that no broker or agent was to be considered so far as the payment of commission was to be concerned. Certainly, under the allegations of the complaint in this suit, plaintiff failed to prove that it was the procuring or efficient cause of the lease of May 24th, 1927, and a judgment of non-suit or a direction of verdict should have been granted.

Appellant refers to the following authorities to sustain the foregoing proposition:

9 Corpus Juris, page 621:

> "It is not every sale to a customer procured by the broker that will entitle him to a

> commission, however; he must be the procuring cause of the transaction. Hence, if a broker fails to bring a customer to terms, and then abandons the negotiations, or they are broken off, he is not entitled to a commission where a sale is subsequently made by the owner to the customer through independent negotiations."

At page 602:

> "However, to entitle a broker to a commission, where the contract concluded differs from that which the broker was authorized to negotiate, the negotiations commenced by the broker must have continued uninterruptedly, and he must have been actively instrumental throughout in causing the parties to consummate the transaction."

One of the leading New Jersey cases on this subject is a case decided in this court in 1928, to wit:

> Murray Apfelbaum, Inc. v. Bernstein, 104 N. J. L. 664.

The same rule apparently applies in other jurisdictions; see

> Haines v. Wooster, 133 Pacific, 998;
> Fairchild v. Cunningham, 84 Minn. 521; 88 N. W. Rep. 15,

in which latter case the Court said:

> "And where an agent opens negotiations for such a sale, fails to bring the intending purchaser to definite terms, and the negotiations are abandoned, he is not entitled to a commission, even though the owner of the property subsequently sells the same to the person with whom the agent previously negotiated."

See also

Watts v. Howard & Calkins, 51 Ill. App. 243.

The following language taken from a New York case is called to the Courts' especial attention, because the language used in the opinion is so peculiarly applicable to the point now under discussion. It is taken from the case of

Sibbald v. Bethlehem Iron Co., 83 N. Y. 378; (Court of Appeals, 1880).

Before commencing the quotation, a brief statement of the facts in the above cited case may be beneficial.

Plaintiff was authorized by the defendant to sell its steel rails, etc., to the Grand Trunk Railroad Co. Plaintiff began its negotiations in December, 1873 and continued them until April, 1874. On April 23, 1874 the defendant revoked the authority of the plaintiff, and on May 13th, 1874 the defendant sold its rails to the Grand Trunk Railroad Co. through the efforts of another broker. Plaintiff sued the defendant for commissions. There was a verdict for the plaintiff in the lower court which was reversed by the Court of Appeals.

The Court said, at page 383:

> "But in all the cases under all and varying forms of expression, the fundamental and correct doctrine is that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue. * * * It follows as a necessary deduction from the established rule that a broker is never entitled to commission for unsuccessful efforts. The risk of failure

> is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated he gains no rights to commissions. He loses the labor and effort which was staked upon success. And in such event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to and materially assist in the consummation of the sale; he may have planted the very seeds from which others reap the harvest; but all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors."

The Court proceeds to add that the failure of the broker must not have been brought about by the owner himself. For example, the owner may not in order to avoid commissions capriciously change his mind after a ready and willing purchaser is procured by the broker.

Another terse statement of the law is given by the Court at pages 390-391:

> "If after the broker has been allowed a reasonable time within which to produce a buyer and effect a sale he has failed to do so, and the seller in good faith and fairly

> has terminated the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts."

Also see the case of

Queen v. Jennings, 93 N. J. L. 353.

POINT 3.

The Court erred in allowing plaintiff's case to go to the jury on two inconsistent theories, to wit: Express Contract and quantum meruit.

Appellant urges that the plaintiff, having alleged and proved an express contract which it contended embraced the agreement of the defendant, it could not at the same time seek to recover on a *quantum meruit* count which was on the theory of an implied contract, because an implied contract cannot exist when there is an existing express contract about the identical subject. As was said by Justice Van Syckel, speaking for this Court in 1869, in the case of

Voorhees v. Executors of Woodhull, 33 N. J. L. 494;

at page 496:

> "The doctrine upon which the plaintiff rests her case is contrary to the well settled rule, that an express contract excludes an implied one. An implied contract cannot exist, when there is an existing express contract about the identical subject. The par-

ties are bound by their agreement, and there is no ground for implying a promise. It is only when the parties do not agree, that the law interposes and raises a promise.

"Where an express contract exists, there must be a rescission of it before the parties will be remitted to the contract which the law implies, in the absence of that agreement which they make for themselves."

See also the case of

Osterling v. Cape May Hotel Co., 82 N. J. L. 650.

POINT 4.

The trial court erred in the admission of testimony.

The next ground which is urged for a reversal of the judgment under review, deals with two questions of evidence. The first one will be found on pages 74, 75, State of Case, and specifically deals with the following question:

"Q. In cases, such as I have just told you, where the parties are brought together and the lease is afterwards made, what is the custom of the real estate business in this town and vicinity, as to whether or not a commission shall be claimed and paid, if afterwards it turns out that the lease is actually made?"

It will be noted from the record that an exception to the overruling of an objection to this question was allowed, and the principal reason stated at that time, which is now urged, was that the question called for a conclusion on the part of the witness bringing into this case a custom of the

real estate business which we respectfully urged had nothing whatsoever to do with the issues of the case being tried, inasmuch as the plaintiff claimed commissions in question by reason of an express or implied contract, not in any way based on custom.

The second question of evidence which is urged as a reason for the reversal of the judgment under review, will be found in the State of Case, beginning on page 202, lines 23 to 40; all of page 203; all of page 204, and on page 205, lines 1 to 30. It will be noted from a reading of the questions to which objections were made at that time and to the rulings of the court, to which proper exceptions were taken, that the entire line of questioning dealt with payments made by the defendant to a Mr. Hall, who was an employee of the Brandes Products Corporation, and it will be noted that the payments in question were all made after the lease of May 24th, 1927. Appellant urges that this line of questioning was extremely prejudicial to the defendant's case; that it injected into the issues being tried by the jury, a factor that was absolutely immaterial and did not have the slightest relevancy. Appellant concedes that if there had been in the pleadings an allegation that the defendant had fraudulently or in bad faith discharged the plaintiff or interfered with its efforts in procuring the execution of a lease with the Brandes Products Corporation, or had taken advantage of all the services and efforts on the part of the plaintiff to bring about the consummation of the lease with the Brandes Products Corporation, and then had by direct negotiations with the tenant, closed a lease with it for the same premises and for the same term and for the same rental, etc., then the testimony which is the subject matter of this discus-

sion, would have been quite relevant and properly admissible.

In this connection may we respectfully point out that the testimony conclusively proves that the prospective lease on which the plaintiff's agent claimed to be working subsequent to June 16th, 1926, was not the lease which was eventually executed. The only similarity was the fact that the landlord and tenant were the same. Not one single term of such a prospective lease was ever definitely agreed upon between the contracting parties. It was not until after March 1927 that the minds of the contracting parties met, and as has already been pointed out, there is not a scintilla of evidence in the case which indicates that any effort on the part of the plaintiff was responsible for any of the terms of the lease of May 24th, 1927 (Exhibit P-7).

The admission of this testimony by the trial court undoubtedly poisoned the minds of the jurors and attempted to make them believe that the defendant, by the payment of money to Hall, an employee of the Brandes Products Corporation, was carrying out a scheme to defeat the plaintiff of a claim for commissions, and to accomplish that purpose, was corrupting an employee of the tenant.

Furthermore, this testimony was clearly inadmissible, because, assuming for the sake of argument that it is admitted that the plaintiff was a broker of the defendant's in connection with the procuring of the lease of May 24th, 1927, then there was nothing legally to stop the defendant from having two brokers and paying two commissions if it so desired, but the payment of commission to one of the two alleged brokers, would not be admissible evidence to prove that the other of the two alleged brokers was entitled to the payment of commissions. Appellant strenuously urges

that the admission of this testimony was absolutely and unequivocally harmful to the defendant's case and is the kind of harmful error which should result in a reversal of the judgment under review.

POINT 5.

The trial court erred in its charge to the jury.

Appellant will now point out a few portions of the charge to which it took exceptions, and which it believes constitute harmful error. Those exceptions not referred to in the following argument, are waived.

Exception to plaintiff's second request to charge, include the remarks of the trial court following the request to charge.

Plaintiff's request to charge #2, was as follows:

> "A broker is entitled to commissions, when he has procured a tenant able and willing to enter into a lease on terms on which the broker was authorized to act."

This request to charge appellant concedes is a proper general statement of the law, but it must be remembered in this particular case there was no testimony of any terms having been given to the plaintiff as broker, on which it was authorized to act. As a matter of fact, it will be remembered that the prospective tenant itself at no time prior to March, 1927, seemed to know just exactly how much space it wanted or how much rent it was willing to pay, or just where it desired to locate.

The remarks of the trial court following this request were, in the opinion of appellant, most harmful, and they are herewith quoted in full, (State of Case, page 349):

> "Of course, this is not very important, because, in this case, there was a lease. It was not a question of being able to do it. It did do it. It entered into the lease, I mean to say, on the lease of May 24, 1927, the only lease in question."

It will be noticed that the contents of the request to charge itself distinctly say that a broker is entitled to commissions when he has procured a tenant able and willing to enter into a lease. Then follows the remarks of the trial court just quoted, in which it states that it was not very important, because there was a lease. This necessarily implied to the jury that the broker therefore, was entitled to commissions, which clearly consituted harmful error.

Without repeating in full plaintiffs' request No. 3 (State of Case, page 349) and the remarks of the trial court following it, it is respectfully urged that this request to charge is in a great many respects quite similar to the second request. It repeats a correct statement of the general law; but the remarks following it are prejudicial, and constitute harmful error.

It is also respectfully urged that plaintiff's request to charge, No. 6, (State of Case, page 351) was also erroneous. It will be observed that this request concerns the agreement of June 16th, 1926, namely, Exhibit P-2, and for the reasons already stated in this brief, appellant urges that the trial court should have ruled this agreement out of the case and not left it for consideration by the jury.

The same argument is also made with reference to plaintiff's request No. 8.

The only other exception to the charge which will be urged now concerns the trial court's remarks after charging defendant's request No. 4, (which

request will be found in the State of Case, page 353, and the remarks on pages 353, 354.) Appellant's objection to the court's remarks is that they changed entirely the meaning of the request to charge itself, especially when the trial court said that the plaintiff's contention was that the express contract and the implied contract were not both intended to cover the same subject matter.

Conclusions.

It is therefore respectfully urged that the trial court should have granted defendant's motion for a judgment of non-suit or for a direction of a verdict in its favor, first, because the written agreement, Exhibit P-2, is invalid for the reasons set forth in full herein; secondly, under the *quantum meruit* count, there was no proof at the close of the case that the plaintiff was the procuring or efficient cause of the lease of May 24th, 1927, and therefore the trial court should have granted the motion of non-suit, or the motion to direct a verdict in favor of the defendant. And thirdly, the trial court should not have left the case to the jury on two inconsistent theories, namely, express contract and *quantum meruit*.

Furthermore, appellant urges that for the errors in the admission of evidence and in the charge of the trial court, the judgment under review should be reversed.

Respectfully submitted,

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INDEX