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52

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**Notice and Grounds of Appeal.**

NEW JERSEY SUPREME COURT.

|  |   |                   |    |
|--|---|-------------------|----|
| A. WILLIAM MALINOWSKI,<br>Plaintiff,                                       | } | Action<br>at Law. | 10 |
| vs.  |   |                   |    |
| LINCOLN DEVELOPING Co., a corpora-<br>tion, <i>et al.</i> ,<br>Defendants. |   |                   |    |

To Messrs. KANTER & KANTER,  
Attorneys of Defendants.

SIRS:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from so much of the judgment entered in this cause as adjudges that the plaintiff is not entitled to recover the amount of commission on sales of real estate made by him for the defendant, Lincoln Developing Company, on the following grounds:

1. The Court decided that there could be no recovery by the plaintiff for commissions on sales of real estate made by him because the authority to sell was not in writing signed by the said defendant.

2. The court decided that there could be no recovery by the plaintiff for commissions on sales of real estate made by him because he had not obtained a license to engage in the business of a real estate broker.

*Notice and Grounds of Appeal.*

3. The court directed a verdict in favor of the said defendant and against the plaintiff on the items of commissions on sales of real estate made by the plaintiff for the said defendant; whereas the court should have submitted those matters to the jury.

**10** 4. The court refused to charge the 1st, 2nd, 3rd, 4th and 6th requests to charge of the plaintiff.

5. The court charged the jury as follows:

**20** “The plaintiff, however, contends that he was not a real estate agent or broker, and had no license as a broker or real estate agent, and was not acting as one, but was a salesman for the defendant, and therefore the act which I have just read does not apply to him; but that contention does not appear to be well founded \* \* \*

6. The court directed the jury as follows:

**30** “Now, that being the law and the court holding that it applies to this particular case, directs that there can be no recovery for the lands sold on which the plaintiff claims a commission. You are therefore relieved from considering how much commission the plaintiff was entitled to receive for the lots sold, or whether the payment which he admits having received for the sale of these lots, of \$1043.75 was all the money the plaintiff was entitled to for making these sales, because under the law he cannot recover anything more for the sale of these lots than he has already received, even if you had it under consideration and were to say that he was entitled to receive something more.”

**40**

*Notice and Grounds of Appeal.*

## 7. The court directed the jury as follows:

“You gentlemen are only dealing with the case that is now before you, and under this case as presented there can be no recovery for plaintiff’s commissions on sales of real estate made by him for the defendant. That statute prevents any recovery for that. That is not your province to deal with, because the court removes that from you. You are limited in your findings to the amount plaintiff is entitled to receive as manager of this company, if you find he was manager, and during that time the evidence shows there were eight sales.”

10

Dated, June 13th, 1926.

Yours &c.,

HERBERT CLARK GILSON,  
Attorney of Plaintiff.

20

30

40

**Complaint.**

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

|    |   |   |                   |
|----|---|---|-------------------|
| 10 | <p style="text-align: center;">A. WILLIAM MALINOWSKI,<br/>Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">LINCOLN DEVELOPING COMPANY, a<br/>corporation, and in the alterna-<br/>tive, IGNACIO DE TYNFO,<br/>Defendants.</p> | } | Action<br>at Law. |
|----|---|---|-------------------|

20 The plaintiff, A. William Malinowski, residing in Jersey City, Hudson County, New Jersey, says that:

1. At the times hereinafter mentioned, the defendant, Lincoln Developing Company, was a corporation of the State of New York, having authority to transact business in New Jersey, and was then and there engaged in the business of buying and selling real estate; and the defendant, Ignacio DeTynfo was the President of said corporation.

30 2. On or about December 12th, 1923, defendants employed plaintiff as a salesman on a commission of 25% of all sales made by plaintiff or through him; and plaintiff accepted said employment and continued therein from that time as hereinafter stated.

3. On or about April 15th, 1924, defendant, Lincoln Developing Company, appointed plaintiff man-

*Complaint.*

ager of its said business, on the commission of 5% on all sales made by said company of vacant lots, and 1% on all sales of improved property and plaintiff accepted said appointment and continued therein from that time until on or about September 4th, 1924.

4. The commissions as aforesaid earned by plaintiff during the time hereinbefore mentioned on the sales made by him and by the said corporation, amounted to the sum of \$3,191; and the defendants paid to plaintiff on account of said commissions, the sum of \$1,043.75, leaving a balance of \$2,147.25 due to the plaintiff from the defendants, as shown by the statement hereto annexed and made part thereof, marked "Schedule A." 10

5. The said balance of \$2,147.25 has not been paid. 20

Plaintiff demands against the defendant, Lincoln Developing Company, or, in the alternative, against the defendant, Ignacio DeTynfo, \$2,147.25 damages, together with interest from September 4th, 1924.

HERBERT CLARK GILSON,  
Attorney of Plaintiff. 30

## Schedule A—Annexed to Complaint.

LINCOLN DEVELOPING COMPANY  
To  
A. WILLIAM MALINOWSKI, Dr.

|         |                      |                      |       |           |         |           |
|---------|----------------------|----------------------|-------|-----------|---------|-----------|
| 1924    |                      |                      |       |           |         |           |
| Jan. 1  | Markewicz contract   | (25%—\$900.)         | ..... | \$225.00  |         |           |
|         | Mieckowski “         | (25%—\$800.)         | ..... | 200.00    |         |           |
| to      | Luchin deed          | (10%—\$1000.)        | ..... | 100.00    |         |           |
|         | Pasuk contract       | ( 5%—\$1500.)        | ..... | 75.00     |         |           |
| Sept. 4 | Kostiw contract      | ( 5%—\$1250.)        | ..... | 62.50     |         |           |
| 10      | Synica contract      | ( 5%—\$1400.)        | ..... | 70.00     |         |           |
|         | Gorski contract      | ( 5%—\$1400.)        | ..... | 70.00     |         |           |
|         | Melynik contract     | ( 5%—\$1200.)        | ..... | 80.00     |         |           |
|         | Mahychil contract    | ( 5%—\$1600.)        | ..... | 80.00     |         |           |
|         | Zajac contract       | ( 5%—\$1150.)        | ..... | 55.00     |         |           |
|         | Gregulich contract   | ( 5%—\$1000.)        | ..... | 50.00     |         |           |
|         | Gerenskowski “       | ( 1%—\$6750.)        | ..... | 67.50     |         |           |
|         | Petrykiewicz “       | ( 1%—\$3600.)        | ..... | 36.00     |         |           |
|         | Ortynowicz “         | (\$2.50 monthly)     | ..... | 90.00     |         |           |
|         | Kowalcyzk “          | (\$10. “ )           | ..... | 200.00    |         |           |
|         | Smolinaki “          | (\$10. “ )           | ..... | 250.00    |         |           |
| 20      | Tanne contracts      | (\$7.50 “ )          | ..... | 800.00    |         |           |
|         | Oltarzewski contract | (\$5.00 “ )          | ..... | 125.00    |         |           |
|         | Gural “              | (\$5.00 “ )          | ..... | 250.00    |         |           |
|         | Malek “              | (\$7.50 “ )          | ..... | 375.00    |         |           |
|         | Luchin “             | (\$5.00 “ )          | ..... | 100.00    |         |           |
|         | Zoldak “             | (\$2.50 “ )          | ..... | 125.00    |         |           |
|         | Zulkowski “          | ( “ )                | ..... | 25.00     |         |           |
|         |                      |                      |       |           |         | \$3191.00 |
|         | Credit:              |                      |       |           |         |           |
|         | By cash account      | Mieckowski contract  | ..... | 5.00      |         |           |
| 30      | “ “ “                | Ortynowicz “         | ..... | 26.25     |         |           |
|         | “ “ “                | Kowalcyzk “          | ..... | 140.00    |         |           |
|         | “ “ “                | Smolinski “          | ..... | 210.00    |         |           |
|         | “ “ “                | Tanne contracts      | ..... | 305.00    |         |           |
|         | “ “ “                | Oltarzewski contract | ..... | 60.00     |         |           |
|         | “ “ “                | Gural “              | ..... | 100.00    |         |           |
|         | “ “ “                | Malek “              | ..... | 75.00     |         |           |
|         | “ “ “                | Luchin “             | ..... | 65.00     |         |           |
|         | “ “ “                | Zoldak “             | ..... | 32.50     |         |           |
|         | “ “ “                | Zulkowski “          | ..... | 25.00     | 1043.75 |           |
| 40      |                      | Balance              | ..... | \$2147.25 |         |           |

**Answer of Lincoln Developing Co.**

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

|   |   |                   |    |
|---|---|-------------------|----|
| <p style="text-align: center;">A. WILLIAM MALINOWSKI,<br/>Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">LINCOLN DEVELOPING COMPANY, a<br/>corporation, and in the alterna-<br/>tive, IGNACIO DE TYNFO,<br/>Defendants.</p> | } | Action<br>at Law. | 10 |
|---|---|-------------------|----|

The defendant, Lincoln Developing Company, a corporation, answering the complaint herein says that:

20

1. It admits all the allegations of paragraph 1 of the complaint herein.
2. It denies the allegations of paragraphs 2, 3 and 4 of the complaint herein.

## FIRST SEPARATE DEFENSE.

3. The plaintiff was not, at the time of the making of the contracts, alleged to have been made by him with the defendants, specified in the complaint herein, duly authorized or licensed as a real estate broker or as a real estate salesman.

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## SECOND SEPARATE DEFENSE.

4. The contracts alleged to have been made by the plaintiff with the defendants were not evi-

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*Answer of Lincoln Developing Co.*

denced by any memorandum in writing, signed by the owner or his authorized agent, and specifying therein the rate of commission to be paid to the plaintiff.

## THIRD SEPARATE DEFENSE.

- 10     5. The contracts alleged to have been made by the plaintiff with the defendants were not recognized in writing or memorandum, signed by the owner or his authorized agent, and specifying therein the rate of commission to be paid to the plaintiff.

## FOURTH SEPARATE DEFENSE.

- 20     6. The plaintiff was not the person who effected the sales or contracts alleged in paragraph 4 of the complaint herein, and particularly in "Schedule A" referred to in said paragraph 4.

## FIFTH SEPARATE DEFENSE.

7. The plaintiff has been fully paid all sums due him from the defendants.

## SIXTH SEPARATE DEFENSE.

- 30     8. The plaintiff, during the time specified in the complaint herein, was engaged in performing such acts as interfered with, and prevented the faithful accomplishment of the services and duties for which the plaintiff says he was engaged and which he, the said plaintiff, alleges to have performed.

*Answer of Lincoln Developing Co.*

## SEVENTH SEPARATE DEFENSE.

9. The sums alleged to have become due to the plaintiff from the defendants have not become due.

## FIRST OBJECTION IN LAW TO THE COMPLAINT.

10. At or before the trial of this action the defendant in whose behalf this answer is filed will move to strike out the complaint herein on the ground that said complaint does not state a cause of action in favor of the plaintiff and against this defendant. 10

KANTER & KANTER,  
Attorneys of defendant, Lincoln De-  
veloping Company, a corporation.

20

30

40

**Reply to Answer of Lincoln Developing  
Company.**

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

|  |   |   |                   |
|--|---|---|-------------------|
|  | <p style="text-align: center;">A. WILLIAM MALINOWSKI,<br/>Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">LINCOLN DEVELOPING COMPANY, a<br/>corporation, and in the alterna-<br/>tive, IGNACIO DE TYNFO,<br/>Defendants.</p> | } | Action<br>at Law. |
|--|---|---|-------------------|

10

The plaintiff, A. William Malinowski, in reply to the answer of the defendant, Lincoln Developing Company, says that:

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1. He denies each and every allegation contained in the 1st, 2nd and 2rd Separate Defenses of said Answer.

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2. At or before the trial of the within action the plaintiff will move to strike out the 1st, 2nd and 3rd Separate Defenses in said Answer on the ground that the same are immaterial because it was not necessary for the plaintiff to be duly authorized and licensed as a real estate broker or as a deal estate salesman, or that the said contracts between the plaintiff and the defendants be evidenced or recognized by any memorandum in writing, signed by the owner or his authorized agent, and specifying therein the rate of commission to be paid to the plaintiff.

40

3. He denies each and every allegation contained in the 4th, 5th, 6th and 7th Separate Defenses of said Answer.

HERBERT CLARK GILSON,  
Attorney of Plaintiff.

**Referee's Report.**

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

|   |                             |                  |
|---|-----------------------------|------------------|
| <p>A. WILLIAM MALINOWSKI,<br/>Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>LINCOLN DEVELOPING COMPANY, a<br/>corporation, and in the alterna-<br/>tive, IGNACIO DE TYNFO,<br/>Defendants.</p> | <p>} Action<br/>at Law.</p> | <p><b>10</b></p> |
|---|-----------------------------|------------------|

I do respectfully report that I have heretofore made a report in which I stated the balance in favor of the plaintiff at the sum of \$2,238.54, and to which report is annexed my oath as Referee, which I took before entering upon the reference. **20**

In pursuance of the further order of this Court referring the matter back to me, I do respectfully report that I have now been attended by Mr. Herbert Clark Gilson, attorney of the plaintiff, and Mr. Elias A. Kanter, one of the attorneys for the defendants, and have taken the testimony which is filed herewith.

I deem it proper before stating the account to give my findings specifically on the questions of law and of fact which have been submitted to me, and which of necessity must be determined by me before the statement of the account. **30**

No attempt was made before me to charge the defendant, Ignacio De Tynfo, individually. There must therefore be judgment in his favor. I have considered the matter only as against the Lincoln **40**

*Referee's Report.*

Developing Company, and wherever I have used the word defendant in this report, it is to be considered as referring to the Lincoln Developing Company only.

## I.

10 This action is brought by the plaintiff to recover commissions on the sale of real estate under an oral agreement entered into between the plaintiff and defendant on December 12, 1924, under which the defendant hired and employed the plaintiff to make sales of real estate owned by the defendant. I find as a fact, on the evidence before me, that this agreement was actually entered into, and that under it the plaintiff was entitled to twenty-five per cent. commission on the sale of unimproved  
20 property made by him, and five per cent. commission on the sale of improved property, and that by a further oral agreement the plaintiff was employed as manager for the defendant to employ agents, and was to collect his commissions on the sales made by them on the basis of five per cent. on all vacant property and one per cent. on improved property.

## II.

30 The defendant claims that the plaintiff is not entitled to recover the commission on sales because of the provisions of the act entitled "An act for the prevention of frauds and perjuries," C. S., p. 2614, section 10, and the supplements thereto, the agreement not being in writing.

This contention is in my opinion untenable. The property in question was the property of the defendant corporation. The plaintiff was hired as an employee to sell that property and no other. He  
40 was not pursuing an independent employment. He

*Referee's Report.*

was not holding himself out to be a broker, and he was not making sales of property of persons other than the defendant. He had his office with the defendant Lincoln Developing Company. The defendant rests his argument on the case of *Stout v. Humphrey*, 69 N. J. Law, 436. In that case the plaintiff was an attorney at law, independently employed, and was retained by the defendant to sell one specific piece of property. He was, as pointed out by the Court there, a broker for that piece of property. 10

## III.

The defendant also urges that the plaintiff is not entitled to recover under the agreement in view of the act entitled "An Act to define, regulate and license real estate brokers and salesmen, to create a State Real Estate Commission and to provide penalties for the violation of the provisions hereof", P. L. 1921, p. 370. Section 1 of that act reads as follows: 20

"From and after the first day of October, one thousand nine hundred and twenty-one, it shall be unlawful for any person, firm, association, partnership or corporation, whether operating under a trade name or otherwise, to engage, either directly or indirectly, in the business of a real estate broker or salesman within this State without first obtaining a license under the provisions of this act." 30

The ruling as to the previous point covers this point also. The Real Estate Commission act contemplates a person who sells real estate of outsiders, either as a broker or as the employee of a broker. It does not cover the case sub judice, where the plaintiff is an employee of the owner, selling the 40

*Referee's Report.*

owner's property as a regular occupation, and not selling anyone else's property. I find that there is no force in the defendant's contention on this point.

## IV.

In a number of the contracts the sales had not all been made at the time this suit was commenced. I find however as a fact that the contract was  
 10 broken by the defendant, and that under those circumstances the plaintiff became entitled to the commission which had been earned or could have been earned thereafter by way of damages.

## V.

The plaintiff claims, among other things, for commissions on sales made by salesmen other than himself of five per cent. on all vacant property and  
 20 one per cent. on improved property. His claim is that by an oral agreement he was employed as manager, was to employ the agents and collect his commissions on the sales made by them on the basis which I have above stated. The evidence as to whether he was employed as manager is conflicting, but I think the plaintiff has borne the burden of proof and has proved by corroborative evidence that he was installed as the manager of the defendant, and that the defendant through its President permitted him to hold himself out as the Com-  
 30 pany's manager.

On the entire case I report that the plaintiff has proved the items of his commissions claimed by him, and I find and state the account between the parties as follows: namely: That the defendant, Lincoln Developing Company, is indebted to the plaintiff in the sum of \$2,147.25, with interest from September 4, 1924.

40 The itemized statement of the account is as follows:

*Referee's Report.*

|                       |          |         |           |          |           |
|-----------------------|----------|---------|-----------|----------|-----------|
| Markewicz             | lot      | \$900.  | Com. 25%  | \$225.00 |           |
| Mieckowski            | "        | 800.    | " "       | 200.00   |           |
| Luchin (1st           | "        | 1000.   | " 10      | 100.00   |           |
| " (2nd                | "        | 850.    | " special | 100.00   |           |
| Gerenkowcki           | house    | 6750.   | " 1%      | 67.50    |           |
| Petrykiewicz          | "        | 3600.   | " "       | 36.00    |           |
| Ortynowicz            | lot      | 750.    | " divided | 90.00    |           |
| Kowalczyk             | "        | 800.    | " 25%     | 200.00   |           |
| Smolinski             | "        | 1000.   | " "       | 250.00   |           |
| Tanne (1st            | "        | 1000.   | " "       | 250.00   | 10        |
| " (2nd                | "        | 500.    | " "       | 125.00   |           |
| " (3rd                | "        | 500.    | " "       | 125.00   |           |
| Oltarzewski (1st lot) |          | 500.    | " "       | 125.00   |           |
| Gural                 | lot      | 1000.   | " "       | 250.00   |           |
| Malek                 | "        | 1500.   | " "       | 375.00   |           |
| Zoldak                | "        | 500.    | " "       | 125.00   |           |
| Zulkowski             |          |         |           | 25.00    | \$2668.50 |
| <hr/>                 |          |         |           |          |           |
| Pasuk                 | contract | \$1500. | 5%        | 75.00    |           |
| Kostiw                | "        | 1250.   | "         | 62.50    |           |
| Snnisa                | "        | 1400.   | "         | 70.00    | 20        |
| Gorski                | "        | 1400.   | "         | 70.00    |           |
| Melynik               | "        | 1200.   | "         | 60.00    |           |
| Malyeil               | "        | 1600.   | "         | 80.00    |           |
| Zajac                 | "        | 1150.   | "         | 55.00    |           |
| Gregulich             | "        | 1000.   | "         | 50.00    | \$522.50  |
| <hr/>                 |          |         |           |          |           |

## RECAPITULATION.

|   |           |    |
|---|-----------|----|
| Total on sales by plaintiff.....        | \$2668.50 |    |
| Total on sales by agents.....           | 522.50    |    |
|   | <hr/>     |    |
|   | \$3191.00 | 30 |
| Payments on account of commissions..... | 1043.75   |    |
|   | <hr/>     |    |
| Balance due .....                       | \$2147.25 |    |

together with interest from Sept. 4, 1924.

All of which is respectfully submitted this eighteenth day of January, A. D. Nineteen hundred and twenty-six.

H. T. ROSENBERG,  
Referee. 40

**Exceptions to Report of Referee.**

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

|    |   |   |                   |
|----|---|---|-------------------|
| 10 | <p style="text-align: center;">A. WILLIAM MALINOWSKI,<br/>Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">LINCOLN DEVELOPING COMPANY, a<br/>corporation, and in the alterna-<br/>tive, IGNACIO DE TYNFO,<br/>Defendants.</p> | } | Action<br>at Law. |
|----|---|---|-------------------|

20 The defendant, Lincoln Developing Company, a corporation, by its attorneys, Messrs. Kanter & Kanter, excepts to the report of M. T. Rosenberg, Esq., to whom the matters of account in the above stated case was referred, for the following reasons:

1. The said referee reported in favor of the plaintiff and against Lincoln Developing Company, a corporation.
- 30 2. The said referee did not report in favor of the defendant, Lincoln Developing Company, a corporation, and against the plaintiff.
3. The said referee admitted illegal evidence on the part of the plaintiff over the objection of the defendant, Lincoln Developing Company, a corporation.
- 40 4. The said referee rejected legal evidence offered by the defendant, Lincoln Developing Company, a corporation.

*Exceptions to Report of Referee.*

5 to 30. Exceptions to specific items in "Schedule A" annexed to the complaint, Nos. 1 to 5 and 7 to 23, because the plaintiff had not proved his right thereto by a fair preponderance of evidence, and because he failed to show a compliance with section 10 of the Statute of Frauds, and the Statute requiring a broker's license.

10

31. The said referee failed to report that the plaintiff has been fully paid all sums due him from the Lincoln Developing Company.

32. The said referee failed to report that the plaintiff, during the times specified in the complaint in this action, was engaged in performing such acts as interfered with, and prevented the faithful performance of, the services and duties for which the plaintiff alleges he was engaged and which the said plaintiff claims to have performed.

20

33. The said referee has in diverse other respects erred in his said report and in the conduct of the reference before him.

34. The said referee had no jurisdiction to hear and decide the matters and things by him reported on.

30

Wherefore the defendant, Lincoln Developing Company, a corporation, demands a trial by jury, according to the form of the statute in such case made and provided.

KANTER & KANTER,  
Attorneys of Defendant,  
Lincoln Developing Company.

February 6th, 1926.

40

**Postea.**

## NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10A. WILLIAM MALINOWSKI,  
Plaintiff,

vs.

LINCOLN DEVELOPING COMPANY, and  
in the alternative, IGNACIO DE  
TYNFO,  
Defendants.Action  
at Law.20

This case was tried before Judge Willard W. Cutler, with a jury at the Hudson Circuit on May 25th, 26th and 27th, 1926.

The plaintiff submitted to a voluntary non-suit against the defendant, Ignacio De Tynfo.

The jury rendered a general verdict against the defendant, Lincoln Developing Company, and in favor of the plaintiff for five hundred and seventy-three dollars and ninety-one cents (\$573.91).

Signed May 28, 1926.

30

WILLARD W. CUTLER,  
Judge.

40

**Judgment.**

NEW JERSEY SUPREME COURT.

|  |  |                  |
|--|--|------------------|
| <p>A. WILLIAM MALINOWSKI,<br/>Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>LINCOLN DEVELOPING COMPANY,<br/><i>et al.</i>,<br/>Defendant.</p> | <p>Action<br/>at Law.<br/>On Postea.</p> | <p><b>10</b></p> |
|--|--|------------------|

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant, Lincoln Developing Company, for the sum of five hundred and seventy three dollars and ninety-one cents (\$573.91).

**20**

Entered June 3rd, 1926.

On motion of

HERBERT CLARK GILSON,  
Attorney of Plaintiff.

**30****40**

*Motion to Strike Complaint.*

## NEW JERSEY SUPREME COURT.

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|  |  | <p style="text-align: center;">A. WILLIAM MALINOWSKI,<br/>Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">10 LINCOLN DEVELOPING Co., a corporation, and in the alternative,<br/>IGNATIO DE TYNFO,<br/>Defendant.</p> |
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Before—Hon. WILLARD W. CUTLER, and a Jury.

Jersey City, N. J., May 25, 1926.

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## APPEARANCES:

HERBERT C. GILSON, Esq., for the Plaintiff.

KANTER & KANTER, Esqs., and WILLIAM  
GEORGE, Esq., counsel for the Defendants.

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Mr. Kanter: In behalf of the defendant Lincoln Developing Company I move to strike out paragraph two of the complaint on the ground that that paragraph, taken in connection with the rest of the allegations in the complaint, fails to allege a cause of action in favor of the plaintiff as against the Lincoln Developing Company, on the following grounds:

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First, the complaint fails to allege the plaintiff's compliance with the provisions of Chapter 141 of the public laws of 1921, page 370, in that the plaintiff was not licensed.

*Motion for Direction of Verdict.*

Secondly, the complaint fails to allege plaintiff's compliance with the requirements of section 10 of the Act entitled "An Act for the Prevention of Frauds and Perjuries; 2 Compiled Statutes, page 2610, as amended by Chapter 273 of the Public Laws of 1189, page 1020. Thirdly, this motion applies to items numbers 1, 2, 3, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 of Schedule A of the complaint, these items being the items of the contracts which the plaintiff alleges to have procured as stated in his complaint. 10

The Court: It is a question of fact. I will deny the motion.

Mr. Kanter: Exception.

I would like to have counsel elect as to whether counsel for the plaintiff is to rely for his prima facie case upon the report of the referee, or is he to introduce independent evidence on his main case? 20

The Court: He may rely upon the report.

(A jury was thereupon drawn, and, having been found satisfactory, was sworn.)

Counsel opened to the jury.

Mr. Gilson: I offer in evidence a certificate copy of the referee's report in this case.

(Admitted and marked Exhibit P-1.)

Plaintiff rests. 30

Mr. Kanter: In behalf of the defendant Ignatio De Tynfo I now move for a direction of a verdict in his favor on the report.

Mr. Gilson: The report provides that in the referee's opinion there should be a judgment in favor of the defendant De Tynfo. Of course that was at the end of the entire case. This has all been opened up by the exceptions, and until there is evidence to show what kind of a judgment that is, whether 40

*Motion for Direction of Verdict.*  
*Motion for Non-Suit.*

it is a judgment of non-suit or an affirmative judgment in favor of De Tynfo, it seems to me that question should be reserved until the evidence of the defendant is put in.

The Court: I will refuse your application at this time.

**10** Mr. Kanter: Exception.

I ask an exception to your Honor's refusal to direct a verdict in favor of the defendant De Tynfo on the submission of the report. I now rest as far as the defendant De Tynfo is concerned. I make the same motion on behalf of the defendant De Tynfo.

The Court: I will deny that motion.

**20** Mr. Kanter: Your Honor understands I ask for a direction of a verdict on the report and on the whole evidence. I have no evidence on behalf of the defendant De Tynfo.

The Court: I understand it. This is an alternative case. I will deny your motion.

Mr. Kanter: Exception.

In behalf of the defendant Lincoln Developing Company I move for a non-suit to it because the report does not contain facts upon which any verdict could be based.

**30** The Court: I will refuse the motion.

Mr. Kanter: Exception.

*Frank McDonald. Called by Defendant. Direct.*

FRANK McDONALD, sworn for the Defendant.

DIRECT EXAMINATION BY MR. KANTER :

Q. What is your full name? A. Frank McDonald.

Q. What is your business? A. Public accountant. 10

Q. Are you acquainted with the Lincoln Developing Company? A. Yes.

Q. Do you know the plaintiff Malinowski? A. Yes.

Q. How long have you been the accountant of the Lincoln Developing Company? A. Since 1912.

Q. At my request have you made a compilation of Schedule A of the complaint and the books of the company and calculated the amounts of the various contracts claimed by the complaint? A. Yes. 20

Q. You have made that by compilation from the books of account of the company? A. Yes.

Q. Is that before you now? A. Yes.

(Marked D-1 for identification.)

Q. With reference to item 1 on the plaintiff's complaint, Schedule A, what do the books of account show as to whether or not Mr. Malinowski procured that contract? 30

Mr. Gilson: I object to that. He is offering a paper this witness made up from the books. He is trying to get the books in evidence by having the witness read from a paper marked for identification. This is a new one to me. He must produce the books first. Then if the

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*Frank McDonald. Called by Defendant. Cross.*

plaintiff testifies it is from the books it is admissable in evidence.

The Court: I do not think he can do that.

Mr. Kanter: I have the books here.

The Court: If you offer the books and say that is a copy I think it will be admissable.

- 10 Q. The book which is now before you is what?  
A. It is the customer's ledger.

Mr. Kanter: I offer the book in evidence.  
(Admitted and marked D-2.)

Q. Have you taken from the customer's ledger a compiled account in respect to these various contracts? A. Yes.

- 20 Q. In respect to item No. 1 in the plaintiff's complaint will you tell us whether according to the books of the company Mr. Malinowski procured that sale which he alleges he secured? A. He did not.

Mr. Gilson: I object and ask that the answer be stricken out. He only has one book here and he asks as to the books of the company.

- 30 CROSS EXAMINATION BY MR. GILSON:

Q. What other books are there besides this sales ledger? A. The sales book.

Q. And there is a cash book? A. Yes.

Q. And the cash book would show the payments made on account of the contracts shown in this sales ledger and sales book? A. Yes.

*Frank McDonald. Called by Defendant. Cross.*

Q. Of course you had to refer to those other books in making up this statement before you? A. This is made up from this book alone.

Q. So that there may be other information with respect to these contracts you are testifying to in the sales book and in the cash book, is that correct? A. It is very unlikely.

Q. Well, you cannot swear that there is not? A. I think I could. 10

Q. Well, you think. A. Because the information is always copied from the sales book to the customer's ledger, not the cash book—the amounts are copied and credited.

Q. Will you swear there is not anything in either the sales book or the cash book relating to these transactions?

Mr. Kanter: This is the sales book. 20

A. May I look at that a moment.

Q. There is a sales book and a cash book as I understand you, is that right? A. This is the customer's ledger.

Q. Then there is a sales book? A. A sales book and a cash book.

Q. As I understand you there is nothing in either the sales book or the cash book relating to these transactions that you have compiled here; am I correct? A. No, I do not think you are correct, counsellor. 30

Q. So that you did in making up this statement use the cash book and the sales book? A. No.

Q. In addition to this customer's ledger? A. The cash book and sales book are posted to the customer's ledger, and this book was examined and this statement made from it. These items are 40

*Frank McDonald. Called by Defendant. Cross.*

checked into this ledger from the other book and they are entered in detail. Here is the space for the total and here are the credits here, and in the cash book is entered the date and the name of the customer and the amount and what it is paid for under its respective column. In the sales book this information is entered (indicating).

10 Q. You did not make any entries in any of these books? A. No, sir.

Q. Did you check up or verify these figures you found in the customer's ledger with the sales book and cash book? A. No, sir. I may have checked some of them at other times, but not at this particular time when I made this statement. In this audit—it is a test audit for this purpose, because of the fact that the president himself very carefully  
20 watches his credit entires to see that the sales are all put in so that he can make his calculations.

Q. And this was made up for the purpose of this suit? A. Yes.

Q. I notice on this statement marked for identification, "Not owned by company," under the last item here. Where do you find that in this ledger?  
A. That information, "not owned by company," and this one here, was given to me by De Tynfo, and it was put in these books for memorandum  
30 purposes.

Mr. Gilson: I object to the use of this statement when the books are here and this witness can testify from the books—unless the statement is made up from the entries in the book. I have no objection if that is so. But it is evident that is not so, that he has gotten that information from other sources besides  
40 that.

*Frank McDonald. Called by Defendant. Redirect.*

The Court: As to those two items I do not suppose that is competent.

Q. And those the only two items?

Mr. Gilson: Your Honor will see on the first entry—

The Court: I say statements not taken from that book are not competent. 10

Mr. Gilson: Why don't you use the book?

Mr. Kanter: Because I want the jury to get the benefit of the compilation. The jury cannot keep these figures in mind unless somebody has compiled it for them.

REDIRECT EXAMINATION BY MR. KANTER:

Q. Mr. McDonald, in pencil you have the words "Date of suit October 8, 1924." That you did not find in the books? A. No. 20

Q. That was information given you by somebody else? A. Yes.

Mr. Gilson: Now you are getting in evidence something I am trying to prevent, by reading to him what he has on there.

Mr. Kanter: I want to get this statement before the jury so that they will have some figures to remember when they get in the jury room. 30

Mr. Gilson: I object to that statement. I think we ought not to have a statement compiled from the books and from some other sources.

The Court: Why are not the books here?

Mr. Kanter: The books are here.

The Court: Only one. 40

*Frank McDonald. Called by Defendant. Redirect.*

Q. You were asked to look at item No. 1 of the complaint? A. Yes.

Q. And you were asked to find the entry of the sale made with respect to that item, and do you find it in the book before you? A. Yes, sir.

Q. What did you copy from that book onto the schedule?

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Mr. Gilson: That is what I objected to.

Mr. Kanter: I submit I ought to be permitted to try this case in my own way if it is proper.

The Court: He is entitled to object.

Q. What did you copy on the schedule marked for identification from that book which is before you?

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The Court: He has testified that that book is made up from the cash book and the sales book. If that is true that is nothing more than what we ordinarily call a ledger. You cannot offer that in evidence.

Q. How long have you been the accountant of the Lincoln Development Company? A. Since 1912.

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Q. And does the ledger indicate the name of the agent that procured the sale; was that entered at some place in the ledger? A. Yes.

Q. So that when you look through that ledger with respect to each account there you can tell the agent who procured the sale? A. Yes.

Q. Did you for purposes of this suit make the compilation using the customer's ledger and the information contained in that ledger? A. Yes.

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*Frank McDonald. Called by Defendant. Redirect.*

Q. Now I ask you what did you copy with respect to item No. 1 from the customer's ledger onto the compilation? What information did you copy?

Mr. Gilson: That is what I object to. I think we will have to have that cash book.

The Court: He may find out from this gentleman how this book is made up. 10

Mr. Gilson: He has testified it is from the sales book and from the cash book.

The Court: Then those books must be produced.

Mr. Kanter: I am not trying to prove the facts in the cash book or in the sales book. I am trying to prove the amounts paid by customers up to a certain time and whether this item No. 1 was procured by the plaintiff— which information is contained in this book. 20

The Court: Why don't you produce your original books? Then you can check them up and find out without any trouble.

Mr. Kanter: All right; if we are to wade through that I will have to call back Mr. McDonald in the morning.

Q. Did you know the plaintiff Malinowsky in the early part of 1924? A. Yes. 30

Q. When it is, to your recollection, that you first became acquainted with him? A. I could not specify the date, but it was some time early in that year. I had an office arrangement in this company's office. Our main office is in Brooklyn. I leased this place and had an office arrangement there for some months and was in there every day or so for some time.

*Frank McDonald. Called by Defendant. Redirect.*

Q. The office of the defendant company is located where? A. 206 Broadway.

Q. How frequently did you get there? A. Every day or so.

10 Q. In this case Mr. Malinowski has testified, and it is found according to the referee's report, that on or about April 15, 1924, a change in the relationship between him and the defendant company occurred. Did you observe any change in the character of the work done by Mr. Malinowski after April 15, 1924 from what it had been before? A. There was none, sir.

20 Q. Of what did the organization force in April, 1924 consist? A. The President, the stenographer, ones or two salesmen, and occasionally a man would drop in and attempt to sell something; and another officer and Mr. De Tynfo's wife acted as an officer.

Q. You mean Mr. De Tynfo was an officer of the company? A. Yes; and myself.

Q. In the office there was a stenographer, Mr. De Tynfo himself, and one or two agents? A. Yes.

Q. And occasionally someone else would come in to sell? A. Yes.

Q. How large was the office? A. Do you mean the area?

30 Q. Yes. A. I judge about ten or twelve by twenty-eight.

Q. This was at 206 Broadway? A. Yes.

Q. How frequently did you get to that office, after April 15, 1924? A. It was my practice to go in there every day or so on my way to Brooklyn or uptown New York.

Q. This office consisted of an outer waiting room and an inner office? A. A small partition, about eight feet high.

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*Frank McDonald. Called by Defendant. Redirect.*

Q. The partition not rising to the ceiling? A. Not rising to the ceiling.

Q. Did you ever observe Mr. Malinowski train any agent, break in any agents, do any correspondence or do any other work that is usually associated with the idea of manager?

Mr. Gilson: I object as leading. 10

The Court: Objection sustained.

Q. What did you see him do before April 15, 1924? A. Well, in my experience of several years—

Q. Just answer the question. A. Act as an ordinary salesman.

Q. What did that consist of? A. Mr. De Tynfo's office usually—

Q. What did that consist of? A. Following up leads. 20

Q. What did you see Malinowski do when he came to the office? A. Stood around mostly—look up leads and confer with Mr. De Tynfo regarding those leads and go out probably late in the afternoon or occasionally during the day or take people to the property.

Q. What did he do after April 15, 1924? A. The same thing.

Q. Did you ever see him train any agents? A. No, sir. 30

Q. Did you ever see him prepare any correspondence? A. No, sir.

Q. Were there any more agents after April 15, 1924, than there were prior to April 15, 1924? A. The same thing, the same character of agents occasionally coming in.

Q. What is the last time that you observed Mr. Malinowski there in 1924? A. Some time in the middle of the year. 40

*Frank McDonald. Called by Defendant. Cross.*

Q. In June of 1924? A. I will say around that time, I cannot be certain, counsellor.

Mr. Kanter: That is all. I want it understood I am going to ask the privilege of recalling Mr. McDonald in the morning with these other books.

10 The Court: You may do that.

CROSS EXAMINATION BY MR. GILSON:

Q. You originally sublet this office to Mr. De Tynfo or the Lincoln Developing Company? A. Not exactly.

Q. You had the lease of the office first? A. Yes.

Q. And he came along and asked you to let him have desk room or something? A. He paid half and later took it all over. The lease was not transferred.

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Q. First you had the whole office and he later came along and made an arrangement with you by which he took part of the office, and that ran along for a while and he made an arrangement by which he took the whole office over and you sublet from him? A. Yes.

Q. And during all of that time you sort of audited his books? A. Yes.

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Q. When you went over there about every day how long would you stay? A. Some days I might stay for an hour or two; sometimes half a day; sometimes just a few minutes.

Q. It was usually just to get your mail? A. No; there might be some compilation I wanted to make in New York City rather than go to the Brooklyn office.

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*Frank McDonald. Called by Defendant. Cross.*

Q. How often would you average staying there more than ten or fifteen minutes to an hour or so?

A. It is very hard to say. I do not keep data of time on jobs of that kind. If I am going to be on a job of several weeks I would keep a record of myself and any employees I might send.

Q. Did you have any particular time for going there, morning or afternoon? A. Usually when I went to the city.

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Q. You lived in Brooklyn? A. No. I have an office in Brooklyn.

Q. You would first stop there and then go to Brooklyn? A. Sometimes. Sometimes I would stop up town or go to New Jersey.

Q. You did not have much opportunity to watch Mr. Malinowski to see what he was doing, did you?

A. Yes, because I have always watched Mr. De Tynfo's business pretty well. I have been rather interested in his success. I have known him many years when he would not talk very well; I would usually talk to these agents and say, "Did you make any sales? Why don't you go out and get some leads?" I always took a fatherly interest in the concern.

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Q. Have you known Mr. De Tynfo very long? A. Since 1912.

Q. Before renting the office to him? A. About ten years.

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Q. Before that? A. Yes, 1912. That occurred in 1923.

Q. Before 1912 had you known him very long? A. No.

Q. Did you know that Mr. De Tynfo or the Lincoln Developing Company had had cards printed with Mr. Malinowski's name as treasurer on that card?

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*Frank McDonald. Called by Defendant. Cross.*

Mr. Kanter: I object as not cross examination.

The Court: Why is it cross examination?

Mr. Gilson: If he knew the Lincoln Developing Company had obtained cards printed with Mr. Malinowski's name on as manager, that would be something showing a change had taken place and that he was not only a salesman.

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The Court: I will allow the question.

A. As treasurer?

Q. You did know it? A. No, sir, I did not know it.

Q. If you knew that after April, 1924, it is a fact that they did have cards printed with Mr. Malinowski's name on then you would change your testimony about when a change took place about April, isn't that so?

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Mr. Kanter: I object to the question.

The Court: Objection sustained.

Mr. Gilson: Exception.

Q. This card shows "Manager" and not "Treasurer". If I said, "Treasurer" I misspoke. I am asking if you ever had any knowledge that Mr. Malinowski was manager or that the Lincoln Developing Company had cards printed with his name on as manager? A. No, sir, I did not. If I did it would have been only the name; there was not anything to manage.

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Q. Did you know that had happened? A. No.

Q. If you did know, if it were a fact that in April, 1924, that did take place then would you want to change your testimony— A. Not at all.

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*Frank McDonald. Called by Defendant. Cross.*

Q. —with respect to no change having taken place about April, 1924, with respect to his employment? A. No, because I would see it, I would know it through the effect on the bookkeeper and the stenographer, I would know it through the effect on the sales, I would know if any difference had taken place; and there was not any.

Q. Isn't it a fact that before December, 1923, when Mr. Malinowski first became connected with the company, that all that Mr. De Tynfo and the Lincoln Developing Company had there was an office with one clerk, a girl; isn't that so? A. The organization was about the same as it is now.

Q. Did they have a telephone there before December, 1923? A. Not for a while, no.

Q. And after Mr. Malinowski went there they put in a telephone? A. Yes, but I do not think it was because of Mr. Malinowski's coming; they were trying to get a telephone for some time.

Mr. Gilson: I ask that that be stricken out.  
The Court: Strike it out.

Q. They did have more clerks in the office after Mr. Malinowski came there? A. No.

Q. You think they only had one girl? A. I think that is all. There was a change of girls there. They might have had an overlapping for a week or so due to the change of bookkeepers.

Q. You never heard Mr. De Tynfo pick out Mr. Malinowski and ask him to go out and follow up some leads that he could not put through, did you? A. I have never heard him that way. I have heard him ask Mr. Malinowski to go out to customers to see if he could close them or see if he could make appointments with them.

*Frank McDonald. Called by Defendant. Redirect.*  
*John Markiewicz. Called by Defendant. Direct.*

REDIRECT EXAMINATION BY MR. KANTER :

Q. Mr. Gilson referred to a telephone being installed after Malinowski got there. Do you know what was the reason for there being no telephone there in the early part of 1924? A. I do not, sir.

10 Q. Do you know where the office had been before?  
 A. In Newark.

Q. Do you know how long it took to get telephones at that time from the telephone company?

A. I knew it took some time, because I had an experience with it.

Q. Was that the occasion of there being no telephone in the office of the Lincoln Developing Company? A. That is what I understood.

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JOHN MARKIEWICZ, sworn for the defendant.

DIRECT EXAMINATION BY MR. KANTER :

Q. Where do you live? A. Clark Township, Lincoln Boulevard, near Rahway, in Union County.

30 Q. You bought some property from the Lincoln Developing Company, didn't you? A. Yes.

Q. I show you a contract dated April 17, 1924, between you and the Lincoln Developing Company. Did you buy the property mentioned in that contract? A. Yes.

Q. Was that the date you bought it? A. Yes.

Q. Did you buy that property as a result of Mr. Malinowski asking you to buy it?

Mr. Gilson: I object.

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*John Markiewicz. Called by Defendant. Direct.*

A. No.

Mr. Gilson: I do not want to object all the time but if he is going to ask each witness that I must object to it. He can ask how he came to buy the property. That is very leading and it contains a conclusion of law.

The Court: He can tell us the facts. That is a conclusion. 10

Q. Who asked you to buy this property? A. I find an ad in the paper.

Q. What paper? A. In this paper.

Q. You found it in some foreign language paper? A. Yes.

Q. What do you call this paper? A. Ukranian National Association. 20

Q. As a result of seeing an advertisement in the newspaper what did you do?

Mr. Gilson: This is a 1926 paper.

A. I don't keep the same paper. It is the same paper.

Q. You found it in that newspaper of which you have this copy? A. Yes.

Q. Back in 1924 you saw an advertisement in the newspaper? A. Yes. 30

Q. Because of that advertisement where did you go? A. I found it in the paper and I go to the New York office.

Q. Whose office? A. Mr. De Tynfo.

Q. Whom did you see there? A. Mr. De Tynfo.

Q. Then what did you do? A. I bought it. I bought it from De Tynfo.

Q. You bought the property? A. Yes. 40

*John Markiewicz. Called by Defendant. Cross.*

CROSS EXAMINATION BY MR. GILSON:

Q. Did you ever see Mr. Malinowski? A. No. After, not before.

Q. Where did you see him? A. One time in Newark I came in to Mr. De Tynfo, and after Mr. De Tynfo says, "That is my agent"—about two or three weeks later.

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Q. That was in Mr. De Tynfo's house or his office? A. Right in his house Mr. De Tynfo has his office to-day.

Q. Then did Mr. Malinowski talk to you about this property? A. I am buy it already.

Q. Did he talk to you about the property? A. I give deposit before, after about three weeks, I don't talk nothing to Mr. Malinowski.

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Q. Didn't you telephone first before going to Newark, to Mr. De Tynfo? A. I can't tell you now.

Q. You don't remember that? A. I don't remember.

Q. But you remember, don't you, that the property you first bought from Mr. De Tynfo you came down and exchanged for other property—you changed—do you remember that? A. No.

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Q. I don't think you understand me about "exchange". The first lots you bought, you did not buy them, did you? A. Sure I buy them first.

Q. Didn't you when you went to Newark buy some other lots? A. Now listen. When I am buy it and when I am changing, that is different. After I buy other lots. Mr. Malinowski don't talk, only Mr. De Tynfo, come with his wife to my house, and my wife and Mr. De Tynfo talk business. Mr. Malinowski never come to my house.

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*John Markiewicz. Called by Defendant. Cross.*

Q. Not to your house, to Mr. De Tynfo's house. Isn't this what happened: After you signed the contract with Mr. De Tynfo you went to Mr. De Tynfo's house and said, "I don't like them, I want some other lots"? A. Mr. De Tynfo came in. I no take my wife to Mr. De Tynfo's office; but Mr. De Tynfo and his wife come in my house. We make business right in my house after, not in Mr. De Tynfo's office. That is all wrong. 10

Q. Then after you signed the contract you went out and looked at the property, didn't you? A. I seen before that property, and after Mr. De Tynfo and his wife come in and talk, I don't see nobody. We bought first off the property. One time I am taking my wife to Clark Township and my wife says, "That is no good place"—I have a little tailor shop—"that is no good place." I talk to my wife, and after Mr. De Tynfo come in. I no talk before nothing to nobody, and after Mr. De Tynfo come in my house he change it to other lots. Not change it, only I buy other lots. 20

Q. And Mr. Malinowski was the one who sold you the other lots, wasn't he? A. Mr. Malinowski wasn't stay in my place this time. I no make nothing from Mr. Malinowski some business, nothing. 30

Q. You never talked with Mr. Malinowski? A. No.

Q. Now let me ask you this: You remember testifying before down in Jersey City in Mr. Rosenberg's office, the referee, don't you remember testifying? A. What do you say?

Q. Do you remember telling your story before a referee down in Jersey City? A. I don't know nothing from Jersey City. Jersey City is something I don't know nothing about, nothing. 40

*John Markiewicz. Called by Defendant. Cross.*

Q. You went down to 15 Exchange Place, to testify for Mr. De Tynfo last summer? Don't you remember that? A. No, I don't know. I don't know nothing like that.

Q. Don't you remember being sworn as a witness and testifying for Mr. De Tynfo in this case?

A. In this case, yes; that is different. Yes.

10 Q. Don't you remember testifying as follows—page 41—“Q. Isn't this what happened, that you and Mr. De Tynfo talked about this four or five times and then Mr. Malinowski called you up finally and asked you to meet him at the Newark office, don't you remember that? A. No, no. Q.

Did Mr. Malinowski telephone to you and ask you to come down to the Newark office? A. I don't know who called me when I came in to see Mr. De Tynfo.” Do you remember testifying that way?

20 A. I don't remember that; I don't think so.

Q. Do you remember this, that after seeing Mr. De Tynfo four or five times somebody telephoned to your house and asked you to come down to Mr. De Tynfo's house in Newark?

Mr. Gilson: I object to that. It is not a statement in the previous testimony given by this witness.

30 A. Sure; before I come in. I don't know anything. Somebody come to me there. I have a business of tailor. I stay all the time in the shop, about nine or ten. After I get through I come to meet De Tynfo. I didn't get a telephone and don't know anything about it.

Q. Don't you remember testifying as follows: “But you did in answer to a telephone message go down to the Newark office and meet Mr. Malin-

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*John Markiewicz. Called by Defendant. Redirect.*  
*E. H. Mieczkowski. Called by Defendant. Direct.*

owski? A. Please, I can't tell you I got a telephone call. I no got a telephone, only I go to Mr. De Tynfo before and Mr. De Tynfo says I come in any time to Mr. De Tynfo, but I can't tell you who was on the telephone. I ain't got a telephone." Do you remember testifying that way?

A. Look—

Q. No, answer the question. A. No, no, no.

Q. How did you happen to get here to-day? A. I got a paper.

Q. Let's see it. Did you get any money, fifty cents or a dollar or something? A. Maybe.

Q. How much? A. Five cents, just my fare. I got railroad tickets and five cents, that is all.

REDIRECT EXAMINATION BY MR. KANTER:

Q. You did not have any telephone, did you, in 1924? A. No.

(Adjourned to May 26, 1925.)

May 26, 1925.

EDWARD H. MIECZKOWSKI, sworn, for the defendant.

DIRECT EXAMINATION BY MR. KANTER:

Q. You are one of the men who bought property from the Lincoln Developing Company in respect to which Mr. Malinowski claims a commission. You did buy property from the Lincoln Developing Company? A. I did.

*E. H. Mieczkowski. Called by Defendant. Direct.*

Q. If I showed you the contract would you remember it? A. Yes.

Q. I show you a contract dated January 16, 1924. Is that the property you bought from the Lincoln Developing Company? A. Yes.

Q. Did you ever see Mr. Malinowski before January 16, 1924? A. I did not see him before.

10 Q. This contract was sent out to your house by Mr. De Tynfo with Mr. Malinowski? Yes or no? A. No. I took the contract with me while I was in the office.

Q. Then Mr. Malinowski came out and saw you sign your name on the contract, did he? A. That was this way—

Q. Did Mr. Malinowski come out and see you sign your name on the contract? A. Yes.

20 Q. Before January 16, 1924, had you seen Mr. Malinowski—before that time? A. Before that time, no, sir.

Q. How did you happen to buy this property? A. I found an advertisement in the paper.

30 Q. Do you know what paper it was? A. It was a Polish paper, and I write a letter to that company, and Mr. DeTynfo called to my house, and we agreed to go to the property the following Sunday. So we went over there and of course Mr. Malinowski was there with me, and Mr. Malinowski and Mr. De Tynfo and more people, and we went to the property. He showed me some property I did not like at all, so Mr. De Tynfo took me to a different side of the land and showed me different lots and I agreed to by them.

Q. And for the lots which he then showed you and which you then agreed to buy did you then give Mr. De Tynfo a deposit of ten dollars? A. I did.

40

*E. H. Mieczkowski. Called by Defendant. Cross.*

Q. And did you subsequently pay—you know what subsequently means—later on, did you later on give him an additional forty dollars? A. I give him forty or fifty dollars, something like that.

Q. And it was then that you agreed to buy the lots from the Lincoln Developing Company A. I called him—

Q. It was then that you agreed to buy these eight lots from the Lincoln Developing Company? A. Yes. 10

Q. And did Mr. Malinowski have anything to do with it excepting to see you sign your name to this contract?

Mr. Gilson: I object to that.

The Court: So far as he knows.

Q. As far as you know, did he have anything to do with it excepting to see you sign your name to this contract? A. No, I guess not. 20

CROSS EXAMINATION BY MR. GILSON:

Q. You are talking about January 16, that is the date of this agreement you signed. Do you remember whether you signed it on the 16th, or was that the date you took the contract home with you? A. I don't remember exactly whether the date was when I signed it home or whether the date was when I took the contract from the office. I don't know which it is. 30

Q. When you took this contract home with you you kept it all the time until you signed it? A. Yes.

Q. About how many days was it between the time Mr. De Tynfo gave you this contract and the time 40

*E. H. Mieczkowski. Called by Defendant. Cross.*

you signed it, about how many days? A. About a week.

Q. About a week? A. Yes.

Q. So that you did see Mr. Malinowski before you actually signed the contract? A. I seen him on the contract. We went together from the office.

10 Q. And you saw him out at your house, didn't you? A. I saw him out at my house, yes.

Q. When he went out there to your house after you had seen Mr. De Tynfo and had taken this contract, you did not want to sign the contract at first, did you? A. No.

Q. And he talked to you and finally it was through his talking to you that you did sign the contract, isn't that so? A. Well, I give a deposit  
20 and he told me I would not get the money back unless I have to sign it and have to buy it.

Q. Who told you? A. Malinowski.

Q. Don't you remember testifying as follows in this same case before the referee, on pages 49 of Volume four:

“Now, when did you first meet Mr. Malinowski?  
A. Well, first I meet Mr. Malinowski at my house when Mr. De Tynfo, his boss, gave me the contract, and he told me to read it and sign it at my house  
30 with my wife. So I read the contract and I don't like it, so I sent him a letter and he—De Tynfo—first come to my house, because I don't like the contract, and instead of Mr. De Tynfo Mr. Malinowski came in.”

Do you remember that? A. Yes, that is it.

Q. “Q. Then Mr. Malinowski fixed the contract up so it was all right for you? A. It was the same contract but he accept this contract. It is all right,  
40 so I say.”

*E. H. Mieczkowski. Called by Defendant. Cross.*

Do you remember that? A. Yes.

Q. "Q. So he talked you into signing the contract? A. He talked me into signing the contract—Mr. Malinowski."

Mr. Kanter: I object to that characterization and I object on the ground that is not a correct representation of the testimony. There is nothing there that Mr. Malinowski said anything about the contract. 10

The Court: You are supposed to be reading it.

Mr. Gilson: I simply put in, following this, "Mr. Malinowski." Strike out the "Mr. Malinowski."

Q. Do you remember testifying that way? A. I don't remember everything, but I remember something about it. 20

Q. Is it a fact that Mr. Malinowski did talk you into signing this contract when he went out there? A. Of course, when he came to my house he did.

Q. And it is a fact that Mr. De Tynfo could not close the contract with you and sent Mr. Malinowski there to close it, isn't that so? A. Well, he did not call. Instead Malinowski came. At first I did not admit Mr. Malinowski. 30

Q. But you paid Mr. Malinowski the money, didn't you, when you signed the contract? A. No, I paid in the office the second time when I go, and the third time when Mr. Malinowski come in after the contract was signed. I paid him a couple of times.

Q. You paid Mr. Malinowski when you signed the contract? A. After I signed the contract, but not the same day. 40

*E. H. Mieczkowski, Called by Defendant. Redirect.*

REDIRECT EXAMINATION BY MR. KANTER:

Q. You did not pay Mr. Malinowski any money when you signed the contract? A. No; I paid the money at the office before.

10 Q. And the first transaction you had in reference to buying these lots was giving a ten dollar deposit to Mr. De Tynfo? A. Yes.

Q. And agreeing to buy the lots by a memorandum, by a paper you signed then? A. Yes.

Mr. Gilson: I think these contracts should be put in evidence. They are using them. I offer that contract in evidence.

Mr. Kanter: I do not know that you can. It is my case now.

20 Mr. Gilson: Then I object to the use of the contract and reading from it unless it is in evidence.

The Court: There was not any objection made at the time. It stands the way it is.

Mr. Gilson: May I offer it in evidence myself? They have produced it on the other side.

The Court: When it comes to your side.

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

30 The Court: It may be marked for identification.

(Marked D-2 for identification.)

*George Luchin. Called by Defendant. Direct.*

GEORGE LUCHIN, sworn for the defendant.

DIRECT EXAMINATION BY MR. KANTER:

Q. On or about August 8, 1924, did you buy a certain property from the Lincoln Developing Company? A. Yes.

Q. Do you remember what property was bought about that time? A. I remember. 10

Q. What property was it? A. King Street, Rahway, New Jersey.

Q. I show you the contract and ask you to refresh your recollection as to the date and the property that you bought about August 8, 1924. A. I will show you my contract. I got everything.

Q. You have produced here a contract dated August 8, 1924? A. I have got receipt here.

Q. You have produced a slip dated August 8, 1924, referring to lots seven and eight in block A? A. Yes. 20

Q. And you have produced here a contract dated August 8 referring to the same property? A. Yes.

Q. Who induced you to buy this property which you bought pursuant to this slip and this contract?

Mr. Gilson: Would you mind changing the word "induced"? That is a conclusion for the Court and jury. 30

The Court: I suppose he is entitled to tell us just exactly what took place.

Q. How did you happen to buy this property?  
A. In 1923, November 5, I make hurt for my hand. I stay in the hospital for a long time after—May 18—

40

*George Luchin. Called by Defendant. Direct.*

Q. I am not talking about the property you bought May 19, I am talking about the property you bought in August, 1924. Now, forget the property of May 19 at present. A. 1924, May 18, I see advertisement and I go over in the office.

Q. To whose office? A. Mr. De Tynfo. I say, "You sell the property? Yes. What place?" He says, "Rahway." "All right; I come in to-morrow," I say. I go to the road and buy myself tickets and pay my carfare on the train and everything. I see that property. I go to my friend Joe Klipshik. He says, "I live here three years. You buy. I no stay in New York."

Q. You say that in May you went out there to Rahway and you met a man by the name of Klipchik? A. Yes.

Q. And he said he liked the property? A. Yes.

Q. And thereupon what did you do? A. He said, "Any place you better live away from New York; you have lots of work here; you open business here and live here."

Q. Then did you buy some property in May 1924? A. Yes.

Q. After you bought that property did you buy some other property, in August? A. Yes.

Q. How did you happen to buy the property in August? A. Another property—I go one Sunday and see my property again, and near two lots belong to an Italian fellow, they don't belong to De Tynfo. He come in the same time and say, "Mr. De Tynfo, you sell my property. Italian people like a whole bunch; one family never live."

Mr. De Tynfo says, "All right; you told me first you only need two lots on a main road and a business. I had opened up on a business, gas

*George Luchin. Called by Defendant. Cross.*

station, candy store and everything." So Mr. Malinowski at that time stay vacation.

Q. Let me get that straight. When you went out there in August you say you saw certain property that was owned by two Italian fellows? A. Yes.

Q. Would you remember their names if I told them to you; was it Malone and Galanti? A. Yes. 10

Q. Did Mr. Malinowski ever ask you to buy that property which you bought in August, 1924? A. Never. First I see that property, just I see that Sunday the first time.

Q. Did Mr. Malinowski ask you to buy it? A. No.

Q. Did he ever show you the property? A. No.

Q. And you bought that property as a result of some talk you had with De Tynfo, is that correct? A. Yes. 20

Q. And you paid for the property? A. Yes.

Q. And that was in August of 1924? A. Yes.

Q. You had been coming in to the Lincoln Developing Company pretty often; did you come into the Lincoln Developing Company many times between May and August? A. I come in every day.

Q. You were also trying to sell some lots for the Lincoln Developing Company? A. Yes. 30

Q. Did you see Mr. Malinowski in that office from about June 15, 1924 until the time you bought this property in August? A. No.

CROSS EXAMINATION BY MR. GILSON:

Q. As I understand it you saw an ad in a Polish paper in May and you answered the ad by letter; you wrote to the Lincoln Developing Company? A. Yes. 40

*George Luchin. Called by Defendant. Cross.*

Q. Then in answer to that letter which you wrote him Mr. Malinowski went out to your house to see you, didn't he? A. To my house.

10

Mr. Kanter: I object to that, because we are not going into the transaction in May. It is the transaction in August, that being the one on which commissions are claimed by the plaintiff and denied by the defendant—item three of the complaint.

Mr. Gilson: If Mr. Malinowski first sold him one piece of property and later on sold him another—

The Court: What he did about the second lot is all right; what he did about the first lot is immaterial.

20

Mr. Gilson: Isn't it competent to test his credibility?

The Court: If you want to insist on it, go ahead.

Q. It is a fact that Mr. Malinowski went out to see you in answer to your letter, isn't it? A. To buy the second lot?

Q. No, first. A. The first time—

30

Mr. Kanter: Just a minute.

The Court: It has not anything to do with it, but if you allowed him to testify to the May lot I cannot stop him from being cross examined on that.

A. I seen the property of Mr. De Tynfo. I go to my friends and Mr. De Tynfo sell me. I pay \$20 deposit; \$80 left, \$10 a month. I have a receipt here—not Malinowski.

40

*George Luchin. Called by Defendant. Cross.*

Q. I am asking you whether Malinowski did not go out to see you in answer to your letter. A. Letter? Who write me a letter? I go myself to the office.

Q. You wrote a letter when you saw this ad in the Polish paper, and then Mr. Malinowski went out to your house, didn't he? A. Never stay my house. 10

Q. Went to your office? A. Just in the office I see De Tynfo, not Malinowski.

Q. Mr. Malinowski never went out to see you? A. No; and after go vacation.

Q. I am talking about May.

Mr. Kanter: I object.

A. The second lots I never see— 20

Mr. Kanter: I object. This is not in issue here.

The Court: It is cross examination.

Q. I am talking about May and not August. Didn't he go out to see you in May—Mr. Malinowski? A. Sure I see him, one time in May; in June I no see him.

Q. In May didn't he go to your house? A. In May never go to my house, never to my house—Mr. Malinowski. 30

Q. You worked for this company as an agent? A. 12 months I no work. I stay in hospital six months. Then I come in the office, sometimes bring in Mr. De Tynfo's orders and tell him to pay me ten or fifteen dollars. I not an agent, I no go a license, I can't sell. Just for my work. I 40

*Frank McDonald. Recalled. Direct.*

am crippled six months. I stay in the hospital six months—Dr. Wolf, 64 Second Street.

Q. Do you work for the Lincoln Developing Company now? A. Sometimes I find my friend and bring over that De Tynfo sell and pay me a couple of dollars. I make a living.

10 Q. What do you mean a couple of dollars, how must percent? A. Ten or fifteen dollars for customer. I no agent. I no take a commission, 25 and 20 per cent.

Q. You haven't got a license as a real estate broker, have you? A. I haven't got a license. Mr. De Tynfo got it, not me.

Q. But Mr. De Tynfo asked you to sell some of this property for him.

20 Mr. Kanter: I object to the question.  
The Court: Objection sustained.  
Mr. Gilson: Exception.

A. If I sell lot and you come in and take my commission, what you say?

The Court: That is all.

30

FRANK McDONALD, recalled:

Mr. Kanter: Mr. McDonald and I have gone over the accounts as contained in the ledger showing the amounts paid by various people who bought lots from us up to October 8, 1924, the date of bringing this suit. To shorten the testimony Mr. McDonald has

40

*Frank McDonald. Recalled. Direct.*

prepared that statement in tabulated form so that the jurymen can see with respect to each item in the complaint at a glance what was paid by the customers to us, what was paid by us to Mr. Malinowski and what would be due to Mr. Malinowski according to his complaint up to October 8, 1924. That testimony is all in tabulated form. To ask this witness each specific question with respect to each item would take a long time, and I want to shorten the testimony and ask if Mr. Gilson will admit that sheet. 10

The Court: Show Mr. Gilson the tabulation.

Mr. Gilson: I haven't any objection to the tabulation but it seems to me he can state the total payments instead of putting that sheet in evidence. It is not confined to the books. It has a lot of other memoranda on it, and I do not think it should go in. Won't it do to let the witness state the totals paid on each contract? 20

The Court: Show Mr. Gilson the statement.

Mr. Gilson: We will not admit it.

## DIRECT EXAMINATION BY MR. KANTER:

30

Q. You testified yesterday you are the auditor of the company? A. Yes.

Q. Please turn to page 136 of your ledger—

Mr. Gilson: I would like to ask Mr. McDonald a question or two. These books are not in evidence.

40

*Frank McDonald. Recalled. Direct.*

BY MR. GILSON:

Q. Do you know whether the Lincoln Developing Company had more than one set of books? A. I know they have but one set of books.

Q. Did you keep these books yourself? A. No.

10 Q. Some clerk in the office made the entries and then you would come and audit the books periodically? A. Yes.

Q. About how often would you audit the books? A. Once a month if I had an opportunity. Perhaps I would not come in two months, perhaps I would come in in two weeks and look over things. Not regular periods.

20 Q. When you audited the books did you verify or check the entries in that ledger from the cash book and that other sales book? A. Occasionally. It was not a detailed audit. Occasionally for tests. May I explain why?

The Court: Yes, go ahead.

Mr. De Tynfo and I found in many realty companies that I have audited that the chief himself in order to protect himself against thieving by the bookkeepers or cashiers, will check his own entries.  
30 Every day they look over the cash book and see that the credits are made in the ledger. They are very carefully watched. That is the main reason for not checking them in detail.

Q. Then you cannot tell whether the information you have from that ledger from which you have tabulated these figures correctly represents the entries in these other books, can you? A. Well, I checked last night and this morning these particular items from the sales book and from the cash  
40

*Frank McDonald. Recalled. Direct.*

book, excepting a few at the end that I did not quite get finished with.

BY MR. KANTER:

Q. You have checked the items specified in the complaint to which I called your attention? A. Except a few at the bottom. 10

Q. Which? A. I put a pencil mark here. I checked these.

Q. Which haven't you checked? A. These.

Q. Indicating the last how many? A. Seven. I might say that where mortgages were taken back they were given credit for the full amount of the contract, so it was not necessary to check those in detail.

Q. You say you had checked the items represented by items Nos. 1, 2, 3, 14, 15, 16, 17-A, 17-B and 17-C, 18, 19, 20, 21, 22 and 23? A. 22 and 3 not in detail, because they were mortgage items and full credit was given there. 20

Q. With the exception you have mentioned you have checked these items which I have mentioned? A. Yes.

Q. And you have found the ledger is a correct transcript of the records in the original books of entry? A. Yes. 30

Q. Will you tell us—item No. 1, 2 and so forth represent the items in what? A. The sales book and cash book.

Q. And item No. 1 refers to what paper in this court room? A. Schedule A of the complaint.

Q. So when you testified to item No. 1 that has reference to item No. 1 of Schedule A? A. Yes.

*Frank McDonald. Recalled. Direct.*

Q. Item No. 1 of Schedule A refers to what account or what contract in the ledger of the company? A. Markiewicz; ledger folio 136.

Q. Will you tell us how much had been paid by the customer Markiewicz on item No. 1 up to and inclusive of October 8, 1924? A. \$175.

10 Q. According to the records of your company that you have checked was Mr. Malinowski the agent who had procured that sale?

Mr. Gilson: I object to that.

Q. Would your records show which agent had procured that sale? A. Yes.

20 Mr. Gilson: I object to that on the ground that would not be binding on the plaintiff.

The Court: I do not think so.

Mr. Gilson: Let me see the books.

The Court: Show him the books.

Q. Turn to page 136 of your ledger. If Mr. Malinowski had procured that sale where would the fact of his having been the agent who procured that sale have been entered?

30 Mr. Gilson: I object.

The Court: Objection sustained.

Q. Does the fact that he procured that sale appear on that account? A. No, sir.

Q. In these accounts is the name of the agent who procured the sale entered? A. Yes.

Q. Was that the system of entry in this account book? A. Yes, devised by myself.

40

*Frank McDonald. Recalled. Direct.*

Q. You say the total payments made by that purchaser up to October 8, 1924, were \$175? A. Yes.

Q. Item No. 2 refers to what account in your ledger? A. Mieczkowski, folio 120.

Q. Turn to that page. That refers to what item of the complaint? A. Item 2.

Q. How much had been paid by the customer up to October 8, 1924? A. \$130. 10

Q. Was that account checked by you? A. Yes.

Q. Is the plaintiff's name indicated in that account as being the agent who procured that sale? A. No, sir.

Q. Item No. 3 refers to what account? A. Luchin.

Q. What page? A. Page 149.

Q. That you say refers to item 3, Schedule A? A. Yes. 20

Q. How much had been paid by the customer up to October 8, 1924? A. That was a deeded property.

Q. Was the entire consideration paid? A. Yes, sir, the whole thing had been paid.

The Court: How much was that consideration?

A. \$1,000. 30

Q. According to the complaint the plaintiff claims \$100 commission on that. That is what percentage of \$1,000? A. Ten percent.

Q. Come back a minute. How much is 50 per cent of \$175? A. \$87.50.

Q. How much is 50 per cent. of \$130? A. \$65.

Q. Now I direct your attention to item No. 14 of Schedule A of the complaint. A. Ortymowitch. 40

*Frank McDonald. Recalled. Direct.*

Q. How much had been paid Mr. Ortymowitch in respect to that item 14, Schedule A, on his contract up to October 8, 1924? A. \$119.

Q. How much had been paid to Malinowski up to that time on account of his commissions? A. \$26.25.

10 Q. How much was due him up to that time for his commissions? A. \$13.75.

Q. How much was the total due him? A. \$40.

Q. So the balance unpaid to him on October 8 was \$13.75. A. Yes.

Q. Item No. 15. A. Kowalchuk, page 123.

Q. How much had been paid by the purchaser up to October 8, 1924? A. \$300.

Q. 50 per cent. of that is how much? A. \$150.

20 Q. How much had been paid to Malinowski up to that time? A. \$140.

Q. How much was due Malinowski on October 8? A. \$10.

Q. Item No. 16 refers to what item of the complaint? A. Smolinski, paid \$128.

Q. How much had been paid by the customer on that item up to October 8, 1924? A. \$420.

Q. How much is 50 per cent. of that? A. \$210.

30 Q. How much had been paid Mr. Malinowski up to that time? A. \$210.

Q. How much was due Malinowski on that date? A. Nothing.

Q. Item No. 17 in the complaint is a combination of three items, is it not? A. Yes, A, B and C, John Tanne arbitrarily No. A. Page 130.

Q. How much had been paid by the customer on that up to October 8, 1924? A. \$210.

Q. On 17-B how much? A. Page 132, \$500.

Q. And on 17-C. A. Page 140, \$155.

*Frank McDonald. Recalled. Direct.*

- Q. There is due him in commission up to that time how much? A. \$307.50.
- Q. How much had been paid him? A. \$305.
- Q. And the balance due him? A. \$2.50.
- Q. That is on the three items embraced in item 17 of Schedule A? A. Yes.
- Q. Item 18 refers to what page of your ledger? A. 131—Oltarzewski. 10
- Q. How much had been paid to the customer up to that time? A. \$140.
- Q. How much is 50 per cent. of that amount? A. \$70.
- Q. How much had been paid to Malinowski up to that time? A. \$60.
- Q. How much was due Malinowski on October 8, 1924? A. \$10.
- Q. Item No. 19. A. Gural—page 135. 20
- Q. How much had been paid by Gural up to that time? A. \$220.
- Q. How much is 50 per cent. of that amount? A. \$110.
- Q. How much had been paid to Malinowski up to that time? A. \$100.
- Q. How much was due Malinowski at that time? A. \$10.
- Q. Item No. 20 refers to what? A. Malek, page 138. 30
- Q. How much had been paid by the customer up to that date? A. \$195.
- Q. And 50 per cent. of that amount? A. \$97.50.
- Q. How much was paid to Malinowski? A. \$75.
- Q. And the amount due Malinowski? A. \$22.50.
- Q. Luchin, page 139, refers to what item in Schedule A? A. 21.
- Q. That item 21 is a different transaction from item No. 3 of Schedule A? A. Yes. 40

*Frank McDonald. Recalled. Direct.*

- Q. Two different pieces of property? A. Yes.
- Q. With respect to that item 21 how much had been paid by Luchin up to October 8, 1924? A. \$130.
- Q. And 50 per cent of that? A. \$65.
- Q. How much had been paid to Malinowski? A. \$65.
- 10 Q. Anything due Malinowski? A. No, sir.
- Q. Item No. 22 of Schedule A refers to what page of your account? A. 141—Zoldak.
- Q. How much had been paid by Zoldak up to that time? A. \$70.
- Q. And 50 per cent. of that is how much? A. \$35.
- Q. How much had been paid Malinowski? A. \$32.50.
- 20 Q. And the amount due Malinowski? A. \$2.50.
- Q. In the Zulkoski account, item No. 23 of the complaint, it is stated in the complaint that \$25 was the commission for procuring that sale. What was the sale price of that property. A. \$800.
- Q. 25 is what per cent. of \$800—a little over three per cent? A. Yes, three and a fraction.
- Q. Was Mr. Malinowski paid that \$25? A. Yes.
- Q. In full? A. Yes.
- 30 Q. On this schedule which is before you you have included the name of the customer and the item of the complaint to which it refers? A. Yes.
- Q. And in the second column you have given the page which you have already testified to? A. Yes.
- Q. And in the third column you have given the total contract price? A. Yes.
- Q. And in the fourth column you have included the amount paid by the customer up to October 8,
- 40 1924? A. Inclusive, yes.

*Frank McDonald. Recalled. Direct.*

Q. Mr. Malinowski in this case claims that the commissions were to be paid him 50 per cent. of the amount paid on deposit and 50 per cent. as each payment was made by the customer, and on that basis have you paid the amount that was due Malinowski up to October 8? A. Do you mean as a commission on the sale?

Q. Yes. A. No, sir.

10

Q. You have paid the amount that would be due up to October 8 on that basis? A. The portion of the payment paid on account of the commissions, but not as a commission on the sale.

Q. I am asking you whether you have paid the amount that would be due on the plaintiff's claim on the portion of the payment. A. Yes. May I—

Q. Have you shown it in column No. 5? A. It is customary for the agent to get half of the payment irrespective of the amount of the commission. He got half of the payment.

20

Q. In column 5 you have taken and computed the commissions upon the total of the payments made up to October 8, 1924? A. Yes.

Q. And those are the figures in column 4? A. (No answer.)

Q. You have indicated with reference to items Nos, 1, 2 and 3 what the commission would be, have you not? A. Yes.

30

Q. In column 6 you have given the amount paid to Mr. Malinowski up to October 8? A. Yes.

Q. And in column 7 you have given the amount of the balance that was due to Malinowski on October 8, 1924? A. Yes.

Q. In column 5 showing the commissions due to Malinowski up to October 8 have you disregarded the first three items of items 1, 2 and 3? A. Yes.

40

*Frank McDonald. Recalled. Direct.*

Q. Why did you disregard them? A. No indication of their being due Malinowski.

Q. For the other items of the complaint how much commissions were due him up to October 8, 1924? A. \$1110.

Q. How much had he been paid up to that time? A. \$1038.75.

10 Q. How much was due him up to that time? A. \$71.25.

Q. Mr. Malinowski in this case, as you have been informed by me, also claims commissions on the sales made by others while he claimed to be acting as manager, and have you at my request made a calculation of the amounts that would be due to Mr. Malinowski if that claim were correct? A. Yes.

20 Q. Item No. 4 of Schedule A refers to what account? A. Pasuk.

Q. How much was paid by the customer up to that time? A. \$525.

Q. How much would Mr. Malinowski be entitled to up to that time? A. \$75.

Q. Item No. 5 refers to whom? A. Kostew—page 152.

30 Q. How much was paid by the customer up to that time? A. \$650.

Q. How much would be due to Malinowski up to that time if his claim were correct? A. \$62.50.

Q. Item No. 6 refers to what? A. Synica, page 151.

Q. How much was paid by the customer up to that time? A. \$770.

Q. How much would be due to Malinowski on October 8, 1924? A. \$70.

40 Q. Item No. 7. A. Gorsky, page 153.

*Frank McDonald. Recalled. Direct.*

Q. How much was paid by Gorsky on that? A. \$700.

Q. How much was due Malinowski if his claim were correct? A. \$70.

Q. Item No. 8 refers to what? A. Melymuka, page 150.

Q. How much was paid by the customer up to that time? A. \$100. 10

Q. And if Mr. Malinowski was correct how much would be due him up to that time? A. \$50.

Q. Item No. 9 refers to what? A. Makychik, page 158.

Q. And it refers to item No. 9 of the complaint schedule A. A. Yes.

Q. How much was paid by the customer up to that time? A. \$625.

Q. If Mr. Malinowski were correct how much would be due him up to that time? A. \$80. 20

Q. Item No. 10 refers to what item? A. Page 156, Zajac. That is a deed sale, deeded on September 10. The whole consideration is shown there.

Q. If he is correct how much would be due him up to that time? A. \$52.50.

Q. Item No. 11 refers to what? A. Gregulich, page 154.

Q. How much was paid by the customer up to that time? A. \$100. 30

Q. How much would be due Mr. Malinowski? A. \$50.

Q. Item No. 12 refers to what? A. Grenowski, page 145.

Q. How much was paid by the customer up to that time? A. \$3,000.

Q. How much cash and how much mortgage? A. That was deed later—\$3,750.

*Frank McDonald. Recalled. Direct.*

Q. What would be due Mr. Malinowski if he were correct? A. \$67.50.

Q. Item 13 refers to what? A. Petrykiewicz, page 143. That was a deed property too. The whole consideration is shown.

Q. How much would be due him on that? A. \$36.

10 Q. With reference to this set of figures from 4 to 13, Schedule A of the complaint, inclusive, you have given in the first column on this sheet which is before you the number of the item in Schedule A of the complaint? A. Yes.

Q. Then the name of the account? A. Yes.

Q. Then the number of the page of the ledger? A. Yes.

20 Q. And in the next column the total price of the property? A. Yes.

Q. And in the following column the amount paid by the customer up to October 8? A. Yes.

Q. And in the last column the amount due Malinowski if his claim is correct? A. Yes.

Q. I want to call your specific attention to item 10, page 156, of your ledger, and I want you to tell us what date that sale was made? A. September 10, 1924.

30 Q. The plaintiff states in his complaint that this arrangement between him and the company was terminated September 4, 1924. You say this entry shows a sale September 10, 1924? A. Yes.

Q. How about item No. 11. When was that sale made? A. That is page 150. Mr. Gregulich—September 8, 1924.

Q. You have marked those two sales in red ink? A. Yes.

40 Q. This summary of your testimony you have on this sheet? A. Yes.

*Frank McDonald. Recalled. Cross.*

Q. There is on this sheet in your writing: "Date of suit October 8, 1924." That is not in your books, is it A. No, sir.

Mr. Gilson: I don't think that should go in if it is not in the books and I object to it.

Mr. Kanter: Will you admit that the date of the alleged termination of the contract is September 4, 1924? 10

Mr. Gilson: Yes.

Q. That fact which Mr. Gilson and I have just discussed as to the termination of the contract, September 4, 1924, was that written in by you in pencil, this memorandum? A. Yes.

Q. This memorandum then is a resume of your testimony—a tabulation of your testimony? A. Yes. 20

Mr. Kanter: I offer the memorandum.

Mr. Gilson: I object to it.

## CROSS EXAMINATION BY MR. GILSON:

Q. You said, referring to items 10 and 11, in the last part of your testimony, that according to your books, the date of the first sale was September 10, 1924, and the second one September 8, 1924? A. Yes. 30

Q. Is there anything to show whether those dates are when the deeds were delivered or not? A. 154, Mr. Gregulich's account, apparently no deed delivered on that. It is an open contract.

Q. What is the date of the contract? A. September 8.

Q. Where does that show in the book? A. Here. 40

*Frank McDonald. Recalled. Cross.*

Q. Where does it show that is the date of the contract? A. It is the date of the first entry. The principal charge is here. For convenience, so that we will enter the payments against principal and payments against interest and taxes, entries were made for each and the balance carries over as each payment is made. The description of the property is here.

10

Q. Where is that? A. In the sales book, page 118.

Q. Does it show in that, "contract closed September 8"? A. Yes.

Q. Then the contract was dated before September 8, wasn't it? A. The contract is usually dated the day it is closed. The contract closing is not the time the deed is turned over. The deed is turned over after all the payments are made. Just the date of the contract would be the date of closing.

20

Mr. Kanter: What number are you referring to now? A. 118; 11 on your schedule.

Mr. Gilson: Will you produce that contract?

(Paper produced by Mr. Kanter.)

30 Q. Do you know when the deed was delivered on that contract? A. Apparently no deed was delivered at that time. It may have been later, but I don't think so. The last payment is May 8, 1926, and there is still a balance due, so no deed has been delivered.

Q. That second contract, September 10, the Zajac—where is that entry? (Witness indicates.)

40 Q. That says in the sales book that the deed was delivered on September 10, 1924, does it? A. Yes.

*Frank McDonald. Recalled. Cross.*

Q. Do you know when that contract was made?

A. September 10, 1924, it was a cash sale apparently.

Q. The contract and the check were made at the same time? A. Yes.

Q. Have you that contract?

Mr. Kanter: I have not. That was not noticed to us. That was a cash sale. 10

Q. You did not give us the page number of that item No. 23—Zulkoski, where the sales price was \$800? A. 137.

Q. How much had been paid on that up to October 8, 1924?

Mr. Kanter: I object to the question because it is immaterial here. The plaintiff claims a commission of \$25 and he was paid \$25. 20

Mr. Gilson: I will withdraw it.

Q. In making up this statement which you have before you, Mr. McDonald, you took schedule A with the books of the Lincoln Developing Company? A. Yes.

Q. And besides these books you have testified to you checked up on the credits as set forth in Schedule A, did you not? A. Do you mean the sales price and the credits, the payments by the customer? 30

Q. No; the credits on Schedule A, being the payments made by the company to Mr. Malinowski. A. No.

Q. Will you look at them and compare them with your sheet and see if they don't all correspond with just what you have said? A. Yes. 40

*Frank McDonald. Recalled. Cross.*

Q. So that we have given the Lincoln Developing Company credit for all payments that the company is entitled to on Schedule A, haven't we? A. Yes.

Q. You said that in item No. 2, page 120, it does not appear that Mr. Malinowski or any other agent had anything to do with that contract? A. Yes.

10 Q. Doesn't it appear on the book some place that Mr. Malinowski received a payment of \$5 on account of that contract—on account of his commission? A. No. I saw an item of \$5 relating to that item, which was charged as advances.

Q. You have it right on your schedule, haven't you? Doesn't it appear in the cash book? A. Not against that case.

20 Q. Does it appear against any case? A. No. I think it is an item of advances.

Q. Will you turn to that please? A. Can you tell me about what date it is?

Q. January 16, 1924. A. There is \$5 charged to transportation on January 16, 1924.

Q. On account of what? A. Probably advance as fare for taking somebody out.

Q. Does that refer to the book from which that was entered? A. That is the check number.

30 Q. There is not anything in the books to show for what contract that was advanced? A. There might be two or three items.

Q. That is just charged to overhead? A. Yes.

Q. Not charged to any particular contract? A. No, just charged to transportation.

Q. Is there any account there in the name of Mr. Malinowski in those books? A. No, only against each individual customer's account the agent's name appears.

*Frank McDonald. Recalled. Cross.*

Q. About how many agents were there during the periods covered by the books? Do you mean the whole period since we started the company?

Mr. Kanter: I do not think that is material.

Q. No, not since you started the company. A. What do you mean? 10

Q. Do those books start from the time the company was formed? A. This cash book runs back to November, 1917.

Q. I mean the early part of 1924, the first half of 1924. A. They came in occasionally. They would not make good and would go out. They might come in and get \$25 advance and run away.

Q. You noticed in dropping in there for an hour or so every day that there were a number of agents there all the time, weren't there? A. No; there might be one, sometimes there might be two. Sometimes the agents would be mixed up with customers; you would not know which was which. Ordinarily there would be one or two agents around. Sometimes there might be a sub agent on for a week or two. 20

Mr. Kanter: I offer the summation.

Mr. Gilson: I object to it. There are a lot of things written on it which are not in the books and have not anything to do with it. 30

The Court: If there is anything in that statement that does not appear on the books it should go out.

Mr. Kanter: Suppose you strike it out.

The Court: That should go out. Whatever is not on the books should go out. It is going to save the jury a lot of time to have the memorandum in. 40

*Ignacio De Tynfo. Called by Defendant. Direct.*

Mr. Kanter: I offer it.

Mr. Gilson: No objection.

(Admitted and marked Exhibit D-1.)

Mr. Gilson: I think the books should go in with it.

The Court: Yes.

10 Mr. Kanter: I want the books to be offered in evidence, but if Mr. Gilson should be under the necessity of having this printed, I do not want it considered that they are to be printed.

The Court: No.

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IGNACIO DE TYNFO, sworn for the Defendant.

20 DIRECT EXAMINATION BY MR. KANTER:

Q. You are the president of the Lincoln Developing Company? A. Yes.

Q. Where do you live? A. Newark.

Q. How long have you lived in Newark? A. Five years.

Q. When did you first meet Mr. Malinowski, the plaintiff in this case? A. In 206 Broadway, New York.

30 Q. When? A. Between Christmas and New Years in 1923.

Q. You were the president of the Lincoln Developing Company at that time? A. Yes.

Q. How did he happen to come to the office of the Lincoln Developing Company? A. A woman by the name of Syniska from Jersey City came up to my office to buy a house near Rahway, and Mr. Malinowski represented her to make the contract.

40

*Ignacio De Tynfo. Called by Defendant. Direct.*

Q. He was a lawyer? A. He said he represented Mr. Gilson and he came with the woman to see that the contract was all right.

Q. He told you he represented Mr. Gilson? A. Yes.

Q. And that is how you became acquainted with him? A. Yes.

Q. When this transaction with this lady was completed did you have any talk with him about forming a business connection? A. I asked him what he was doing and he said he was working for Mr. Gilson and for some detective agency, and I asked him if he would like to sell real estate, and he said he possibly would consider and let me know later if he would sell real estate. 10

Q. Did you make any appointment for a further interview with him? A. Yes, in the first week in January he came to the office and went with me to Rahway. 20

Q. Did you go to Rahway, New Jersey? A. Yes, sure.

Q. And did you look over the property of the Lincoln Developing Company? A. I showed Mr. Malinowski the property in King Street in Clark Township near Rahway, and he looked over and liked the property, and then he asked me what commission I am paying, and I told him that I had no strict price on the property because Polish people mostly bargain, otherwise they would not buy. I said whatever price he got I will pay him commission according to the price, and I told him that I am paying all the time since I am in business from five to twenty-five percent for the sale of lots and from one to five percent for the sale of houses, if I have any. So he was satisfied with those terms. 30

40

*Ignacio De Tynfo. Called by Defendant. Direct.*

Q. Did you also tell him how the commissions were payable? A. Yes, I did.

Q. How were they paid? A. We usually sell installments everything. People pay five or ten dollars a month, so we pay half to the salesman and half we keep for the property.

10 Q. How much of the deposit? A. All amounts; ten or fifteen dollars, any amount, as much as we can get from the customer.

Q. You then told him that the proposition you could offer him was to pay him a varying rate of commission, from five to twenty-five percent and from one to five percent, depending upon whether the property was improved or unimproved and what price you got. A. Price and location and terms.

20 Q. And that the commissions would be payable to him half of the deposit on account of the commission and as the customer paid you would give him half from each payment until the entire commission was paid? A. Yes.

Q. What did he say to that? A. He said he was satisfied and said he would go over and try to get customers.

Q. Was anything said about a definite rate of commission on any definite piece of property? A. No.

30 Q. Of course you were then acting for the Lincoln Developing Company in making this arrangement? A. Yes.

Q. Did he say anything to the effect that he was going to work for your company all the time? A. No.

Q. Did the company at any time agree to pay him 25 percent commission on all lots sold by him? A. No.

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*Ignacio De Tynfo. Called by Defendant. Direct.*

Q. You know he makes that claim in his complaint? A. I do.

Q. Is it true? A. No.

Q. Did the company at any time ever agree to pay him five percent commission on all improved property sold by him? A. No.

Q. After Malinowski started in selling property for your company how did you agree with him upon the rate of commission, how did you know what rate of commission he was to get in a certain case? A. He used to come in the office and tell me such a man offered him so much for the lots, that he asked him more and he would not pay. I had a system of letting the property go cheaper because they would not buy. I give a chance to the agents to make some commission and make some myself. I used to tell him what I would pay him on each sale. If he agreed to the amount he got the deposit. 10 20

Q. In other words he would come in and say, "Mr. Jones wants to give me \$850, and you would say, "I can give you this rate of commission" and he would go out and make the sale? A. Yes.

Q. Each deal you made was a separate transaction? A. Yes.

Q. Was this manner of doing business ever changed? A. No. 30

Q. Mr. Malinowski in his complaint says that he was entitled to a commission of 25 percent on all unimproved property. Do you happen to remember, Mr. De Tynfo, what property he first sold, the A. I think he made one sale in January with an-first sale made by Malinowsky, do you remember? A. I think he made one sale in January with another agent.

Q. Do you remember the Dobriansky sale? A. Yes. 40

*Ignacio De Tynfo. Called by Defendant. Direct.*

Q. What was the commission paid on that sale?

A. \$30.

Q. What was the sale for? A. \$600.

Q. What was a commission of five percent? A. Yes.

Q. Did he make any other sale in January? A. Tymniak.

10 Q. Will you turn to page 191 of your ledger and tell us the date of the Dobriensky sale?

Mr. Gilson: These are not in the complaint. I do not see what they have to do with it.

Mr. Kanter: They have a definite relevancy. The company says our agreement was to pay 25 percent commission. If we can show that other sales for which he was paid were at different rate it tends to destroy the plaintiff's claim.

20

The Court: That may go in.

Q. What page is the Dobriensky sale? A. 121, \$600, \$30 commission.

Q. Turn to the Tymniak sale, page 122; what was the sale price? A. \$250.

Q. How much was Malinowski's commission? A. \$50.

30 Q. Was he paid? A. Yes.

Q. He was paid \$30 in the other case? A. Yes.

Q. Was there any dispute about it, did he ever ask you for more money on that? A. No.

Q. Did he ever ask you for 25 percent on that? A. No.

Q. That is 20 percent—\$50, isn't it? A. Yes.

Q. In the Greczyick case, page 126, what was the sale price? A. \$1000.

40 Q. What was the commission? A. \$225.

*Ignacio De Tynjo. Called by Defendant. Direct.*

Q. That was slightly less than 25 percent? A. Yes.

Q. Turn to page 142 of your ledger; sale made to whom? A. Piezylwicz.

Q. How much was the sale price? A. \$400.

Q. What was his commission? A. \$75.

Q. Paid to Malinowski? A. Yes, in full.

Q. Did he ever ask you for any more? A. No. 10

Q. He did not make any complaint in this case? A. No.

Q. These commissions you have testified to were four pieces where they were less than 25 percent and in some cases considerably less? A. Yes.

Q. They were cases in which he had gotten the purchaser? A. No.

Q. On item No. 3, page 149 of your ledger in this case according to the complaint Mr. Malinowski claims \$100. How much was the sale price? A. \$1000. 20

Q. So the commission claimed according to the complaint is ten percent? A. Yes.

Q. Turn to page 124— A. He did not make the sale.

Q. Turn to page 124, item 14 of schedule A, the sale price was how much? A. \$750.

Q. According to the complaint the plaintiff claims \$90, and \$90 is approximately what percent of \$750? A. I cannot tell you offhand. 30

Q. Well, 12 percent, roughly? A. I suppose so.

Q. According to the complaint, item No. 15, schedule A, in reference to Kowalchuk, page 123 of your ledger, what is the sale price of that property? A. \$1000.

Q. And the commission claimed according to the complaint is \$150. That is what percentage of \$1,000? A. I could not tell you. 40

*Ignacio De Tynfo. Called by Defendant. Direct.*

Q. Well, it is 15 percent. So the rate of commission claimed in the complaint there is 15 percent, is it not? A. Yes.

Q. Turn to item 21, Schedule A, page 139, the sale price there was how much? A. \$850.

Q. And the commissions claimed in that case are \$100? A. Yes.

10 Q. That differs from 25 percent, does it not? A. Yes.

Q. So it is not true your agreement was to pay him 25 percent on the sales of all property? A. No.

Q. You say your arrangement was in each case he would come in, ask about the price, and agree upon the commission and that would be the commission that was agreed upon? A. Yes.

20 Q. Mr. Malinowski in his complaint says in April 1924 you made him the manager of the company and agreed to pay him in addition to the commission which had already been agreed upon, five percent on all unimproved property and one percent on all improved property sold by the company, by whatever agents it was sold. Is that so? A. No. I want to make a remark about that.

30 Q. What happened some time in 1924 in reference to this manager business? A. It was not in April as he claims—and it was at no time—but about the 15th of June he intended to leave me and he told everybody and me that he was going to leave. Of course one man by the name of Bartell owned property across the street from me—

40 Q. I want to know about this manager business. I want to get to that point. Let's do it quickly, please. A. About June 10 he came one time to the office and said he found it difficult to sell to people because people mistrust agents and he says he has

*Ignacio De Tynfo. Called by Defendant. Direct.*

not any license and he wants to show the people that he is something with the company. He suggested to me I should allow him to print cards and put some title on the cards. Then I consented to that—not seeing anything. Usually agents can do anything they want in respect to cards.

Q. Well, you did consent? A. Yes. He ordered cards from the printer on Second Street, New York, I believe, the Press Company Incorporated, and at the time the cards were brought for proof, the copy was made by him in his handwriting, the proof was made by him, I was not present and I really do not know what he put on the cards; and that was about the time he was leaving my office and I had no chance exactly to remember what was on the cards. When he left he took everything, cards and books and everything, from the office and I did not have chance to see what was on the cards.

Mr. Kanter: I would like to have one of those cards, Mr. Gilson, please.

Q. As I understand you, around June 10 he came to you and said he was going to sell some lots and wanted to have something to show? A. Yes.

Q. He wanted cards printed showing that he was what? A. An official of the company.

Q. Did you see these cards—You have seen these cards? A. No, sir.

Q. Well, you have seen these cards before. A. I have cards like this, but without his name.

Q. You saw these cards last year? A. In Jersey City I saw them.

Q. You see the word "Manager" on them? A. Yes.

*Ignacio De Tynfo. Called by Defendant. Direct.*

Q. When you allowed him to have cards printed with an official title on them, did you at that time or any time tell him you would pay him a commission of five percent on all lots sold by anybody and one percent on improved property? A. No, never.

Q. Did he at any time act as manager of the company? A. Never.

10 Q. How many people did you have working for you at that time? A. When he left in June I had a clerk and a man to go out and help me with customers.

Q. Mr. McDonald said you had a room ten or twelve feet by twenty feet, divided by a partition, running not quite to the ceiling. A. Yes.

Q. And you had Wintoniak? A. Yes.

20 Q. Where is Wintoniak now? A. In the hospital for operation.

Q. Then did you have a staff of agents that required the assistance of a very competent—or otherwise—manager? A. I never had any more than one man to help me out to go with customers and take them home. This book will prove I had only Wintoniak after he left.

Q. You had a stenographer, you said? A. Yes.

30 Q. When did you see him after this occasion? A. Malinowski left about June 16. He said he felt sick he was in the war and wanted to go to a camp on Staten Island.

40 Q. When was the next time you saw him after about June 15? A. He came on June 30 and asked me if any customers paid on his account, and I told him it was not paid because it was only two weeks and customers pay every month and sometimes once in three weeks five and ten dollars; but he said that I owe him carfare five dollars, that he was out before to Rahway. He also wants me I should send

*Ignacio De Tynfo. Called by Defendant. Direct.*

a check to the printer because he has not any check account and I should charge him with \$7.50 for the cards, and I made a check, charging him with carfare and I put on the check stubs all the time whatever I pay them so the bookkeeper can put in the cash book and know exactly what this money is for, because I personally do not keep the books, except a cash book I keep myself; and I marked on June 30 \$5 carfare. 10

Mr. Gilson: Have you that check?

A. I haven't the check. I think I have the stub.

Mr. Kanter: I think we have the check.

A. Here is the whole page of the check book. I did not know anything about it before. June 30, 1924, check 1696, Anything Malinowski, railroad fare, by cash, \$5; printing cards \$7.50, a total of \$12.50. 20

Mr. Gilson: But where is the check?

Mr. Kanter: I have the check among my papers.

A. I did not put here fare, but I put car fare; but that is the same. This is for printing. 30

Q. You say it was June 30 as shown by your entry on the stub of the check book? A. Yes.

Q. When this transaction was cleared up? A. Yes.

Q. So Mr. Malinowski paid for those cards, did he? A. Yes.

Q. When did you see him after that? A. The first week in August. 40

*Ignacio De Tynfo. Called by Defendant. Direct.*

Q. What did he come in for? A. He also asked me if anybody paid for his account.

Q. You had sent him a couple of checks between June 30 and August 8 on account of the payments you had received? A. I could not say if I mailed or gave him personally, but between June 15 and September he was twice or three times in the office—

10

Q. From the time that he told you he was going to a camp, that you say was about June the 15th, until about August the 8th, you sent him or gave him some checks, did you? A. Either one of the two.

Q. On account of payments that had come in? A. Yes.

Q. Paying him whatever was due? A. Yes.

20

Q. August the 8th—you say he came in in the early part of August? A. Yes.

Q. What did he say? A. He said he had no money, he had expenses. He was taking care of his mother and sister, I suppose, and he needed money and asked for some money.

Q. At that time when he came in in the early part of August did you owe him anything? A. No.

30

Q. What did you tell him? A. I tell him if he go back to work I will give him advances, I will loan him money.

Q. What sum did he ask for? A. First he asked I should loan him \$50, then he asked me \$150 and then about \$400.

Q. What did he say about coming to work for you again? A. He said he had telegrams and letters every day from some big detective agency which offers him a steady position, and he would not work for me, and I knew as a fact that he had

40

*Ignacio De Tynfo. Called by Defendant. Direct.*

already made arrangements with Bartell in Rahway to sell his lots.

Q. Did Mr. Malinowski ever train any agents for you? A. Never.

Q. Did he ever bring any sub agents to your office? A. Never.

Q. Did he ever do any office managing for you? A. No, sir. 10

Q. You are familiar with the plaintiff's complaint, are you not? A. Yes.

Q. Have you classified the items of the plaintiff's complaint according to the dates of the transactions? A. Yes.

Q. I show you a sheet and ask you whether the transactions mentioned in the plaintiff's complaint are classified according to the dates which they occurred? A. Yes. 20

Q. The plaintiff's claim gives the date of the contract with the purchaser? A. Yes.

Q. And the second column the name of the purchaser? A. Yes.

Q. And the last column refers to the schedule number in the complaint? A. Yes.

Mr. Kanter: I don't want to go through with this witness what I did before. I want to offer this. 30

Mr. Gilson: I have no objection.

Mr. Kanter: I offer it in evidence.

(Admitted and marked Exhibit D-3.)

Q. Item No. 2 of the plaintiff's schedule refers to a sale made January 16, 1924 to Edward H. Mieczkowski. Did Malinowski procure Mieczkowski as the purchaser of the property? A. No, sir. 40

*Ignacio De Tynfo. Called by Defendant. Direct.*

Mr. Gilson: I object to the question. "Procure" is a conclusion. It is for the court and jury to say who procured it.

The Court: He can testify to what was done.

10 Q. Is it true, as the plaintiff claims in his complaint, that he got Mieczkowski to buy the property referred to in that sale?

Mr. Gilson: I make the same objection. It seems to me it is not right to let the witness give a conclusion as to who got the contract. That is for the court and jury to decide.

The Court: He may answer that question.

Mr. Gilson: Exception.

20 A. No.

Q. Mr. Malinowski also claims with reference to item No. 1, contract made April 17, 1924, that he got Mr. Markiewicz to buy that property, is that true? A. No.

Mr. Gilson: I object to all of these questions and ask an exception to each one.

The Court: You may have it.

Mr. Gilson: Exception.

30

Q. Mr. Malinowski also says as to item no. 3 in schedule A of his complaint that he procured George Luchin to buy the property mentioned in the contract of August 8, 1924, is that true? A. No.

40 Q. Mr. Malinowski claims as to items 4 to 13 inclusive in his complaint that he acted as manager and by reason of his acting as manager he was entitled to a commission of either five or one percent

*Ignacio De Tynfo. Called by Defendant. Direct.*

on account of the sales made by him, and you say you made no arrangements to pay him any such commission, is that correct? A. Yes.

Q. And Mr. Malinowski says that he made this arrangement on or about April 15, 1924. I want you to turn to schedule B-3 and tell me whether Mr. Malinowski after April 15, 1924—you notice that that contract was made April 16, 1924, with Gural, item 19, on April 17 there was a contract made with Markiewicz, item no. 1 on May 5, 1924 there was a contract made with Synica, no. 6, a contract with Malek, item no. 20, May 19 a contract with Luchin, item no. 21, May 31 a contract with John Tane, item 17, arbitrarily no. (C), and on June 4 contract made with Jan Zoldak, item no. 22, and on August 8 a contract with Luchin, no. 3. Did you with respect to the items from April 16 through August 8, 1924, which he claims were sales made by him, pay him a commission also for acting as manager for that period? A. No, sir.

Q. You notice that his first item in the complaint is a contract made April 17, 1924 with Markiewicz, and he says he was not paid. Did he ever demand payment of that? A. No, sir.

Q. Did he continue with your company after April 17? A. He did.

Q. The second item is January 16, 1924 with Mieczkowski. Did he make that sale? A. No.

Q. Did he ever claim commissions on that sale? A. No.

Q. Did you give him a check for five dollars with reference to that transaction? A. I did, for fare.

Q. I show you that check and ask you whether that is a check you gave him? A. Yes, January 16.

Q. That refreshes your memory? A. Yes.

*Ignacio De Tynfo. Called by Defendant. Direct.*

Q. What was that check in payment for? A. Car-fare.

Q. In doing what? A. To procure his signature to the contract.

Q. You had Mr. Malinowski go to Mr. Mieczkowski? A. I told him I haven't time; you are not doing anything; you go and get his signature. I will  
10 give you five dollars; and I paid him the same day.

Q. Did he ever ask you for commissions on that? A. No, sir.

Q. That was January 16, 1924? A. Yes.

Q. And he continued working for you after January 16? A. Yes.

Q. And he never made any complaint about that? A. No, sir.

Q. You say the contract with George Luchin was  
20 not procured by him, is that right—item No. 3, August 8, 1924? A. No.

Q. When he came to you in August had you paid him everything that was due him up to that time? A. Yes.

Q. Did you see him between August the 8th and the time he brought this suit? A. No.

Q. Do you remember that you sent him a letter telling him to turn in his real estate license? A. Yes.

30 Q. You sent him that letter some time in September? A. Yes, about the third.

Mr. Kanter: I would like to have that letter, Mr. Gilson.

(Paper produced.)

Q. I show you a letter dated December 3, 1924, did you send that to the plaintiff Malinkowski? A. Yes.  
40

*Ignacio De Tynjo. Called by Defendant. Direct.*

Q. How long before you sent that letter—this letter is dated September 3, is that right? A. Yes.

Q. When was it that you had seen Mr. Malinowski before sending this letter, last? A. August 8, I think.

Q. So you did not see him between August 8 and about September 3, 1924? A. No.

Q. After you sent this letter did you see him at all? A. I saw him at Jersey City at the Referee's office. 10

Q. In the course of this suit?

Mr. Gilson: Are you offering that letter in evidence?

Mr. Kanter: I have no objection.

Mr. Gilson: If you are, you ought to put it in with the envelope. 20

The Court: I think so, if that is the envelope it was received in.

Mr. Kanter: This is the letter we sent.

The Court: Is that the envelope you sent it in?

Mr. Kanter: I don't know.

The Court: Find out.

Q. Is this the envelope you sent it in? A. I don't know. 30

Q. Mr. Gilson wants to point out that this letter is mailed September 10, the letter is dated September 3. A. All the envelopes have got the same thing.

Q. You don't remember whether it was mailed in that or not?

Mr. Gilson: You only mailed one letter to Mr. Malinowski in September? 40

*Ignacio De Tynfo. Called by Defendant. Direct.*

A. I don't know.

(Letter admitted and marked Exhibit D-4.)

Q. Did you see Mr. Malinowski between September 3, the date of the letter, and October 8, 1924, the date of the institution of this suit? A. No.

10 Q. Of course between August 8 and October 8 money was coming in, was it not? A. Very little.

Q. Mr. Malinowski has calculated the amount that was due Malinowski, and that was the commission that was due him October 8, and he brought this suit against you for several thousand dollars October 8, 1924. Did you see him between September 3 and October 8? A. No.

20 Q. Turn to item No. 10 of the plaintiff's complaint—it refers to a commission while acting as manager of \$30—when was that sale made? A. September 10, 1924.

Q. Was the contract actually made that day or was it closed? A. It was just a sale. When I make contracts the party pays cash and we give him credit.

Q. That was the date the transaction was completed? A. Yes.

30 Q. And that was the date of the original transaction? A. Yes.

Q. How about item No. 11; when was that sale made? A. September 8, 1924.

Q. Both of those transactions were after the date alleged in his complaint as the termination of his agreement? A. Yes. He was not around since June 15.

40 Q. Did you know when you first hired Malinowski that he was not a licensed real estate broker? A. No.

*Ignacio De Tynfo. Called by Defendant. Cross.*

Q. Did your company ever give Mr. Malinowski any written agreement for commissions as required by the statutes of New Jersey? A. No.

CROSS EXAMINATION BY MR. GILSON:

Q. About how large a tract of land was this you were selling? A. It was only one street. 10

Q. About how many acres approximately? A. About 80 lots, the whole tract.

Q. About how many houses on the lots? A. There was no houses.

Q. What did you mean then by unimproved property and improved property? A. Because I always intend in the business to build houses, if a man wants to build a house. If a man buys lots and wants a house I build it. 20

Q. You did sell some lots that way? And did build some houses on the property? A. Not on this property that Mr. Malinowski was selling. I built two houses on another tract.

Q. Was anybody present at this conversation you say you had with Mr. Malinowski between Christmas and New Year's? A. No.

Q. Where was it? A. What conversation do you mean.

Q. The arrangement you made with Mr. Malinowski? A. I was with him there in Rahway on the property. 30

Q. Nobody was there? A. No.

Q. And so you told him that he would have to depend upon the amount of his commission according to the amount he got for the lot? A. Yes.

Q. And you did not have any fixed price for the lots then, did you? A. No.

*Ignacio De Tynfo. Called by Defendant. Cross.*

Q. How did he know what price to ask for the lots? A. Well, I had an approximate price of those lots, but it was not sold. I did not have a strict price. I allowed the agents to sell for any amount they could and I fixed their commission.

10 Q. And the agent would tell you how much he could get for a straight lot and if that was lower than the price you had fixed there would not be a sale, is that right? A. Not every case.

Q. If an agent came in with a price more than the price you had fixed on would say, "All right"? A. That is it.

Q. And that was so with Mr. Malinowski as well as with Volgar and other agents you had? A. In some cases.

20 Q. You had four or five agents at the time? A. I only had Wintoniak part of the time, because Wintoniak started to sell after he left in June, and Volgar only brought one customer and never more.

Q. Then you had some others, didn't you? A. No.

Q. No other agents during that time? A. No.

Q. How about Mr. Rasin? A. Rasin was no agent. Rasin was in my office before Malinowski came.

30 Q. Did he sell some lots for you? A. He was a couple of days, maybe a week, in and out, and he left. He was no salesman.

Q. He did sell some lots for you? A. He did not.

Q. Didn't you pay him any commission? A. I paid him \$25 for going out to one fellow by the name of Grachek in Brooklyn, and since then he left the office.

Q. You were president of this corporation? A. Yes.

*Ignacio De Tynfo. Called by Defendant. Cross.*

Q. Your wife was one of the other officers; what was she? A. At present she is secretary.

Q. What was she then? A. I can't tell you. Possibly she was then too.

Q. It is just a little family corporation; there are no other stockholders but you and Mrs. De Tynfo? A. No stockholders, no.

Q. It always has been that way? A. Yes. 10

Q. You say Mr. Malinowski paid for the printing of these cards you have identified? Don't you remember that the company paid for them? A. No.

Q. Didn't the company pay for them at first? A. Mr. Malinowski asked me to send a check to the printer because he has no check account. The company charged him \$7.50 and I sent a check for him.

Q. But the Lincoln Developing Company paid the printer this check for the printing of these cards which I show you now? A. He asked me and I did it. 20

Mr. Gilson: I offer that card in evidence.

Q. That is the card, is it not? A. I did not look at it, this is my company.

Q. And this is his name as manager? A. But he got these cards. 30

(Card admitted and marked Exhibit P-2.)

Q. When do you say you first saw those cards with Mr. Malinowski's name on as manager? A. In the referee's office in Jersey City.

Q. He talked to you about these cards and you paid the bill for the printing of the cards and you never saw them? A. What interest have I to take his cards? Can I use your card? No. 40

*Ignacio De Tynfo. Called by Defendant. Cross.*

Q. You did not know whether he had his name as manager or president or what when you paid the bill? A. I did not know what he had on the cards.

Q. What did he say he wanted to put on the cards? A. He said he wanted manager or general manager, I can't say now.

10 Q. And you said, "All right"? A. I did not say all right. I said I had no objection. I said to him, "If you can do more business it is so much better for me."

Q. That was about April, 1924? A. The cards he ordered between June 1 and 15 and it was credited to his account on June 30 according to the stub and my memory, and there was no conversation about it in April, because April was the third month since he was doing business at all.

20 Q. Up to that time he had not been making any collections, had he? A. He made no collections at any time.

Q. In your contracts it is provided that no payments shall be made to agents, isn't it? A. That is right.

Q. And about after June, as you say, you did authorize Mr. Malinowski to go out and collect as well as sell, didn't you? A. No.

30 Q. Didn't he collect? A. In a case like that no customer will pay to an agent without written authority and seal of the company and my signature, because it says in the contract that they cannot pay to anybody else except the company, and if I authorize anybody I give him written authorization and sign it and put a seal on it.

Q. Did you do that with Mr. Malinowski in some cases? A. No, sir.

40 Q. Didn't he ever collect the money on these contracts? A. I can't say. If a salesman gets a sale

*Ignacio De Tynfo. Called by Defendant. Cross.*

and wants to get his commission quicker, of course, he is in the neighborhood and he gets the money from the customer—but he is not my collector.

Q. And you say it was not necessary for you to have any manager and Mr. Malinowski never broke in any agents? A. No, sir.

Q. Didn't he go out with some agents and show them how to talk to people who had answered the advertisements? A. No. 10

Q. Didn't you send him out with Volgar, one of your agents, to close a deal that Volgar couldn't close? A. I do not recall that. Volgar was my salesman.

Q. Don't you remember the Kwiatkowski case? A. I can't get the name.

Q. Don't you remember that that was a contract that Volgar could not close and you told Malinowski to go out with him? A. I have no customer like that. 20

Q. Oh, it is Natalski. A. I have no customer like that.

Q. Don't you remember Volgar closed a contract and it was cancelled afterward? A. I have no contract with any man by that name.

Q. Don't you remember you were present when Mr. Volgar, your own witness, testified that way before the referee? A. I don't know what he testified. 30

Mr. Kanter: I object. That is not proper cross examination.

Mr. Gilson: It is to test his credibility.

The Court: What he says himself would be proper, what somebody else said is not competent.

Mr. Gilson: Withdraw the question. 40

*Ignacio De Tynfo. Called by Defendant. Cross.*

Q. Don't you remember hearing Mr. Volgar say that he could not close a contract and asked you to send Mr. Malinowski, your manager, with him to close it? A. Never.

Q. You don't remember hearing him say that in Mr. Rosenberg's office? A. I could not hear; I was put out by you in Mr. Rosenberg's office.

10 Q. I put you out? A. Somebody did.

Mr. Kanter: He was not present at the examination.

Mr. Gilson: Nobody put him out that I know of.

20 Q. Well, this letter, Exhibit D-4, is a letter you say you wrote to Mr. Malinowski and it is dated September 3, and I show you an envelope. Can you say whether that is the envelope in which you mailed that letter? A. I could not very well say because this envelope does not show anything except it is a plain envelope.

30 Q. Don't you remember testifying this way before Mr. Rosenberg in this case: "Q. I show you an envelope addressed to Mr. Malinowski, marked Exhibit P-3 and call your attention to the date of the post office stamp on it, September 10. Don't you remember? A. This is the same letter.

Q. Don't you remember that you mailed that letter of September 3 in that envelope on September 10? A. No; I wrote it on September 3 and delivered it by mailing it on September 10, I remember." Did you testify that way? A. If I did it is perfectly all right.

40 Q. "Q. You wrote it on September 10 and dated it September 3? A. No, I beg your pardon, I wrote it on Sept. 3, but did not mail it until September 10.

*Ignacio De Tynfo. Called by Defendant. Cross.*

"Q. Why did you hold it a week? A. Because I was too busy to mail it a couple of times."

Do you remember testifying that way? A. I believe this is true, because it happens I could not get in the office, and I could not let the stenographer mail it because she can make mistakes and I would be responsible for it. This is my signature.

10

(Envelope marked P-3 for identification.)

Q. Isn't it a fact the reason you wrote that letter was because you received a communication from Mr. Malinowski that he was going to quit because you had not paid him? A. He never wrote to me anything.

Q. Did he tell you so? A. No, sir, except that I got a letter from you, I don't know when I got that letter.

20

Q. On September 10 isn't it a fact you wrote this letter and dated it September 3 so as to be a day ahead of him in his notice that he was going to quit? A. I beg your pardon. There is no reason in that. What reason is there in that letter. He quit in June.

Q. When this arrangement was made between Christmas and New Years, 1923, that he was to go to work for you as an agent on some sort of commission, there was no length of time mentioned? A. No.

30

Q. He was just to work indefinitely? A. Yes.

Q. In this contract of Dobrianski, in which you say the commission you paid him was only five per cent., who made that sale? A. I took him along like I did in all cases.

40

*Ignacio De Tynfo. Called by Defendant. Cross.*

Q. What? A. I take along a man to assist me. If I go to the property I have so many people there I take a salesman out in case somebody comes along I have to talk to him. He stays with the customer. I do that on all the sales, and I pay him a commission.

10 Q. Did you take Mr. Malinowski along on the Dobrianky sale? A. Yes.

Q. Is that the reason you gave him the \$30? A. Yes.

Q. He did not make the sale? A. Just as much as other salesmen make sales.

Q. Did you get the contract or did he get the contract? A. Well, he was present and usually customers pay me the deposit and I make the receipt.

20 Q. You have been telling us who got or procured contracts. Now I am trying to find out what you mean by that. In this particular case did you get it or procure it or did Mr. Malinowski get it or procure it? A. I could not remember how it was, but I paid him \$30 commission on that case.

Q. But that was not intended to be a commission for getting or procuring the contract, was it? A. I suppose it was.

30 Q. Who got or procured the Tymniak contract? A. It was the same thing. I went to Tymniak and took Malinowski along.

Q. Who got the contract, or procured it, you or Mr. Malinowski? A. I think he did.

Q. And so you gave him \$50? A. Yes.

Q. You say that Mr. Malinowski did not work for you after about June 15? A. He did not work.

Q. Weren't there a lot of contracts closed that he got, in August? A. No, sir; the contract is

*Ignacio De Tynfo. Called by Defendant. Cross.*

closed the same day almost that a man goes out to look at the property.

Q. Will you refer to your books and see if your books do not show that the Piezlywicz deed was closed in August? A. What lot is it?

Q. King street, lot 74. A. Do you remember the date?

Q. Contract June 18. A. That was June 16. 10

Q. The contract, but when was the deed closed?  
A. On January 20, 1296.

Q. What was the date of the contract? A. June 16.

Q. Mr. Malinowski got that, didn't he? A. This man was out before June 16 to the property—a week before June 16, but even that June 16 to the property—a week before June 16, but he did not have any money, and he brought money in after to the office and I gave him a commission for that. 20

Q. But Mr. Malinowski got it, and his name is on the contract, on June 16? A. I don't know if it is on the contract. I know I paid him commission.

Q. Then you are mistaken in the fact that he did not work for you after June 15, aren't you?  
A. Either 15 or 16, I cannot remember one day.

Q. Could it have been the 17th or 18th? A. It was not later than the third week in June, because he was not around until later. 30

Q. And he came in your office you say two or three times in August to borrow money from you?  
A. He says he needs money. He asked me if customers paid. I said no.

Q. Wasn't he nagging at you to pay him the money you owed him in August all the time, and you did not pay him and he quit September 4th?

40

*Ignacio De Tynfo. Called by Defendant. Cross.*

A. No, he never asked me for any money except in August.

Q. I show you this Gural contract dated April 16, 1924, and call your attention to the fact that that contract was signed by Mr. Malinowski as manager. You see that, don't you? A. He could sign it—

10 Q. Do you see it or don't you see it? A. Yes, as manager.

Q. You have known that all the time, haven't you? A. No, sir, this is the first time I have seen it.

Q. Today? A. Maybe I seen it before at the referee's office, but I did not know he was managing the contract in my name.

20 Q. That was April 16. A. When I was in the office I allowed the stenographer to sign, but did not allow him to sign.

Q. You looked over the contracts every week? A. When the contract is closed I looked for the money that was due on the contract; then the girl puts it in the book.

30 Q. Don't you look to see what the terms of the contract are, whether they are according to the amount you agreed to sell it for or anything else? A. I authorize the stenographer to make a contract when I am not present, when I am out of town, and that was the case when I was not in. It was closed by Malinowski.

Q. I show you a picture and ask you if you recognize the people in that picture.

Mr. Kanter: I object as not proper cross examination.

40 A. What has got to do a picture in this case?

*Ignacio De Tynfo. Called by Defendant. Cross.*

Mr. Gilson: I want to prove that he knew Mr. Malinowski was working after he says he was, and I am going to prove it by this picture.

A. Can I prevent him from taking pictures or anything else?

10

Mr. Kanter: I object to the question as not proper cross examination.

The Court: It think it may be competent.

Mr. Kanter: Exception.

Q. You recognize those people, don't you? A. Yes.

Q. You were there at the time that picture was taken, weren't you? A. No, sir.

20

Q. How do you know you were not? A. I am sure I was not.

Q. Didn't you ever see that picture before? A. No.

Q. Didn't you see it in Mr. Rosenberg's office? A. Maybe I did.

Mr. Kanter: I want you to be fair about it. He was not in the room when the testimony was given, and the record will show it.

30

Q. Don't you know as a matter of fact that this picture was taken on Sunday, August 10, 1924, on your property in Rahway with Mr. Malinowski and these customers in the picture? A. No, sir.

Q. And one of your agents? A. No, sir.

Q. You do not know that? A. I have one man right here in the court room. Let him testify if it is true what you say and I am satisfied.

40

*A. W. Malinowski. Called in Rebuttal. Direct.*

Q. Is it true or not true that Mr. Malinowski was out there on the property after June 16 or 17, 1924?

Mr. Kanter: I object to the question.

10 A. How do I know whether he was there?

Mr. Kanter: Clearly this witness cannot say whether Malinowski went out there June 16th or 17th unless he was there at the time.

Q. Did you see him there? A. No, sir, except when he quit me he was working against me, stealing my customers. That is what I say, in this month and all the time, in September, October, November and January.

20 Q. But before September 4 he was not trying to sell any property, was he? A. He had arrangements with Bartell, because Bartell offered him a better position.

(Defendant rests.)

30 ANTHONY W. MALINOWSKI, sworn for the plaintiff in rebuttal.

DIRECT EXAMINATION BY MR. GILSON:

Q. You are the plaintiff in this case? A. Yes.

Q. Where do you live? A. 647 Jersey Avenue, Jersey City.

40 Q. Will you tell us how you came to have any relations with Mr. De Tynfo or the Lincoln Developing Company?

*A. W. Malinowski. Called in Rebuttal. Direct.*

Mr. Kanter: I object to the question. This is rebuttal. He is now trying to prove the main case.

Mr. Gilson: I will withdraw it.

Q. Is it true you had any conversation with Mr. De Tynfo between Christmas and New Years, 1923, through which you agreed to work for him as an agent in selling any of this property in Rahway on a commission of from five to twenty-five per cent? 10

Mr. Kanter: I object to the question. He is going back and trying to prove his main case and this is the very question he would have to ask if he had not offered the referee's report. He cannot prove his case that way. It is not rebuttal. 20

The Court: I will allow it.

Mr. Kanter: Exception.

A. Yes.

Q. What was the five per cent for? A. The five per cent. was on property—

Mr. Kanter: I object to the question; it is the same thing, it is not rebuttal. 30

The Court: Now you are going on through what you have already offered in your report.

Q. Mr. De Tynfo says you never acted as manager for the Lincoln Developing Company, is that so?

Mr. Kanter: I object as not rebuttal. That is one of the things he should prove on his main case. 40

A. W. Malinowski. *Called in Rebuttal. Direct.*

The Court: The defendant denies the statement which appears in your report. That is not rebuttal now.

Mr. Kanter: I insist that that report is a prima facie and the only prima facie case upon which the plaintiff must rely.

After argument the Court declared a recess.

10

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AFTER RECESS.

The Court: I have looked at the case of Paulsen (36 Law), and it seems very clear that the report of the referee is the prima facie case of the plaintiff, but still the Court of Errors seem to have thought that the plaintiff had a right in case he was not satisfied that all the facts required were stated in that report to offer other evidence. This case has been tried before a referee and tried here and a great deal of time spent on the matter. I am going to allow the plaintiff to put in such evidence as he thinks is necessary, even allowing him to open the case for that purpose. I think the matter ought to be clearly brought out before this jury so that it will be finally settled. Of course you have got to confine yourself to matters that the defendant has gone into. Other matters you cannot go into. I am going to allow that course to be taken. I am not so sure that you are right in offering it by way of rebuttal.

20

30

Mr. Gilson: I was going to ask your Honor to be permitted to reopen the case for that purpose.

40

*A. W. Malinowski. Called in Rebuttal. Direct.*

The Court: I am not so sure that you have a right to offer it in rebuttal. The report is prima facie your case. You can abandon it or rely on the report.

Mr. Kanter: I am entitled to know whether the plaintiff does abandon the report.

The Court: He does not have to abandon it; he may put in any additional evidence he may desire on facts not covered by the referee. 10

Mr. Kanter: Exception.

The Court: We do not want to go into any matters that the defendant has not raised by his exceptions.

Q. Question repeated as follows:) "Q. Mr. De Tynfo says you never acted as manager for the Lincoln Developing Company, is that so?" A. No, 20  
sir, I acted as manager from the middle of April. I was manager from the middle part of April, around the 15th of April, 1924, until the third or fourth of September. That is the time I resigned.

Q. How did you resign, verbally or in writing or how? A. Verbally, over an argument regarding my back commissions.

Q. In a conversation with Mr. De Tynfo? A. Yes.

Q. Just what did you say and what did he say at that time? A. There was about a week or over that we argued about the commission that was due to me and I rendered him a bill for around \$900 that was due me from January on. In some cases I got five dollars where I should have gotten fifty dollars; but he always claimed he did not have the money. He had no more property to sell in April. He said, "When I get my new property I will pay 30  
40

*A. W. Malinowski. Called in Rebuttal. Direct.*

up to date." In June he did buy a new tract of land about four blocks away from the other—

Mr. Kanter: I object.

The Court: Strike that out.

Mr. Kanter: I submit that all of the testimony so far given by this witness should be  
10 stricken out. He is making a speech.

The Court: Confine yourself to questions of the contract.

Q. What was said with respect to your resigning at that time, September 3 or 4? A. He said, "I won't pay you. If you quit you forfeit the commissions due you."

Q. Then about a week later you received this letter, D-4? A. Yes.  
20

Q. I show you an envelope marked P-3 for identification and ask you if you recognize that? A. Yes.

Q. Where did you get it? A. At my home through the mail.

Q. What letter came in that envelope? A. This letter, D-4.

Mr. Kanter: I submit that is not rebuttal.

Mr. Gilson: I offer this letter in evidence.  
30 (Admitted and marked Exhibit P-3.)

Q. Mr. De Tynfo says that you did not work there, do any work after June 15 or 16 or 17. Is that so? A. No, sir. I worked right on except about four days on the 21st of August, which was my birthday, and I went away for four days. That was the only time I went away. That was the  
40 19th, 20th, 21st and 22nd of August. It was my

*A. W. Malinowski. Called in Rebuttal. Direct.*

vacation time for those few days. That was my own birthday.

Q. Did you tell him about June 15 that you were not feeling well, that you had been in the War and were going over to a camp in Staten Island or something of that kind? A. No, sir.

Q. Were you out on the property with any customers after June 16 or 17? A. Yes. 10

Q. I show you a photograph and ask you where and when that was taken? A. This was taken in Clark Township on Mr. De Tynfo's property, with Mr. Wintoniak, who was an agent, and Mr. Gregulich, who is also an agent at this time, but he came out to see about the property at that time, and the contract was made—

The Court: Now, stop. 20

Q. Do you know when that photograph was taken? A. August 10, 1924.

Mr. Gilson: I offer that in evidence.  
(Admitted and marked Exhibit P-4.)

Q. What if anything did you do with respect to obtaining or closing contracts after June 15, 16 or 17? A. I used to get the contract from the office, go down there to the party—whoever it was—get the amount of money, get the people to sign the contract, leave their own contract and take a copy to the office and turn it over to Mr. De Tynfo. 30

Q. Have you any memorandum that you made at the time as to what particular contracts you did that with after the third week we will say of June? A. I kept a book of my own. I have a book that I kept showing the sales. 40

*A. W. Malinowski. Called in Rebuttal. Direct.*

Q. Referring to that book, give us the names of some of the contracts.

Mr. Kanter: After the third week in June.

A. There are in this book also.

Q. I want the names of them.

10

The Court: What is that book?

The Witness: A book I kept my account in, and all the contracts I closed while I was in the employ of the Lincoln Developing Company from January on till September; the only one that I closed, my own personal sale, was Mr. Piezlywicz. That was on the 18th day of June.

20

Q. Did you have anything to do with any of the other contracts after the third week in June? A. Yes.

Q. Which one? A. The Petrykiewicz, the Grenkowski case. That was a deed that was on.

Q. What did you do in those two cases? A. The Grenkowski—

30

Mr. Kanter: I object to this evidence. The plaintiff in his complaint has stated that he did not procure these contracts but is claiming his commission as manager. There is nothing in the complaint on which this evidence can be predicated.

The Court: He may tell what he did as manager from the time he claims he acted as manager up to the time he quit.

40

*A. W. Malinowski. Called in Rebuttal. Direct.*

A. Mr. De Tynfo would make a contract, get a deposit; when a contract was made I used to take that contract to—

The Court: Can't you tell us what you did?

A. Mr. Grenkowski, Gregulich, Mr. Natalski, Mr. Zulkoski, Mr. Malek. I guess that is all. 10

Q. What did you do with respect to those contracts as manager? A. The deposit was received and I got the people to give me the money due on that contract and received the money, took it to the office and gave it over to Mr. De Tynfo.

Q. Was that different from what you had done as salesman? A. Oh, yes.

Q. When you were first employed, or made this arrangement, did you tell Mr. De Tynfo that you were a licensed broker? A. No, sir. 20

Q. This card, Exhibit D-2, did you talk to Mr. De Tynfo about having those cards printed with your name on as manager? A. I did not.

Q. Did you have them printed without any talk to him? A. No, sir. Mr. De Tynfo had those cards printed for me with the rest of the stationery. He had an office at 209 Broadway with old stationery. The old stationery ran out— 30

The Court: Answer the question.

A. Mr. De Tynfo ordered that card for me.

Q. Who paid for it? A. The Company did.

Q. And later they deducted that expense from the amount that was coming to you? A. Yes, about two months after I think it was.

Mr. Kanter: I move to strike that out as purely voluntary. 40

*A. W. Malinowski. Called in Rebuttal. Direct.*

The Court: I do not think I will strike it out.

Mr. Kanter: It is not rebuttal.

Q. What if anything did you have to do with this Markiewicz contract, number one on schedule A of the complaint? A. I was in the Newark office and Mr. De Tynfo said, "I had this party out several times and cannot do anything with him." I called him up and he came to the Newark office, Mr. Markiewicz came in answer to my telephone. There we made the bargain, but he did not have the money. He said, "I am going home and get a hundred dollar check and let my wife sign it and I will bring the check." I said, "All right;" but a call came from the New York office that there was a party there who wanted to see the property, and I wanted to leave, and Mr. De Tynfo did receive the deposit from that man.

Q. Who obtained the signature to the contract?

A. Mr. De Tynfo, when the deposit was made.

Q. What did you have to do with the Mieczkowski contract, number 2 on schedule A? A. We all left the office together. I showed him the property.

Q. Who are "all"? A. Mrs. De Tynfo, Mrs. Maciejewsky, an agent, and two or three other buyers, and Mr. Mieczkowski. I showed him the property on King Street. He did not like the King Street property and said he did not care for anything on that side of the trolley line but wanted something on the other side. I said, "I will take you over there; but Mr. De Tynfo will have to show you that, I don't know where it is, it is not staked out." I turned him over to Mr. De

*A. W. Malinowski. Called in Rebuttal. Direct.*

Tynfo and he showed him the property. The man came into the little bungalow and made a deposit of ten dollars.

Q. Gave it to you? A. No, to Mr. De Tynfo.

Q. What if anything did you have to do with the Luchin deed—number 3 on Schedule A? A. In the May one—

10

Mr. Kanter: I object to the May contract. There was no testimony denying that one.

Mr. Gilson: It seems to me if the plaintiff were the procuring causation of a purchaser who subsequently made another purchase he would be entitled to his commission because he was his customer.

The Court: I do not know of any such law as that.

20

Q. Did you have anything to do with the sale in August to Luchen? A. Mr. Luchen said, "When I get my money from the Compensation I will take these lots on Westfield Avenue." That was in May when he bought the first lots on King Street.

Q. But you did not talk to him between that time and the time he closed the contract in August? A. Oh, yes.

30

Q. About the sale in August? A. Yes. I told him, "When is your money coming?" He said, "Well, it is pending, I don't know when I am going to get it." And we reserved those lots for him.

Q. What if anything did you have to do with the Grenkowski contract?

Mr. Kanter: I object as immaterial.

Mr. Gilson: I will withdraw that.

40

*A. W. Malinowski. Called in Rebuttal. Direct.*

Q. What if anything did you have to do with the Ortymowitch contract?

Mr. Kanter: I object to that question on the same ground. It is not in issue.

Mr. Gilson: I will withdraw that.

10 Q. What if anything did you have to do with the Pasuk contract?

Mr. Kanter: I object to the question. He says he was the manager, and it is immaterial whether he did anything or not.

Mr. Gilson: I will withdraw it.

20 Q. What if anything did you have to do with the Ortymowitch contract?

Mr. Kanter: Same objection. I have already objected to that question.

The Court: When do you say you became manager?

The Witness: Around the 15th of April, 1924.

The Court: How do you fix the time?

30 The Witness: It was around the middle part of the month, around the 15th. I don't say it was the 15th. It was around the 15th.

The Court: There is no way of fixing the exact date?

The Witness: No.

The Court: I think any contracts that were made after that date would not be competent to go into. I have allowed you to have this witness tell you what he did as manager, but

40

A. W. Malinowski. *Called in Rebuttal. Direct.*

the detail of various contracts I do not think makes any difference.

Mr. Gilson: Our claim is that as manager he was only to receive an additional compensation and the original arrangement stood, that he was to still sell property at the original rate, but as manager he was to receive an additional commission on sales by all agents, not only himself. I am trying to find out what he did with respect to these other contracts he obtained himself and not through other agents.

10

The Court: You had better find out what he says his real contract was.

Q. What was your original arrangement when you went to work for this company? A. You mean in the early part when I started to work?

20

Q. Yes, in December. A. When I went out to see the property Mr. De Tynfo showed me the King Street property and he said he pays 25 per cent commission on all lots, and that if he built any houses he would pay five per cent commission on the houses. I said, "All right," and I accepted the proposition and worked on.

Q. How was that commission to be paid? A. 50 per cent of all payments made by the customer including the deposit.

30

Q. When you became manager as you say around the 15th of April what arrangement did you have then with Mr. De Tynfo? A. Well the same thing. The commission of 25 per cent stood as it was that I was to receive—

The Court: Just tell us what the contract was.

40

*A. W. Malinowski. Called in Rebuttal. Direct.*

A. Five per cent extra for all sales made by everyone in the company and one per cent on improved property—that is on houses.

Q. Was that or was it not in addition to what you were to receive for contracts or sales you made yourself? A. Yes, it was in addition to my other commission.

10 Q. How were your duties any different as manager, or after the middle of April, than they were before? A. There were advertisements and new agents came in and I took them out and showed them the property, and I used to go out and close contracts, help the agents close them.

Q. Did you do any collecting before April 15 as a salesman? A. I can't say whether I did or not.

20 Q. When you went there in December what was the office force? A. Just Mr. De Tynfo. There was a girl there for about a week. We were without a girl for three weeks then. Mrs. Martin worked as a stenographer for about a month. She went and we got another stenographer and she worked until the day I left.

Q. Did they have a telephone when you first went with them? A. No, sir.

30 Q. When you and Mr. De Tynfo were out of the office and there was not any young lady there what arrangements did you have about answering any messages?

Mr. Kanter: I object.

The Court: It is immaterial.

Q. After you went there did you have any talk with Mr. De Tynfo about changing that office con-

*A. W. Malinowski. Called in Rebuttal. Direct.*

dition that existed when you first went there? A.  
I did.

Mr. Kanter: I object as immaterial.

Mr. Gilson: As manager I want to show he  
changed that whole system that he had there.

The Court: That question of yours would  
not apply to that, that would apply to the 10  
time he went there.

Q. What if anything did you have to do with  
the Kowalchuk contract?

Mr. Kanter: I object.

The Court: I will let him testify to con-  
tracts after the middle of April that he secured  
himself. 20

Mr. Gilson: Not prior to that?

The Court: You may ask about prior to  
that if you want to. I was under the impres-  
sion when you asked the question before that  
he only received a commission on those that  
were procured after the change in the con-  
tract. Now he says he was to receive the reg-  
ular commission and in addition to that a  
certain sum. You may show what contracts  
he had anything to do with procuring. 30

Q. What did you have to do with these other  
contracts mentioned in Schedule A upon which  
you claim the original commission of twenty-five  
per cent or five per cent in addition to the ones  
you have already testified to?

Mr. Kanter: I think that I ought in fair-  
ness to the court, counsel and jury, tell your 40

*A. W. Malinowski. Called in Rebuttal. Cross.*

10 Honor that certain contracts are not in issue at all. We have tried to make it plain to the jury that certain contracts he did procure. We emphasized that he did not procure one, two and three, and we said he was not our manager and was not entitled to any commissions for acting as our manager. Now, one, two and three he has already gone over. That is January 16, 1924, April 17, 1924 and August 8, 1924. Those are the three to which I directed my testimony. Now the balance of those I have had Mr. McDonald calculate what the commissions were. In the other cases we say he did not act as our manager. We say we did not make any such arrangement with him. Now according to him it does not make 20 any difference whether he worked for us or not with respect to those items below.

Q. Did you go in to Mr. De Tynfo in August and ask him to lend you money? A. No, sir. I used to lend him money. He never lent me anything.

Mr. Kanter: I move to strike that out.

30 The Court: Strike it out, answer the question.

A. No.

CROSS EXAMINATION BY MR. KANTER:

40 Q. You testified, did you not, before Mr. Rosenberg, the referee, that because of the fact you became manager of the Company you secured four agents and trained them? A. Yes.

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. Have you got those four agents in court? A. No, sir.

Q. You testified here that the last contract which you procured for us in respect to which you were entitled to the full commission of 25 per cent was a contract procured on June 18 from Piezlywiecz?

A. Yes.

Q. How do you know that is the date? A. That is the date of the closing. 10

Q. What memorandum have you of that? A. My book.

Q. Turn to it, please. A. Right here, page 20 in my book.

Q. That is the last entry in your book? A. No, not the last entry.

Q. But all the entries after page 20 refer to contracts which were procured while you were claiming to act as manager so to speak, is that right? A. Procured by whom? 20

Q. Any agent of the company except yourself, the plaintiff? A. Yes.

Q. So June 18 was the last contract which you directly procured and upon which you claim the entire commission, am I right about that? A. You limit that to the entire commission?

Q. Yes. A. The entire commission, yes. 30

Q. You understand that, do you? A. Yes.

Q. Commission in which you acted as the sales broker? A. As the salesman.

Q. There is no question about that? A. No.

Q. That was the last one you procured? A. No, there were others that I helped out in.

Q. That was the last one on which you are entitled the commission? A. I think it is.

Q. After page 20 in your book those other transactions refer to transactions which may have been 40

*A. W. Malinowski. Called in Rebuttal. Cross.*

procured by other agents of the company but where-  
on you are entitled to commissions because you  
were manager as you say? A. Yes.

Q. And you were to get these commissions of  
five and one per cent regardless of who made the  
sales? A. Yes, I got it too.

Q. But regardless of whether you made the sales?  
10 A. Regardless of whether I made the sales.

Q. And you say that arrangement was made on  
April 15? A. Around that time.

Q. From then on you charged those commissions?  
A. Yes.

Q. Put them in your book? A. Yes.

Q. You put them in your account and sued for  
them in this case? A. Yes.

Q. You made the sale, did you not, to Peter  
20 Gural? A. Yes.

Q. Did you charge your commission of five per  
cent on that? A. That was my own personally.

Q. Didn't you say you were entitled to this com-  
mission regardless of who made the sale? A. That  
was my own sale.

Q. And that included yourself? A. Not includ-  
ing myself.

Q. You did not charge the five per cent on that?  
30 A. I charged 25 per cent, my commission.

Q. You did not charge as 5 per cent? A. No, I  
was not acting as manager for myself.

Q. You did not charge 5 per cent on any sales  
made by yourself after April 15 at five or one per  
cent, did you? A. I could not be a manager of  
myself. I got my own commission of 25 per cent.

Q. You said on direct examination and on cross  
examination that you were entitled to a commis-  
40 sion of five per cent and one per cent on all lots

*A. W. Malinowski. Called in Rebuttal. Cross.*

sold by the company, in addition to your compensation, regardless of who made the sale. A. I did not say that.

Q. You say your last sale was June 18, 1924? A. Yes—personal sale.

Q. Will you please tell us the date of the first sale for which you asked for commissions for acting as sales manager? A. Right along. 10

Q. What is the first transaction? A. I cannot recall that.

Q. Isn't it the transactions that occurred after June 10? A. No, sir.

Q. You are sure about that? A. (No answer.)

Q. You claim in reference to item No. 4, commissions for acting as sales manager. According to D-3 in evidence that was made on August 12. A. What is the name of the party? Those are items; I don't know how the items go. If you will give me the name I will be able to answer it. 20

Q. Point out any contract that was made prior to June the 10 for which you claim commissions by reason of your being sales manager—any one. A. Petrykiewicz is one.

Q. Point to Petrykiewicz, please. A. I have it here.

Q. What was the date? A. I don't remember the dates. 30

Q. Didn't you say in answer to the Judge's question that June the 18th was the last transaction of Petrykiewicz and you had the date there? A. I have the date I received the deposit and the date of the contract.

Q. But these other transactions in which you were the sales manager, you did not put in the dates? A. No. 40

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. When did you get the names? A. Mr. De Tynfo would give me the names when I would go down with him and close the contracts.

Q. You were the sales manager? A. Yes.

Q. And you looked at the company books? A. The company books were always locked. This is a new set. He has two sets in the office.

10 Q. Mr. McDonald is then telling an untruth when he says that?

Mr. Gilson: I object.

The Court: Strike that out.

Q. You have not a single name on your complaint of the name of the customer in full? A. I have.

20 Q. On your complaint? A. Yes.

Q. Let us see about that. What is the full name of item No. 1. Who is item No. 1?

Q. You have it in your complaint, haven't you? A. May I have the complaint, and I will be able to answer.

Q. I will show you the complaint. A. Yes.

Q. "Markiewicz, Mieczkowski, Luchin," and so on, without giving the full names. A. That is the full name.

30 Q. You say you were acting as broker with respect to the Mieczkowski contract? A. I did not say I acted as a broker.

Q. You got that man as a purchaser? A. Yes.

Q. This was not one transaction; there were a number of transactions had with this company? A. Yes.

Q. 25 or 30 transactions? A. Yes.

40 Q. You were getting purchasers for their property? A. Yes.

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. The property was located in Rahway? A. Clark Township, Union County.

Q. And this contract, whatever it was, was made in New Jersey? A. No, it was made in New York, in the branch office in New York City.

Q. Didn't you say you went out to Rahway and accepted the proposition? A. It was offered to me in New York and also in New Jersey. 10

Q. Didn't you testify before Mr. Rosenberg that you went out to Clark Township and looked at the property and there accepted the proposition? A. Yes.

Q. Then the engagement was accepted in Rahway? A. How could I go to Rahway and accept it without knowing what I was going for? It was explained to me first.

Q. But the acceptance of the proposition was in New Jersey? A. Yes. 20

Q. What you say occurred in the latter part of December, 1924? A. It was around the 10th or 15th of December, I do not know the date.

Q. And the company's office at that time was in New York? A. Their branch office, yes.

Q. You say you made this contract to sell lots for the company and get this rate of commission, whatever it was, in December, and you made your first sale when? A. In January. 30

Q. What was the first sale you made? A. I don't remember the date.

Q. You have a record there? A. Do you want me to look at the record?

Q. Yes. A. January the 16th, the contract. The contract was not closed until the 25th of January.

Q. What are you reading from? A. Mieczkowski's. 40

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. You did not get your commission, did you?

A. I got five dollars on commission—and the check reads that.

Q. But you did not get your commission? A. No, sir.

Q. You say the check reads so? A. Yes—January 25th.

10 Q. I show you a check of January 16, 1924; that is the check? A. That is a check.

Q. The check does not read as you put it? A. I said January 25. This is January 16, expenses.

Q. That is the date you got the contract signed? A. No, sir, the contract was signed on the 25th.

(Marked D-5 for identification.)

20 Q. In any even you knew Mieczkowski paid a substantial deposit? A. Yes.

Q. And you knew you were not getting your commission, didn't you? A. Yes.

Q. And notwithstanding that you continued working for this company? A. He told me that—

Q. Did you continue working for this company? A. I did, yes.

30 Q. You say the Markiewicz transaction in respect to which the commissions were disputed, that the office was in Newark? A. The main office is in Newark at the present time I understand.

Q. And that is where the main office was then, he said? A. No, I said I went over there.

Q. When was that? A. I can give you the date from the record.

Q. Give us the date. A. That was around in April.

40 Q. What date in April? A. The contract was closed around the 30th day of April.

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. What date did you make your initial transaction according to your record? A. You do not remember yourself, do you? A. I know it was closed around the 30th of April. That is what I have in my record.

Q. Do you remember independently of your record? A. The deposit was given about several weeks before. 10

Q. Do you remember without reference to your book? A. I do.

Q. Close your book, please. Do you remember the date the contract was closed? A. Around the 30th day of April.

Q. Do you know what date the contract is dated? A. No.

Q. Do you know what date you closed the Malek contract? A. No, I do not. 20

Q. Do you know what day it is dated? A. No.

Q. Do you know about the date of any of these contracts? A. Not from memory, no.

Q. Then how do you say you know the date of that one you were testifying from? A. I opened the book and read it from there.

Q. Which one are you testifying about? A. The Markiewicz case.

Q. You said you knew that of your own memory. After I read it, yes. 30

Q. You mean you remember if it you look at your book? A. Yes.

Q. Do you not remember it independently? A. Independently, no.

Q. Open your book again, please. Now what date was the contract dated? A. I never entered in my book the date of the contract. It was the date I was there—the record. 40

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. You were there when the contract was signed? A. Either there or I close it myself.

Q. Don't you know whether you closed it or were there? A. I cannot answer it.

Q. And yet this was a contract you claim you procured? A. The contract might have been dated the 10th and was not closed until the 15th or 25th.

10

Mr. Gilson: I move to strike that out.

Mr. Kanter: I object to striking it out.

The Court: He is trying to find out whether you procured that contract or somebody else.

A. The only way I can recollect—

Q. Will you answer the question? A. You knew that that contract was made, didn't you? A. Yes.

Q. Yet you said a moment ago you did not know whether it was made or not. A. I saw the contract was typewritten in the office. Mr. De Tynfo took it over to the Newark office and there turned it over to the man, I don't know what date.

20

Q. You learned at least by April 30 that the contract was made? A. Mr. De Tynfo came in and told me about it. I asked him about it several times.

Q. That is how you learned about it, because Mr. De Tynfo told you about it? A. Yes. I insisted on my commission then. He told me he would give it to me later on, there was not enough money in.

30

Q. You did not get it? A. No.

Q. You continued working in May and June and July and August? A. Yes.

Q. You testified the last transaction you made directly was June 18? A. Yes.

40

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. Why do you claim a sale in item 3 to George Luchin of August 8? A. It was arranged so that as soon as this man made his money he would buy these lots and they were reserved, and that was the date it was closed.

Q. You said the last transaction you had in which you claimed commissions— A. Directly, personally. 10

Q. You said before that the last transaction you had in respect to which you claimed commissions was June 18, 1924, with reference to Petrykiewicz, and you were paid that commission? A. Yes.

Q. Why do you then include item no. 3, the transaction of August 8? A. Because that was a deed.

Q. That is your best answer? A. Yes.

Q. Can you point to any contract to which you are entitled to commissions by reason of your having acted as manager, which contract was made prior to June 10? A. Why, every one of them I am entitled to. I cannot mention the names. There are several of them. 20

Q. It is a fact, is it not, that there is not a single contract that was made prior to June 10 on which you claim commissions as manager? A. I don't know.

Q. Can you point to any? A. If I look it over. 30

Q. Exhibit D-3 in evidence shows the first transaction on which you claim commissions as manager is item 13, and that is dated June 10, is that correct? A. What is the name?

Q. Petrykiewicz. That was not before June 18? A. I haven't the date.

Q. How about Teodor Grenkowski? Do you claim commissions for acting as manager in respect to that? A. Yes. 40

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. What date was it—July 12, wasn't it? A. I don't know.

Q. What date is it according to your memorandum? A. I do not know when this was settled. It was a lawsuit and I do not know if it settled today.

10 Q. What date was the Julius Melymuka contract made—your Number 8? A. That was in August.

Q. How about Makychik, have you got it in your memorandum? A. Yes.

Q. What date is it? A. There is no date, the real estate board settled that.

Q. Wasn't it in September? A. No, that was in June. There were three contracts and the real estate board closed the last contract.

20 Q. Isn't it a significant fact to you that when you quit the employ of this company in the early part of June you first conceived of making up this statement and there is not a single transaction in that book that is prior to June for commissions for acting as manager, even though you claim you were manager on April 15? A. No, sir.

Q. There is none in that book, is there? A. I am entitled to anything right on to September 3.

30 Q. I want you to point out any transaction prior to June 10 where you were manager and claim commissions. A. Gregulich that I closed.

Q. But that is not one in which you claim commissions as manager? A. No. How could I claim it when I made the other sales before I was manager?

Q. You claim you were appointed manager April 15? A. I have proved it, I think.

40 Q. That is for the jury to say. Show me any transaction between April 15 and June 10 on which you claim commission by reason of being the man-

*A. W. Malinowski. Called in Rebuttal. Cross.*

ager—any one. A. Petrykiewicz and the rest of them. Your mind is made up to June 10; I am talking about September 3.

Q. But June the 10th is the first one you can point to? A. We had no property at that time. I sold everything out—until he did buy new property in June.

Q. They had no property and yet found it important to appoint you as manager to break in agents? A. For the new tract of land. 10

Q. You did not think enough of these four agents to bring them to court? A. They were coming and going, as agents do.

Q. You knew I questioned you before Mr. Rosenberg. A. Yes.

Q. You knew you would be questioned about them today? A. Yes. 20

Q. And you haven't brought them? A. The check shows they received money.

Q. Did you make any effort to get them here? A. No.

Q. Do you know where they live? A. I do not.

Q. One of them was your brother? A. No, sir, my brother only helped me out on Saturday and Sunday.

Q. Didn't you say you broke in your brother as agent? A. As sub-agent, not agent. 30

Q. He was one of the men you said you trained? A. I did not train him at all.

Q. That was one of the things you did while acting as manager? A. My brother was only taking people to the property; he was not acting as agent or sub-agent.

Q. Who were the other people? A. Mr. Rasin, Mr. Donke, Mr. Wintoniak, Mr. Volgar and a woman agent. 40

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. But of these six people not one is here? A. No; they all belong to Mr. De Tynfo. They are here but not on my part.

Q. Do you know where they live? A. No.

Q. They are all men of your nationality—Poles?

A. They are Russians. Mr. De Tynfo employed them first and turned them over to me.

10 Q. You said you did not tell Mr. De Tynfo you were a licensed broker when he first employed you?

A. No.

Q. Were you? A. I was not. It was not necessary.

Mr. Gilson: I move to strike that out.

The Court: The last part will be stricken out.

20 Q. Were you a licensed broker of the State of New Jersey? A. I was not acting as a broker.

Q. I want a responsive answer. You were not a licensed broker at any time during this period? A. I was not acting as a broker.

The Court: Were you a broker during that time?

30 A. I was not a broker. I can't answer it. I had no broker's license.

Mr. Gilson: I move to strike that out.

A. I was not a licensed broker.

Q. Did you ever get a written agreement for your commissions? A. No.

Q. Did you ever serve any written notice specifying the rate of commission to be got? A. No.

40

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. You did make a claim for \$900? A. Yes, \$900 and \$400.

Q. And \$400? A. Yes.

Q. And \$60? A. Not \$60.

Q. Varying amounts? A. No.

Q. Before you made a claim in this case you made a claim for \$3,000? A. I did not. I made a claim as I said for \$900 due me on my straight commission; \$444, something like that, on the commissions due as manager, and it was turned over to Mr. DeTynfo. Mr. De Tynfo made that statement. 10

Q. Didn't you before Mr. Rosenberg testify that before the institution of this suit—didn't you testify you had made a claim of \$3,191? A. That was the final claim. That was not when I was still employed with the Lincoln Developing Company, that was after. 20

Q. You made a claim—

Mr. Kanter: I object to that. It is perfectly clear that is the claim by him.

Q. Did you on cross examination in rebuttal on August 5, 1925, before Mr. Rosenberg, a Supreme Court Commissioner, on page 159, testify that you had furnished an account to the real estate Commission claiming a total debit of \$2,044.75 and that you had received only \$1,060.25? A. Yes, I did. I was not employed then. You asked me before, did I make the statements to Mr. De Tynfo—and I did. 30

Q. You know very well what I am talking about. A. I am answering your questions.

Q. You made different claims in this case? A. I did nothing of the kind. 40

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. You claimed to the real estate Commission that the total debits were \$2,044.75? A. Yes.

Q. You claim in this case that the total debits are \$3,000— A. No, I have a credit there of a thousand dollars.

10 Q. You made a claim before the real estate commission, and you so testified before Mr. Rosenberg, that your total debits exclusive of credits were \$2,044 and some odd cents? A. No.

Q. You so testified before Mr. Rosenberg? A. I did not.

Q. Isn't it a fact—I am reading from page 159, line six,—“Is it not a fact that in the complaint to the real estate Commission you made a claim of \$3,061? A. If it is there it is so.” Didn't you so testify? A. Yes.

20 Q. “Q. Have you a copy of it? A. I haven't got it with me.” A. Yes.

Q. “Q. And had you claimed a balance of \$2044.75, claiming you had received only \$1016.25? A. If it is there it is so.” A. Yes.

Q. “Q. Will you deny that fact? A. No, I will not.

30 Q. When you came to revise your figures for this suit you made your figures \$3191 and your credits \$1043.75, leaving a balance of \$2147.25. A. If it there it is so.” Did you so testify? A. I did, and that is what I testified today.

Q. So you did make different claims of different amounts? A. They are not different claims; they are leading to the same thing.

Q. The thing it is leading to is to get you as much money as you can get? A. No, what is due me.

40 Q. You knew your commissions were 25 per cent., didn't you? A. Yes.

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. How much commission did you get on the first sale you made? A. Which first sale I made?

Q. Which is the first sale you made? You know the sales you made. A. I will have to look in the book for the first sale. The first sale was Markiewicz. I only got five dollars on that.

Q. Why does it happen you claim only \$100 on item No. 3 when your contract was you were to get 25 per cent? A. Who is item No. 3? 10

Q. Item No. 3 is a sale you say you made to George Luchin, August 8, 1924? A. That was brokerage. I was then a broker.

Q. Why do you claim a commission of \$20 on item 14? A. This man was a Russian. I turned him over to Mr. Wintoniak and split the commission. I got \$90 and he got \$60.

Q. Of the 25 per cent? A. Yes, \$150. 20

Q. How much commission did you get on the sale to Kowalchuk? A. It was a thousand dollar sale. It was listed for eleven hundred dollars.

Q. You sold it for a thousand dollars? A. Yes.

Q. How much commission do you charge in your complaint? A. \$200.

Q. You are mistaken sir. A. I can give you what is due me.

Mr. Gilson: He is not mistaken. 30

A. There is a balance of \$60. I received \$140.

Q. How much commission did you claim on the sale made to Luchin for item No. 21—\$100, wasn't it? A. There are two lots there.

Q. \$850. A. There was a credit of \$150 given.

Q. I do not care about the credit. A. I have to mention it when I receive \$150—

*A. W. Malinowski. Called in Rebuttal. Cross.*

Q. What commission did you get on Zulkoski?  
A. I received \$25 on that. I claim \$200, but I left it out of this—I overlooked it.

Q. Zulkoski is in this complaint at \$25? A. Yes.

Q. You were not in a hurry in making up this complaint? A. Yes. I am not an expert typewriter. I made it out and turned it over to Mr. Gilson that way.

10 Q. You say Mr. Gilson did not have this typewritten in his office? A. I mean the one I turned over to him.

Q. You read it over? A. Yes.

Q. That has been called to your attention a number of times? A. Here.

Q. Wasn't it called to your attention before the referee, Mr. Rosenberg? A. Yes, but I cannot change it. Why should I?

20 Q. Because it is the truth; you were entitled to \$25 and you got it. A. No, sir.

Q. That was how much percentage? A. That was 25 per cent.

Q. Did you make any sales to Dobrianski and the other names mentioned here? A. I did not.

Q. You got \$30? A. Yes.

Q. Did you make a sale to Tymniak? A. Yes.

30 Q. What percentage did you get? A. I got \$50.

Q. What percentage is that of \$250? A. I allowed that man \$50.

Q. I did not ask you that. A. I have to give you the percentage when you want me to answer it. I received five per cent. on it, but we had allowed the man a certain amount and I had to deduct it from my amount.

40 Q. In other words there was throughout this proposition a varying rate of commission? A. No, sir.

*A. W. Malinowski. Called in Rebuttal. Redirect.*

Q. Just as Mr. De Tynfo claims? A. Absolutely no.

Q. When I ask you, haven't you received payment in full for these claims for a lesser amount, you persist in telling us the contract was 25 per cent? A. Absolutely; and it is proved by the contract and his books that I allowed so much to a certain buyer. 10

Mr. Kanter: I move to strike out the last part.

The Court: Strike it out.

Mr. Gilson: I call on the defendant to produce that check dated January 25th.

Mr. Kanter: I haven't any such notice to produce. 20

REDIRECT EXAMINATION BY MR. GILSON:

Q. Why was there a difference in some of these commissions Mr. Kanter has been talking so much about? A. When the listed price was a thousand dollars a buyer would come along and say, "I won't give you a thousand dollars, I will give you \$900." If I sold it for nine hundred dollars I would have to forfeit half of what I allowed; the company would lose \$50 and the other \$50 I would have to give off the commission—but it was a 25 per cent. straight basis. 30

Q. And that was true in all of these cases they have called attention to where the commission was less than the amount you agreed on, you would split commissions with the purchaser and the company would make an allowance. A. I did not split it, ubt just allowed them that amount. Instead of losing the sale I allowed them \$100 or \$150, whatever it might have been. 40

*A. W. Malinowski. Called in Rebuttal. Redirect.*

Q. Mr. Kanter would not let you answer the questions of why you continued to work after not receiving your commissions. What did you start to say about that? A. He said he would be all right when he got more property, he would pay it up.

10 Q. What did he say about that check of January 25? A. January 25 I have it marked in my book.

Q. What is there about that check? A. It reads right on the check, "On commission"—and the date.

Mr. Kanter: I object to this witness testifying to it. It is the first demand I have had.

A. I testified at the last trial before Mr. Rosenberg and you promised to produce the check.

20 Mr. Kanter: I move to strike that out.  
The Court: Strike it out.

Mr. Kanter: I object to it. It is the first demand we have had for the check.

Mr. Kanter: I offer this check, D-5 for identification, in evidence.

(Admitted and marked Exhibit D-5.)

Mr. Gilson: I submit to a voluntary non-suit as against Mr. De Tynfo.

30 Mr. Kanter: I think the offer for a voluntary non-suit comes too late. The case has been rested as to Mr. De Tynfo on both sides.

The Court: They may take a non-suit at any time before they go to the jury.

Mr. Kanter: I think we are entitled on the report to get a judgment against the defendant De Tynfo.

The Court: He may take a voluntary non-suit at any time.

40 (Counsel sum up to the jury.)  
(Adjourned to May 27, 1926.)

### Charge to Jury.

The Court charged the jury as follows:

The Court: Members of the jury:

The Lincoln Developing Company was the owner of some land near Rahway in this State, and in the month of December, 1923, employed the defendant to sell some lots on this plot, agreeing to pay him a commission on the lots which he sold.

10

The plaintiff, acting under this employment, sold certain lots for this company and received certain payments on account of the lots so sold by him.

The plaintiff contends that in the following April—that would be April, 1924—he was appointed manager of this company and was to receive as his salary, in addition to commissions on the lots he sold, five per cent. on all unimproved lots, and one per cent. on all improved property sold by the company, whether the lots were sold by him or by some one else.

20

The defendant did not pay the plaintiff all the money he demanded, and thereupon the plaintiff started this suit to collect the money he claims is due him from the defendant company and Mr. De Tynfo, the president of this company.

The defendants deny liability and say that the plaintiff cannot recover commissions for lots so sold, because the Act known as the Fraud and Perjury Act prevents a recovery against an owner by a broker or real estate agent unless the provisions of the Act have been complied with; that the plaintiff has not complied with the provisions of this Act because the plaintiff is not a duly licensed broker or real estate agent, and lastly because the plaintiff was never employed by the defendant as manager.

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*Charge to Jury.*

This being a matter in which accounts were involved, the case was referred by the court to Mr. Maximilian T. Rosenberg, who, after hearing the evidence, made his report, and afterwards made a supplementary report, finding in favor of the plaintiff, and against the Developing Company, but finding that there was no liability shown on the part  
10 of the other defendant.

When this case was referred both the plaintiff and the defendant reserved the right to a trial by jury, and that right is given them by the statute; and the defendant company, not being satisfied with this report, filed exceptions to the same and applied for a jury trial, and the case now comes before you to be tried in the usual way, except that the referee's report is offered in evidence and is,  
20 under the statute, prima facie evidence of the facts therein contained. However, that does not mean that you are bound to find the same way that the referee found, but that the facts set out in the report are to be taken as true unless the evidence produced by the defendant satisfies you that the referee was mistaken. The plaintiff must always establish his case by a preponderance of the evidence before he can ask a verdict at your hands.

30 The Legislature of this State has provided by an amendment to the Tenth Section of the Fraud & Perjury Act as follows:

40 "No broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such land is in writing, and signed by the owner or his authorized agent, or the authority of the

*Charge to Jury.*

broker or real estate agent to make a sale or exchange of such land is recognized in a writing or memorandum signed by the owner or his authorized agent, whether or not such writing or memorandum is signed by said owner or agent before or after such sale or exchange has been effected, and the rate of commission on the dollar shall have been stated therein, provided, however, that any broker or real estate agent who may hereafter be employed by any owner of real estate by oral agreement, to sell or exchange any real estate belonging to such owner, and who shall actually effect the sale or exchange of such real estate pursuant to such oral agreement, before the same shall have been terminated by such owner, in writing, as hereinafter provided, may recover from such owner the amount of commission on such sale or exchange, provided such broker or agent shall within five days after the making of such oral agreement serve upon such owner a notice, in writing, setting forth the term of such oral agreement and stating the amount or rate of commission to be paid thereunder, and provided said owner shall not have repudiated or terminated such agreement prior to the actual sale or exchange of said real estate; said owner shall have the right, at any time after receiving such notice, to repudiate or terminate such oral agreement by serving upon such broker or agent a notice, in writing, to that effect, and upon the repudiation or termination of such agreement by the serving of such notices upon such agent or broker prior to the actual sale or exchange of such property by such agent, such agreement shall be

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*Charge to Jury.*

null and void, and no recovery of any commis-  
 sion shall be had thereunder; provided, how-  
 ever, that if any broker or agent shall have  
 entered into negotiations with a prospective  
 customer in good faith, under such agreement,  
 for the sale or exchange of such property, and  
 such negotiations shall be pending at the time  
 10 of the repudiation or termination of such  
 agreement by such owner, and such sale or ex-  
 change is subsequently consummated between  
 such owner and such customer, such agent or  
 broker shall be entitled to recover his commis-  
 sion on such sale or exchange, notwithstand-  
 ing the repudiation or termination of such  
 agreement. The notice provided for herein  
 shall be served either personally or by for-  
 20 warding the same to the person to be served,  
 by registered mail, to the last known post of-  
 fice address of such person."

There was no written authority in this case, and  
 no notice in writing that the plaintiff had sold any  
 lots under the verbal authority, so if the plaintiff  
 was selling as a broker or real estate agent there  
 then can be no recovery for commission on the lots  
 he sold, because the statute absolutely prohibits a  
 30 recovery in an action by a broker unless the au-  
 thority is in writing, or unless he gives notices as  
 I just mentioned in reading the statute.

The plaintiff, however, contends that he was not  
 a real estate agent or broker, and had no license  
 as a broker or real estate agent, and was not act-  
 ing as one, but was a salesman for the plaintiff,  
 and therefore the act which I have just read does  
 not apply to him; but that contention does not ap-  
 40 pear to be well founded, for in the case of Stout v.

*Charge to Jury.*

Humphries, where an attorney at law was employed orally to sell a hotel property and after he had sold it the owner refused to pay, claiming that there was no written authority and that therefore there should be no recovery, the attorney admitting there was no written authority but claiming he was not a broker or real estate agent but was acting for the owner and could recover because the Act of Frauds and Perjuries did not apply to his case— you see that is a similar case to the one that we now have before us—Justice Pitney, before whom the case was tried, held :

“But, as I read this statute”—that is the statute of Fraud and Perjuries—“both in its letter and manifest policy, it is aimed at any person who acts as a broker or real estate agent in the very transaction in question out of which the claim to compensation arises. It would be a very narrow construction of the statute to say that it applied only to him who ostensibly and usually carried on the business of brokerage or real estate business so-called.”

That, of course, was the decision of the trial judge, and not the decision of the Court of Errors and Appeals; but this case of *Stout v. Humphries* was carried on writ of error to the Court of Errors and Appeals, and the Court of Errors and Appeals reviewed it, and quoted this section of the charge of Justice Pitney, and said, among other things :

“The learned trial judge we think tersely and correctly interpreted this section of the statute.”

*Charge to Jury.*

Now, that being the law and the court holding that it applies to this particular case, directs that there can be no recovery for the lands sold on which the plaintiff claims a commission. You are therefore relieved from considering how much commission the plaintiff was entitled to receive for the lots sold, or whether the payment which he admits having received for the sale of these lots, of \$1043.75 was all the money the plaintiff was entitled to for making these sales, because under the law he cannot recover anything more for the sale of these lots than he has already received, even if you had it under consideration and were to say that he was entitled to receive something more. But that does not end your difficulties, gentlemen. You have got a problem still to determine, and one that you must solve from the evidence that you have heard, and that problem is, was the plaintiff appointed to act as manager of this company in April, 1924, and did he act in such manner until some time in September, and if he did was he to receive five per cent on the sales of the unimproved land of the company made during that time? The plaintiff contends that there were eight sales made during that time by others than himself, and that his commission of five per cent on those sales amounted to \$522.50.

The defendant, however, says that there was no appointment of this plaintiff as manager, and that he left the company in June and was never back after that day. Of course, if he was not manager of that company and did not act as manager, then there must be a verdict in favor of the defendant.

Here you see, members of the jury, you have a disputed question of fact to decide from the evidence. You are sole judges of what the evidence has been and the weight and the credibility you

*Charge to Jury.*

will give to the evidence of the witnesss that you have heard.

If you find from all this evidence that the plaintiff was appointed manager of this company and acted as such manager, and that his compensation was to be five per cent on the sales which were made by others than himself during that time, then he can recover and you must determine the amount of the recovery. 10

If the contract was that the plaintiff was to receive his pay by sharing the payments made by purchasers of the lots so sold, then the recovery would be his share of the payments, made up to the time he brought this suit. He could not recover after that day. He would have to bring some other suit to recover after that day; and you will have to determine from the evidence you have heard and from the documents which have been offered how much was collected up to that time on these eight properties which were sold and the share which he was to receive in those payments. 20

But if the contract did not state when he was to receive this five per cent, or if you are satisfied from the evidence that the defendant defaulted in this contract and did not live up to his bargain, then the plaintiff is entitled to his full payment, and if it was five per cent on the purchase price of these eight lots it would be \$522.50 and you would add to that the interest from the 4th of September 1924. 30

Now, members of the jury, that is the case which you have to decide. If the plaintiff has established his case the verdict cannot be more than \$522.50 with interest from September 4, 1924, because the statute forbids a recovery for the com- 40

*Charge to Jury.*

missions on the lots which he himself sold. Of course if there was no appointment as manager then he cannot recover at all. If you find, as I have said, that the contract was that he was to be paid as the money was collected, he can only recover such share of the \$522.50 as had been paid prior to the time that he brought this suit, his share of it—together with interest from the 4th day of September, 1924.

If you find that the plaintiff has failed to establish his case at all of course there would be a verdict for the defendant.

That, members of the jury, is the case which you have to decide from the evidence. I have tried to make it clear, and so far as the law is concerned you may take the law from the court, and if the court is wrong he of course will be reversed.

There are several requests to charge by both the plaintiff and the defendants.

Mr. Kanter: I will withdraw mine.

The Court: I have charged, I think, all I think is the law in this case, and I refuse to charge further than I have charged, and allow both the parties exceptions to their requests, and that brings the case squarely up on your exceptions.

Mr. Gilson: I desire to except to the charge wherein your Honor said if the plaintiff sold as broker or agent there can be no recovery, because I think that the charge should have been that the plaintiff was not an agent or broker under the law.

The Court: All right.

Mr. Gilson: Secondly, "That the contention of the plaintiff that he was not a broker is not well founded."

*Plaintiff's Requests to Charge.*

The Court: You may have an exception to what I said on that subject.

Mr. Gilson: Thirdly, I except to that part of your charge where you said that the plaintiff cannot recover for commissions on the lots he sold.

And I also except to the refusal of the court to charge the requests.

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**Plaintiff's Requests to Charge.**

1. It was not necessary for the plaintiff to have a license as a real estate broker to sell the property of defendant.

2. It was not necessary that the contract or agreement between the plaintiff and defendant be in writing; an oral agreement is binding in view of the fact that it was for an indefinite time.

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3. If the jury find that the defendant did not pay the plaintiff in accordance with the agreement between the parties, then the defendant failed to carry out its part of the agreement and the plaintiff is entitled to commissions on all contracts procured by him even though all of the installments had not been paid.

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4. The rate of commission is for the determination of the jury.

5. The question whether or not the agreement was changed in April, 1924, whereby plaintiff became manager, is for the jury.

6. The question as to which contracts the plaintiff was instrumental in procuring, is for the jury.

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**Jury's Request for Further Instructions.**

The jury having returned to court for further instructions, the court charged as follows:

The Court: Mr. Foreman, I have received your communication.

(The communication is as follows:)

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"HONORABLE WILLARD CUTLER:

Does your charge disallow our rendering any verdict for moneys due the plaintiff while he was acting in defendant's employ as salesman? Also if the defendant in any way is liable when they employ a salesman knowing the salesman has or had no license.

JOHN DONNELLY,  
Foreman."

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**Further Instructions by Court.**

You gentlemen are only dealing with the case that is now before you, and under this case as presented there can be no recovery for plaintiff's commissions on sales of real estate made by him for the defendant. The statute prevents any recovery for that. That is not your province to deal with, because the court removes that from you. You are limited in your findings to the amount plaintiff is entitled to receive as manager of this company, if you find he was manager, and during that time the evidence shows there were eight sales. If you find the commission was five per cent of the sales which were made by others, then the total amount of his recovery would be \$522.50, and in addition to that he would be entitled to interest on that sum at six per cent from September 4, 1924. Of course, if you find he was not the manager, or if you find that the bargain was that he was only to receive the money in sums that were received by the company on these sales, you would be limited to a sum less than \$522.50, for it would be his share of the sum received by the company up to the date the suit was brought, which was October 8, 1924.

(Neither counsel being present, the court allowed an exception to counsel for the plaintiff and to counsel for the defendant.)

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**Exhibit P-1.**

(This exhibit is the Referee's Report and is set forth in full at pages 11 to 15, both inclusive.)

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**Exhibit P-2.**

(Business Card.)

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Homes  
Bungalows  
Cottages  
Building Lots  
Plots  
Garden Farms  
and  
Farms  
on  
Easy Terms

LINCOLN DEVELOPING Co., INC.,  
Real Estate Developers  
and Builders  
206 Broadway New York  
Room 244  
Phone Cortlandt 5718  
Anthony Wm. Malinowski,  
Manager

20

**Exhibit P-3.**

(Envelope)

New York City Office  
206 Broadway, Room 244

(Stamp)

30

(Postmarked)  
Hud. Term. Sta. N. Y.  
Sept. 10  
6:30 P. M.  
1924

MR. A. WM. MALINOWSKI  
297—7th Street,  
Jersey City, N. J.

40

**Exhibit P-4.**

(Letter from defendant to plaintiff.)

LINCOLN DEVELOPING COMPANY  
 Incorporated  
 Real Estate Developers  
 and Builders  
 206 Broadway Room 244  
 Corner Fulton Street  
 Telephone Cortlandt 6069

10

New York, September 3, 1924.

Mr. A. Wm. Malinowski,  
 297—7th Street,  
 Jersey City, N. J.

Dear Sir:

Please note that your license #C1636BR has been forwarded to the New Jersey Real Estate Commission for cancellation, therefore your employment has this day terminated with us. 20

Kindly mail us in the enclosed envelope your pocket card issued by the Real Estate Commission, upon receipt of which we will forward same to the Commission, as required by Section 10 of the License Act.

Yours very truly,

30

LINCOLN DEVELOPING COMPANY.

I. DETYNFO,  
 General Manager.

IDET:EZ

40



01 OCT. 1. 1926

## New Jersey Court of Errors and Appeals

|  |   |
|--|---|
| A. WILLIAM MALINOWSKI,<br>Appellant,       | } Action at<br>Law.<br>Appeal from<br>Supreme<br>Court. |
| vs.  |   |
| LINCOLN DEVELOPING COMPANY,<br>Respondent. |   |

### BRIEF OF APPELLANT.

#### Facts.

This appeal is by the plaintiff from the direction of a verdict against him on part of his claim for compensation under a verbal contract of employment. The principal question involved is whether or not the plaintiff was a "real estate broker" within the meaning of the statute of frauds.

The plaintiff's claim was for compensation as salesman, amounting to \$1,624.75 with interest; and also for compensation as manager, amounting to \$522.50 with interest. The trial court directed a verdict against the plaintiff on his claim as salesman upon the ground that the contract was unenforceable because the statute of frauds requiring every "real estate broker" to have his authority in writing, had not been complied with (*pp. 134-136*). The other part of plaintiff's claim (as manager) was submitted to the jury, and a verdict in favor of the plaintiff for \$573.91 (that being the amount of the claim as manager, together with interest) was rendered. This appeal is from the direction of the verdict on the plaintiff's claim as salesman.

The defendant, Lincoln Developing Company, was the owner of a large tract of land which had been laid out in lots, in Clark Township, near Rahway, N. J. In December, 1923, the plaintiff was employed by the defendant to help sell the lots (*pp. 71 & 109*). The compensation was to be 25% on unimproved lots, and 5% on improved property (*p. 109*). The sales were usually made on installment payments, and the plaintiff was to receive one-half of each installment until his compensation or commission was paid (*pp. 71 & 109*). In April, 1924, the contract of employment was modified by the appointment of the plaintiff as sales-manager of the defendant, and his compensation was increased by allowing him 5% on sales made by all other salesmen or unimproved property, and 1% on improved property sold by all other agents, in addition to the commission on sales made by himself (*p. 110*).

Between December, 1923, and September 4th, 1924, the plaintiff sold a number of lots, and he received \$1043.75 from the defendant on account of his commissions (*p. 68, line 1*). The defendant became so far behind in its payment to the plaintiff that he severed his connection with the defendant on September 4th, 1924. The president of the defendant said "If you quit you forfeit the commissions due you" (*p. 102, line 15*).

The case was referred to M. T. Rosenberg, Esq., and the defendant filed exceptions to his report. The action then came on for trial before Hon. Willard W. Cutler and a jury. The plaintiff submitted to a voluntary non-suit against the alternative defendant, De Tynfo, president of the defendant corporation (*p. 130*). The court directed the verdict against the plaintiff on his claim as salesman, and submitted to the jury the question whether or not the plaintiff was appointed manager of the defend-

ant (*pp. 136, 137*). It is evident from the request of the jury for further instructions, that they desired to find in favor of the plaintiff as salesman as well as manager even though the contract was not in writing (*p. 140*). Exceptions were taken to the charge and to the refusal to charge the requests of the plaintiff (*pp. 138, 139*).

### I.

#### **The contract was not within the Statute of Frauds.**

The plaintiff had never been in the real estate business. He met the president of the defendant corporation when he went to the office with a friend, and the position of salesman was offered to him (*p. 71, line 13; p. 109, line 27*). There was only one contract of employment which was modified by increasing the plaintiff's compensation and duties when he was appointed sales manager (*p. 110*).

The defendant was selling its own property and, being a corporation, could do so only through its employees and officers. The plaintiff was acting solely for the defendant, and he was not engaged in "buying and selling for others."

The statute of frauds requiring all "brokers or real estate agents" to have their authority in writing, was not applicable. The statute was aimed at "brokers and real estate agents," for it expressly uses those words. Our other statute providing for licenses defines a "broker" as follows:

"A real estate *broker* within the meaning of this act is any person, firm, association, partnership or corporation which, for compensa-

tion, valuable consideration or commission, sells or offers for sale, buys or offers to buy, or negotiates purchase, sale or exchange of real estate, or leases or rents, or offers to lease or rent real estate *for others*." (My italics). *P. L. 1921, p. 371, sec. 2.*

The same statute also defines a real estate salesman, as follows:

"A real estate *salesman* with the meaning of this act is any person who, for compensation, valuable consideration, or commission, is employed, either directly or indirectly, by a *licensed real estate broker* to sell". \* \* \*

*Ibid.*

Those definitions are in harmony with the usual definitions.

"A broker is one who is engaged for others on a commission negotiating contracts relative to property with the custody of which he has no concern; \* \* \* A person is not a broker \* \* \* who acts for one principal to the exclusion of all others."

*9 C.J. 508.*

"A real estate broker is one who engages in the purchase and sale of real estate as a business or occupation, and so hold himself out to the public in that character and capacity."

*Chadwick v. Collins, 26 Pa. 138.*

The statute of frauds was not designed to protect the wrongdoer; it was intended to prevent fraud. In the instant case the employment was not denied, nor that plaintiff sold numerous lots for the defendant. And the jury found that the defendant was guilty of a breach of the contract.

\* \* \* "the defendant cannot avoid his legal responsibility for services actually performed by availing himself of the provisions of a statute primarily intended to prevent fraud. *Updike v. Ten Broeck*, 32 N. J. L. 110."

*Wilson v. Wilderness Poultry Farm*, 82 Atl. (N. J.) 517 (not officially reported).

~~"A master was liable for services actually performed by a discharged servant, though the contract of employment was within the statute of frauds."~~

~~*Wilson v. Wilderness Poultry Farm*, 82 Atl. (N. J.) 217, (not officially reported).~~

The trial court based the direction of the verdict on the case of *Stout v. Humphrey*, 69 N. J. L. 436, but that case was different from the instant case as pointed out by the referee in his report (pp. 12, 13) :

"The property in question was the property of the defendant corporation. The plaintiff was hired as an employee to sell that property and no other. He was not holding himself out to be a broker, and he was not making sales of property of persons other than the defendant. He had his office with the defendant Lincoln Developing Company. The defendant rests his argument on the case of *Stout v. Humphrey*, 69 N. J. Law, 436. In that case the plaintiff was an attorney at law, independently employed, and was retained by the defendant to sell one specific piece of property. He was, as pointed out by the Court there, a broker for that piece of property."

## II.

### **A broker's license was not necessary.**

It was not necessary for the plaintiff to have a license as a real estate broker. The statute expressly provides that an owner selling his own property, is not required to have a license. Therefore, it being unnecessary for the defendant to obtain a license, it was not necessary for its salesman to have a license. This point is also covered under the first point, and in the words of our Supreme Court in *Ludwig vs. Aberbach*, 4 N. J. Misc. Rep. 169 (not yet officially reported) :

“There is no merit in the contention that the plaintiff is not entitled to recover for the reason that he is not a duly licensed broker.”

## III.

### **Defendant broke the contract.**

The plaintiff terminated the employment on September 4, 1924, because the defendant would not pay him the balance of his commissions (p. 102). The president of defendant pretended that he wrote a letter to plaintiff on September 3rd, 1924 (*Exhibit P-4*), in order to make it appear that it (the defendant) had terminated the employment, when in fact the letter was not written until September 10th, 1924, and mailed on that day (*Exhibit P-3, & p. 92*).

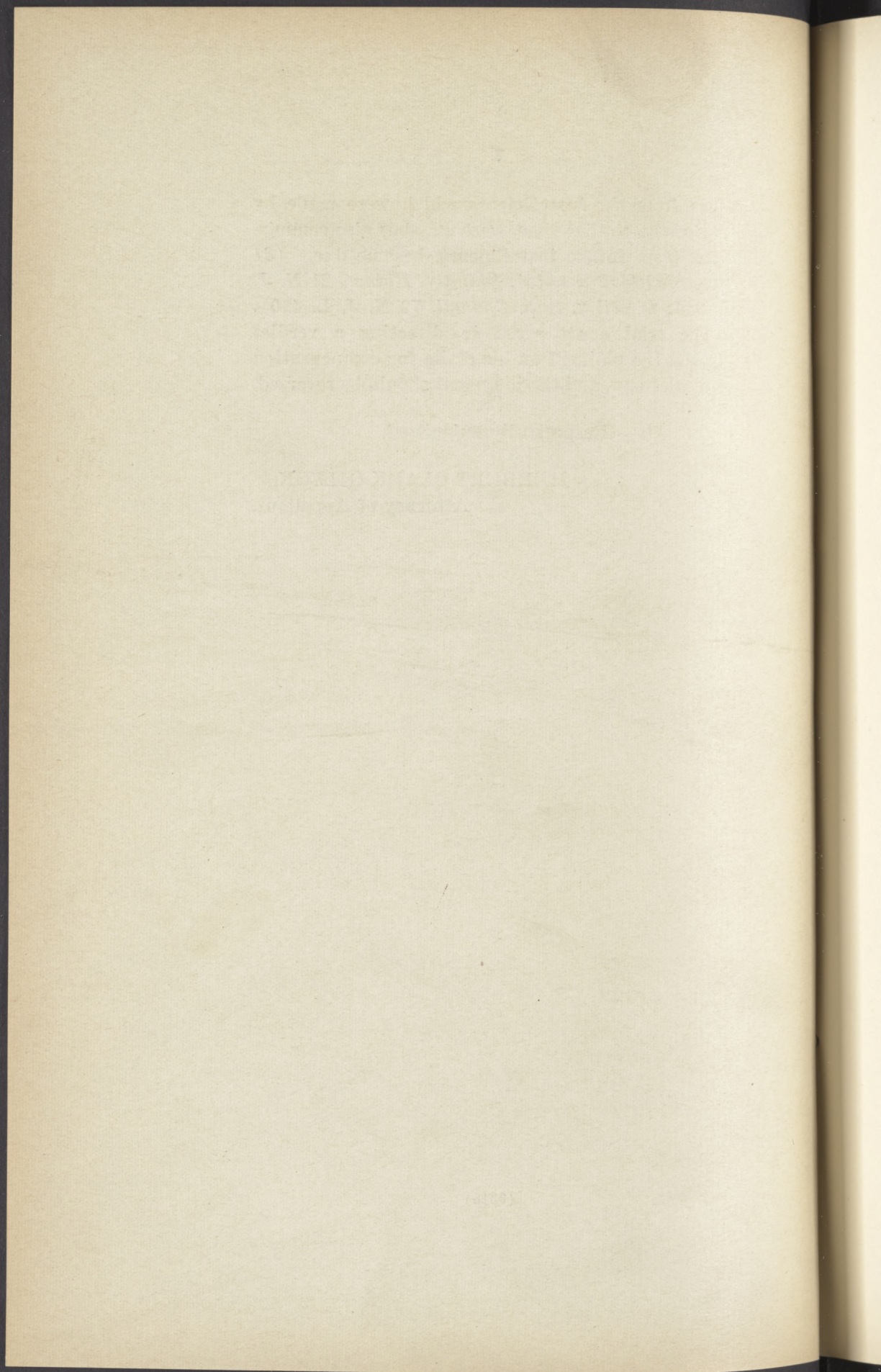
In view of the fact that the defendant was guilty of a breach of the agreement, not only the commis-

sions from the installments which were made by vendees up to that time, were due, but also commissions from future installments, became due. (*31 Cyc. 1509-1512 & notes; Shinn v. Haines*, 21 N. J. L. 340; *O'Neil v. Sup. Council*, 70 N. J. L. 410).

The trial court erred in directing a verdict against the plaintiff on his claim for compensation as a salesman, and the judgment should be reversed.

Respectfully submitted,

HERBERT CLARK GILSON,  
Attorney of Appellant.



## New Jersey Court of Errors and Appeals

A. WILLIAM MALINOWSKI,  
*Plaintiff-Appellant,*

*vs.*

LINCOLN DEVELOPING COMPANY, a  
corporation,  
*Defendant-Respondent.*

*On Appeal  
from  
Supreme  
Court.*

### RESPONDENT'S BRIEF.

#### Statement of the Issue.

This action was instituted by the plaintiff-appellant against the defendant-respondent to recover two claims, the first being on an alleged contract whereby "defendant employed plaintiff as a salesman on a commission of 25% of all sales made by plaintiff or through him" in respect to sales of plaintiff's realty, as stated in paragraphs 1 and 2 of the complaint (State of Case, p. 4, ll. 20-38), and the second being on an alleged contract, made subsequent to the first contract, whereby "defendant appointed plaintiff manager of its said business on a commission of 5%, etc.," as stated in paragraph 3 of the complaint (State of Case, bottom of p. 4 and top of p. 5).

On the second cause of action, that is, for commissions earned by the plaintiff as manager, there was a verdict for the plaintiff against the respondent for \$573.91, which verdict is not under review in any way.

In respect to the balance of the plaintiff's claim, which arose solely by virtue of the allegation that he earned commissions in effecting the

sale of the defendant's real estate, about 12 or 13 transactions being involved (State of Case, p. 6), there was a directed verdict in favor of the respondent. It is only this directed verdict which is attacked by the appellant as being erroneous.

#### POINT I.

The plaintiff was not entitled to recover for effecting the sale of defendant's real estate in the absence of a compliance on his part with Section 10 of the Statute of Frauds.

Counsel for plaintiff in the third paragraph of his brief (top of p. 2) concedes: "The defendant, Lincoln Developing Company, was the owner of a large tract of land which had been laid out in lots, in Clark Township, near Rahway, N. J. In December, 1923, the plaintiff was employed by the defendant to help sell the lots. The compensation was to be 25% on unimproved lots, and 5% on improved property. The sales were usually made on installment payments, and the plaintiff was to receive one-half of each installment until his compensation or commission was paid." It is a conceded fact in this case, as pointed out by the Trial Court in his charge to the jury, that "there was no written authority in this case, and no notice in writing that the plaintiff had sold any lots under the verbal authority" (State of Case, p. 134, ll. 25-28); counsel for the plaintiff-appellant concedes that this is an accurate statement of the facts and that the statute was not complied with in any manner but, in effect, claims that the statute was not applicable to the plaintiff. But we think that this conclusion is erroneous, and that the Trial Court properly ruled that the statute of frauds presented a complete defense to the claim of the

plaintiff based on his allegation that he had sold the lots of the defendant at an agreed rate of commission.

As against the Lincoln Developing Company, the complaint makes the claim that on December 12, 1923, the plaintiff was engaged by the company "as a salesman on a commission of 25% of all sales made by plaintiff or through him"; see paragraph 2 of complaint. According to the complaint itself, therefore, the plaintiff claims commissions of 25% on all sales effected by him. The sales which plaintiff, insofar as his complaint is concerned, claims to have procured, are as follows:

|                          |                       |
|--------------------------|-----------------------|
| John Markewicz . . . . . | item #1 of Schedule A |
| Edward St. Meczkowski    | " 2 " " "             |
| George Luchin . . . . .  | " 3 " " "             |
| Martin Artymowich . .    | " 14 " " "            |
| Dimitry Kowalchuk . .    | " 15 " " "            |
| Ceslaw Smolinski . . . . | " 16 " " "            |
| Joseph Tanne contracts   | " 17 " " "            |
| Wladyslaw Oltarzewski    | " 18 " " "            |
| Peter Gural . . . . .    | " 19 " " "            |
| Wojiech Malek . . . . .  | " 20 " " "            |
| George Luchin . . . . .  | " 21 " " "            |
| Jan Zoldak . . . . .     | " 22 " " "            |
| Stanislaw Zulkowski . .  | " 23 " " "            |

The other items of the complaint, Nos. 4 to 13 inclusive, relate to plaintiff's alleged employment as manager, which is not now under review. The contracts, specifically above enumerated, the plaintiff contends, are those which he claims to have procured pursuant to his engagement to pay him 25% commission on unimproved property and 5% commission on improved property.

This engagement, regardless of what the rate of commission or the manner of its payment, was in essence and in fact a contract between an owner, the company, and a broker, the plaintiff.

That the parties to the transaction, and particularly the plaintiff, so regarded it, is quite evident because the complaint claims "commissions" and throughout all his testimony the plaintiff uses the word "commissions," the most apt designation of the compensation to which a broker is entitled. Calling this arrangement a contract of employment does not change its legal essence, for every contract by which one person agrees to do something for another is a contract of employment. But where an owner employs another to sell that owner's realty, while (it is true) that engagement may be termed a contract of employment, it still remains true that such a contract, in New Jersey, becomes subject to the provisions of our statute of frauds. Section 10 of that statute reads as follows:

*"No broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such land is in writing, and signed by the owner or his authorized agent, or the authority of the broker or real estate agent to make a sale or exchange of such land is recognized in a writing or memorandum signed by the owner or his authorized agent, whether or not such writing or memorandum is signed by said owner or agent before or after such sale or exchange has been effected, and the rate of commission on the dollar shall have been stated therein, provided, however, that any broker or real estate agent who may hereafter be employed by any owner of real estate by oral agreement, to sell or exchange any real estate belonging to such owner, and who shall actually effect the sale or exchange of such real estate pursuant to such oral agreement, before the same shall have been terminated by such owner, in writing, as hereinafter provided, may recover from such owner the amount of commission on such*

sale or exchange, provided such broker or agent shall within five days after the making of such oral agreement serve upon such owner a notice, in writing, setting forth the terms of such oral agreement and stating the amount or rate of commission to be paid thereunder, and provided said owner shall not have repudiated or terminated such agreement prior to the actual sale or exchange of said real estate; said owner shall have the right, at any time after receiving such notice, to repudiate or terminate such oral agreement by serving upon such broker or agent a notice, in writing, to that effect, and upon the repudiation or termination of such agreement by the serving of such notices upon such agent or broker prior to the actual sale or exchange of such property by such agent, such agreement shall be null and void, and no recovery of any commission shall be had thereunder; provided, however, that if any broker or agent shall have entered into negotiations with a prospective customer in good faith, under such agreement, for the sale or exchange of such property, and such negotiations shall be pending at the time of the repudiation or termination of such agreement by such owner, and such sale or exchange is subsequently consummated between such owner and such customer, such agent or broker shall be entitled to recover his commission on such sale or exchange, notwithstanding the repudiation or termination of such agreement. The notice provided for herein shall be served either personally or by forwarding the same to the person to be served, by registered mail, to the last known post office address of such person." (Italics ours.)

2 C. S., "Frauds and Perjuries," Sec. 10, page 2617, as amended by Chap. 273, P. L. 1918, page 1020, 1 (1911-1924) Cumulative Supplement to Compiled Statutes, page 1452, Sec. 84-10.

The plaintiff's employment, according to his own version, was to procure purchasers of the company's (owner's) lands, clearly a case within the statute. Plaintiff does not claim by virtue of any written authority or memorandum, or any other compliance with the statute; see bottom page 124 of the case. The benefit of the statute is claimed by the answer, and, therefore, as the plaintiff has not shown a compliance with the statute, there was properly a judgment in favor of the defendant on this branch of the case.

The device adopted by the appellant, of calling this engagement a "contract of employment," in the attempt to bring it without the purview of the statute, is not a novel one as can be seen from the case of *Adams v. Grady*, 77 N. J. L. 301, 72 Atl. 55. In that case, similarly to the case at bar, the plaintiff alleged that the defendant employed the plaintiff to sell real estate and had promised to pay for said services, without alleging that the contract was in writing; a demurrer was interposed to the complaint, and argued on the basis of the statute of frauds. The demurrer was overruled, but the necessity of *proving* the existence of a *written* contract for this employment was not eliminated. In *Stout v. Humphrey*, 69 N. J. L. 436, 55 Atl. 281, the Court held that *this section is aimed at, and applies to, any person who acts as the procuring cause of the contract in reference to which the claim for commission arises.* The opinion in that case, in part, reads as follows:

"The *insistment of the plaintiff* in error is that this section is expressly confined to *real estate agents or brokers* and to contracts authorizing them to dispose of lands of owners, and that an attorney-at-law, *not carrying on commonly a real estate business,* and who is employed, in part at least, by

reason of his being such attorney, to render legal services in and about the sale of real property, is not within the meaning of this section.

“The learned trial judge, we think, tersely and correctly interpreted this section of the statute when he said: ‘But as I read the statute, both in its letter and manifest policy, it is aimed at any person who acts as broker or real estate agent in the very transaction in question out of which the claim to compensation arises.’ *It would be a very narrow construction of the statute to say that it applied only to him who ostensibly and usually carried on the business of brokerage or a real estate business so called.*

“\* \* \* But conceding that the attorney does not cease to be such when his employment is a service not strictly professional, and, as in this case, was that of a broker or real estate agent, *the mere fact that he is an attorney will not relieve him from the provisions of the statute which require the written authority of the owner for the sale or exchange of land before he will be entitled to any commissions for such sale or exchange.*” (Italics ours.)

*Stout v. Humphrey*, 69 N. J. L. 436, 55 Atl. 281.

In the case of *Leimbach v. Regner*, 70 N. J. L. 608, 57 Atl. 138, suit was brought on a *quantum meruit* to recover compensation for effecting the sale of lands, pursuant to an oral agreement. The Supreme Court speaking through Justice Garretson, reaffirmed the ruling in *Stout v. Humphrey*, *that the statute is aimed at any person who acts as broker in the very transaction out of which the claim for compensation arises.* The subterfuge of a *quantum meruit* was disregarded.

In the case at bar, plaintiff claims to have been the procuring cause of the contracts made by the

owner, the defendant company, with the purchasers of its property, but does not show any *written* authority, recognizing him as the agent, or specifying the rate of commission. Under these circumstances, we contend that plaintiff's action, for the commission discussed in this point, must fail by reason of the statute and the cases adjudicating it, and the directed verdict was, therefore, proper.

### POINT II.

The plaintiff, as a matter of law, is not entitled to recover commissions on the alleged sales made by him, because of our statute requiring licenses for real estate brokers.

It is a conceded fact, in the case at bar, and also shown by the testimony at bottom of page 124, that the plaintiff was never licensed as a real estate broker by the State Real Estate Commission of the State of New Jersey. The statute, in its salient aspects, is as follows:

"1. From and after the first day of October, one thousand nine hundred and twenty-one, *it shall be unlawful for any person, firm, association, partnership or corporation, whether operating under a trade name or otherwise, to engage, either directly or indirectly, in the business of a real estate broker or salesman within this State without first obtaining a license under the provisions of this act.*" (Italics ours.)

Chap. 141, P. L. 1921, page 370, Sec. 1;  
1 (1911-1924) Cumulative Supplement to  
Compiled Statutes, page 214, Sec. \*26-1.

"2. *A real estate broker within the meaning of this act is any person, firm, association, partnership or corporation which, for compensation, valuable consideration or commission sells or offers for sale, buys or*

offers to buy, or negotiates purchase, sale or exchange of real estate, or leases or rents, or offers to lease or rent *real estate for others*. A real estate salesman within the meaning of this act is any person who, for compensation, valuable consideration or commission, is employed, either directly or indirectly, by a licensed real estate broker to sell or offer to sell, to buy or offer to buy, or to negotiate the purchase, sale or exchange of real estate, or to lease or rent, or offer to lease or rent any real estate for others, as a vocation. The provisions of this act shall not apply to any person, firm, association, partnership or corporation who, as owner or lessor, shall perform any of the acts aforesaid with reference to property owned by them; nor shall the provisions of this act apply to persons holding a duly executed power of attorney from the owner for the sale, lease or exchange of real estate; nor shall this act be construed to include in any way attorneys at law; nor shall it be held to include a receiver, trustee in bankruptcy, administrator or executor, or any person selling real estate under order of any court, nor to a trustee selling real estate under a deed of trust." (Italics ours.)

Chap. 141, P. L. 1921, page 371, Sec. 1;

1 (1911-1924) Cumulative Supplement to  
Compiled Statutes, page 214, Sec. \*26-2.

This act (amended in 1925 by Chapter 243, P. L. 1925, page 672, which amendments do not apply to the case at bar, because passed after the accrual of the cause of action set up in the complaint), it will be observed, makes it illegal for any person to act in the prohibited occupation without the license, and, of course, one who contravenes the statute by doing something which is illegal, cannot claim compensation for performing the illegal act; we take that to be elementary. The question to be considered is whether the

plaintiff was acting as a real estate broker, within the meaning of the act, in respect to the purchasers of property whom he claims to have directly procured. The statute itself defines what a real estate broker is, and if the plaintiff falls within that definition, the subterfuge of calling himself an employee will avail him nothing.

In examining the statute, we find that it expressly states that it shall be unlawful "*for any person*" to engage "*either directly or indirectly*" in the prohibited occupation. In other words, the legislature saw fit to impose this restriction on all persons and irrespective of what *form* the employment might take. But we are aided by section 2 which states that the broker is a person who "*for compensation*" sells real estate. That definition certainly squares with plaintiff's alleged engagement, and he is directly within the definition. Section 2 also states that it is a person who sells real estate "*for others.*" Certainly, in the case at bar, the plaintiff was not selling his own real estate, but was selling, or offering for sale, the property of "*others,*" that is, the property of the company. We cannot conceive of any person more closely fitting the statute than the present plaintiff, and we make this analysis of the statute only because we find no New Jersey cases adjudicating it.

In *Roman v. Lobe*, 208 N. Y. S. 617, decided by the Appellate Division of the New York Supreme Court on March 6, 1925, the plaintiff sued to recover compensation for his services in procuring a purchaser of realty. It appeared that the plaintiff had been engaged by the owner, that he was the procuring cause of the sale and that the contract of purchase had been executed on a date whereon the plaintiff was without the license to act in that capacity, as prescribed

by the statute of that state which, in substance, provided that "no person \* \* \* shall engage in or follow the business or occupation of, or hold himself out \* \* \* or act temporarily or otherwise as a real estate broker \* \* \* without first procuring a license therefor as provided for in this article." The defendant moved to dismiss the complaint on the ground that it failed to show that the plaintiff was a licensed broker at the time of the accrual of the cause of action; the motion was granted. The plaintiff appealed, but the Appellate Division sustained the judgment dismissing the complaint. This case, therefore, on a statute similar to ours, is clearly unequivocal authority for the proposition that unless the procuring cause of the sale can show that he was licensed, as prescribed by statute, he cannot recover.

In the case of *Goldman v. Rubenstein*, 124 Misc. 606, 209 N. Y. S. 155, the agent procured the sale of a drug store, which involved also the sale of a lease for the store; the agent was not licensed. The case holds that the plaintiff is not entitled to recover if he fails to show a license granted pursuant to the statute, referred to in the Roman case, *supra*.

In the case of *Groetzinger v. Forest Hills Terrace Corporation*, 123 Misc. 274, 205 N. Y. S. 125, the plaintiff sued for "services rendered." It appeared that the services alleged to have been performed was the procuring of a loan for the owner. The statute, referred to in the preceding New York cases, necessitated the license for one who performed this service. The Court held, disregarding the *form* in which the action was brought, that it was essentially for acting as a broker in procuring a loan, which, without the license would be illegal, and denied any judgment

to the plaintiff. Substantially to the same effect is the case of *Meyers v. Suffern*, 203 N. Y. S. 103, decided by the Appellate Division, First Department, where it was held that the illegality of the contract need not be pleaded as a defense in the action, but that such illegality may be availed of as a defense, to prevent the plaintiff from recovering whenever the illegality should appear.

In the case at bar, the fact that the plaintiff was not licensed by the Real Estate Commission of the State of New Jersey is conceded by the plaintiff in Point II of his counsel's brief, and the absence of a license is specially pleaded in the answer. For these reasons, the legal rules here contended for are applicable.

In *Ruckman v. Bergholz*, 37 N. J. L. 437, 440, Court of Errors and Appeals, by Chancellor Runyon, inferentially at least, held that no recovery could be given to an unlicensed broker where the statute (providing for licenses) made acting without a license illegal. Court said:

"The question in such cases is, whether the statute, was intended as a protection or merely as a fiscal expedient; whether the legislature intended to prohibit the act unless done by a qualified person, or merely that every person who did it should pay a license fee."

*Ruckman v. Bergholz*, 37 N. J. L. 437, 440.

Of course, the statute involved in the case at bar is not a "fiscal expedient," but its intention is to prohibit an act "unless done by a qualified person" as prescribed by the statute. The plaintiff was not so qualified, and hence was not entitled to any recovery.

In Point II of his brief, counsel for the appellant refers to the case of *Ludwig v. Aberbach*,

4 N. J. Misc. Rep. 169, as authority for the proposition that it was unnecessary for the plaintiff to have a license. Our examination of that case leads us to the conclusion that it cannot fairly be cited as giving full support to the principle contended for by the appellant. It seems to us that that case (which contains no citation of authority or argumentative reasoning in support of its expression on this phase of the case) must have been decided on the basis of its peculiar fact only, that being that the plaintiff was acting only in one isolated instance, following in this respect the case of *Wensley v. Godby*, 128 Atl. 590, not yet officially reported. In the *Wensley* case, the Supreme Court decided that "a proper construction of the act of 1921 does not invoke its application to an individual contract of brokerage." In the *Ludwig* case also, apparently, an isolated instance of brokerage only was involved. It is unnecessary to determine whether this ruling, as applying to a single instance of brokerage, is correct or not, because, in the case at bar, the facts are that the plaintiff was engaged in many (at least 13), and not in merely one transaction. He was, therefore, in the business of procuring purchasers of real estate, and hence clearly within the terms of the statute.

On this point, we, therefore, urge, in respect to the contracts which the plaintiff claims to have procured, there should be no judgment in his favor, first, because a plain reading of the statute makes such recovery a legal impossibility, and secondly, because the adjudications on statutes *in pari materia* are highly persuasive against the right of recovery.

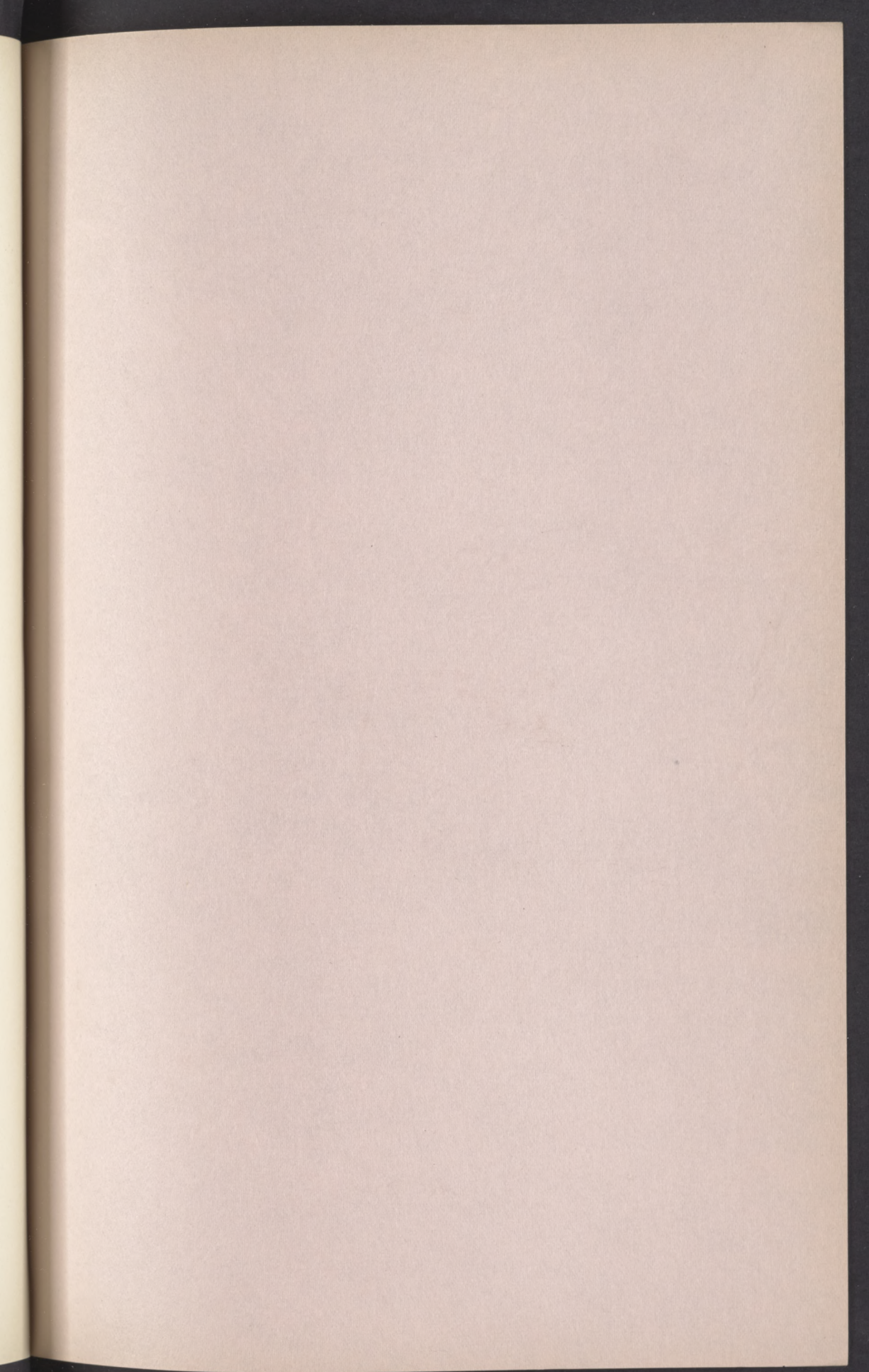
**POINT III.**

The directed verdict should be affirmed.

Respectfully submitted,

KANTER & KANTER,  
Counsel of Defendant-Respondent.

ELIAS A. KANTER,  
Of Counsel.



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