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TESTIMONY.

Plaintiff's Witnesses.

WRIT OF ATTACHMENT.

UNION COUNTY, *ss.*

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

(SEAL)

We command you, that you attach the rights and credits, moneys and effects, goods and chattels, lands and tenements of George I. Ryerson, wheresoever they may be found in your county, so that he be and appear before our Supreme Court to be holden at Court House, in and for said County of Union, on the day of next, to answer Gubelman Publishing Company in an action at attachment, to the damage of the said Gubelman Publishing Company $3,788.67 as is said.

And in what manner you shall execute this, our writ, make appear to us at the day and place aforesaid; and have you then and there this writ.

Witness, Esquire, Judge of our said Supreme Court, at aforesaid, the day of , 1929.

TRANSCRIPT OF PLEADINGS FOR TRIAL.

New Jersey Supreme Court

ESSEX COUNTY.

GUBELMAN PUBLISHING COMPANY, a corporation,
Plaintiff,

vs.

GEORGE I. RYERSON,
Defendant.

Blanchard & Carey, attorneys for plaintiff.
H. Edward Wolf, attorney for defendant.

Summons issued:

FIRST COUNT.

Plaintiff, a New Jersey corporation with its principal place of business at No. 2 Garden street, Newark, Essex County, New Jersey, says:

1. On or about the 1st day of March 1918, plaintiff and defendant entered into a contract wherein defendant agreed to work for the plaintiff as a salesman and solicitor of orders, devoting his full time and best efforts to the exclusive service and benefit of the plaintiff and plaintiff agreed to employ defendant as such salesman and solicitor of orders at an agreed salary of $30.00 per week with the right of the defendant to participate in the profits derived from said orders in so far as ten per cent. of the

value of such orders exceeded the agreed salary of the defendant.

2. On or about April 22, 1922, by mutual consent of the parties, the agreed salary of defendant was increased to $40.00 per week and a further increase, by mutual consent of the parties to $50.00 a week was made on or about September 15th, 1922. In addition to such increased salary plaintiff furnished defendant with an automobile to be used by defendant exclusively in the business of and for the benefit of the plaintiff, and defendant agreed to continue as heretofore to work as a salesman and solicitor of orders for the plaintiff, devoting his best efforts and full time exclusively for the service and benefit of the plaintiff, and intending that plaintiff should rely upon said representation and promises.

3. On or about the 1st of April, 1925 and at all times subsequent thereto defendant has continued to draw his regular weekly salary of $50.00 per week paid to him in cash on Friday of every week, and has continued to have the use of an automobile furnished by the plaintiff. Plaintiff, believing and at all times being led to believe and to rely upon the said representations by the defendant that defendant was devoting his full time, best efforts and use of said automobile exclusively to the services of the plaintiff, has continued to fulfill in every particular and at all times its obligation to defendant under said aforementioned agreement down to and including the month of August, 1929.

4. Notwithstanding said performance by the plaintiff defendant has at all times since April 1,

1925 fraudulently and deceitfully used said automobile and the greater part of his time and efforts in soliciting business and orders from plaintiff's regular customers and others for his, the defendant's own personal benefit and account which orders defendant secured and fulfilled to his own benefit and profit and to the detriment, harm and injury of the plaintiff. Defendant further persuaded many of the plaintiff's regular customers to deal with defendant and not with the plaintiff, falsely representing to said customers that plaintiff was no longer able to perform and execute for said customers their orders.

5. During said period from April 1, 1925 up to and including the 16th day of August, 1929, fendant fraudulently and deceitfully represented to the plaintiff intending that plaintiff should rely upon said representation that he, the said defendant was devoting his full time and best efforts exclusively for the service and benefit of the plaintiff and did fraudulently and deceitfully continue to ask for, obtain and receive from the plaintiff $50.00 in cash on Friday of each and every week, the said plaintiff believing and relying upon the said fraudulent and deceitful representations. During said period defendant did fraudulently ask for and receive from the plaintiff the sum of $11,450.00. The said sum of $11,450.00 exceeds by $3,788.67 the sum of ten per cent. of the value of the orders procured by defendant for the plaintiff during said period.

6. As a result of defendant's fraudulent and deceitful conduct and his knowingly, fraudulent and deceitful representations to the plaintiff, plaintiff has been injured by the loss of cus-

tomers and profits which might reasonably be anticipated from executing orders for said customers and by the payments of money to the defendant upon the aforesaid fraudulent representations made to the plaintiff by said defendant.

WHEREFORE, plaintiff demands of the defendant the sum of $15,000.00 as damages and costs of this suit.

BLANCHARD & CAREY,
Attorneys for Plaintiff.

Filed: Dec. 7, 1929.

The defendant George I. Ryerson, residing at 135 May street, Union, Union County, says:

That the defendant admits so much of paragraphs 1, 2, 3, 4, 5 and 6 of said complaint wherein it states that the defendant was employed by plaintiff about March 1st, 1918 and received compensation ranging from Twenty-five ($25.00) Dollars per week to Fifty ($50.00) Dollars a week until August 1929 and was to participate to the sum of 10% of said business and that an automobile was furnished for the defendant's use.

That defendant does deny all other allegations in said paragraphs.

COUNTER-CLAIM.

The defendant, George I. Ryerson, entered into an oral agreement with the Gubelman Publishing Company, the plaintiff in the above-entitled cause, on or about March 1st, 1918 wherein the

defendant was to make his best efforts to solicit new business for the plaintiff. The plaintiff agreed to pay the sum of $25.00 per week and that if said business exceeded the amount of advance the defendant was to receive in addition the difference between the amount paid to him and 10% of the total business he procured.

That between the period of March 1918 and September 1st 1922, the weekly payments were increased to the sum of $50.00 and continued in such amount until about August 30th, 1929.

That the defendant produced a great deal of business and at various times during the course of said employment requested the plaintiff to furnish statements showing the amount of business done with the customers of the defendant. That about June 1919 and various times thereafter, the plaintiff furnished the defendant with statements until December 1927, but has refused and does refuse to give a statement to date of business furnished by the defendant.

The statements furnished were inaccurate and did not show the true amount of business brought in by the defendant, and though he has complained to the plaintiff, the plaintiff does still refuse to give the information desired.

That because of such actions on the part of the plaintiff, the defendant believes that he has lost great sums of money, that at no time has his weekly salary amounted to 10% of his gross business.

The defendant therefore believes that he has suffered damages to the sum of $10,000.00 and requests that judgment on his counter-claim be

Reply.

given him against the plaintiff in the sum of $10,000.00 besides lawful interest and costs of suit.

H. EDWARD WOLF,
Attorney for Defendant.

Filed: Dec. 26, 1929.

Plaintiff, Gubelman Publishing Company, admits the allegations of the first, second and third paragraphs of the counter-claim, insofar as they agree with and substantiate the allegations of the complaint. In all other respects, each and every other allegation of the first, second and third paragraphs of the counter-claim is denied.

The fourth, fifth and sixth paragraphs of the counter-claim are denied.

BLANCHARD & CAREY,
Attorneys for Plaintiff.

Filed: Dec. 28, 1929.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-seventh day of February, A. D. nineteen hundred and thirty-one.

(SEAL)

FRED L. BLOODGOOD,
Clerk.

POSTEA.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

GUBELMAN PUBLISHING COMPANY, a corporation, *Plaintiff,* *vs.* GEORGE I. RYERSON, *Defendant.*		*Action at Law.* *Postea.*

This case was tried before Judge Worrall F. Mountain, to whom the same was referred for trial, with a jury at the Essex Circuit on March 12th, 1931 and March 13th, 1931.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Two Thousand Eight hundred forty dollars and fifty cents ($2,840.50).

WORRALL F. MOUNTAIN,
Circuit Court Judge.

Dated March 16, 1931.

JUDGMENT.

NEW JERSEY SUPREME COURT.

GUBELMAN PUBLISHING COMPANY, a corporation, *Plaintiff*, *vs.* GEORGE I. RYERSON, *Defendant*.	*Action at Law.* *On Postea.*

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of two thousand eight hundred and forty dollars and fifty cents, besides costs to be taxed nisi.

Entered March 19, 1931.

On motion of
BLANCHARD & CAREY,
Attys.

Damages	$2,840.50
Costs	74.88
	$2,915.38

A true copy.

FRED L. BLOODGOOD,
Clerk.

TESTIMONY.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

March 12, 1931.

GUBELMAN PUBLISHING COMPANY, *Plaintiff,* *vs.* GEORGE I. RYERSON, *Defendant.*	*Action at Law.*

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For plaintiff appear Blanchard & Carey (by Robert Carey, Jr.).

For defendant appears H. Edward Wolf.

A jury is called and sworn.

Mr. Carey opens for plaintiff.

Mr. Wolf opens for defendant.

Mr. Wolf: The counter-claim of the defendant has been abandoned and I would ask that it be withdrawn.

Mr. Carey: I would like to call some short witnesses if I may.

The Court: If they can be substituted in the process of the case without upsetting it, that is all right.

Mr. Carey: I will proceed with this witness for a distance to make the picture.

Mr. Wolf: I will consent to the witnesses being put on out of order.

The Court: Very well.

JOHN A. O'NEILL, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q Where are you engaged in business? A Eastern Steel Casting Company.

Q What is your position there? A Purchasing agent.

Q As purchasing agent there did you have occasion at times to purchase printing supplies or literature of any kind from anyone? A Yes, sir.

Q Did you ever in that capacity have any relation with George Ryerson, the defendant in this case? A Yes, sir.

Q When did you first have any dealings with Mr. Ryerson? A 1927, I believe.

Q How did you come to come in contact with Mr. Ryerson? A He made us visits soliciting printing business.

Q Did you give him any business at that time? A I believe we gave him one order.

Q Did he have this work done for you? A I believe so.

Q Did you pay him for the work? A After we gave him the business we paid him.

Q You say this is the first time he solicited business from you in 1927? A Sometimes in there, because I was on purchases in 1923 and then off in 1926 and then switched back again, so I think it was after I was switched back.

Q How did Ryerson represent he would have this work done for you? Do you recall that? A The first order he had Gubelman do it.

Q When did he cease to have Gubelman do it? A He told me in 1928 he was in business for himself.

Q About what part of the year of 1928, as near as you can remember? A The very beginning of the year.

Q At that time when he told you that was he again soliciting work from you for himself? A From there on he solicited business for himself only.

Q How often did he use to come around? A About once a month.

Q In the beginning of 1928? A Yes, sir.

Q Did you give him any business during that period? A In February, 1928, I gave him an order.

Q Have you any way of knowing where he had it made up for you? A I don't know where he had it made up. We didn't give it to him under his own name.

Q Did he have some trade name he was operating under? A Yes, Expediency Press, printing.

Q Up until how recently has he solicited printing from you? A He was in about two months ago.

Q Under what name is he trying to get business?

Mr. Wolf: I object. I think anything after his discharge is irrelevant.

Mr. Carey: Yes, withdraw the question.

Q In the first part of 1928 he advised you he was in for himself? A Yes, sir.

Cross examination by Mr. Wolf.

Q It is not possible it was 1929 he told you he was in business for himself? A No, sir.

Q During 1928 you had business which you gave him? A Only a little; rush jobs.

Q What was the cost of that rush job? A $33.00.

Q That is the only business you gave him in 1928? A Yes, sir.

Q That is the only business you gave him while he was with Gubelman after you became purchasing agent, isn't that so? A At what time?

Q He was discharged in August, 1929. When you became purchasing agent in 1927 or 1927 and August, 1929, that was the only business you gave him? A I thought I recalled giving him one order for Gubelman, but I am not sure.

Q Did Gubelman during that time estimate on any of your work? A Not from 1928 on.

Q In 1927 did he estimate on any of your work? A Yes.

Q Did you give Gubelman the work? A No, I did not with the exception possibly of one order.

Q Why didn't you give him the work? A The prices were high.

Re-direct examination by Mr. Carey.

Q Have you any records or documents or papers to show this transaction with Mr. Ryerson? A Yes, I have.

Q Have you them with you? A I can show them to you, but not leave them here.

Q I show you what purports to be an invoice and statement under date of March 26, 1928, and I ask you what this is.

Mr. Wolf: I will admit that and the other one eleven dollars and something.

Mr. Carey: Yes. I offer in evidence invoice and statement of March 26, 1928, for $22.50, being bill of Expediency Press, services to Eastern Steel Casting Company.

(Same is received in evidence and marked Exhibit P. 1.)

(Also bill and statement of the same company to the Eastern Steel Casting Company under date of May 15, 1928, in the amount of $11.00.

(Same is received in evidence and marked Exhibit P. 2.)

Q I show you Exhibit P. 1 and I ask you to tell us what is represented by that bill. A This bill dated March 26th covers 1,000 invoice forms which were printed on February 28th and 1,000 printed in March. We received the invoices on February 28th and for March 28th received the invoices March 26th, they rendered a bill that same day.

Re-cross examination by Mr. Wolf.

Q Those two invoices represent the $33.00 you spoke of on your direct examination? A Yes, sir.

ALFRED GROSS, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q What concern are you connected with? A Newark Lithographing Company.

Q What is your position? A President.

Q Have you, in the conduct of that business, had occasion to meet Mr. George Ryerson? A Yes, sir.

Q What has been your connection with Mr. Ryerson? A Well, I did reproduction work. He brought several jobs for me to reproduce.

Q Just prior to August, 1928, how long prior to that date did you first begin to do this kind of work? A Prior to?

Q To August, 1928. A I only started business in 1928, May.

Q Thereafter, when did you first deal with Mr. Ryerson? A About six months after, about that.

Q He would bring you the requirements of the jobs and you would carry out the work? A Yes, sir.

Q Did you bill Mr. Ryerson individually? A Yes, sir.

Q Did he sometimes operate under other names than his own? A Never to my knowledge.

Q It was always under his own name? A Yes.

Q Did he pay you for the work you did from time to time? A Partly.

Q Did he at any time represent to you that he was bringing you these jobs that he was connected with Gubelman Printing Company? A

No, I never knew until this case came up he was connected with them.

Cross examination by Mr. Wolf.

Q You call your work reproducing work? A Reproduction. I do lithographic work.

Q Does the Gubelman Publishing Company do any of that themselves? A I couldn't tell you.

Q Yours is a special line, isn't it? A Yes, sir.

Q It is not usual for a printer to do your line? A No.

Q Your line is for the printer, to assist him in his work? A Yes, I do work for printers.

Q Your work was not a complete printing office? A Yes, it was, we have complete printing jobs.

Q That you did for Mr. Ryerson? A Yes.

Q What was the total cost to Mr. Ryerson for the work you did during that period of time? A I couldn't tell you all told, but I have a bill here of one of the items.

Q What is that item? A This was a bill of January 5, 1929, for $45.00 for reproduction work.

Q Who was the work for? A George Ryerson, No. 60 William street, Newark.

Q I understand the work was done for him, but do you know who his customer was? Does your record show it? A No, but I know one job I can tell you for the Auto something.

Q You are not sure? A Automotive Corporation.

Q How much was that job? A I wouldn't say this is the job, referring to one.

Q After examining your books you found that this one job you did for him in May, 1928? A 1929.

Q January, 1929? A Yes, sir.

OTTO VOIGT, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q What concern are you connected with? A Crown Press.

Q What is your position there? A Owner.

Q What kind of work do you do there? A Printing.

Q General printing work? A Yes, sir.

Q It isn't newspaper? A No, general printing, the regular run of job work, running on forms, different kinds of office forms.

Q In your conduct of that business, have you ever had any business dealings with George Ryerson? A Yes, I did about $55.00 worth of work for him altogether.

Q I am interested in the work you did for him before two or three years ago. A The only records I have to go back to the early part of 1928, that is around February. I have the record here.

Q Did you bring any of these with you? A Yes, I have them here.

Q I show you what purports to be pages taken out of a ledger book with the title "Ryerson." A Yes.

Q And I ask you what these are. A These are kept, little separate accounts of these jobs I had with Mr. Ryerson. The earliest job I have

dated is April, 1928, and I have the list of what the jobs are and the amounts.

Q Did you make that out yourself? A Yes, sir.

Q That is your own record? A Yes, sir.

Mr. Carey: I offer it in evidence.

Q I show you an envelope job ticket 3095, Crown Press, containing various blotters and samples of printing. Will you say what this is, please? A Those are the jobs I was contracted to do; in other words, that job was given to me to be printed.

Q By whom? A Mr. Ryerson.

Q Was the job printed for him? A Yes.

Q On Mr. Ryerson's order? A Yes, sir.

Q Did Mr. Ryerson pay you for them? A Yes, sir.

Q Those of samples of the work referred to in your ledger sheet you just testified to? A Yes, sir.

Mr. Carey: I offer in evidence these various samples of printing contained in this envelope.

(Same is received in evidence and marked Exhibit P. 3.)

Q I show you a second envelope job 3309, Crown Press. What is that? A That is another small job I had for him on envelopes of which there is a sample inside.

Mr. Carey: I offer this in evidence.

(Same is received in evidence and marked Exhibit P. 4.)

Q I show you a third envelope job No. 3119 of Crown Press and I ask you what that is. A This contained two jobs given to me by Mr. Ryerson.

Q You printed a circular for Mr. Ryerson's order? A Yes, sir.

Q And you delivered it or Ryerson called for it? A He called for it.

Q The circulars for Westinghouse Manufacturing for spare tire mirrors, is that another one? A Yes, sir.

Mr. Carey: I offer these in evidence.

(One blue envelope and ledger sheets received in evidence and marked Exhibit P. 5.)

Q And two more for the same company, "Automobile accessories," those were all done at Mr. Ryerson's request for the Westinghouse Manufacturing Company? A Yes, sir.

Mr. Carey: I offer these in evidence.

(Same is received in evidence and marked Exhibit P. 6.)

Cross examination by Mr. Wolf.

Q These two papers torn out of ledger represent all the business you did for Mr. Ryerson from April 30, 1928, to August 31, 1929? A Yes, sir.

Q They represent all the business you did for him? A Yes, sir.

Q The total business you did for him is represented here by $58.00? A Yes, sir.

Q This $58 represents everything in these envelopes? A Yes, sir.

Q So the total amount of business that you did for Mr. Ryerson for the Westinghouse people, or any other people you did for Mr. Ryerson was $58? A Yes, sir.

Q You are positive of that? A Yes, sir.

CHARLES H. BLAKEMAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q What is your business? A President of the Union Press, Union, New Jersey.

Q What type of printing do they do there? A Job printing.

Q In the course of your business there have you had any contact with George Ryerson? A I have.

Q I am interested particularly in any contacts you might have had with him in 1928 and prior to that. When did he first come to you? A In May, 1928.

Q What was the occasion of that? A He had 3,000 blotters printed for the company of Frelinghuysen, printed in two colors.

Q Were you paid for that job? A No, sir.

Q Who did Mr. Ryerson represent he was acting for at the time? A Himself. He was a printer's broker, as he called himself.

Q Is that the first time you had anything to do with him? A Yes, sir.

Q Did he ever come back to you after that with other propositions? A He come back after a while, it was about the same time, he brought a circular to be imprinted. That I don't remember, it was so small a job. It was imprint-

ing for some firm in East Orange. He had the circulars all printed up then or just imprinted.

Q Have you with you any records? A I have not. I did this morning and then I was busy and left the books up in the shop, but it was only two jobs I ever did for Ryerson.

Q Did he at any time represent to you that he was engaged by Gubelman Publishing Company? A No, sir.

Q As their salesman and representative? A No, sir. Ryerson told me that he was in the brokerage business. I just started at the time and he told me that he would keep me supplied with printing provided my prices were right. He furnished the stock, the broker usually does that.

Q Did he go into any details as to how he would keep your shop supplied with printing, where he would get it? A No, a broker is the same as a salesman except that he is working for no house at all, he places it with me, you or the other, the cheapest man.

Cross examination by Mr. Wolf.

Q At first you said you did one job and then only two jobs. How many jobs did you do for him? A Two jobs, the blotter and the imprint.

Q You do not do imprinting? A Yes, I did the imprinting in the job itself.

Q What was the total charge made by you for the imprinting? A $3.50.

Q How much was the total charge made by you for the printing of the blotters? A $10.50.

Q The total amount of the work you did for Mr. Ryerson from May, 1928, to date was $14? A Yes, sir.

Q Has any part been paid? A No, sir.

Q Did Mr. Ryerson offer you any other jobs? A I won't say yes or no, I don't just remember.

Re-direct examination by Mr. Carey.

Q I show you a blotter, is this yours? A Yes, that is mine.

Q I show you a blotter of the Faitoute Iron & Steel Company, is that one of the jobs you did for Ryerson at his request for that company? A Yes, sir.

Mr. Carey: I offer this in evidence.

(Same is received in evidence and marked Exhibit P. 7.)

LEOPOLD T. GUBELMAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q You are the president of the Gubelman Publishing Company, are you not? A Yes, sir.

Q Where is your place of business? A 2 Garden street, Newark.

Q What is the character of your business you do there? A Printing and printing specialties.

Q For the benefit of the Court and jury state more in detail what that means. A Well, we do a quoting and jobbing business, such as printing of office forms, circulars and so on and then we do work printing in the road which we do not do for any parties in Newark which is done throughout the country.

Q How long have you been in business here in Newark, in the printing business? A Since 1908, I imagine, or 1909, I am not sure.

Q When was Ryerson first associated with your business? A In 1918.

Q How did he come to be connected with you? A We advertised for a salesman and Mr. Ryerson was one of the applicants and he was engaged.

Q Did you discuss the terms of his employment with him? A We did.

Q What were the arrangements made with him at that time? A We talked over the question of what he might do in the way of selling and talked over the terms and I asked him what he wanted and he wanted $25 a week to start on, which we gave him.

Q In return for that $25 a week what was he to do? A He was to solicit printing for our concern.

Q For about how long was his salary continued at $25 a week? A I couldn't tell that exactly, it was raised to $30 in about a year and a half's time and then to $40 and then to $50 respectively.

Q Do you remember when it was raised to $50? A No, I have my vouchers here, our payroll vouchers here, yes, covering those things; in fact, I think those are more accurate you have there because they may date back to some of these vouchers. He has been drawing $50 a week for the last four or five years at least.

Q I show you a collection of statements of earning commissions with payroll vouchers attached to each; are those the original record of your company? A Yes, sir.

Q Referring to the records, when did Mr. Ryerson first get $50 a week? A According to these records it would be May, 1924.

Q Since May, 1924. Subsequent to that time was there any change in that salary? A Prior?

Q Subsequent. A No, he was paid $50 each week.

Q Up until when? A Up until August 24, 1929.

Q Was there any arrangement made with him whereby he might increase the amount he got weekly if the volume of his sales warranted it? A Yes.

Q Explain that. A When arriving at a figure which he himself determined he stated that he expected to be advanced as sales would increase and then we talked over the question of a commission to be paid him on all amounts of sales over his salary, to be taken care of quarterly and if at any time there be a portion not earned in a subsequent quarter it was to be taken out of the following quarter. There was nothing changed as to his drawing account, the salary.

Q No change whatsoever of the $50? A No.

Q But a possibility of earning more than that? A If he turned in the business, yes.

Q If the volume of sales warranted? A Yes, sir.

Q That was based on commission of what? A Ten per cent. was our allowance for selling.

Q Ten per cent. of what? A Of the sales price, of the price printing was sold at.

Q In order to carry on the job did he have an automobile? A In 1922 and 1923 he spoke to me that if he had an automobile he could cover much more ground and consequently

thought he could get much more business. I thought the idea was a good one and I supplied him with an automobile.

Q Since that time has he always had an automobile to carry on his business? A Always.

Q Who supplied the automobile and paid for it? A We did.

Q Has the automobile provided by you been in constant use? A I don't understand the question.

Q I mean to say as he comes and goes from time to time during this period of employment was the automobile he was using being used all the time? A Yes, he was supposed to go around in the car. He took his car home and he kept it in the garage at his home and we allowed him $15 or $12 for the garage.

Q In addition to $50 salary? A Yes, sir.

Q With respect to the amount which he earned by reason of this commission over and above the $50 salary? A Yes.

Q Would the records of the company show as to that? A Well, the statements here show that he earned at different times sums of money, but after that he started falling behind.

Q Give us the date when he started falling behind, as near as you can tell from those records. A The last check received here in payment of commissions is December, 1923.

Q You mean the earliest? A No, the latest and from then on he started falling off slowly.

Q What was the situation around the first part of the year 1928, with respect to sales as against his salary, in other words, I mean would 10 per cent. of his sales exceed or be less than his salary or how much? A In 1928 for the first quarter there was a deficit of $268. Second

quarter $273. Third quarter $335 and the fourth quarter $258.

Q What was the general condition of your business at that time? A We had the best years we ever had in 1928 and 1929.

Q Was that condition generally prevalent in the printing trade? A Supposed to be. Business is supposed to have been good during those years.

Q Yes, during that period Mr. Ryerson's sales were abnormally low? A They dropped off gradually, yes, sir.

Q Beginning with April, 1925, as revealed by your records there, do you find a steady periodic deficit in Mr. Ryerson's business for you? A From there on the deficits had increased.

Q Up to the latter part of August, 1929, state what the total deficit was as compared with the flat $50 a week salary which he had been getting all that time.

By the Court.

Q What would the deficit amount to? A Approximately $3,780.

Mr. Carey: I offer in evidence the statement of earning commissions with the vouchers showing the complete state of the account of Mr. Ryerson from 1925 to the date of his discharge.

The Court: Is there any objection?

Mr. Wolf: No objection.

(Same is received in evidence and marked Exhibit P. 8.)

Q During the time Mr. Ryerson was earning commissions over and above his salary he received that payment in what form? A In the form of checks.

Q I show you a check dated June 8, 1923, payable to the order of George Ryerson for $208.52 endorsed by George Ryerson. Is that a check of your company? A It is.

Q Was that paid to Mr. Ryerson and cashed by him? A It was.

Mr. Carey: I offer this check in evidence.

(Same is received in evidence and marked Exhibit P. 9.)

Q Check dated December 15, 1923, to the order to George Ryerson, endorsed by Mr. Ryerson. Was that made by your company and cashed by Mr. Ryerson? A Yes, sir.

(Same is received in evidence and marked Exhibit P. 10.)

Q How frequently were statements of this account prepared and furnished to Mr. Ryerson? A Supposed to be furnished quarterly.

Q Is that the way those statements appeared to be, quarterly statements? A Yes. I would state however, that in the latter period we ran behind in his account sometimes and we were delayed, they were not made out quarterly, not on the day.

Q After they were finally made out they appeared as quarterly statements? A Yes, sir.

Q When did Mr. Ryerson terminate his employment with you? A I believe August 30th.

Q Of what year? A 1929.

Q Had you any information or reason to believe that he was performing work for anyone other than yourself prior to that time? A Some several weeks, yes.

Q How long before had you first got that information? A We got a bill for some linotyping, it was sent to us.

Q I show you an envelope from the Ruhl Composition Company containing a bill and statement. Can you identify that? A Yes, that was received by us in the mails addressed to us.

Q What does that purport to be? A The enclosed calls for some linotype composition made up for the Ryerson Printing Service, 46 William street, amounting to $4.40. "I will call you at Gubelman's about this bill."

Q Did that refer to any work that the Gubelman Publishing Company had any knowledge of ordering? A We never did any business with the Composition Company.

Q Did you inquire from them what that meant? A Yes, Mr. Mills and I went up to see the Ruhl Composition Company and the gentleman was not in and we waited for a while and then went back the following morning and Mr. Ruhl stated that it was a composition for Mr. Ryerson who he said wanted it delivered to 60 William street.

Mr. Carey: I offer the letter in evidence.

(Same is received in evidence and marked Exhibit P. 10.)

Q What was the next information you received that Mr. Ryerson was running a business of his own? A I had a call from an office inquiring about room cards which they needed,

that was the Riviera Hotel and they were wholly out of and Mr. Mills went down to see them and then he called me up on the 'phone. We had no such order on our books.

Q Have you heard the testimony of Mr. O'Neill to the effect that he prepared 1,000 forms for Mr. Ryerson in March and May, 1928? You were in court and heard that testimony? A Yes.

Q Did you or your company ever order such forms or have any of the business dealings referred to by Mr. O'Neill with his company? A No.

Q That order, or rather, those orders which Mr. O'Neill testified as being placed by Mr. Ryerson, were they with your authority or knowledge? A They were not.

Q Did you ever receive any money for the finished work for these jobs that were delivered at 60 William street? A No.

Q Did you hear Mr. Gross of the Newark Lithograph Company testify a half an hour ago to the fact that he had done some reproduction work for Mr. Ryerson at his address 60 William street, Newark, New Jersey? A I did.

Q Did you hear him testify that he had never heard of you before this case? A I did.

Q Had you ever heard of him? A No.

Q Had you or your company had any business with him? A No, sir.

Q Did you ever instruct Mr. Ryerson to deal with him? A No.

Q Did you hear Mr. Voigt of the Crown Press testify to the fact that he had printed ledger sheets and various samples for Mr. Ryerson in February, 1928? A I did.

Q Was that work done with your knowledge? A It was not.

Q Was it done for your company or under instructions of your company? A It was not.

Q If it had been you would have known of it, would you not? A I would.

Q Did you hear Mr. Blakeman of the Union Press testify that in May, 1928, Mr. Ryerson had come to him representing himself to be a printer's broker and secured printing in various blotters such as P. 7, the Faitoute Iron & Steel Company? A I did.

Q Was that done under your instructions or with your knowledge? A It was not.

Q Did your company get any benefit from this work? A It did not.

Q Did you or your company ever have an office address at No. 60 William street, Newark? A No, we did not.

Q Did you ever authorize Mr. Ryerson to take space there? A We did not.

Q Did you ever have any space or authorize Mr. Ryerson to install an office for you at 207 Market street, Newark? A I did not.

Q During the time when he was employed by you? A I did not.

Q Did you ever authorize or instruct Mr. Ryerson that he might take business for himself if the bids presented on behalf of yourself were not acceptable? A I did not.

Q Would that be controlled by contract under which he was working for you? A My understanding of it, yes.

Q Did Mr. Ryerson ever come to you with any suggestion that the arrangement under which he worked for you should be carried? A He did.

Q When did he come to you with that proposition? A I imagine about 18 months before he culminated his services with us, he suggested he would like to go on a commission basis.

Q Did he say what he meant by that? A He meant to only draw earnings on the jobs he brought in. I flatly refused and stated that I wanted only our man to represent only our house and none other.

Q Did he understand your refusal? A I told him in plain English.

Q Did he continue thereon to receive the same salary he had before? A He did.

Q So that the salary he thereafter received would have been entirely inconsistent with any change of arrangement? A It would.

Q Did Mr. Ryerson ever come to you and tell you that he was getting jobs on the outside and building up a business of his own? A No, not until he was accused of doing it in our office.

Q When was he accused of doing it? A The last morning, that is either Friday or Saturday morning we withheld that week's wages on your instructions and I accused him of selling and placing orders outside.

Q At any rate, what did he say to you in respect to what he had been doing? A He first denied it but finally admitted that he had placed a few small orders outside.

Q Did you tell him at the time that you knew of that Ruhl bill that had come to your office? A No, I did not.

Q Did you tell him at the time of the fact that the Hotel Riviera had called up trying to straighten out the Ryerson job with your office? A You mean at the time it happened?

Q At the time you had him in your office he admitted it then? A That I couldn't say positively. Very likely.

Q You say he admitted having done a few jobs? A Yes, finally.

Q After first denying he had done anything of the sort? A Yes, sir.

Q Who was present when he made that confession? A Mr. Ryerson was quite loud about it and there were present Mr. McMann, Miss Conlon and Mr. Mills, all office people.

Q Did you ever authorize Mr. Ryerson to place printing jobs either for himself or for your company with the Central Paper Company? A No.

Q Did you authorize him to purchase paper from them? A No.

Q Or to deal with the Webb Printing Company? A No.

Q Or the Newark Wire Cloth Company? A No.

Q Or the Court Paper Company? A No.

Q Or the Lauter Piano Company? A No.

Q You have already stated that you never had any work done by your company Ruhl Composition Company? A Let me understand you. You say the Lauter Piano Company. That was a company of ours, Mr. Ryerson solicited from them.

Q Did he solicit from them? A Oh, yes, for us; whether he solicited them for himself or not, I do not know.

Q You stated that your company had had no dealings with Ruhl. A Right.

Q Has your compony had any dealings with the Loomer Paper Company? A No.

Q Did you instruct Mr. Ryerson to have any dealings with them? A We purchased all paper by order from the office.

Q Have you ever had any printing done by Otto's Print Shop? A No.

Q Or instruct Mr. Ryerson to visit them? A No.

Q For yourself or other companies? A No.

Cross examination by Mr. Wolf.

Q How many salesmen did you have soliciting the same line of work as did Ryerson by soliciting? A He was the only salesman.

Q Up to the time he came with you you had no salesman? A We did have, yes.

Q You let him go when Mr. Ryerson came? A I don't remember the exact circumstances. We always had a salesman.

Q You are positive that Mr. Ryerson was to receive the amount of salary agreed on between you and he, whether or not the amount of business he brought in amounted to 10 per cent.? A Absolutely, there was never any salary retained.

Q There is no disagreement there at all between you and he? A No.

Q He was to receive so much a week positively? A Positively.

Q Whether business was good or bad? A That is right.

Q You continued with that arrangement from 1918 to 1929, the time his employment was terminated? A Right.

Q Was it terminated by you or him or how? A We dismissed him.

Q You mean you dismissed him? A That is right.

Q Now, at no time during the employment was there any discussion between you and Mr. Ryerson to change the agreement existing between you and he, was there? A At one time only.

Q At that time he offered to disregard the weekly salary and go on a straight commission basis? A Yes, sir.

Q What brought up that discussion? A What brought that up?

Q Yes. A I suppose that he was falling behind and thought it might be better the other way, I don't know.

Q Up to that time his salary for each week exceeded 10 per cent. of his gross sales? A Yes. Not at all times. I beg your pardon. We have checks there showing for years he earned money over his drawing account.

Q Then I understand that if there was a surplus of more than 10 per cent., at the end of a quarter of a year he also received that 10 per cent.? A Of each quarter, yes, beyond what his drawing account was.

Q Then, the opening of your counsel in saying that the surplus was to remain and be charged against any deficits the following quarter, is not so? A I don't know what you are driving at.

Q Your statement was that the surplus at the end of a quarter remained? A Yes.

Q And if it was there the next quarter you took it from the $250? A No, that was never the case.

Q You did pay him a surplus? A Yes, but if there was a deficit in the next quarter that was deducted on the following quarter.

Q The $250 he already got? A He got that, yes. The checks prove that.

Q At this time he gave you an offer to work for you for a certain commission and which according to your records was to his disadvantage, what discussion had been going on between you and Ryerson that brought that about? Did you complain about the amount of business he was bringing in? A I called his attention to the fact that we needed more business, but there was no question about cutting his salary.

Q Was anything said at that time about your prices being too high? A That is the old cry, the old, old cry. It did not take salesmen to sell prices down below cost and we did not pretend to be cheap printers.

Q When he came and told you your prices were too high, that he was losing customers, was there any discussion then about his changing the arrangements with you? A Yes, and I refused to have him change. If he was not satisfied he could have quit.

Q You were satisfied to have him go along falling behind every month? A Until I saw he was not straight.

Q When did you find out he was not straight? A When those things came to my attention.

Q Was that in 1927 or 1928? A The facts as just given on the Ruhl case.

Q The first case you knew of was the Ruhl? A Yes.

Q When did you learn of the other cases? A We learned of lots of other cases when we investigated them.

Q When did you investigate them? A Immediately.

Q After you discharged him you investigated all his business? A No, before.

Q How long before you discharged him did you start investigating?

Mr. Carey: I object. If it is interesting there is no objection, but I do not see the relevancy.

The Court: Admit it.

Mr. Wolf: Withdraw that question.

Q Did Mr. Ryerson ever tell you that it because your prices were too high that it was necessary for him to take some of the smaller jobs to other printers? A No, he did not.

Q Did he ever show you any other work that was done this way? A No, he did not.

Q Did he ever show you the receipt from one of these printing jobs? A No, he did not.

Q If you had obtained this job of O'Neill's which amounted to $33, what would your gross profit have been? A We figure a 20 per cent. profit gross.

Q On the business he brought you, you figured 20 per cent. for your gross profits? A That is including the selling.

Q You heard these other witnesses testify to the work they did? A Yes, sir.

Q Am I correct in stating that your gross profits would have been 20 per cent. of those jobs? A Yes, sir.

Q You testified that the $50 a week started in 1925. As a matter of fact, an examination of those papers shows that it started in December, 1922? A Well, maybe.

Q Refer, if you have the record completed, to the statement of December 1, 1922. A Yes.

Q Am I correct in stating that he at that time did reach the eleventh week of his $50 salary? A Yes, two weeks at $40 and eleven at $50.

BENJAMIN S. BERKOWITZ, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q What business concern are you connected with? A Central Paper Company.

Q What is your position with that concern? A Treasurer.

Q Has your company ever sold paper to George Ryerson? A Yes, sir.

Q When did you first have your business dealings with Ryerson? A According to the records I looked up, the first sale was made in 1927.

Q Was this paper sold to Mr. Ryerson individually or was he operating under a trade name? A Individually.

Q Did he pay you for the paper? A Paid cash.

Q If you have your record there what was the exact date of the first transaction with him? A The girl hasn't the date, she simply has the year. The first transaction took place in 1928, the date, I don't know, was April 20th.

Q What was the size of that order? A $12.95.

Q Paper you supplied him? A Yes.

Q Any subsequent orders to that? A There was another sale the very same day for $7.99.

Q That is for a different kind of paper? A It must have been for a different order, yes, different kind of paper.

Q Did he take this paper with him or have it delivered to him? A He undoubtedly took it with him.

Q When he purchased that paper did he say anything about the Gubelman Publishing Company? A No, he never mentioned that to us. I was under the impression he was a broker.

Q Taking these jobs referred to around and getting them from anybody? A Yes, sir.

Q And marketing them out where he could get the best price? A Yes, sir.

Q Have you continued to do business with him since then? A According to our records there were several sales done in 1929, rather small ones starting with $1.93 in February.

Q That is as far up as we are interested. A This was subsequent to 1928.

Q On none of these occasions did you have any indication that you were dealing other than with Mr. Ryerson as an individual? A No, I didn't know he was connected with any concern.

Q He paid himself cash for these various orders? A Yes, as a rule we never question anyone, who they are connected with when they buy and pay and carry away; no reason for it.

Cross examination by Mr. Wolf.

Q The first sale you ever made to Ryerson was in April, 1929? A No, 1928, I said.

Q That was $12.95? A Yes, sir.

Q The next one was the same day of $7.99? A Yes, sir.

Q And the next one was in February, 1929, of $1.93? A Yes, sir.

Q What was the next one? A Another one March 3rd, $2.13. Do you want the others? 10

Q Yes, up to August, 1929. A There is one here May 3, 1929, $2.17. May 3, 1929, $4.57. Same month on the 29th, 90 cents. Eighth month of the year $2.70 and another one the same day $3.54.

Q In August, 1929, you had two sales, one of $2.70 and one of $3.54? A Yes, sir.

Q What was the $12.95 sale in April, 1929, what kind of paper? A We had no record of it.

Q Did you sell any paper to the Gubelman 20 Publishing Company? A On several occasions, yes.

Q Did you sell them on the same date? A No.

Q Have you referred to your records to see whether you have or not? A Yes, sir.

Q Does the record here show what the paper was delivered on any of these items? A No, these are all cash sales and the only thing we do is enter the name of the man, we do not itemize. 30

Q Did you ever see Ryerson before he made the first purchase of $12.95? A Not prior to that.

Q Did you make any inquiry from him as to who he was with? A No, sir.

Q You presumed he was a broker? A Yes, sir.

Q You did not ask him, did you? A Well, no, we did not ask him at that time but we found out after that he was a broker.

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Q That is, you did not ask him whether he was a broker or with some concern? A No.

Q Is he still doing business with you? A No, we never done any business since April 9, 1930.

(Adjourned to Friday, March 13, 1931, at 10:00 o'clock A. M.)

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

March 13, 1931.

SECOND DAY.

(Continued pursuant to adjournment.)

Present: As before stated.

HERMAN FRANKLIN FISHER, sworn in behalf of plaintiff.

Direct examination by Mr. Carey.

Q What is your business? A Manufacturing of china bathrooms.

Q In the china bathroom fixtures, you say? A Yes, sir.

Q Have you had occasion in that business to have printing jobs done for your company? A Yes, sir.

Q Have you ever had any relation with Mr. Ryerson in connection with the printing jobs? A Yes, sir.

Q How long have you known Mr. Ryerson in a business way? A About two and a half years.

Q What would that relationship be, exactly? A Salesman, soliciting our business for printing.

Q Did he sometimes solicit in the name of Gubelman Publishing Company? A At all times.

Q How would those bids be received? A They came on the stationery of Gubelman Publishing Company.

Q Did you in many instances give business to Gubelman Publishing Company? A We gave business to Gubelman Publishing Company through Mr. Ryerson.

Q Were there times when the Gubelman Publishing Company's bids were not acceptable to you? A Yes, they were high.

Q How would Mr. Ryerson conduct the bidding then? A Well, we first met Mr. Ryerson, he came in to bid and if successful he got it, when the other fellow got it he lost and as time went on, he was a pretty good salesman and he became friendly and towards the latter part I told him that they were too high and I could not give it to them and he asked for an opportunity to re-bid which we gave him.

Q He would bid in Gubelman Publishing Company's name and then re-bid in the name of some other publisher or printer? A I don't know whether he bid in his own name or not. It is over a year since we did any direct business with him.

Q He would not bid in Gubelman's name the second bid, that would be a different bidder? A As I recall, he asked me for an opportunity to have Gubelman Publishing Company re-bid and he came back with the second bid and that was

not acceptable, it was too high and then he thought he could place it for us at a better figure if we would give him an opportunity which he did.

Q Did he place some jobs for you? A Only one.

Q Is that the time he printed copies of a pamphlet for you? A I don't know whether he printed that or not.

Q But you remember that after the Gubelman bid was not acceptable to you he would place it somewhere else? A In this one instance.

ELMER L. SNYDER, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q Where are you employed? A Riviera Hotel.

Q Were you employed there in 1928 and 1929? A 1929.

Q In that year did you in your capacity there as manager have occasion to give out some printing jobs? A I did, I had the privilege of giving out printing jobs.

Q In connection with these printing jobs did you ever meet Mr. Ryerson? A I did.

Q How did you come to meet him? A Before I went with the Riviera Hotel he had done some work for the hotel and at that time still owed us some part of the work.

Q Did he make any bids for some of this hotel printing? A No, he was doing some of the work at the time.

Q He was doing the work at the time you went there? A Yes, sir.

Q What kind of work was he printing, these blanks? A Guest ledger cards.

Q Such as this (indicating)? A Yes, sir.

Q Were those some of the cards he printed for the hotel? A I couldn't tell you, I don't know. It was some kind of a card but I couldn't tell by the serial number whether that was the job he did or not.

Q Did Mr. Ryerson say anything to you about who he was working for at the time? A My first connection with Mr. Ryerson was when we were running low on the cards and I then tried to find out who was doing the work and I remember his name had been mentioned to me and I called the party who told me who he was and I found out that he was working for the Gubelman Publishing Company.

Q Did you speak to him about getting some more cards printed? A No, not about some more, I spoke about the balance of the order.

Q Did he say whether or not the Gubelman Publishing Company were printing those or someone else? A Gubelman Publishing Company were not printing those cards.

Q How do you know that? A Because the Gubelman Publishing Company did not know anything about the cards.

Q How do you know that? A Because I was in touch with Gubelman Publishing Company.

Q Did you eventually get in touch with Mr. Ryerson himself? A I did.

Q What did he tell you about the cards and who was printing them? A He gave me a blotter with his name on, with the name of a firm.

Q Do you remember the name of that firm? A If I recall, it was the Expediency Press or something of that sort.

Q What did he say about it? Is that the blotter he gave you (indicating)? A Yes, sir.

Mr. Carey: I offer this blotter in evidence.

(Same is received in evidence and marked Exhibit P. 12.)

Q Did he tell you he was working for this concern? A They were doing the printing.

Q Did you get further printing done from him or not? A No, I stopped him, I took what few cards he had printed at the time and stopped the order.

Q That was in 1929? A 1929.

Q Do you remember about what part of the year it was? A I don't know. It was in the summer, I couldn't tell you exactly, because I had no interest at that time in it.

Cross examination waived.

CHARLES E. CONOVER, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q What is your business? A Job printing.

Q Whereabouts is your plant located? A 43 Union avenue, Irvington.

Q How long have you been in business there? A Been in business of printing about 12 years, but in this particular location four months.

Q Whereabouts were you located prior to there? A 19 Union avenue, Irvington.

Q You were there quite some time? A Five years.

Q Did you ever know George Ryerson? A Yes, sir.

Q How long have you known him? A Since about 1918.

Q Have you ever had any occasion to do printing for him? A Yes, sir.

Q Has he ever had occasion to do printing of his own in your establishment? A Yes, sir.

Q When did you first have any of these relations with him, where you did jobs for him or he worked in your place? A As far back as 1921.

Q Beginning at that time what kind of jobs would you do for him? A Well, most anything he brought in in the line of cards, envelopes, billheads, tickets.

Q Did he bring those in as his personal jobs? A He would bring them to me and I would quote a price on it and he worked for me and on other occasions he would come in and do the work himself.

Q Were those occasions frequent or infrequent? A Sometimes three or four or five at a time and perhaps nothing again for months.

Q You say that he would do the jobs himself. Just what would he do? A Set the type, rack them up and put them on the press and run them off.

Q That relationship continued for several years, did it? A Yes, sir.

Q All through 1928? A Yes, sir.

Q Up to 1929? A Yes, sir.

Q I show you an envelope called Job Ticket 1846. Tell me what that is. A Printing 3,000 circulars. It is changing a price list for James A. Kohl & Company.

Q Was that done by you in your establishment? A As near as I can recall Mr. Ryerson brought the linotype composition in to me and it was printed there.

Q What was the price on this job, do you know? A $7.00 was the total cost.

Q This was not a job for Gubelman Company, was it? A Not to my knowledge.

Mr. Carey: I offer this circular in evidence.

(Same is received in evidence and marked Exhibit P. 13.)

Q I show you Job Ticket 1877 and I ask you what that is. A That is 5,000 four-page letterheads for Lauter Piano Company.

Q How was that brought into your office? A He brought it in and we both worked getting the forms ready and he did the press work and he furnished the stock.

Mr. Carey: I offer this in evidence.

(Same is received in evidence and marked Exhibit P. 14.)

Q Job Ticket 1875. What does that represent? A Some tickets for an association he belonger to connected with Jube Memorial Church.

Q Was that done in your place? A It was.

Q He brought the work in? A Yes, sir.

Mr. Carey: I offer this in evidence.

(Same is received in evidence and marked Exhibit P. 15.)

Q Job Ticket 1740, I show you that and state what that is. A That is imprinting of 500 circulars.

Q What was the date? A The stock was furnished May 12, 1928.

Mr. Carey: I offer this in evidence.

(Same is received in evidence and marked Exhibit P. 16.)

Q This other Job Ticket 1875, what is the date of that job? A April 6, 1928.

Q This Job Ticket 1877, what is the date of that? A March 31, 1928.

Q I show you Job Ticket 1739 and I ask you what that refers to. A 1,000 folders brought to me by him from the Westinghouse Manufacturing Company.

Q What was the date of that job? A May 15, 1928.

Mr. Carey: I offer this in evidence.

(Same is received in evidence and marked Exhibit P. 17.)

Q I show you Job Ticket 1850. What is that? A Three hundred tickets for that party.

Q Was that brought in by him the same as the others? A Yes, sir.

Mr. Carey: I offer this in evidence.

(Same is received in evidence and marked Exhibit P. 18.)

Q Job Ticket 1866? A Hotel Riviera, 1,000 ledger sheets.

Q Each of those envelopes contain a specimen or sample of the job that was done? A Yes, sir.

Q This was brought in by Mr. Ryerson to you? A Yes, sir.

Mr. Carey: I offer this in evidence.

(Same is received in evidence and marked Exhibit P. 19.)

Q Mr. Ryerson paid you for your share of the job in each one of these cases? A Yes, in a way.

Q I show you Job Ticket 1529. What does that refer to? A Printing 500 postal cards for Automotive Equipment Company.

Q Envelope dated December 11, 1928. A That is one of the postal card orders.

Q An envelope dated April 1, 1929. A Five hundred cards, for Hotel Riviera, Mr. Snyder.

Mr. Carey: I offer this in evidence.

(Same is received in evidence and marked Exhibit P. 21.)

Q In that I notice proof of calling cards, "E. L. Snyder, Hotel Riviera." Were those prepared in your plant? A Yes, sir.

Q Was this order brought in by Mr. Ryerson? A Yes, sir.

Mr. Carey: I offer this in evidence.

(Same is received in evidence and marked Exhibit P. 22.)

Q Did your work with Mr. Ryerson continue on throughout this period of years, orders coming in irregular? A Yes, sometimes six months or more elapsed, sometimes a month or two, and sometimes as far as a year.

Q He has come back in time and in the long run given you quite a volume of business? A Yes, run into quite a little money.

Q During that time it was clear to you that the work was Mr. Ryerson's work, was it not? A Yes.

Q And that he was getting materials and often would bring them to your place? A Very frequently he would furnish materials.

Q Sometimes he would operate your press doing job matters? A Yes, sir.

Q In that case your job would be less? A Merely time during the use of the material.

Q You would not be prepared to estimate the length of time Ryerson himself operated your presses, would you, an approximate idea? A Well, I should think Mr. Ryerson devoted about 100 hours at least during 1928 and 1929.

Q In those two years you estimate about 100 hours on the press? A Yes, sir.

Cross examination by Mr. Wolf.

Q How much did Mr. Ryerson pay you for the use of your press during 1928 and 1929? A He didn't pay me anything.

Q What was your charge to Mr. Ryerson for the use of the press? A The charge was estimated at 50 cents an hour.

Q How was that amount agreed upon? A Just because I thought it was a satisfactory price.

Q Satisfactory to him? A Yes.

Q How much cash did he give you in 1928 and 1929? A Didn't give me any.

Q Why didn't he? A Because we had little business dealings before and there was a little balance on business I had done with him before.

Q That little business deal you had with Mr. Ryerson was that you had purchased back in 1920 and 1921, Mr. Ryerson's equipment from when he had been in business himself? A Part of it.

Q The greater part of it, didn't you? A No, not the greater part.

Q He had sold you that because he had gone with Gubelman Publishing Company? A Yes.

Q You are still indebted to Mr. Ryerson, aren't you? A No, sir.

Q He hasn't paid you any cash for 1928 or 1929. When was your account settled? A It was practically settled in 1922, as far as that goes.

Q As a matter of fact you allowed Mr. Ryerson to use this press at an agreed price of 50 cents, but did not collect? A No, sir.

Q I show you Exhibit P. 16, what was that job worth? A The charge on this is $1.50, imprinting 500.

Q Do you keep a job ticket for every job you had? A As a rule.

Q How long did you keep them? A Possibly six months or a year, possibly two years.

Q Everything Ryerson had to do with you kept? A No.

Q Why? A Because I have destroyed lots of them in moving, they were absolutely worthless to me and I threw them away.

Q You and Ryerson have an account to settle? A Practically.

Q You have destroyed the evidence of it? A Not all of it.

Q You have testified of jobs you have done between 1922 and 1928. Look among the tickets there for the years 1922, 1923 and 1924. A I have the records here.

Q Look here and see if there is a ticket for the years back of 1928? A I do not believe there is, to my knowledge.

Q Here is one marked April 13, 1926, the Kohl job of 3,000 circulars. What was that job worth? A It cost $107.25.

Mr. Carey: I object to what the jobs were worth as irrelevant under the pleadings. I think it might be well to urge that now to save time.

Mr. Carey: The basis of this action is the $50 a week salary he was drawing and turning in occasionally an order to make it look as if he was still working for Gubelman. On that occasional order he would get 10 per cent. which is the commission rate and which is customary in business, but the difference between that and 10 per cent. he should pay back to Gubelman and that is the basis of the damages and not what he made on the outside jobs. Therefore any relation to anything he got on this job or any other job is irrelevant and immaterial.

(Argument.)

The Court: If you hire a man to work for you and you pay him for it, of course, he owes you what we ordinarily call fidelity. He is supposed to devote his time to your

business and if he does not do that and accepts your money, in my opinion the entire amount is due. It is an absolute failure of consideration. An employee cannot take money from one man and be absolutely false and untrue to him. There is no question about that at all. I do not know that this happened, but I say that an employee who is faithless is not entitled to any salary and if he gets it I do not know why the employer should not get it all back. If you want to show these amounts merely to show they are trivial, I will admit it, but not as forming any basis for damages.

Mr. Carey: To save time I will say that the value of the jobs is trivial compared with the volume of the jobs done, as far as I know. I haven't been able to trace other jobs this man has done over a period of years, but I have found enough jobs to prove what his practice was during those years.

Q When would Mr. Ryerson work at your place, what part of the day? A Saturday afternoons or night.

MICHAEL A. McMANN, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q Are you employed by the Gubelman Publishing Company? A Yes, sir.

Q What do you do down there? A Office manager.

Michael A. McMann, for Plaintiff, Direct.

Q Were you office manager when Mr. Ryerson worked for Gubelman? A Part of the time.

Q During the last part of his employment were you office manager there? A Yes, sir.

Q Do you recall the occasion when he was discharged? A Yes, sir.

Q State the circumstances of that occasion. A Why, Mr. Ryerson came to me for his salary and I told him that he would have to see Mr. Gubelman before I could give it to him and he went to Mr. Gubelman and Mr. Gubelman accused him—

By Mr. Wolf.

Q Were you in the room with Mr. Gubelman when he accused him? A Yes. Mr. Gubelman accused him of doing work for people on the outside and in the course of conversation he admitted he did.

By Mr. Carey.

Q He admitted he did? A Yes, sir.

Q In the presence of Mr. Gubelman and yourself? A And Mr. Mills.

Q Then, what happened? A I don't know, I was busy and they still conversed among themselves and the result was that Ryerson went out.

Cross examination waived.

THOMAS WEBB, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q Are you the proprietor of the Webb Printing Company? A One of them.

Q Your place of business is in Plainfield, isn't it? A Yes, sir.

Q Do you know Mr. George Ryerson? A I do.

Q You have done printing work for him there, have you? A Yes, sir.

Q When was about the first time you began doing printing work for him? A In October, 1928.

Q 1928? A Yes, sir.

Q How would you get this work to do, would he come in with jobs or just how would the work be brought to you? A He would bring me a copy and we would reproduce the work and he would take it away.

Q Those various jobs he brought to you, who did he say the job would be done for? A Whatever that ticket represents there.

Q I mean to say was he acting as his own jobber or as a broker or what? A Yes, he brought them in for these people under his name, I presume.

Q He furnished you with the material, did he? A Yes.

Q You did the printing? A Yes, sir.

Q And turned the finished product back to Ryerson? A Yes, sir.

Q These are the jobs and they run through, some run up to 1930, starting back in 1928. I show you a collection of job tickets going from

November 20, 1928, to September 4, 1929. Were these jobs all done for Mr. Ryerson at his request by you? A Yes, sir.

Q Were these jobs done under dates of Nover 21st, Continental Electric Company; November 21st, Eck Electric; same day, General Tube Company; November 27th, Westinghouse Manufacturing Company; January 16, 1929, for Mr. Ryerson individually; same for January 17th; January 23rd, Westinghouse Manufacturing Company; January 27th, another job for Westinghouse Manufacturing Company; February 14th, a job for Beaver Manufacturing Company; February 16th, for Westinghouse; February 16th, another one for Westinghouse; March 13th, for Westinghouse. In each of these job tickets that you have referred to is an envelope containing a proof of the particular piece of printing? A The original copy and the finished job.

Q You were paid by Mr. Ryerson for the work you did, were you not? A Not all.

Q For some but not all? A There is a small balance.

Q Did Mr. Ryerson ever come in and do any printing in your place himself? A Once it was for himself.

Q He did a job for himself once? A Yes, sir.

Mr. Carey: I offer this in evidence.

(Same is received in evidence and marked Exhibit P. 23.)

Q What was your understanding as to Mr. Ryerson's capacity as jobber or broker or what at the time you were doing his work for him? A I presumed he was a broker.

Q Taking jobs wherever he might find them and giving them wherever he got good treatment? A Yes.

Cross examination by Mr. Wolf.

Q What is the earliest date of any job in that batch? A November 20th, I think.

Q What year? A 1928.

Q The first job you did was November 20, 1928? A Yes, sir.

Q What is the latest job in that batch? A October or November, 1930.

Mr. Carey: It is in evidence only up to September 4th.

Q Have you any knowledge what this batch of work cost from November 20, 1928, to September 4, 1929? A They are all marked on the envelope.

Mr. Carey: I object to that as irrelevant.

Mr. Wolf: Will you agree then that it does not exceed $200?

Mr. Carey: I do not know, but I will agree it is irrelevant and comparatively trivial.

The Court: I would suggest that you limit your cumulative evidence, if you can do so.

Mr. Carey: Very well.

HENRY H. MILLS, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q You are employed by the Gubelman Publishing Company? A I am.

Q You were employed there for the first time on what date? A The end of November, 1929.

Q Were you engaged there from then up to the end of August when Mr. Ryerson was discharged? A Yes, I am still there.

Q Were you present at the office on that day Mr. McMann testified to and Mr. Gubelman testified to that Mr. Ryerson came in? A I was.

Q Tell the jury what the discussion was at that time. A Against Mr. Gubelman's accusation to Mr. Ryerson that he had been getting work for his own interest and not for the company's interest he first denied it and after some indication that we had definite proof to that effect he admitted he had been getting it but referred to it as warranted, that he was on a commission basis and he thought it was his right to do so.

Q Did you at any time notice Mr. Ryerson doing any business which would indicate it was not for Gubelman Publishing Company?

Mr. Wolf: I object.

The Court: Between February and August.

Q Prior to August and after you were employed by Gubelman?

The Court: Admitted.

Leopold T. Gubelman, recalled, Direct.

A I opened a letter to the company from Ruhl Typesetting Company which was a bill for Mr. Ryerson, previously admitted in evidence.

Q P. 10? A That is right.

Q Did you ever see Mr. Ryerson carry in the automobile furnished by the company any work that would appear not to have been work of Gubelman Publishing Company? A In August, 1929, I passed his car and noticed a frame used on printing presses and in that frame was a code locked up which I am perfectly positive was a code used for printing a job which he was furnishing the Hotel Riviera, because I had seen that job a few days previous to that in the printed form.

Q That was in the car furnished to him by Gubelman Publishing Company? A That is right.

Cross examination by Mr. Wolf.

Q What is your position there now? A Clerical.

Q What was your position when you first came there? A The same.

Q What have you to do with the selling end, anything? A No.

LEOPOLD T. GUBELMAN, recalled in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q There have been offered in evidence the job tickets of Mr. Conover for work done by the

Conover Press for Mr. Ryerson, exhibits being Exhibit P. 13 to Exhibit P. 22, inclusive. Will you look at these job tickets and tell me if any of these were for work done for your company for work done pursuant to your instructions to Mr. Ryerson? A There is one here.

Q Can you tell from the notation on the envelope what is the date of it? A March 31, 1928.

Q I have the enclosure of that in my hand. I was about to ask some further question on that. A Yes.

Q All of those job tickets, were any of them ones you instructed Ryerson to have done for you? A None.

Q What was the date given of that Lauter-Humana Company? March 31, 1928? A That is the date of the ticket.

Q I show you some correspondence and papers and ask you to tell me what they are. A This letter from Lauter-Humana Company dated February 29, asking, "Please arrange to return at your earliest convenience sample of four-page letterheads delivered to your Mr. Ryerson a few days ago, on which you made us a quotation."

Q That is the job the Gubelman Company bid on? A Yes, sir.

Q The papers that you have in your hand are the estimates and offer of bid and so on. A The estimate part and copy of our bids to the customer.

Q At that time Mr. Ryerson was in your employ as your only sales solicitor? A Yes, sir.

Q On that particular bid, did you ever get the business for that? A No.

Q Exhibit P. 14, that enclosure of Lauter Piano Company cut indicates that the work for

that particular job was done by Mr. Conover, does it not, at Mr. Ryerson's solicitation? A Yes, sir.

Q Is that the same job on which you bid? A I believe it to be.

Q In other words, Mr. Ryerson represented you people to get a bid for you?

Mr. Wolf: I object to that as forming a conclusion.

The Court: Sustain the objection.

Q In any event, the Gubelman Publishing Company did not get that job, did they? A No.

Q Mr. Ryerson did get the job? A Yes, sir.

Cross examination by Mr. Wolf.

Q Did you estimate on that job? A Yes, sir.

Q Was your estimate delivered by mail to Lauter Piano Company? A That I couldn't say.

Q Were your estimates mailed or delivered as a rule? A That is indefinite, sometimes Mr. Ryerson took them and sometimes they were mailed.

Q Who made that estimate? A That depends. Different persons.

Q Who made that particular estimate? A I made this one.

Q Did Mr. Ryerson do any estimating for you? A No.

Q Did he ever at any time place a price on any work that was submitted to your office? A Not that I recall.

Q He had nothing to do with prices, did he? A He had nothing to do with prices, no.

Leopold T. Gubelman, recalled, Cross.

Q If your bid was mailed he only knew what your bid was either by receiving the information from your office or from the customer? A We always gave him a third copy of our estimate so he knew exactly what was sent out.

Q So the price put on that work was your own price? A Right.

Q Ryerson in no way had any authority in shaping prices, he had nothing to do with it, did he? A Excepting as any salesman might, he was looking to lower prices.

Q Ryerson continuously worked for lower prices, didn't he? A Yes, sir.

Q He told you he was losing business because your prices were too high? A Yes.

Q You failed to receive a lot of work he had brought in requesting bids on? A We have an estimate of bookkeeping and accounting at the end of the year showing us exactly what profit we make.

Q I do not doubt that you run your business right. My question is, on a great deal of the work Mr. Ryerson solicited you lost it because of your prices? A Probably. I could go out and yet twelve bids and there will be 50 per cent. difference in the bids.

Q Mr. Ryerson complained to you that the Lauter bid was too big or too high, didn't he? A No, not in this particular instance, there is no record of it. Whenever Mr. Ryerson got a price we made a bid and he knew what the price was that went out and we made a notice and went over our affairs and we were keeping down on the price but we had much equipment and typesetting and so forth.

Q Did you have any work from Lauter since then? A We had some.

Leopold T. Gubelman, recalled, Cross.

Q That type of work? A I couldn't say as to that. These letterheads ran for a year or two.

Q Did Mr. Ryerson ever show you a check from the Essex Press? A No, not that I recall.

Q Did he ever talk to you at any time about a job done by the Essex Press? A For the Essex Press?

Q Not for the Essex Press, by the Essex Press. They are competitors of yours? A Not that I know of.

Q At the time Mr. Ryerson discussed about going on a straight commission basis with you? A Yes.

Q Did he discuss with you the fact your estimates were too high and he thought he could do better by going on a straight commission basis? A I told him he would represent us or not at all, if he did not like it, why didn't he get out, if he could not sell our work.

Q The same answer to you, why didn't you fire him if he was not producing the work? A That is all right, I gave him a chance.

Q Did he ever say to you that your work was too high and he could get along better by working on a commission basis? A No, he did not put it in those words, he suggested to go on a commission basis. If he thought he could do better why didn't he get out?

Q When he said to you he was going on a commission basis did he tell you at that time your work was too high? A Salesmen always complain that prices are high.

Q From the day Ryerson started with you until he quit, he complained that your prices were too high? A No, he did not, always.

Q You have made a great effort to find out all the work Mr. Ryerson has had done by the

various printers in this community, haven't you? A No.

Q All this cumulative stuff here of Webb and Conover has all been dug up through your efforts? A No.

Mr. Carey: I object. What difference does it make?

The Court: I think that is immaterial. Sustain the objection.

Re-direct examination by Mr. Carey.

Q I show you another collection of job tickets, P. 23, that was produced by Mr. Webb and I have just asked you to look through these. Have you done so? A I have.

Q Were any of the jobs covered by these job tickets jobs done for your company or at your request? A No.

Q Were any of these jobs, jobs taken by Mr. Ryerson of any of your company's customers? A Yes, sir.

Q Which ones? A This batch here (indicating).

Q Name the customers who are regular customres. A I wouldn't say they are regular. We have had work from time to time from the General Tube Company, Lauter Piano, Westinghouse, up to 1928; Continental Electric, Baker Electric. That is all of this.

HARRIS J. FREEMAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Carey.

Q You have this business on Mott street where you do ruling and work of that kind, don't you? A Yes, sir.

Q Prior to August, 1929, did you ever do any work for George Ryerson? A When he was in business for himself, but that was years ago before he was with Gubelman Publishing Company.

Q Between 1928, July, 1928, and a year later, did you ever have any ruling job for Ryerson? A I did.

Q For Ryerson personally? A Yes, sir.

Cross examination by Mr. Wolf.

Q What was the particular date of that job? A I couldn't tell you what the dates are because they were all small jobs and simple things as jobs go.

Q What do you mean, small? A $2.50, $3.00.

Q Your work is a specialty, isn't it? A It is.

Q You do your work for printing companies? A Yes, sir.

Q There are very few printers in this community that can do ruling? A Only one.

Q You are the only one who does ruling? A No, there are three other ruling concerns in Newark.

Q Is Gubelman Publishing Company a concern that does ruling? A No, not to my knowledge.

PLAINTIFF RESTS.

Mr. Wolf: I respectfull move for a nonsuit on the first ground that there is no evidence of fraud and deceit upon which this case is based.

On the second ground that there is no element of damages, no damages have been proved. It was a contract, as explained before, to guarantee this man's salary, that he is entitled to have work of his own done on the side; if he renders services to the firm, allowed to do work on the side on Saturdays and nights and Sundays, and I think there is no proof here on the part of the plaintiff been proved and on the first ground there is no fraud and deceit in this case.

The Court: I am supposed to give my reasons for denying the motion, but I had better not give them now and I will deny the motion.

I do not understand the testimony to be exactly as you quote it, particularly concerning the nature of the contract.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

GEORGE I. RYERSON, the defendant, sworn in his own behalf.

Direct examination by Mr. Wolf.

Q How long have you been in the printing line? A I think the good part of 25 years.

Q Prior to 1918 were you in business for yourself? A Yes, sir.

Q About that time did you make any change? A Oh, yes.

Q What was the change you made? A I lined up with Gubelman Publishing Company.

Q What did you go with Gubelman Publishing Company as? A Salesman, solicitor.

Q Who engaged you? A Mr. Gubelman.

Q What was the agreement between Mr. Gubelman and yourself? A There didn't seem to be much of an agreement. What he was concerned about mostly was my qualifications.

Q Did he agree to pay you any certain sum of money a week? A He asked me what I would want and I said I thought I had the qualifications for going out on a strictly commission basis, 10 per cent. commission basis.

Q You did come to an agreement and went to work there? A Oh, yes.

Q You received how much a week to start? A When I offered to go out on a 10 per cent. commission basis he said, "No, I'll start you at $20 a week."

Q That amount was later increased until finally in 1923 you were receiving $50 a week, that is so? A That is correct.

Q You received $50 a week until August, 1929? A Yes, excepting the last week.

Q You have not been paid for the last week? A No.

Q During that time you also received the check Mr. Gubelman identified as excess over your salary? A I received debates for commissions up until I passed $40 a week and from then on I never received any.

Q That was because at no time did your total sales exceed—the 10 per cent. of your total sales exceed your salary? A That was

what I was led to believe, although I always doubted it.

Q You were furnished with a statement by the concern every quarter? A No, I was not.

Q When did you receive your last statement? A About a year and a half prior to my getting out.

By the Court.

Q I think it would be better if you would explain to us your point of view of the 10 per cent. proposition. A There was no signed contract, it was an agreement in which I offered to go on a 10 per cent basis. He said, "No, you are a married man and we wouldn't think about sending you out for less than $20 a week and anything you make over that we will pay you on a percentage of 10 per cent."

Q He said that anything you made over $20 he would pay you on the basis of 10 per cent.? A The aggregate business, the gross business.

Q That is, if you took in a certain gross business every week and 10 per cent of that exceeded your salary you would get the surplus? A Yes; of course, from the start I felt that I would make more than $20 a week.

By Mr. Wolf.

Q What is your understanding of that? A $20 salary plus 10 per cent. overriding and he never said anything about any deficit, that was a manipulation on their part after. I was never behind, moreover, all the time I was there. Several times I was offered a good position with another concern and they told me to lay off

and in one instance he offered to give me an automobile and he told me to get it and consider it mine, it was always in my possession. I had to maintain it. He did that as a premium for my staying. The Print Shop was the firm I refer to that offered me that position at the time.

Q You have seen here introduced in evidence numerous job tickets or envelopes representing jobs done by Webb, Conover and several others. They have all been identified as work furnished by you to them. Did you give that work to these men? A I believe I did. Of course, I have not seen the envelopes. I take it for granted I did.

Q You have heard great stress laid on the Lauter job. A Yes.

Q You gave that to the firm of Webb? A Oh, yes. Gubelman had his chance at it. "Of course," he said, "the hell with it." That was his quotation.

Q These customers you heard Gubelman testify were his customers? A He thought they were.

Q They were customers you brought to Gubelman Publishing Company? A Yes, I was doing work for them when I was in business for myself.

Q Did Gubelman estimate on those jobs? A Yes, invariably without exception.

Q Why did you take them somewhere else? A Because I was constantly losing business, not only business but customers. Some of those customers I had as long as 20 years and I still have some.

Q Did you ever tell him that you were handling the work that way? A Yes, at least three years before I got out.

Q What particular job, if any, did you call his attention to that you were taking somewhere? A One job more Mann Bock. That man had dealings with Gubelman Publishing Company and he withdrew, he said, "Don't go there, take it anywhere else than Gubelman's." I had it done by the Essex Press and I showed Mr. Gubelman a check for $25 for Mann Bock. He denied he had seen it.

Q You heard Mr. Gubelman testify that you come to him and asked to be put on a commission basis? A I did.

Q What caused you to go to him and ask him to change? A I could see that I was getting nowhere, it was only a question of time I would have to get out, especially as Mills came in.

Q What was the attitude of Mr. Gubelman to your customers that made you go out? A He was very arrogant and over the telephone he was insulting and people constantly reminded me of it and I told him about it and he would say, "To hell with them, they are a lot of pikers, anyhow."

Q How were his prices, high or low? A Exceptionally high, but he persuaded me to stay, but about five years—if you will please—I do not know whether I am out of order or not—five years before he came to me one morning and he said, "I have it in for you. I have something on you and sooner or later I will let you in on it." I said, "I am through now if you do not let me know what it is." He said, "It is your attitude in relation to the work." He

said, "You stay with us and we will forget it." I didn't know what he had in mind. He was laying for me.

Q After you showed Mr. Gubelman the check of $25 for the Essex Press when again did you speak to him? A In connection with the Boy Scouts job, he also figured on that job.

Q Why couldn't he get the Boy Scout job? A Because he was absolutely out of reason in price and I would not consider it because I had been a former scout master and I wanted it done for them in friendly relationship and I went down and I put the job in at cost, I threw in all the costs and I showed it to Gubelman and everyone in the place told him about it.

Q How long ago was that? A The spring of 1929.

Q When was the Essex Press job? A That was just prior to that. I have no date on that in my mind.

Q When did you talk to Gubelman about changing your basis of working, how long before August, 1929? A It came up right after he made that remark about five years before my dismissal and then again about three years.

Q When did you first start taking the work that he failed to get, to other printers? A The first job I did was this job of Bocks at 60 William street. I took that to the Essex Press, that is the job I showed him the check that represented the commission and he told me at the time he said, "We don't want the job anyhow."

Q Mr. Gubelman? A Yes.

Q Do you know the date of that job? A I believe it was in 1928 some time.

Q How much of your time of each day would you give to the Gubelman Publishing Company? A All of my time, sometimes until late at night. There were no regular hours by the way.

Q What were your hours or the time you devoted to that Gubelman Publishing Company? A My hours, I started out in the morning on an average of from eight to eight-thirty.

Q When would you report to the office? A Sometimes I wouldn't report all the day, but invariably I got there about nine o'clock.

Q What was your practice in submitting estimates? A I took them in.

Q Would you deliver the estimate? A Oh, no. In some cases we rushed an estimate to a prospective customer, but I would take it in, but invariably they would mail them out.

Q You heard it testified here today that you bought paper from Mr. Berkowitz? A Yes, sir.

Q They were concerned particularly with the items of $12.95 and $7.99. Can you explain what those two items were? A I believe that was two years ago. I had a call to go to the corner of Halsey street and Central avenue, advertising people, with the request that it was a rush job and I was instructed that whatever was necessary to get it done quickly and I went to the envelope people and I paid for the envelopes out of my own pocket and was reimbursed by Gubelman out of the petty cash. That happened several times and those purchases were for our own personal use the same as I was paying Bamberger's.

Q You would purchase the stuff for Gubelman for cash? A From time to time. I had considerable leeway and I always appreciated it and didn't overdo it. I considered that Mr.

Gubelman had a lot of confidence in me and I did not betray it.

Q You heard Mr. Gross testify to one job you did. What was that job? A That was a concern that told me absolutely Gubelman was out of the picture.

Q Why? A On account of the continuous general high prices, not only high prices, but laxity on the part of service, abruptness on the wire. Mr. Gubelman took a very domineering attitude on the telephone; he is not accustomed to going out.

Q You heard Mr. Voigt testify about two jobs he did for you? A Yes.

Q Who did you do those jobs for? A One was a church job that was a charity affair. I spoke about that job to Mr. Gubelman in respect to placing an ad and he said, "No, we do not advertise, we would throw our money away." I spoke to him about doing the job in the place at a reduced figure as a personal favor to me or the church club but he just scorned me.

Q What was the other job? A For the Westinghouse Manufacturing Company.

Q Had Mr. Gubelman estimated on that? A He was cut off the list entirely at Westinghouse after a certain time, he hasn't had any work done for them since then and he won't have. I am sorry that witness is not in court.

Q You heard Mr. Blakeman testify that he made 3,000 blotters? A Yes.

Q Did Gubelman estimate on that? A He positively did, yes, sir.

Q Why didn't he get that job? A He was too high. Mr. Eddy of the Faitoute Company said, "There is no use of my giving you work. Several times you have estimated and

bid too high, but because of your persistence we will give you another chance, you can take this blotter up and have Gubelman figure on it."

Q Were there any times when you gave this work to other shops that you felt that you were unfair to your employer? A No, sir, positively not. He knew I was doing it.

Cross examination by Mr. Carey.

Q When you started work there in 1918 you asked to be put on a strictly 10 per cent. commission basis? A Yes.

Q That is what you testified to, isn't it a fact? A Yes.

Q And Mr. Gubelman said, "No," is that right? A Well, he said, "We wouldn't send you out cold like that. I congratulate you on your spirit."

Q He congratulated you then. That was the first congratulation? A Yes, he had looked up my record and he said—

Q He said, "No, you are going on a salary"? A He didn't say that.

Q How did you happen to go on a salary? A He said, "We won't send you out cold, we will give you $20 drawing account against 10 per cent. commission."

Q You testified you were to receive a salary and you would have a commission above the salary to the extent of 10 per cent. on your sales, if your sales exceeded the amount of that salary? A Yes, and I have also said—

Q Yes. You say this job required no regular hours? A I did not say that it did not require

any regular hours. I had no regular hours. It was up to me what I produced.

Q By 1923 you were getting $50 a week, is that right? A I believe that arrangement was made with those people from time to time.

Q Never mind the people, you got $50 a week? A I was promised $60.

Q Will you answer the question, please? You got $50 a week in 1923? A Yes.

Q Since that time you got $50 a week up to the time you were discharged except for the last week? A Yes, sir, sometimes it went for a couple of weeks, but I got on an average $50 a week. I was taking the work in for that, too.

Q You did not get any commission towards the end of your employment there? A I have already answered that.

Q Because your sales did not amount to enough to warrant it? A That is right, in fact, I started slipping after that.

Q You then went to Mr. Gubelman and said, "Put me on a straight commission basis," didn't you? A That was part of the conversation we had, yes.

Q The first time you said you went to him you told him that because you knew that you didn't have a chance with Mills coming in there? A I didn't know Mills was coming in then.

Q That was your testimony. A No, that happened a year and a half after. I went out and Mills came in six months before I went out.

Q Five years before you went out you had this first conversation about the commission? A Yes.

Q And three years later you asked Mr. Gubelman to put you on a straight commission basis? A No, I did not.

Q Didn't you testify as to that a few minutes ago? A No.

Q Then, a year and a half? A A year and a half before I got fired, yes.

Q You said, "Put me on a straight commission basis"? A Yes, I just said that because—

Q Wait a minute. You asked to be put on a commission basis a year and a half ago during the period you were receiving $50 a week? A Yes.

Q And also during the period when you were not receiving any extra dividends by way of surplus commission, is that right? A That is right.

Q You thought then by getting on a commission basis that you could make more money and you wouldn't have asked to have been put on a straight commission basis if you did not think you could make more money? A Mr. Gubelman was—

Q So you would not have asked to be put on a straight commission basis if you did not think you could make more money, would you? A I told you the reason why.

Q Did you think you could make more money by being put on a commission basis?

The Court: Listen to the question and answer as it is asked of you.

A I am trying to, but this is a new affair to me.

Q (Question read.) A Certainly.

Q You would not have asked to be changed from $50 a week salary to a commission unless you thought that you could make more money, would you? A Of course not.

Q Your idea in that then was that you could go out and place a lot of other jobs with other people, is that it? A That is what I told him, yes.

Q If you hadn't thought that you had permission or privilege to place these other jobs anywhere you would not have bothered to speak to him about it, would you? A I knew I could make more commission on a commission basis.

Q If you thought that you had a right to do it while you were on a $50 a week salary you would not have asked him to put you on a commission basis, would you? A I don't understand the question.

Mr. Carey: Withdraw the question.

Q You have heard the testimony here yesterday and today as to various jobs you have done, haven't you? A Yes, sir.

Q You testified about the Boy Scouts' job and charity jobs, but they are not all charity or Boy Scout jobs, are they? A No, sir.

Q That does not represent everything you have done in the past two years, these jobs, do they? A I think they must.

Q Would it surprise you to know that there are half a dozen other people here to testify who have not been called just to save time? A It would surprise me, yes.

Q You think those jobs there (indicating) represent every job you had done? A That represents every job I had done since I was out, I understand, am I correct?

Q Are you correct? You are stating it. A I don't know.

Q Do you mean that there is a single job done after August, 1929? Is there a single one

in this stack after August, 1929? A In looking those over I did not see any.

Q You will find that the last job was September 9th. The other stacks are still there. A I see.

Q You said Mr. Gubelman always had a very kind consideration for you and you never betrayed it, is that right? A That is what it seems.

Q That is what you said. A I considered he was considerate, yes, and I did not consider I betrayed him.

Q Notwithstanding the fact that you said he had been laying for you? A That is what I felt at that time.

Q What did you mean that he was laying for you? A He hinted he was.

Q And you said that he said, "You stay with me and I will treat you right." He said that? A He said it, he did, yes.

Q He did say that? A He said it more than once.

Q You were in fear of him, were you? A No, sir.

Q You stayed because of this kind consideration he had for you? A Oh, no.

Q You could have gotten other jobs? A I was offered other jobs.

Q But you did not take them? A At his suggestion. I used his suggestion not to.

Q You did not figure out in your own mind whether it was good for you to stay or not? A Yes, I figured I would be jumping out of the pan into the fire.

Q You felt that you were as happy there as you would be anywhere? A He said I could stay as long as I wanted to.

Q During that time you had all this independent business on the outside? A These represent jobs he had figured on and lost out on.

Q And then you placed them somewhere else, is that right? No question about that, is there? A No.

Q Notwithstanding the fact that just before you left his employ, after Mills came there, you suggested that you be put on a commission basis, didn't you? That was so that you could go out and place other business, otherwise you would not have had to ask him for this other arrangement permitting you to do so, would you? A Well, there were conditions that led up to that. I suggested I be placed on a 10 per cent. commission basis.

Q That was after Mills came? A No, it was a year before Mills came.

Q That was the last time you asked about that arrangement? A I believe it was.

Q You are not sure? A I am quite positive.

Q You are positive? A I think I have answered the question.

Q Mr. Gubelman replied, "No, you stay on that salary of $50 a week arrangement." A Yes.

Q He stated that to you? A Yes.

DEFENDANT RESTS.

Mr. Wolf sums up for the defendant.

Mr. Carey sums up for the plaintiff.

The Court charges the jury as follows:

CHARGE TO JURY.

MOUNTAIN, *J.*

The action which you have tried is an action brought not for breach of contract but brought on the theory of fraud and deceit, the plaintiff averring that it was a printing company and that it hired the defendant. The plaintiff alleges that about the time that a break became imminent between the litigating parties the defendant was in its employ and receiving as I understood it $50 a week and 10% on the sales above that amount. The plaintiff alleges that it was an employer and that the defendant was an employee, call it if you will, principal and agent. The plaintiff alleges that as soon as that status came into being there were certain legal obligations resting upon both parties, on the part of the plaintiff it was the obligation to pay a consideration to the defendant for his stated services. The plaintiff alleges that one of the terms of this contract, as I understand it, and the terms of the contract are to be decided by you, was that the defendant was to work for it exclusively, that is that the defendant for the consideration paid to him was to do no other work except for the benefit and advantage of the plaintiff. You may find there has been proof introduced that over a period of years the defendant took estimates, in many cases you may find that the defendant estimated and obtained certain work and that this was on the plaintiff's time and was at first in the plaintiff's interest. You may find otherwise, too. You may find that that is not the situation, but that is what the plaintiff com-

plains of and that is one of the reasons the plaintiff desires to recover.

Many instances have been related, considerable testimony has been given, and documents placed in evidence. The defendant alleged that many of these are trivial. Well, whether they are trivial or not is a question for you to decide.

Now, a word as to the obligation that existed between these two parties, and I will have to indulge in a few generalities, if you please. Of course, you know that an employee owes to his employer, fidelity, loyalty, good faith and the duty of exercising diligence and care and a certain amount of efficiency, depending upon his capabilities. That, he owes to his employer because he is being paid for those things. An employee or agent who involves himself in any business interest which is antagonistic to his employer's interest you may find breaches that relationship, when he uses his experience of a business in connection with a rival business to his profit, you might find that he breached the relation which existed between the employer and employee. In other words, the agent or employee is not supposed to represent interests which are adverse to his employer's interest. Some cases that we have arise occasionally and develop from testimony disclosing that an agent obtained some knowledge by virtue of his employment about his employer's business and then took advantage of his employer after having obtained that knowledge.

Now then, we find on the one side the duty the employee owes to his employer and on the other side the duty an employer owes to his employee. That brings us back to this contract. What was the contract that existed between this

person and this corporation? That is for you to determine. The next question is whether you find after deliberation whether the defendant was guilty of any fraud or deceit.

The burden of proof is upon the plaintiff to prove that by the greater weight of the evidence. If you find he was, then your verdict would be for the plaintiff; if you find that he was not, your verdict would be for the defendant.

If you find that the damages are only nominal, I mean by that if you find that the defendant did break his contract with his principal or employer but that the damages are not capable of being ascertained with reasonable certainty or that they are trivial or nominal, although the breach existed, then you would, I imagine, evidence that by bringing in a verdict for six cents for the plaintiff.

What are the damages? That question is not so easy in this case; in fact it is more difficult in this case I think than in any deceit case I have tried. First of all in a case of deceit or fraud the damages are generally those damages which naturally and proximately flow from the deceit or the fraud. That is the academic definition, technical definition. I would say in this case with that definition in your mind that it would be proper for you, if you find for the plaintiff, in discussing damages, to ask yourself what damages has the plaintiff suffered, remembering that you must approximate those damages with reasonable certainty. We were told that this man, the defendant, received a certain salary each week. At the time of the break between the parties it was $50, and as I say, he received 10% for the sales above his salary. The plaintiff alleges that if you take the salary over a period

of time, as I understand the plaintiff's case, and subtract from that this 10% on the gross sales that it leaves some $3,700 to which the plaintiff alleged it is entitled. Whether you find that represents the damages, is for you to decide; I do not know.

During the time this contract was alive and it was being observed in some fashion by both parties, how was the plaintiff damaged by the defendant if it was, and how can you reckon it in terms of dollars and cents to a reasonable degree of certainty?

Now, if the defendant did take some of that time, if he did represent a rival interest, if he did act antagonistic to the plaintiff, how are you going to determine those damages, bearing in mind that they must be determined in terms of dollars and cents and flowing naturally from the tortious act of the defendant? That is something you have to consider.

The plaintiff is not demanding the return of salary on the ground that the contract has been breached between the parties and that there has been failure of consideration, that is what I had in mind, the plaintiff is not doing that, but accusing the defendant of tortious acts and demanding as much damages if the wrong is established as you think it should get and which as I say naturally and probably resulted from the wrongful acts of the defendant, if any there were.

I have been asked to charge several requests in behalf of the defendant and one for the plaintiff which requests I will deny.

(The jury retires.)

Requests to Charge.

PLAINTIFF'S REQUEST TO CHARGE.

If Mr. Ryerson did jobs testified to by plaintiff's witnesses and admitted by Mr. Ryerson, and the contract of hiring was on the basis of a fixed salary plus a commission as also admitted by Mr. Ryerson, then it was Mr. Ryerson's duty not to enter into business for himself and his doing so was a failure of consideration in his contract of employment for which the plaintiff is entitled to a return of salaries.

DENIED.

DEFENDANT'S REQUESTS TO CHARGE.

1. That unless there is an express agreement to repay, an employee is not liable for the return of an amount existing and being the difference between his weekly drawing account and 10% of his gross sale.

DENIED.

2. An agreement to pay employee a drawing account of $50 a week against commissions at a fixed rate is an agreement to pay the amount absolutely and not on condition that orders be secured.

DENIED.

SUBSTITUTION OF ATTORNEY.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY CIRCUIT.

GUBELMAN PUBLISHING COMPANY, a corporation, *Complainant,* *vs.* GEORGE I. RYERSON, *Defendant.*	*Action at Law.* *Substitution.*

I hereby consent to the substitution of Algernon T. Sweeney as attorney for the plaintiff in my place and stead.

Dated July 13th, 1931.

H. EDWARD WOLF,
Attorney for the Defendant.

NOTICE OF APPEAL AND GROUNDS.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

GUBELMAN PUBLISHING COMPANY, *Plaintiff-Appellee,*	*Action at Law.*
vs.	*Notice of Appeal and Grounds.*
GEORGE I. RYERSON, *Defendant-Appellant.*	

To Messrs. Blanchard & Carey, Attorneys of Plaintiff, Lefcourt Building, Newark, New Jersey.

SIRS:

PLEASE TAKE NOTICE, that the Defendant, George I. Ryerson, in the above entitled cause, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, on the following grounds, to wit:

1. Because the Supreme Court erred in giving judgment to the Plaintiff instead of the Defendant, in this:

(a) Because the Plaintiff presented no evidence on the issue of fraud and deceit raised by the pleadings herein to support the verdict.

(b) Because of the utter absence of proof on the part of the Plaintiff of damage actually occasioned to it by Defendant by the fraud and deceit alleged by Plaintiff in its Complaint and found for it by the Jury.

(c) Because the trial Judge refused to nonsuit the Plaintiff at the close of Plaintiff's case for its failure to prove fraud and deceit, as alleged in its Complaint, and its failure to prove any actual damage therefore, if such fraud existed.

(d) Because the trial Judge failed to definitely inform the Jury what was the true measure of damages on the issue in this cause and by the Court's indefinite instructions left the whole question of damages at large, without definition by the Court to the discretion of the Jury, and without any criterion to guide them.

(e) Because the court failed to instruct the Jury that in this cause, there was an utter absence of proof on the part of Plaintiff of the actual damages, if any, suffered by it and the force and effect of the evidence presented, would not justify a verdict for the Plaintiff, if any, above six cents damages.

(f) Because the verdict is against such proper instructions as were given by the trial Judge.

(g) Because the verdict bears no reasonable relation to any possible proper proof of damages, if any, shown by Plaintiff.

(h) Because the action was erroneously tried and prejudicially presented to the Jury by the trial Judge, for the most part, upon the theory of breach of contract and not upon the theory of fraud and deceit, as determined by the pleadings.

(i) Because of the following inter alia erroneous and particularly prejudicial instruction by the trial Judge to the Jury.

"What are the damages? That question is not so easy in this case; in fact it is more difficult in this case I think than in any deceit case I have tried. First of all, in a case of deceit or fraud, the damages are generally those damages which naturally and proximately flow from the deceit or the fraud. That is the academic definition, technical definition. I would say in this case with that definition in your mind that it would be proper for you, if you find for the Plaintiff, in discussing damages, to ask yourself what damages has the Plaintiff suffered, remembering that you must approximate those damages with reasonable certainty. We were told that this man, the Defendant, received a certain salary each week. At the time of the break between the parties, it was $50.00, and as I say, he received 10% for the sales above his salary. The Plaintiff alleges that if you take the salary over a period of time, as I understand the Plaintiff's case, and subtract from that this 10% on the gross sales that it leaves some $3,700.00, to which the Plaintiff alleged it is entitled. Whether you find that represents the damages, is for you to decide: I do not know."

(j) Because the verdict cannot be supported by the evidence in this cause on the theory of fraud and deceit set out in the pleadings in this cause, and the remedy of fraud and deceit in a court of law.

Yours respectfully,

ALGERNON T. SWEENEY,
Attorney and Counsel for
Defendant-Appellant.

Service of a copy of the within Notice of Appeal and Grounds, is hereby acknowledged this 11th of March, 1932.

BLANCHARD & CAREY.
Attorneys of Plaintiff-Appellee.

STIPULATION.

NEW JERSEY COURT OF ERRORS AND APPEALS.

GUBELMAN PUBLISHING COMPANY, a corporation, *Plaintiff-Appellee,* *vs.* GEORGE I. RYERSON, *Defendant-Appellant.*	*On Appeal.* *Stipulation.*

It is herein stipulated by and between Algernon T. Sweeney, attorney for the defendant-appellant, and Messrs. Blanchard & Carey, attorneys for the plaintiff-appellee in the above entitled proceedings that, in the course of trial of the above entitled issues, plaintiff-appellee offered in evidence twenty-three exhibits. For the purpose of economy in the cost of printing as well as space, it is herein agreed that each and all of these exhibits shall be taken to have been incorporated in full in the State of Case in this matter, but that they shall be referred to and described in the following manner, rather than set forth in full:

Exhibit P. 1. Invoice and statement of March 26, 1928, in the amount of $22.50 for 1,000 forms, being bill rendered by George I. Ryerson, trading as the Expediency Press, for services rendered to the Eastern Steel Casting Company by the said Expediency Press.

Exhibit P. 2. Bill and statement of George I. Ryerson, trading as Expediency Press, to Eastern Steel Casting Company,

for services rendered under date of May 15, 1928 in the amount of $11.00 for 2,000 forms.

Exhibit P. 3. Envelope containing 9 blotters, cards and specimens of printing done by the Crown Press at the order of and for Mr. Ryerson commencing with April, 1928.

Exhibit P. 4. A second envelope being job No. 3309 containing specimens of work performed by the Crown Press for Mr. Ryerson in the year 1928.

Exhibit P. 5. An envelope being job. No. 3119 containing specimens of work printed by the Crown Press for Mr. Ryerson, together with ledger sheets of Crown Press, showing the record of this transaction with Mr. Ryerson during 1928.

Exhibit P. 6. A further envelope containing five specimens of printing done by the Crown Press for Mr. Ryerson at his request, during the year 1928.

Exhibit P. 7. A blotter printed by The Union Press, Union, New Jersey, for George Ryerson, in May, 1928, the blotter being for the Faitoute Iron and Steel Company, the order having been solicited by Ryerson and placed with the Union Press for execution.

Exhibits P. 8, P. 9, P. 10 and P. 10a are herewith printed in full.

Exhibit P. 11. Envelope of specimens of printing done for Ryerson by the Crown Press in February 1929.

Exhibit P. 12. A blotter ordered of Ryerson and procured by him, trading as the Expediency Press for the Riviera Hotel, pursuant to Order obtained from the hotel for this printing item.

Exhibit P. 13. Job ticket No. 1846 of Charles E. Conover, job printer, representing the printing of 3,000 circulars for Mr. Ryerson for ultimate delivery to James A. Kohl & Co. with specimen enclosed.

Exhibit P. 14. Job ticket No. 1877 representing the printing of 5,000 letterheads for

Lauter Piano Co. by Charles E. Conover for Mr. Ryerson on the latter's order on March 31, 1928, with specimens enclosed.

Exhibit P. 15. Job ticket No. 1875 representing the printing by Mr. Conover for Mr. Ryerson of tickets for the Jube Memorial Church, with which Association Mr. Ryerson was connected. Job done April 6, 1928. Specimens enclosed.

Exhibit P. 16. Job ticket No. 1740 representing the printing by Mr. Conover of 500 circulars on May 12, 1928 for Mr. Ryerson on the latter's order and for the latter's own business. Specimens enclosed.

Exhibit P. 17. Job ticket No. 1739 showing job of printing 1,000 folders of Westinghouse Manufacturing Company for Mr. Ryerson, May 15, 1928. Specimen enclosed.

Exhibit P. 18. Job ticket No. 1850 representing prining of 300 tickets of Mr. Ryerson. Specimen enclosed.

Exhibit P. 19. Job ticket No. 1866 representing 1,000 ledger sheets of Hotel Riviera for Mr. Ryerson. Specimens enclosed.

Exhibit P. 20. Job ticket No. 1529 representing 500 postal-cards of Automotive Equipment Company, ordered by Ryerson and printed by Conover on December 11, 1928. Specimen enclosed.

Exhibit P. 21. Envelope dated April 1, 1929, containing specimens of and representing printing of 500 cards of Hotel Riviera at Mr. Ryerson's order on April 1, 1929. Specimen enclosed.

Exhibit P. 22. Record and specimen of job of printing calling cards of E. L. Snyder (Hotel Riviera) for Mr. Ryerson, at the latter's order, printed by Mr. Conover.

Exhibit P. 23. A collection of envelopes being known as job tickets, containing proofs for different jobs done by the Webb Printing Company for Mr. Ryerson, the jobs being

referred to more particularly at page 52 of the transcript under Mr. Webb's testimony. The jobs run from November 20, 1928 to September 4, 1929.

All these exhibits relate to work done for or by Ryerson on his individual account during 1928 and the first eight months of 1929, except exhibits P. 8, P. 9, P. 10 and P. 10a which are self-explanatory.

BLANCHARD & CAREY,
Attorneys for Plaintiff-Appellee.

ALGERNON T. SWEENEY,
Attorney for Defendant-Appellant.

Exhibit P. 8.

EXHIBIT P. 8.

STATEMENT OF EARNED COMMISSIONS

Salesman G I Ryerson

Dealer	Invoice No.	Direct Orders 20% Accepted 10%	Direct Orders 20% Shipped 10%	Jan to March 28 1925 Reorders 10% Accepted 5%	Reorders 10% Shipped 5%	Total
January Business	2479.76					
February Business	1282.94					
March Business	2847.44					
	6610.14					
10%				661.		
13 weeks at $50.				650.		
				11.		
Deficit Aug 30	133.81					
" Dec 31	73.					
	206.81					
Less	.70					
	206.11					
Less 3/28/25	11					
	195.11					
			Month of April to June 30 1925			
April Business	2440.39					
May Business	1527.21					
June Business	2279.39					
	6246.99					
10%			624.70			
13 weeks at $50.		650.				
Deficit			25.30			
		650	650.00			
Deficit March 28	195.11					
Deficit June 30	25.30					
	220.41					

Exhibit P. 8.

STATEMENT OF EARNED COMMISSIONS

Month of July to September 1926

Salesman G Ryerson

Dealer	Invoice No.	Direct Orders 20% Accepted 10%	Direct Orders 20% Shipped 10%	Reorders 10% Accepted 5%	Reorders 10% Shipped 5%	Total
July Business	1107.98					
August Business	1130.40					
September Business	1372.05					
	3610.43					
10%			361.04			
13 Weeks at $50		650.				
Deficit			288.96			
		650	650.00			
Deficit March 28	195.11					
Deficit June 30	25.30					
Deficit Sept. 30	288.96					
Total Deficit	$509.37					

Month of Sept. to December 1925

October Business	1350.15					
November Business	2064.24					
December Business	1922.39					
	5336.78					
10%			533.68			
13 Weeks at $50		650				
Deficit			116.32			
		650	650.00			
Deficit March 28	195.11					
" June 30	25.30					
" Sept. 30	288.96					
" Dec 31	116.32					
Total Deficit	$625.69					

Exhibit P. 8.

STATEMENT OF EARNED COMMISSIONS

Month of January to March 1926

Salesman G Ryerson

Dealer	Invoice No.	Direct Orders 20% Accepted 10%	Direct Orders 20% Shipped 10%	Reorders 10% Accepted 5%	Reorders 10% Shipped 5%	Total
January Business	2261.07					
February Business	2043.00					
March Business	1757.53					
	6061.60					
10%			606.16			
13 weeks at $50.		650.				
Deficit			43.84			
		650.	650.00			
Deficit for 1925	625.69					
Deficit March 31	43.84					
Total	669.53					

Month of April to June 1926

April Business	1838.39					
May Business	1487.64					
June Business	1858.05					
	5184.08					
10%			518.41			
13 weeks at $50		650.				
Deficit			131.59			
		650.	650.00			
Deficit 1925	625.69					
Deficit March 1926	43.84					
Deficit June 1926	131.59					
Total	801.12					

Exhibit P. 8.

STATEMENT OF EARNED COMMISSIONS

Month of July to September 1926

Salesman G Ryerson Dealer	Invoice No.	Direct Orders 20% Accepted 10%	 Shipped 10%	Reorders 10% Accepted 5%	 Shipped 5%	Total
July Business	1972.55					
August Business	1110.30					
September Business	2048.82					
	5131.67					
10%			513.17			
13 weeks at $50.		650.				
Deficit			136.83			
		650.	650.00			
Deficit 1925	625.69					
Deficit March 1926	43.84					
Deficit June 1926	131.59					
Deficit Sept 1926	136.83					
Total	937.95					

Month of Oct. Nov. & Dec. 1926

Salesman G Ryerson						
October Business	2076.40					
November "	1704.40					
December "	1571.15					
	5351.95					
10%						
13 weeks at $50		650.	535.20			
Deficit			114.80			
			650.00			
Deficit 1925	625.69					
Deficit March 1926	43.84					
Deficit June 1926	131.59					
Deficit Sept. 1926	136.83					
Deficit Oct. 1926	114.80					
Total:	1052.75					

Exhibit P. 8.

STATEMENT OF EARNED COMMISSIONS

Salesman G Ryerson

Dealer	Invoice No.	Direct Orders 20% Accepted 10%	Direct Orders 20% Shipped 10%	Reorders 10% Accepted 5%	Reorders 10% Shipped 5%	Total
			Month of Jan. Feb. & March 1927			
Salesman G. Ryerson						
January Business	1676.10					
February "	1863.45					
March "	2101.00					
	5640.55					
10%						
13 Weeks at $50		650.	564.06			
Deficit			85.94			
			650.00			
Deficit 1925	625.69					
Deficit March 1926	43.84					
Deficit June 1926	131.59					
Deficit Sept. 1926	136.83					
Deficit Oct. 1926	114.80					
Deficit Jan. 1927	85.94					
	1138.69					
			Month of April-May-June 1927			
Salesman G. Ryerson						
April Business	1779.25					
May "	1502.82					
June "	915.10					
	4197.17					
10%						
13 Weeks at $50		650.	419.72			
Deficit			230.28			
			650.00			
Deficit 1925	625.69					
Deficit Mar. 1926	43.84					
Deficit June 1926	131.59					
Deficit Sept. 1926	136.83					
Deficit Oct. 1926	114.80					
Deficit Jan. 1927	85.94					
Deficit April 1927	230.28					
	1368.97					

Exhibit P. 8.

STATEMENT OF EARNED COMMISSIONS

Salesman G Ryerson

Dealer	Invoice No.	Direct Orders 20% Accepted 10%	Direct Orders 20% Shipped 10%	Reorders 10% Accepted 5%	Reorders 10% Shipped 5%	Total
			Month of July-Aug. Sept. 1927			
Salesman G. Ryerson						
July Business	1735.41					
Aug. "	2225.05					
Sept. "	862.25					
	4822.71					
10%						
13 Weeks at $50		650.	482.27			
Deficit			167.73			
			650.00			
Deficit 1925	625,69					
Deficit 1926	427.06					
Deficit Jan. 1927	95.94					
Deficit April 1927	230.28					
Deficit Jul. 1927	167.78					
Total:	1536.70					
			Month of Oct. Nov. & Dec. 1927			
Salesman G. Ryerson						
October Business	1861.35					
November "	1799.80					
December "	1031.02					
	4692.17					
10%						
14 weeks at $50		700.	469.22			
Deficit			230.78			
			700.00			
Deficit 1925	625.69					
Deficit 1926	427.06					
Deficit Jan. 1927	85.94					
Deficit April 1927	230.28					
Deficit July 1927	167.73					
Deficit Oct. 1927	230.78					
	1767.48					

Exhibit P. 8.

STATEMENT OF EARNED COMMISSIONS

Salesman George I Ryerson

Dealer	Invoice No.	Direct Orders 20% Accepted 10%	Direct Orders 20% Shipped 10%	Reorders 10% Accepted 5%	Reorders 10% Shipped 5%	Total
			Month of Jan. Feb. & March 1928			
Salesman						
Jan. Business	1320.30					
Feb. "	1330.15					
Mar "	1166.83					
	3817.28					
10%						
13 week at $50		650	381.73			
Deficit			268.27			
			650.00			
			Month of Apr. May-June 1928			
Salesman						
April Business	976.90					
May "	1643.95					
June "	1148.27					
	3769.12					
10%						
13 weeks at $50		650.00	376.91			
Deficit			273.09			
			650.00			
			Month of July-Aug. Sept. 1928			
Salesman G I Ryerson						
July Business	728.76					
Aug "	996.95					
Sept. "	1421.98					
	3147.69					
10%						
13 weeks at $50		650.	314.77			
Deficit			335.23			
			650.00			

Exhibit P. 8.

STATEMENT OF EARNED COMMISSIONS

Dealer	Invoice No.	Direct Orders 20% Accepted 10%	Direct Orders 20% Shipped 10%	Reorders 10% Accepted 5%	Reorders 10% Shipped 5%	Total
				Month of Oct. Nov. Dec. 1928		
Salesman						
Oct. Business	1620.55					
Nov. "	1085.50					
Dec. "	1211.00					
	3917.05					
10%						
13 weeks at $50.		650.	391.71			
		391.71				
Deficit		258.29				
Deficit 1925	625.69					
" 1926	427.06					
" 1927	714.73					
" 1928	1618.83					
" 1929	516.37	(up to and inc. Month of July				
Total Defict	3902.68					
1925-29	81.10	1st 4 wks. in Aug.				
	3983.78					
				Month of Jan. Feb. Mar. 1929		
Salesman Geo I Ryerson						
January Business	1,522.06					
February "	1,190.33					
March "	1,682.86					
	4,395.25					
10%			439.53			
13 Weeks @ $50.		650.00	210.47			
			650.00			

Exhibit P. 8.

STATEMENT OF EARNED COMMISSIONS

Dealer	Invoice No.	Direct Orders 20%		Reorders 10%		Total
		Accepted 10%	Shipped 10%	Accepted 5%	Shipped 5%	
			Month of April-May-June 1929			
Salesman						
April Business	1,965.10					
May "	1,647.37					
June "	766.56					
	4,379.03					
10%			437.90			
13 Weeks @ $50.		650.				
Deficit—			212.10			
			650.00			
			Month of July 1929			
Salesman Geo I Ryerson						
July Business	1062.00					
10%			106.20			
4 Weeks at $50		200.00				
Deficit			93.80			
			200.00			

Exhibit P. 9

EXHIBIT P. 9.

GUBELMAN PUBLISHING CO.

No. 6909 Newark, N. J., June 8 1923

FIDELITY UNION TRUST CO.

Pay to the order of George I. Ryerson
Pay only one line
Two Hundred Eight Dollars Fifty Two Cents

Gubelman Publishing Co.
By P. J. Gubelman
Treasurer

$208 52/100#

Void unless countersigned, or if statement is detached or altered

Statement

Com. A/c.....208.52

Countersigned
L. T. Gubelman
President

(Endorsed)
Geo. I. Ryerson

Exhibit P. 10.

EXHIBIT P. 10.

Telephone 4662 Mulberry Terms: Net Cash

Statement

ROLLE COMPOSITION CO. Inc.
Linotype—Ludlow—Makeup
85-87 Academy Street
Newark, N. J. Aug. 1 1929

Sold to Ryerson Printing Service
46 William St Newark, N J

Date	Pounds of Metal	Metal	Composition	Total
July 1	Balance	3.90	.50	4.40

I will call you at Gubelman's about this bill.
Rolle.

Exhibit P. 10A.

EXHIBIT P. 10A.

GUBELMAN PUBLISHING CO.

No. 7187 Newark, N. J., Dec 15 1923

FIDELITY UNION TRUST CO.

Pay to the order of George I. Ryerson

Pay only one line

Fifty Nine Dollars Seventy Four Cents

Gubelman Publishing Co.

By P. J. Gubelman

Treasurer

$59 74 100#

Void unless countersigned, or if statement is detached or altered

Statement

Com. A/c 59.74

Countersigned

L. T. Gubelman

President

(Endorsed)

George I. Ryerson

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

New Jersey Court of Errors and Appeals

GUBELMAN PUBLISHING COMPANY, a Corporation,
Plaintiff-Appellee,

vs.

GEORGE I. RYERSON,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT.

Plaintiff is now and has been since 1908, engaged in Newark, in the business of job printing and printing specialties. The defendant, for about the same time, has been engaged in the printing industry in Newark and vicinity and is a practical printer and immediately before his employment by plaintiff, conducted a small job printing shop of his own.

In 1918, plaintiff advertised for a salesman and from the applicants plaintiff engaged defendant to solicit printing for it. The terms of employment were a stated salary of $25.00 per week and in addition thereto, commissions to such amount as 10% of the amount of his weekly sales exceed his salary, which commissions were to be paid on a quarterly basis. But the salary agreed upon was not to be affected by earned or unearned commissions. The salary was gradually increased to $30.00, then to $40.00 and finally to $50.00 in 1922 or 1923.

No commissions under this agreement were paid after December 15, 1923.

In 1922 or 1923, plaintiff supplied defendant with an automobile to enable him to cover more

ground in soliciting business and allowed defendant $12.00 or $15.00 per month for the rent of garage at defendant's home where the car was housed. This business arrangement continued until on or about August 30, 1929, when plaintiff terminated the employment on the alleged ground that plaintiff had discovered that defendant was placing some printing work with other printing concerns and was doing some jobs himself. The following month plaintiff instituted a tort action grounded upon deceit in the Supreme Court to recover $15,000.00 damages and upon the trial thereof on March 12th and 13th, 1931, at the Essex Circuit, before a Circuit Court Judge and jury, a general verdict was rendered by the jury in favor of the plaintiff and against the defendant in the sum of $2,840.50 upon which a judgment was entered in the Supreme Court in favor of the plaintiff for $2,840.50 damages and $74.88 costs on March 19, 1931.

Questions involved on this appeal appellant seeks to present questions upon the following points:

1. Appellant contends there is no evidence whatever or proof of fraud and damages in the case to justify the verdict upon which judgment was entered.

2. The defendant's motion for non-suit at close of plaintiff's case should have been granted.

3. The charge of the court was erroneous in law and the court did not instruct the jury in respect to what elements and within what limits damages might be estimated in this case.

4. The evidence does not show the case within the legal rules upon which the court submitted the case to the jury.

5. The charge of the court is erroneous in law (raising other questions than the one raised by question three).

6. The verdict is contrary to law in that it rests upon no lawful foundation.

POINT I.

There is no Evidence whatever in the Case to Justify the Findings of the Supreme Court.

Grounds of Appeal:

Because the Supreme Court erred in giving judgment to the plaintiff instead of the defendant, in this:

(a) *Because the plaintiff presented no evidence on the issue of fraud and deceit raised by the pleadings herein to support the verdict.*

(b) *Because of the utter absence of proof on the part of the plaintiff of damage actually occasioned to it by defendant by the fraud and deceit alleged by plaintiff in its complaint and found for it by the jury.*

This court will say that the rule of law applicable in this class of cases is elemental and firmly established; that fraud will never be presumed, but must be proved. As this court said in *Guerber Engineering Company* v. *Stafford,* 96 N. J. L. 280, same case C. A. 114 Atl. 747, at page 748: "The law presumes that business transactions are honest. In other words, fraud is never presumed, and where a party to the transaction alleges its existence the burden rests upon him of proving the truth of his allegations." Equally true is it, as stated by Mr. Justice Depue in the leading case of *Cowley* v. *Smith,* 64 N. J. L. 380, at page 383.

"In such an action (deceit) a false representation without a fraudulent design, is insufficient. There must be moral fraud in the representation to support the action. Pasley *v.* Freeman, 3 T R 51; Haycraft *v.* Creasy, 2 East 92, are the leading cases," and quotes and follows the judgment of Lawrence, *Judge,* in the *Haycraft case, supra,* as follows:

> "If he make it, (representation) with a malicious intention that another should be injured by it, he shall make compensation in damages. But there must be something more than misapprehension or mistake."

In other words, that the defendant has been wilfully guilty of moral fraud in what he has done, as per Lord Haldane, Lord Chancellor, in *Norton* v. *Ashburton* (1914) A. C. 932, in which the Lord Chancellor said, *inter alia:*

> "My lords, I have dealt thus fully with this distinction (between actions on contract and in deceit), because I think that confusion has arisen from overlooking it. It must now be taken to be settled, nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit. This is so whether a court of law or a court of equity in concurrent jurisdiction is dealing with the claim, and in this strict sense, it was quite natural that Lord Bramwell and Lord Hershel should say that there was no such thing as legal, as distinguished from moral, fraud."

In the instant case, to cite cases or to cite further authorities, or even to cite any to this court upon this point would be supererogation, except for the fact that there is no direct proof of an intention to cheat and in the view of the appellant, in the light of the authorities, no evidence upon which a just inference can be based of a wilfull intent to injure the plaintiff by the defendant.

Kerr, on Fraud and Mistake, 5th Ed. at page 474, says:

> "A man who alleges fraud must clearly and distinctly prove the fraud he alleges. The *onus probandi* is upon him to prove his case as it is alleged in the statement of claim (a) or in his particulars (b). Every material step in the evidence which makes out a case of fraud must be proved by sufficient evidence (c). * * * If the fraud is not strictly and clearly proved as it is alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings (e). Fraud will not be carried by way of relief one tittle beyond the manner in which it is proved to the satisfaction of the Court (f)."

In *Angus* v. *Clifford,* C. A. (1891), 2 Ch. D. 449, at page 479, Mr. Justice Kay said:

> "But assuming it to be sufficiently raised by the statement of claim (the issue of deceit), there is no proof and no attempt at proof that the reports were in fact untrue. It seems to me that it is impossible for any court to assume anything to assist the plaintiff to make out his case of fraud. Every step, every material step in the evidence which makes out a case of fraud, it is incumbent upon the plaintiff who alleges fraud to prove by sufficient evidence."

To the same effect is the opinion of Mr. Justice Pitney, in *Northwestern Mutual Life Insurance Company* v. *Breautigam,* 69 N. J. L. 89, at page 92, where the Justice said, *inter alia:*

> "In Byard *v.* Holmes, 5 Vroom 286, it was held that in an action of this character the plaintiff must show with reasonable certainty in his declaration not only what the fraud was by which he has been injured, but also its connection with the alleged damage, so that it may appear judicially to the court that the fraud and the damage sustained to each other the relation of cause and effect,

or at least that the one might have resulted directly from the other."

It is well established as Lord Halsbury said in *Peek* v. *Derry,* 14 Appeal Cases 337, that in dealing with actions of this character, fraud without damage or damage without fraud, does not give rise to such an action. And Lord Chancellor Westbury in *Luff* v. *Lord* (1865), 11 Jurist, (N. S.) Vol. I, page 50, at page 52 said:

> "This is a case which I am obliged to treat upon the strict principles of the court applicable to a case of fraud. Undoubtedly those principles are of a very wholesome character; and I think it most desirable that they should be strictly observed. Fraud ought not to be carried, by way of relief, one tittle beyond the manner in which it is alleged, and in which it is proved. Further: if there be a bill founded upon an allegation of fraud, and that fraud is shewn not to have existed at all, it would be impossible, with any propriety, to attempt to sustain that bill upon any other ground." * * *

Conduct may be deemed wrong, imprudent, censurable and improper, but not deceitful, in the legal sense as illustrated by Lord Bramwell's judgment in the well-known case of *Derry* v. *Peek, supra,* at page 345, in which judgment, in voting to reverse the appeal of the court below, which had found the defendants, promoters of a company, had practiced fraud, Lord Bramwell expresses the hope that the judgment would not be misunderstood and said:

> "Particularly, should I regret if it was supposed that I did not entirely disapprove of the conduct of its directors who accepted their qualifications from the contractor or intended contractor. It is wonderful to me that honest men of ordinary intelligence cannot see the impropriety of this."

And the great jurist, Jessel, makes the same discrimination in *Smith* v. *Chadwick,* L. R. (1882) 20 Ch. D. 27, where the great Master of the Rolls said, *inter alia:*

> "In this particular instance therefore, even assuming that the name was improperly placed on the prospectus—and I do not think it was rightly placed, and I do not wish to say I sanction any such proceedings—I think it is wrong and an imprudent proceeding, but I do not think it was more than that."

In the instant case, the pertinent allegations of fraud against the defendant are found in the fourth, fifth and sixth paragraphs of plaintiff's complaint as follows:

4. Notwithstanding said performance by the plaintiff defendant has at all times since April 1, 1925 fraudulently and deceitfully used said automobile and the greater part of his time and efforts in soliciting business and orders from plaintiff's regular customers and others for his, the defendant's own personal benefit and account which orders defendant secured and fulfilled to his own benefit and profit and to the detriment, harm and injury of the plaintiff. Defendant further persuaded many of the plaintiff's regular customers to deal with defendant and not with the plaintiff, falsely representing to said customers that plaintiff was no longer able to perform and execute for said customers their orders.

5. During said period from April 1, 1925 up to and including the 16th day of August, 1929, defendant fraudulently and deceitfully represented to the plaintiff intending that plaintiff should rely upon said representation that he, the said defendant was devoting his full time and best efforts exclusively for the service and bene-

fit of the plaintiff and did fraudulently and deceitfully continue to ask for, obtain and receive from the plaintiff $50.00 in cash on Friday of each and every week, the said plaintiff believing and relying upon the said fraudulent and deceitful representations. During said period defendant did fraudulently ask for and receive from the plaintiff the sum of $11,450.00. The said sum of $11,450.00 exceeds by $3,788.67 the sum of ten per cent. of the value of the orders procured by defendant for the plaintiff during said period.

6. As a result of defendant's fraudulent and deceitful conduct and his knowingly, fraudulent and deceitful representations to the plaintiff, plaintiff has been injured by the loss of customers and profits which might reasonably be anticipated from executing orders for said customers and by the payments of money to the defendant upon the aforesaid fraudulent representations made to the plaintiff by said defendant.

The allegation in the last sentence of paragraph 4 that "defendant further persuaded many of the plaintiff's regular customers to deal with the defendant and not with the plaintiff, falsely representing to said customers that plaintiff was no longer able to perform and execute for said customers their orders" may be disregarded because there is not a scintilla of evidence to prove it, neither was there apparently any effort to do so.

In all the testimony of the witness there is but one reference to the automobile in the inconclusive testimony of Mr. Henry H. Mills, at page 58, line 8, where the witness answers in response to the question, "Did you ever see Mr. Ryerson carry in the automobile furnished by

the company any work that would appear not to be work of Gubelman Publishing Company? A In August, 1929, I passed his car and noticed a frame used on printing presses and in that frame was a code locked up, which I am perfectly positive was a code used in printing a job which he was furnishing the Hotel Riviera, because I had seen that job a few days previous to that in the printing form. Q That was in the car furnished to him by Gubelman Publishing Company? A That is right."

August, 1929, is the month the defendant was discharged. As to the other part of said allegation in the first sentence of paragraph 4, that defendant had "at all times since April 1, 1925 fraudulently and deceitfully used said automobile and the greater part of his time and efforts in soliciting business and orders from plaintiff's regular customers and others for his, the defendant's, own personal benefit and account, which orders, defendant secured and fulfilled to his own benefit and profit and to the detriment, harm and injury of the plaintiff," the plaintiff offered no proof whatever of any conduct of the defendant in accord with this allegation before the beginning of the year 1928; neither did the plaintiff offer any proof of the time which defendant used in soliciting business, etc., "which orders defendant secured and fulfilled to his own benefit and profit and to the detriment, harm and injury of the plaintiff," except the testimony of Mr. Conover at page 49, who said in response to the question (line 22): "Q You would not be prepared to estimate the length of time Ryerson operated your press, an approximate idea? A Well, I should think Mr. Ryerson devoted about one hundred hours at least during 1928 and 1929." And at page 52, line 27, this

witness, who was, of course, the plaintiff's witness, in response to the question: "Q When did Mr. Ryerson work at his press, what part of the day? A Saturday afternoons or night." So much for the time element, except as to the testimony of Mr. James A. O'Neil, the first witness for plaintiff, who stated, page 12, line 18: "Q How often did he used to come around? A About once a month. Q In the beginning of 1928? A Yes, sir."

Plaintiff did prove that in the years 1928 and 1929, Mr. Ryerson had taken orders for work from witnesses produced at the trial, amounting to $263.25, as established by five witnesses; the first, Mr. John A. O'Neil (at page 14) testified to $33.50 worth of work for the Eastern Steel Casting Company; Mr. Alfred Gross, (at page 16) testified to $45 worth of lithographing reproduction work, which he stated was a special line and not usual for a printer to do (and there is no evidence in the case that the plaintiff did do this kind of work); Mr. Otto Voight (at page 17) testified to $55 worth of work; and Mr. Charles H. Blakeman, (at page 21) testified to $14 worth of work; and Mr. Charles E. Conover (at page) testified to $115.75 worth of work, totaling $263.25 worth of orders that the defendant had taken and had either done the work himself or had it done by others than plaintiff company.

These and other witnesses testified to other work which Mr. Ryerson had solicited and had filled during the years 1928 and 1929 as appears by stipulation, pages 89, 90, 91 and 92 of the State of the Case, but there is no legal evidence in the case of the amount of such other work or the cost thereof.

Before discussing this point further, it may be well to call the attention of the court to the fact that as to the allegation in the complaint under discussion that these orders were solicited "from plaintiff's regular customers and others," Mr. Leopold T. Gubelman, the president of the plaintiff, himself, disclaimed that allegation on page 63, where in response to the question, line 29: "Q Name the customers who are regular customers. A *I don't say they are regular.* We have had work from time to time from the General Tube Company, Lauter Piano, Westinghouse up to 1928; Continental Electric, and Baker Electric. That is all of this." Returning to the matter of proof and to the fact that there was not a particle of proof introduced into the case by the plaintiff as to the cost of said work or the value thereof, or the injury, if any, suffered by the plaintiff specifically on account of these orders, it is proper to point out that rightly or wrongly, such evidence was deemed by plaintiff immaterial and irrelevant as shown by the following incidents in the trial:

On page 51, line 15, question addressed to plaintiff's witness, Mr. Charles E. Conover by Judge Wolf, the trial attorney for defendant, at line 16: "Q Here is one marked April 13, 1926, the Kohl job of 3,000 circulars. What was that job worth? A It cost $107.25." And then ensued the following colloquy between Mr. Carey and the court (the argument of counsel not appearing):

> "Mr. Carey: I object to what the jobs were worth as irrelevant under the pleadings. I think it might be well to urge that now to save time.
>
> Mr. Carey: The basis of this action is the $50 a week salary he was drawing and turning in occasionally an order to make

it look as if he was still working for Gubelman. On that occasional order he would get 10 per cent. which is the commission rate and which is customary in business, but the difference between that and 10 per cent. he should pay back to Gubelman and that is the basis of the damages and not what he made on the outside jobs. Therefore any relation to anything he got on this job or any other job is irrelevant and immaterial.

(Argument.)

The Court: If you hire a man to work for you and you pay him for it, of course, he owes you what we ordinarily call fidelity. He is supposed to devote his time to your business and if he does not do that and accepts your money, in my opinion the entire amount is due. It is an absolute failure of consideration. An employee cannot take money from one man and be absolutely falsely and untrue to him. There is no question about that at all. I do not know that this happened, but I say that an employee who is faithless is not entitled to any salary and if he gets it I do not know why the employer should not get it all back. If you want to show these amounts merely to show they are trivial, I will admit it, but not as forming any basis for damages.

Mr. Carey: To save time I will say that the value of the jobs is trivial compared with the volume of the jobs done, as far as I know. I haven't been able to trace other jobs this man has done over a period of years, but I have found enough jobs to prove what his practice was during those years.

Q When would Mr. Ryerson work at your place, what part of the day? A Saturday afternoons or night."

Lord Justice Bowen in *Ratcliffe* v. *Evans* (1892), 2 Q. B. D. 524, page 528, in giving judgment in an action founded upon deceit said, *inter alia:* "To support it, actual damages must

be shown, for it is an action which only lies in respect of such damage as has actually occurred." This court stated the same principle in an action of deceit in *Bingham* v. *Fish,* 89 N. J. L. 688, saying:

> "The rule of law to be applied in this class of cases is elemental and firmly established, viz., the plaintiff in an action of deceit must show that he has sustained the damages which he alleges he suffered."

Lams v. *Fish,* 86 N. J. L. 321;
Crater v. *Binninger,* 33 N. J. L. 513;
Smith v. *Duffy,* 57 I. D. 679;
Duffy v. *McKenna,* 82 I. D. 62;
Smith v. *Bolles,* 132 U. S. 125.

The plaintiff does not, of course, question the accuracy of this statement of the rule of law, but does differ from appellant in the application of the principle of law just stated to the important facts in this case.

The consistency of the point of view of the plaintiff as to the basis of proof to be submitted upon which a verdict in this action might with legal propriety be founded is further shown by the plaintiff's request to charge which was denied by the court.

> "PLAINTIFF'S REQUEST TO CHARGE.
>
> If Mr. Ryerson did jobs testified to by plaintiff's witnesses and admitted by Mr. Ryerson, and the contract of hiring was on the basis of a fixed salary plus a commission as also admitted by Mr. Ryerson, then it was Mr. Ryerson's duty not to enter into business for himself and his doing so was a failure of consideration in his contract of employment for which the plaintiff is entitled to a return of salaries.
>
> DENIED."

And again on page 56, upon cross examination of plaintiff's witness, Mr. Thomas Webb, Judge Wolf (line 20) inquired: "Q Have you any knowledge of what this batch of work cost from November 1928 to September 4, 1929? A They are all marked on the envelopes. Mr. Carey: I object to that as irrelevant. Mr. Wolf: Will you agree then that it does not exceed $200? Mr. Carey: I do not know, but I will agree it is irrelevant and comparatively trivial. The Court: I would suggest that you limit your cumulative evidence, if you can do so. Mr. Carey: Very well."

Appellant takes quite the opposite view and rightly or wrongly believes that the plaintiff in effect was endeavoring to ride Judge Sanborn's two horses going in opposite directions, used by way of illustration by him in his judgment in the case of *Wilson* v. *U. S. Cattle Ranch Co.*, 73 Fed. Rep. 194, which was quoted and sanctioned by this court in *Kvedar* v. *Shapiro,* 98 N. J. L. 225, at page 228, where the late Justice Katzenbach quoted Judge Sanborn, as follows, *inter alia:*

> "It is as difficult a feat to maintain a cause of action for the consideration paid for the purchase on the ground of rescission and one for damages for the fraud which induced it and for a breach of the contract of purchase itself, in the same action, as it is to ride at the same time two horses that are traveling in the opposite directions."

The point of view of appellant is succinctly indicated by interrogatory statement of Lord Justice Hannen in *Peek* v. *Derry* (1897), C. A. 37 Ch. D. 541 (judgment reversed by House of Lord but upon other grounds), at page 594, Lord Hannen said, *inter alia:* "The question is,

how much worse off is the plaintiff than if he had not bought the shares?'' So it seems to appellant that the burden of the plaintiff was first to establish deceit within the legal rules above stated, and second, to establish by proper legal evidence the actual damage, if any, which had occurred as a direct consequence of defendant's conduct.

The court will note that the plaintiff's basis of this action, as stated by Mr. Carey, *supra,* was the difference between the amount of the salary of $50 a week drawn by the defendant from the first day of January, 1925 to the date of defendant's discharge about August 30, 1929 and 10 per cent. of the gross sales made by Mr. Ryerson during that period, which as claimed by the plaintiff, page 26, line 28, amounted to approximately $3,780.

Assuredly, if there was misconduct of the plaintiff in 1928 and 1929, it could not possibly relate itself back to 1925, 1926 and 1927, during which time the defendant's services were entirely satisfactory to the plaintiff as is shown by the following circumstances:

Defendant testified without challenge or contradiction that during his employment by plaintiff, he was offered other positions (page 77, line 30) but at the suggestion of Mr. Gubelman he did not accept them and that (line 37) Mr. Gubelman stated: ''He said I could stay as long as I wanted to''; and at page 68, he testified without challenge or contradiction that the use of the automobile above referred to was given to him as a premium for not accepting at that time an offer from the Print Shop (lines 39 and 40, page 67); and on page 68, defendant stated: ''Several times I was offered a good position

with another concern and they told me to lay off and in one instance he offered to give me an automobile and he told me to get it and consider it mine, it was always in my possession. I had to maintain it. He did that as a premium for my staying. The Print Shop was the firm I referred to that offered me that position at the time."

That plaintiff was satisfied with the services of defendant during these years 1925, 1926 and 1927 is further irrefragably established by his own testimony that early in the year 1928, Mr. Ryerson proposed changing his contract to a strict 10 per cent. commission, which Mr. Gubelman declined (page 34, line 3): "Q Now, at no time during the employment was there any discussion between you and Mr. Ryerson to change the agreement existing between you and he, was there? A At one time only. Q At that time he offered to disregard the weekly salary and go on a strict commission basis? A Yes, sir. Q What brought up that discussion? A I suppose he was falling behind and thought it might be better the other way. I don't know." Parenthetically, may we respectfully raise the question, if that sounds like a cheater? Again, at page 35, line 69: "Q At this time he gave you an offer to work for you for a certain commission and which, according to your records was to his disadvantage, what discussion had been going on between you and Ryerson that brought that about? Did you complain about the amount of business he was bringing in? A I called his attention to the fact that we needed more business, but there was no question about cutting his salary."

The time of this proposition of Mr. Ryerson's is not in practical dispute. Mr. Gubelman having

testified at page 31, line 1: "Q When did he come to you with that proposition? A I imagine about eighteen months before he culminated his services with us, he suggested he would like to go on a commission basis. Mr. Ryerson's testimony upon this point is in accord, page 75, line 3: "Q Then, a year and a half? A A year and a half before I got fired. Q You said, 'Put me on a straight commission basis'? A Yes, I just said that because— Q Wait a minute. You asked to be put on a commission basis a year and a half ago during the period you were receiving $50 a week? A Yes."

That Judge Wolf was entirely justified by the facts in including in his question (page 35) as to Mr. Ryerson's proposition as to a straight 10 per cent. commission "and which according to your records was to his disadvantage" is conclusively shown by the statement of the records, rightly or wrongly, properly or improperly, introduced in evidence, page 26, line 30, marked "Exhibit P. 8" and printed in the record, pages 93 to 101, inclusive, and by the testimony of Mr. Gubelman, page 26, line 16, that it was well known to plaintiff that 10 per cent. of defendant's gross sales each year was less than the salary received by him from April, 1925, page 26, line 16. "Q Beginning with April, 1925, as revealed by your records there, do you find a steady periodical deficit in Mr. Ryerson's business for you? A From there on, the deficit had increased," and as above stated, in response to an inquiry by the court, "By the Court. Q What did the deficit amount to? A Approximately, $3,780."

It may be well here to advise the court that in the view of the appellant, the word deficit as here used was a misnomer and one hundred

per cent. misleading, and mischievous as the testimony is indisputable that Mr. Ryerson was working on a stated salary of $50 per week and that the matter of commissions was only taken into account in increasing that amount but never in decreasing it and that all reference to the commissions, aside from the manifest error it created, is academic, as it is conceded that no commissions were ever earned after December, 1923.

Mr. Gubelman testified explicitly on page 24, line 4, that since May 1924, Mr. Ryerson was paid $50 each week up until August 1929 and to the question (line 14, same page): "Q Was there any arrangement made with him whereby he might increase the amount he got weekly if the volume of his sales warranted it? A Yes. Q Explain that. A When arriving at a figure which he himself determined, he stated that he expected to be advanced as sales would increase and then we talked over the question of a commission to be paid him on all amounts of sales over his salary to be taken care of quarterly and if at any time there be a portion not earned in a subsequent quarter, it was to be taken out of the following quarter. There was nothing changed as to his drawing account, the salary. Q No change whatsoever of the $50? A No. Q But a possibility of earning more than that? If he turned in the business, yes. Q If the volume of sales warranted? A Yes, sir. Q That was based on commission of what? A Ten per cent. was our allowance for selling." And upon cross examination on this same subject, page 33, line 23: "Q You are positive that Mr. Ryerson was to receive the amount of salary agreed on between you and he, whether or not the amount of business he

brought in amounted to ten per cent.? A Absolutely, there was never any salary retained. Q There is no disagreement there at all between you and he? A No. Q He was to receive so much a week positively? A Positively. Q Whether business was good or bad? A That is right. Q You continued with that arrangement from 1929, the time his employment was terminated? A Right."

As to the further allegation in said paragraph 4 of the complaint (State of the Case, page 4) that "defendant secured and filled for his own benefit and profit and to the detriment, harm and injury of the plaintiff," the plaintiff introduced no evidence whatever of the proof of either of those two propositions, and as appellant views this case, for plaintiff to succeed in this action, it was essential to prove the latter part of the same, "the detriment, harm and injury of the plaintiff."

In all the testimony so far as we can discover, there is not one particle of evidence in the whole case showing that the orders or work mentioned in the stipulation, page 89, and the orders testified to by the witnesses as above stated, had not each and all been submitted to the plaintiff by Mr. Ryerson in regular course for bidding in the first instance and that he took some of them later, after the business had been lost to plaintiff because of the price quoted by plaintiff; and that, beginning in 1928, he did salvage some small orders because as he states he was otherwise losing customers that had been with him when he was conducting a printing shop of his own before his employment with plaintiff.

State of the Case, page 68, line 29: "Q They were customers you brought to Gubelman Publishing Company? A Yes. I was doing work for them when I was in business for myself. Q Did Gubelman estimate on those jobs? A Yes, invariably, without exception. Q Why did you take them somewhere else? A Because I was constantly losing business, not only business, but customers. Some of those customers I had as long as twenty years and I still have some."

Two of the jobs were specifically referred to in the testimony and explanation given that bids of Mr. Gubelman were not acceptable because of high prices. One was the Boy Scouts job (page 70, line 11) and the other the Church job (page 72, line 18) where defendant had solicited as a personal favor reduced prices for the work and had been refused. Mr. Gubelman, himself, confirms the fact that one of the biggest jobs, the Lauter Piano Company, was submitted and an estimate given which was not accepted and as heretofore stated, the plaintiff's witness, Mr. Herman Franklin Fischer testified that the defendant had been so persistent in soliciting work from him as to secure an opportunity to have the Gubelman Publishing Company rebid, (page 41, line 39) but that was not acceptable, it was too high (page 42, line 1) and only then did Mr. Ryerson suggest that he might get a better figure if they would give him an opportunity, which he did.

This Court has held in *Carton* v. *Phelps,* 39 Eq. 312, at page 314, that in appeals from Chancery, this court is not justified in rejecting the uncontradicted testimony as was done in the court below. The observations in that case as to the rule in a law tribunal referred, we think, to controverted facts and not to facts

not controverted as upon this particular point, here; and in *Lomer* v. *Meeker,* 25 N. Y. 362 (1862) the New York Court of Appeals held that "the witness was not impeached or contradicted. His testimony is positive and direct and not incredible upon its face. It was the duty of the court and jury to give credit to his testimony. The positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by court or jury arbitrarily or capriciously."

In the case of *Angus* v. *Clifford, supra,* it was argued before Mr. Justice Kay in an action of deceit against the directors or promoters of a corporation that the fact that the company had failed was of itself evidence of misconduct. Needless to say, the Lord Justice refused to accede to that argument and reminded counsel that allegations of deceit must be strictly proved, but incidentally pointed out, that in that particular case lack of sufficient capital would furnish one reason, which might be named for the failure of the company.

In the instant case, strength was laid upon the fact that the sales of Mr. Ryerson in the year 1928 were less than in previous years, but there is no evidence, whatever, it is respectfully submitted, connecting such decrease with these small orders taken by Mr. Ryerson.

On the contrary, it is conclusively shown by the testimony that it might very well have been the prices charged by plaintiff on account of which he lost both orders and customers. The complaint of high prices on the part of both Mr. Ryerson and the plaintiff's own witnesses runs through the testimony like a lief motif, and Mr. Gubelman, himself, frankly stated (page

35, line 21) "and we did not pretend to be cheap printers." This statement was made in connection with the following questions:

Page 35, line 9. "Q At this time he gave you an offer to work for you for a certain commission and which according to your records was to his disadvantage, what discussion had been going on between you and Ryerson that brought that about? Did you complain about the amount of business he was bringing in? A I called his attention to the fact that we needed more business, but there was no question about cutting his salary. Q Was anything said at that time about your prices being too high? A That is the old cry, the old, old cry. It did not take salesmen to sell prices down below cost and we did not pretend to be cheap printers."

Again, on page 61, line 15. "Q Ryerson continuously worked for lower prices, didn't he? A Yes, sir. Q He told you he was losing business because your prices were too high? A Yes. Q You failed to receive a lot of work he had brought in requesting bids on. A We have an estimate of bookkeeping and accounting at the end of the year showing us exactly what profit we make. Q I do not doubt that you run your business right. My question is, on a great deal of the work Mr. Ryerson solicited you lost it because of your prices? A Probably. I could go out and get twelve bids and there will be 50 per cent. difference in the bids."

Again, on page 62, line 33. "Q When he said to you he was going on a commission basis did he tell you at that time your work was too high? A Salesmen always complain that prices

are high. Q From the day Ryerson started with you until he quit, he complained that your prices were too high? A No, he did not, always."

In the light of the above statements of Mr. Gubelman, himself, that his company did not pretend to be cheap printers and his frank admission that a great deal of the work Mr. Ryerson solicited was probably lost because of plaintiff's prices, is appellant not entirely within reason in saying that within the legal rules in actions of fraud as above set forth and as continuously applied by this court, no amount of damages whatever to the plaintiff, even if fraud should be found, can be predicted upon these transactions.

In the leading case of *Hartfield* v. *Central R. R. Co.,* 32 Law (4 Vr.) 252, at page 253, Chief Justice Beasley, speaking for the Supreme Court, said, *inter alia:*

> "Nor can the mere possibility that if the railroad track had incommoded the property, it would have been more profitably employed, by being taken into consideration. Mere speculative opinions as to what would have been the case under an altered state of fact, can never afford ground for any legal appraisement of damages. Under these circumstances, the plaintiff was to be compensated simply for the ill effects from this nuisance to his lumber business, and yet, although I have examined the testimony in this aspect, I do not find a single witness who speaks to this point. There is absolutely nothing in the case to show that this business was, in any material respect, inconvenienced by the railroad of the defendants. * * * Not a word fell from the lips of a single witness on the subject."

And to the same effect Chief Justice Taney, in *U. S.* v. *Breitling,* 20 Howard 252, page 255, a. c. 15 Law Ed. 900, at page 902, said *inter alia:*

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered." The instruction presupposes that that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions but its tendency to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

The above analysis or criticisms apply to paragraph 5 of the complaint and as stated by Lord Bramwell and Sir George Jessel, *supra,* conduct may be wrong, imprudent, and can even be a breach of contract without being fraudulent and deceitful, and certainly the mere allegation of fraud and deceit are futile. The rule that there must be moral fraud has become elementary in this court. And as Chancellor Walker stated in *Feickert* v. *Feickert,* 98 N. J. Eq. 444, at page 447, in speaking of the assumption to treat a decree in a foreign jurisdiction as invalid, the Chancellor said, *inter alia:*

> "I am not permitted to indulge any such presumption. In law, the presumption is the other way. If they are invalid, it is because they are fraudulent, and fraud is never presumed but always has to be strictly proved."

As above pointed out there was no proof of any conduct on the part of the defendant about which any question could be raised before January 1, 1928, and therefore, the statements herein as to the amount of the salary and the

excess over percentum have no application to the first three years covered by this complaint, even if they have such application at any time, which theory is, of course, denied by appellant.

By this allegation (paragraph 5 of complaint) and by the whole case in appellant's view, the plaintiff is seeking, and has so far succeeded, as the appellant thinks, in having the court create and give specific performance to an entirely new contract between the parties and that to a contract which from the very beginning to the end, the plaintiff testified was offered by the defendant, but rejected by the plaintiff.

As to the allegations in paragraph 6 of the complaint, there is not one particle of proof of one customer lost to the plaintiff; there is not one dollar or one cent of profit shown which might reasonably have been anticipated from executing orders. On the contrary, as above stated, all questions upon that head were held by plaintiff on the trial to be irrelevant and immaterial, other than the payments of money to the defendant and as already stated there was no testimony offered and no endeavor to offer any testimony as to the difference in the value of the services as rendered by plaintiff as shown by the testimony and the value of such services if they had been rendered exclusively for plaintiff without the defendant's having taken and executed any of the small orders, as shown by the testimony.

In the appellant's view, this is the crux of the whole case and brings the case squarely within the rule in *Duffey* v. *McKenna,* 82 N. J. L. 62, at pages 67 and 68, which was an action in deceit in this court, and this court held, as appellant reads the decision of Justice Parker,

at pages 67 and 68, that it was the duty of the plaintiff to furnish the evidence between the price paid by the purchaser and the real value of the property that he had acquired.

The court further held (page 68) that it was the duty of plaintiff to provide this evidence in order to prove his case, and without it there was no means of applying the proper rule of damages. The court was requested to charge the jury that the verdict should be only for nominal damages and it was held that in view of this failure of evidence, "the motion should have been granted because without this evidence in this case, the verdict rests upon no lawful foundation and cannot stand."

It is respectfully submitted that the foregoing is parallel to the instant case.

POINT II.

The Defendant's Motion for Non-suit should have been Granted.

Grounds of Appeal:

(c) Because the trial judge refused to non-suit the plaintiff at the close of plaintiff's case for its failure to prove fraud and deceit, as alleged in its complaint, and its failure to prove any actual damage therefor if such fraud existed.

As appears by the State of the Case, page 65, upon the close of the plaintiff's case, Judge Wolf moved the court for a non-suit for reasons stated, which motion was denied as appears by the following:

> "Mr. Wolf: I respectfully move for a non-suit on the first ground that there is no evidence of fraud and deceit upon which this case is based.

On the second ground that there is no element of damages, no damages have been proved. It was a contract, as explained before, to guarantee this man's salary, that he is entitled to have work of his own done on the side; if he renders services to the firm, allowed to do work on the side on Saturdays and nights and Sundays, and I think there is no proof here on the part of the plaintiff been proved and on the first ground there is no fraud and deceit in this case.

The Court: I am supposed to give my reasons for denying the motion, but I had better not give them now and I will deny the motion.

I do not understand the testimony to be exactly as you quote it, particularly concerning the nature of the contract.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal."

This court has time and again, particularly, in the *Bingham* v. *Fish case, supra,* held that in an action of deceit, even if plaintiff sustains the burden of establishing deceit, he must show he has sustained the damages he alleges he suffered. This court too, like many others, has time and again pointed out the errors that arise through confusing the rule of damages applicable to contracts and to deceit, and in appellant's view, in the light of the analysis made of the testimony offered in this case under Point I, it is believed that *Smith* v. *Cohen,* 256 N. Y. 33, offers a parallel instance of the error made in the instant case below.

In the *Smith* v. *Cohen case,* which was an action upon fraud upon a promissory note of $790.85, it appeared that the plaintiff, a builder, had performed labor for the defendant and had received a promissory note representing the

value of said work. Through some not nice conduct, which in the complaint in that case was deemed fraudulent, the defendant obtained possession of the original note which he destroyed, giving the plaintiff a new note which defendant represented plaintiff could have cashed at once without personally endorsing the same at a local bank. Upon discovery of the misrepresentation, plaintiff brought an action in fraud upon the second note and a judgment was rendered upon the verdict of the jury for the full amount of the note with interest. In reversing the judgment, the court by Judge Crane said, *inter alia:*

> "If we should consider the case alleged as made out, it is quite apparent that the result cannot be sustained as there is no proof of damage. The first note was destroyed by Mrs. Cohen when she received it, but she did not and could not destroy the indebtedness. If the defendants were good financially, the debt was as good as the note; in this case, judgment for the one could have been as easily collected if obtained, as for the other. Damages on the fraud charge would be the value of the first note not merely its amount. If the defendant were insolvent, it had little or no value. There is no proof of damage. * * * Although the defendant owed the money, the courts cannot give judgment as on contract when the complaint is on fraud."

It is respectfully submitted that in this case, Judge Wolf was right in his motion on both grounds, for even if deceit were found that as in the New York case there was no proof whatever of damages; the damages on the fraud charge being the difference between the value of the services rendered and the value of such services if they had been rendered exclusively for the plaintiff, and that the salary or the

difference between the salary and ten percentum of the gross value thereof provided absolutely no criterion or standard, or "test" to use the word of Chief Justice Beasley, because since January 1, 1924, the defendant's salary had always been in excess of the ten percentum of the gross business and the continuous course of business between the plaintiff and the defendant on that basis shows that such arrangement was entirely satisfactory to the plaintiff, so that there is no basis whatever upon which to found a just estimate of damages.

The rule is clear, that fraud, as the ground of an action for deceit, is broadly distinguishable from the misrepresentation or concealment which may afford ground for the rescission of a contract.

Lord Cairns in his judgment in the House of Lords in *Peek* v. *Gurney,* (1873) L. R. 6 H. L. 377, 403, in substance that at common law mere non-disclosure of facts, however morally consurable, will not support an action for deceit.

POINT III.

The Charge of the Court was Erroneous in Law. The Court did not Decide and Instruct the Jury in Respect to what Elements and Within what Limits Damages Might be Estimated in this Case.

Reasons:

(d) Because the trial judge failed to definitely inform the jury what was the true measure of damages on the issue in this cause and by the court's indefinite instructions left the whole question of damages at large, without definition

by the court to the discretion of the jury, and without any criterion to guide them.

(e) Because the court failed to instruct the jury that in this cause, there was an utter absence of proof on the part of plaintiff of the actual damages, if any, suffered by it and the force and effect of the evidence presented, would not justify a verdict for the plaintiff, if any, above six cents damages.

In *Baltimore & Ohio R. R.* v. *Carr,* 71 Maryland 135, S. C. in a collection of Cases on Damages, by Prof. Henry Beale of Harvard, 2d Ed. page 12, the Supreme Court of Maryland said *inter alia:*

> "The rule by which damages are to be estimated is as a general principle, a question of law to be decided by the court; that is to say, the court must decide and instruct the jury in respect to what elements and within what limits damages may be estimated in the particular action."

Harker v. *Dement,* 9 Gill 7; *Hadley* v. *Baxendale,* 9 Exch. 341, page 354:

> "The simple question whether damages had been sustained by the breach of duty, or the violation of right, and the extent of damages sustained as the direct consequences of such breach of duty or violation right, are matters within the province of the jury, but beyond this, juries, as a general rule, are not allowed to intrude, as by such intrusion, all certainty and fixedness of legal rule would be overthrown and destroyed."

With very great respect, it is submitted that the criticism made and sustained by the court in that action applies here, the court in that case saying, *inter alia:*

> "This left the whole question of damages at large, without definition by the court, to

> the discretion of the jury and without any criterion to guide them. What compensation would embrace. * * * were matters thrown open to the jury, and they were allowed to speculate upon them without restraint. This is not justified by any well-established rules of law. In the case of Knight *v.* Egerton, 7 Exch. 407, where such an instruction was given, the court of Exch. held it to be wholly insufficient, and that it was the duty of the judge to inform the jury what was the true measure of damages on the issue, whether the point was taken or not, and the court directed a new trial because of the indefinite instruction as to the true measure of damages."

It is respectfully submitted that adapting the language of the foregoing judgment, the question as to whether or not the defendant was guilty of any fraud or deceit and if so, what elements entered into the measure, and estimate of damages was wholly omitted. As Mr. Chief Justice Cockburn in *Twycross* v. *Grant,* C. A. L. R. 2 C. P. D. 469, at page 452 said, *inter alia*:

> "Nevertheless, when the grounds on which the verdict is looked at, it becomes manifest that they do involve a charge of not having brought to the attention of a jury the various elements into which the question of damages resolves itself."

Sedgwick, in his well-known work on "Damages," 9th Ed., Vol. 4, Sec. 1320, page 2661, says:

> "On this point the jury should have such guidance from the court in the form of instructions on the law applicable to the facts shown as will enable them to understand and act upon the evidence. 236 Penna. 577, S. C. 80 Atl. 1126; and the instructions should state the law in sufficient detail."

In the instant case, it is respectfully submitted that as appears by the Court's charge, State of

the Case, pages 79, 80, 81, 82, appearing herein *infra,* there was, not to adapt the language of the above cases, detailed instructions as to the law applicable to the instant case. The whole matter was left "at large" to the jury.

It is true there was no request to charge upon this particular point and no exception taken and no exception taken to the charge as a whole or any of its parts but upon instructions erroneous in law, it is elementary in this, court that many decisions hold that "the circumstance that no exception to the charge in this respect was taken at the trial, is no bar to the setting aside of a verdict upon a rule of law injurious to the defendant that has been erroneously charged to the jury upon an essential feature of the case as stated by Mr. Justice Garrison in *Clark* v. *Public Service Co.,* 82 L. 319, page 230.

True there has been some intimation this rule is applicable only on rules to show cause but Mr. Justice Garrison expressly says "the doctrine in question is of general application" and if so why not as applicable upon appeal as upon rules to show cause. Certainly the reason for the rule; the promotion of justice, is the same.

No one we think can read the opinion of Chief Justice Beasley in the *Hatfield case supra* and not feel that the great Chief Justice would have been in accord with Mr. Justice Garrison's statement and that the principle he was stating was fundamental and rooted in the interest of justice.

In *Lippincott* v. *Souder,* 8 Law, 161, Chief Justice Kirkpatrick, said *inter alia,* at page 166:

> "I am clearly of the opinion then, that we are not to sustain a verdict founded on an erroneous view of the law, because the counsel labored under a misapprehension and

raised no question before the judge as to the applicability of the Law."

Mr. Justice Garrison, in *Clark* v. *P. S. R. R. Co.*, 83 Law, page 319, at page 320, said:

> "The verdict, however, must be set aside because of an erroneous instruction to the jury on the question of the defendant's liability. * * * The circumstance that no exception to the charge in this respect was taken at the trial, is no bar to the setting aside of a verdict upon a rule of law injurious to the defendant, that has been erroneously charged to the jury upon an essential feature of the case. Hatfield *v.* Central R. R. Co., 4 Vr.; Butler *v.* Hoboken, etc., 44 Vr. 45; Otis Elevator *v.* Hedly, 52 Vr. 173. The fact that the cases cited were concerned with the rule of damages is insignificant as the doctrine in question is of general application.

In *Hatfield* v. *C. R. R.*, 33 Law (4 Vr.) 251, at page 254, the great Chief Justice, said:

> "The whole of this evidence, I conceive, is irrelevant and illegal. It is true, that it was not objected to at the trial by the defendants, but still, it is so clearly aside from the case, that it cannot be permitted to effect the result. This evidence, consequently, must pass for nothing. The result is, there is nothing upon which these verdicts for such large amounts, can rest."

These cases apply we think with even greater cogency to the questions raised as to the charge as a whole under Point Five.

POINT IV.

The Evidence does not Show the Case within the Legal Rules Upon Which the Court Submitted the Case to the Jury.

Reasons:

(f) Because the verdict is against such proper instructions as were given by the trial judge.

(g) Because the verdict bears no reasonable relation to any possible proper proof of damages, if any, shown by plaintiff.

It is elementary in this court that the verdict cannot be supported upon a theory of the law contrary to that upon which the case was submitted to the jury. As stated by Justice Black in *Queen* v. *Jennings,* 93 N. J. L. 353, at page 359, cites *Sensfelder* v. *Stokes,* 69 N. J. L. 86, and continuing:

> "The evidence must show a case within the legal rules upon which the court submits the case to the jury. Bowlby *v.* Town of Phillipsburg, 83 N. J. L. 377. That the verdict must be supported by the evidence is elementary."

The instant case was submitted to the jury under instructions quoted in the very last paragraph of the charge, page 82:

> "The plaintiff is not demanding the return of salary on the ground that the contract has been breached between the parties and that there has been failure of consideration, that is what I had in mind, the plaintiff is not doing that, but accusing the defendant of tortious acts and demanding as much damages if the wrong is established as you think it should get and which as I say naturally and probably resulted from the wrongful acts of the defendant, if any there were."

The jury rendered a general verdict for $2,840.50 (State of the Case, page 8) but there was no evidence whatever submitted by the plaintiff in the view of the appellant showing any damages whatever from the wrong, if any, complained of by plaintiff and the rule that "Fraud without damage, or damage without fraud gives no cause of action" is as old as *Pasley* v. *Freeman,* (1879) 3 T. R. 51-65.

In Point IV

Please note - The following paragraphs through an error in printing have been transposed. They should follow the reprint of the Courts charge under point V ending on page 43, infra -

(To be appended to page 35 at end of first paragraph thereon ending with citation 3 T. R. 51-65.)

charge up to that point had been one sounding in contract instead of deceit and that all of the preceding nine paragraphs were entirely consistent with the statement of the court, already referred to in the colloquy with plaintiff's attorney (State of the Case, page 51), which statement was made in the presence of the jury and in addition to its being entirely inappropriate and not at all pertinent to the facts as established in this case, it may or may not represent the law as to the damages in contract, but it certainly was not pertinent, if we may say so in all deference to the facts in this case. It does show, appellant thinks, that up to the very last moment of the last paragraph in the court's charge to the jury, the court had in mind damages in an action for contract rather than the rule peculiar to actions founded upon deceit.

If appellant is at all right in his understanding of the law applicable to the facts in this case, the

POINT IV.

The Evidence does not Show the Case within the Legal Rules Upon Which the Court Submitted the Case to the Jury.

Reasons:

(f) Because the verdict is against such proper [illegible] by the trial judge.

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The court will note that in the concluding paragraph, the trial court says: "The plaintiff is not demanding the return of salary on the ground that the contract has been breached between the parties and that there has been failure of consideration, *that is what I had in mind, etc.*" In view of the trial court's own statement, we do not think it unfair to say that the whole of the charge up to that point had been one sounding in contract instead of deceit and that all of the preceding nine paragraphs were entirely consistent with the statement of the court, already referred to in the colloquy with plaintiff's attorney (State of the Case, page 51), which statement was made in the presence of the jury and in addition to its being entirely inappropriate and not at all pertinent to the facts as established in this case, it may or may not represent the law as to the damages in contract, but it certainly was not pertinent, if we may say so in all deference to the facts in this case. It does show, appellant thinks, that up to the very last moment of the last paragraph in the court's charge to the jury, the court had in mind damages in an action for contract rather than the rule peculiar to actions founded upon deceit.

If appellant is at all right in his understanding of the law applicable to the facts in this case, the

charge to the jury was not only inaccurate and erroneous, but manifestly prejudicial to the defendant.

Paragraph 5 is inaccurate because even if the jury found that the defendant was guilty of fraud and deceit as mentioned in paragarph 4, the plaintiff would not be entitled to a verdict unless he showed damage by legal evidence.

Paragraph 6 is inaccurate, erroneous, and manfestly prejudicial because it might very well be found that the defendant did break his contract with his principal but that would mean nothing in this action unless both fraud and deceit were found together with damages, and the mere fact at the defendant broke his contract would not entitle plaintiff to a verdict for six cents or otherwise.

Paragraph 7, it is submitted, is entirely erroneous and that the statement at the conclusion thereof, "Whether you find that represents the damages, is for you to decide; I do not know" constitutes legal error in that it was the "duty of the judge to inform the jury what was the true measure of damages on the issue; whether the point was taken or not," and that upon the facts as established in this case, the court should have instructed the jury that the claim of the plaintiff as set out by the court in paragraph 7 could not represent the damages of the plaintiff and they should have gone further and given definite instructions as to the true measure of damages according to the rules and practice of this court.

In *Lambert* v. *Trenton and Mercer Traction Company,* 103 N. J. L. 23, at page 25, the Su-

preme Court speaking by Mr. Justice Minturn, said *inter alia*:

> "Counsel, therefore, might properly assume that the basic rules regulating the quantum of damages recoverable by each plaintiff would receive the attention of the court as an essential portion of its charge without such from counsel and acting upon that assumption prepare for nothing further than to enter the exception to such portion of the charge as should fail to meet the legal requisite, as conceived by counsel,"

which case will be referred to again *infra*. It is also respectfully submitted that the concluding paragraph of the court's charge is inaccurate and erroneous in that the court concluded, "The plaintiff is not demanding the return of salary on the ground that the contract has been breached between the parties and that there has been failure of consideration, that is what I had in mind, the plaintiff is not doing that, but accusing the defendant of tortious acts and demanding as much damages if the wrong is established as you think it should get and which as I say naturally and probably resulted from the wrongful acts of the defendant, if any there were." The phrase "and demanding as much damages if the wrong is established *as you think it should get* and which as I say naturally and probably resulted from the wrongful acts of the defendant, if any there were" is wholly inaccurate, erroneous and woefully misleading as the true measure of damages is not such as the jury "thinks it should get" but the actual damages in dollars and cents as established by the legal proofs under the principle or test laid down by Chief Justice Beasley in *Crater* v. *Binninger*, 33 N. J. L. 513, and which from that day to this has been not only the leading case in New Jersey, but sanctioned and

adopted by the United States Supreme Court in practically all the highest appellate courts of the other commonwealths, and often applied in cases in this court. Williston in his work on "Contracts" Section 1392, cites *Crater* v. *Binninger, supra,* in support of the rule he states as follows:

> "Restricting rule of damages for fraud. The contrary view, however, confining the damages in deceit to the value of what the plaintiff paid with less the value of what he received has the support of the Supreme Court of the United States, Smith *v.* Bolles, 132 U. S. 125, and of some other courts. (Crater *v.* Binninger, 33 N. J. L. 513.) This also seems to be the law of England, Peek *v.* Derry, 37 Ch. D. 541."

POINT V.

The Charge of the Court to the Jury is Erroneous in Law.

Reasons:

(h) Because the action was erroneously tried and prejudicially presented to the jury by the trial judge, for the most part, upon the theory of breach of contract and not upon the theory of fraud and deceit, as determined by the pleadings.

(i) Because of the following *inter alia* erroneous and particularly prejudicial instruction by the trial judge to the jury:

> "What are the damages? That question is not so easy in this case; in fact is is more difficult in this case I think than in any deceit case I have tried. First of all, in a case of deceit or fraud, the damages are generally those damages which naturally and proximately flow from the deceit or the fraud. That is the academic definition, technical definition. I would say in this case with that definition in your mind that it would be proper for you

if you find for the plaintiff, in discussing damages, to ask yourself what damages has the plaintiff suffered, remembering that you must approximate those damages with reasonable certainty. We were told that this man, the defendant, received a certain salary each week. At the time of the break between the parties, it was $50.00, and as I say, he received 10% for the sales above his salary. The plaintiff alleges that if you take the salary over a period of time, as I understand the plaintiff's case, and subtract from that this 10% on the gross sales that it leaves some $3,700.00, to which the plaintiff alleged it is entitled. Whether you find that represents the damages, is for you to decide: I do not know."

That this court may conveniently and fairly review the charge of the court below, which, with great deference, appellant believes inaccurate and erroneous, the same is reprinted here in full the same as in the record, except that for convenience, the paragraphs are numbered.

The court charges the jury as follows:

MOUNTAIN, *J.*:

1. The action which you have tried is an action brought not for breach of contract but brought on the theory of fraud and deceit, the plaintiff averring that it was a printing company and that it hired the defendant. The plaintiff alleges that about the time that a break became imminent between the litigating parties the defendant was in its employ and receiving as I understood it $50 a week and 10 per cent. on the sales above that amount. The plaintiff alleges that it was an employer and that the defendant was an employee, call it if you will, principal and agent. The plaintiff alleges that as soon as that status came into being there

were certain legal obligations resting upon both parties, on the part of the plaintiff it was the obligation to pay a consideration to the defendant for his stated services. The plaintiff alleges that one of the terms of this contract, as I understand it, and the terms of the contract are to be decided by you, was that the defendant was to work for it exclusively, that is that the defendant for the consideration paid to him was to do no other work except for the benefit and advantage of the plaintiff. You may find there has been proof introduced that over a period of years the defendant took estimates, in many cases you may find that the defendant estimated and obtained certain work and that this was on the plaintiff's time and was at first in the plaintiff's interest. You may find otherwise too. You may find that that is not the situation, but that is what the plaintiff complains of and that is one of the reasons the plaintiff desires to recover.

2. Many instances have been related, considerable testimony has been given, and documents placed in evidence. The defendant alleged that many of these are trivial. Well, whether they are trivial or not is a question for you to decide.

3. Now, a word as to the obligation that existed between these two parties, and I will have to indulge in a few generalities, if you please. Of course you know that an employee owes to his employer, fidelity, loyalty, good faith and the duty of exercising diligence and care and a certain amount of efficiency, depending upon his capabilities. That, he owes to his employer because he is being paid for those things. An employee or agent who involves himself in any business interest which is antagonistic to his employer's interest you may find breaches that

relationship, when he uses his experience of a business in connection with a rival business to his profit, you might find that he breached the relation which existed between the employer and employee. In other words, the agent or employee is not supposed to represent interests which are adverse to his employer's interest. Some cases that we have arise occasionally and develop from testimony disclosing that an agent obtained some knowledge by virtue of his employment about his employer's business and then took advantage of his employer after having obtained that knowledge.

4. Now then, we find on the one side the duty the employee owes to his employer and on the other side the duty an employer owes to his employee. That brings us back to this contract. What was the contract that existed between this person and this corporation? That is for you to determine. The next question is whether you find after deliberation whether the defendant was guilty of any fraud or deceit.

5. The burden of proof is upon the plaintiff to prove that by the greater weight of the evidence. If you find he was, then your verdict would be for the plaintiff; if you find that he was not, your verdict would be for the defendant.

6. If you find that the damages are only nominal, I mean by that if you find that the defendant did break his contract with his principal or employer but that the damages are not capable of being ascertained with reasonable certainty or that they are trivial or nominal, although the breach existed, then you would, I imagine, evidence that by bringing in a verdict for six cents for the plaintiff.

7. What are the damages? That question is not so easy in this case; in fact it is more difficult in this case I think than in any deceit case I have tried. First of all in a case of deceit or fraud the damages are generally those damages which naturally and proximately flow from the deceit or the fraud. That is the academic definition, technical definition. I would say in this case with that definition in your mind that it would be proper for you, if you find for the plaintiff, in discussing damages, to ask yourself what damages has the plaintiff suffered, remembering that you must approximate those damages with reasonable certainty. We were told that this man, the defendant, received a certain salary each week. At the time of the break between the parties it was $50, and as I say, he received 10 per cent. for the sales above his salary. The plaintiff alleges that if you take the salary over a period of time, as I understand the plaintiff's case, and subtract from that this 10 per cent. on the gross sales that it leaves some $3,700 to which the plaintiff alleged it is entitled. Whether you find that represents the damages, is for you to decide; I do not know.

8. During the time this contract was alive and it was being observed in some fashion by both parties, how was the plaintiff damaged by the defendant if it was, and how can you reckon it in terms of dollars and cents to a reasonable degree of certainty?

9. Now, if the defendant did take some of that time, if he did represent a rival interest, if he did act antagonistic to the plaintiff, how are you going to determine those damages, bearing in mind that they must be determined in terms of dollars and cents and flowing naturally

from the tortious act of the defendant? That is something you have to consider.

10. The plaintiff is not demanding the return of salary on the ground that the contract has been breached between the parties and that there has been failure of consideration, that is what I had in mind, the plaintiff is not doing that, but accusing the defendant of tortious acts and demanding as much damages if the wrong is established as you think it should get and which as I say naturally and probably resulted from the wrongful acts of the defendant, if any there were.

I have been asked to charge several requests in behalf of the defendant and one for the plaintiff which requests I will deny.

(The jury retires.)

POINT VI.

The Verdict is Contrary to Law. The Verdict Rests upon no Lawful Foundation and Cannot Stand.

Reason:

(j) Because the verdict can not be supported by the evidence in this cause on the theory of fraud and deceit set out in the pleadings in this cause, and the remedy of fraud and deceit in a court of law.

This court in *Robertson* v. *Bernstein,* 105 N. J. L. page 375, at page 382 said *inter alia*:

> "This result is unfortunate for the plaintiff. We concur with the view of the Supreme Court that there was no error on any other branch of the case, but a fundamental rule of evidence cannot be ignored or altered, simply to uphold a judgment

> which may or may not be meritorious and in the case of Duffy *v.* McKenna, which was also an action for deceit, the court held that for want of vital proof of damage, which it was the duty of plaintiff to provide, the verdict rested upon no lawful foundation and could not stand."

Sedgwick on Damages, Section 1323, says "Where the verdict is evidently based upon a wrong theory of damages, the court will not hesitate to set it aside. *Palmer* v. *Fiske,* 2 Curtis C. C. 14; *Ellsworth* v. *C. R. R. of N. J.,* 34 N. J. L. 93; *Creed* v. *Fisher,* 9 Exch. (Eng.) 472"; and in this court, Mr. Justice Kalisch in *Lams* v. *Fish,* 86 N. J. L. 321, at page 324 said *inter alia:*

> * * * "It is a familiar rule of law that before a plaintiff can recover in an action for deceit, he must show that he has sustained damage. Cowley *v.* Smyth, 46 L. 380. This the plaintiff failed to do. There is an utter absence of proof as to the value of the stock, whether it is worth more or less than the plaintiff paid for it is left unrevealed."

It is respectfully submitted that the instant case is an unhappy repetition of the error made in the trial court in *Mitchell* v. *Bassett,* 99 N. J. L. 110.

Blashfield, in his work upon instructions to juries, Sec. Edi., page 379, says:

> "But where the almost necessary effect of the charge is to mislead the jury or where the result shows that the jury were probably misled, it seems that the judgment should be reversed."

Respectfully submitted,

ALGERNON T. SWEENEY,
Attorney and of Counsel
for Defendant-Appellant.

New Jersey Court of Errors and Appeals.

GUBELMAN PUBLISHING COMPANY,
a corporation,
Plaintiff-Appellee,

vs.

GEORGE I. RYERSON,
Defendant-Appellant.

On Appeal.

BRIEF OF PLAINTIFF-APPELLEE.

Statement of Facts.

Plaintiff, a corporation, has been engaged in operating a printing business in Newark since 1909 (p. 23, l. 4). In 1918, the plaintiff hired the defendant, George I. Ryerson, as a salesman to solicit printing business for the plaintiff corporation (p. 23, ll. 8-11). Thereafter, Ryerson was the plaintiff's only salesman up to the time of his discharge in August, 1929 (p. 3, l. 20).

Prior to being hired by the plaintiff, Ryerson had been in business for himself as a printing broker (p. 65, l. 36). Under his contract of employment, Ryerson was engaged at a flat salary to give his full time and energy to acquiring printing business for his employer, the plaintiff (p. 31, l. 10). In order to increase his usefulness, he was furnished with an automobile in 1923 (p. 24, l. 38).

Ryerson's salary, when first hired in 1918, was $25.00 a week. Thereafter and from time to time,

his salary was increased and during the period from 1923 to 1929, he received $50.00 per week as a flat salary (p. 23, l. 35 to p. 28, l. 12).

In addition to his salary, he received certain commissions of so much as 10% of the gross sales secured by him exceeded his flat salary (p. 24). He was paid this additional amount on a separate commission account as a further inducement to the rendering of better service to his employer. In addition, he was given $15.00 a month as an allowance for garage charges for his car which he kept at his own home (p. 25, l. 18).

The Gubelman Publishing Company was engaged in high class printing work, a majority of the contracts being obtained through competitive bidding. It was a part of the defendant, Ryerson's duty to present the bids for the Gubelman Publishing Company on the various jobs open for bidding. In view of the fact that the Gubelman Publishing Company prices were a little higher than the bids of their competitors, by reason of the high quality of the work done by the Gubelman Publishing Company, the success of the bidding depended on the sincere and honest efforts of Mr. Ryerson.

Mr. Ryerson had, throughout the period of his employment and up to about the end of 1923, always received payments on account of commissions earned in excess of his regular salary. From that time on, his salary exceeded 10% of his gross sales, the deficit growing larger as the years progressed. In 1928 and 1929, his sales quite regularly fell beneath the volume necessary to establish a commission basis equal to the $50.00 weekly salary. These were two of the best years the printing business had ever enjoyed. It is the plaintiff's contention that this drop in returns was

concurrent with those actions of Ryerson's which gave rise to this suit.

During the latter years of his employment and unknown to his employer, Ryerson, the defendant, had solicited business for himself as an individual printing broker. He had, both in his own name and under various trade names, presented competing bids for various jobs in direct and successful competition with the bids of his employer, the Gubelman Publishing Company. In those cases where he obtained the contracts on his individual bids, he procured from job printers the work called for by the contracts, buying the necessary materials and in many cases himself performing the printing. The plaintiff necessarily could not possibly know of all the instances where Ryerson obtained contracts in competition with the plaintiff or of all the jobs which Ryerson secured for himself elsewhere, nor could it possibly know of each and every place where Ryerson had his work done in carrying out these contracts taken by him, for himself, individually. The plaintiff did introduce in evidence testimony of numerous individuals and corporations where Ryerson obtained for himself contracts for printing during his employment by the Gubelman Publishing Company, while he was still receiving but not earning $50.00 a week. Among them are the following:

John A. O'Neill so testified for the Eastern Steel Casting Company. Similarly, H. Franklin Fisher so testified as did Elmer L. Snyder for the Riviera Hotel.

Mr. O'Neill testified that as early as 1927, Ryerson solicited business for himself from the Eastern Steel Casting Company; that the first order which he received was for the Gubelman Publishing Company, and that thereafter, in the early part

of 1928, Ryerson solicited business only for himself individually; that Ryerson used to call for business about once a month and that he traded under the name of Expediency Press (pp. 11, 12, 13, 14). Exhibits P-1 and P-2 are two specimens of printing done for the Eastern Steel Casting Company by Ryerson, trading as Expediency Press, the first being in March 1928 and the second under date of May 15th, 1928.

Mr. Fisher is a manufacturer of china bathroom fixtures. He testified that Ryerson frequently bid on jobs for him in the name of the Gubelman Publishing Company and that when the Gubelman Publishing Company bids appeared unacceptable by reason of their prices, Ryerson thereupon bid for the same work in the name of other publishers or printers. He testified to one particular instance where, after the Gubelman Publishing Company bid had been refused, Ryerson secured the bid under another name and at a lower price (pp. 40-41).

Elmer L. Snyder testified that as Manager of the Riviera Hotel, he had occasion to have the printing of cards done by Ryerson while Ryerson was working for the Gubelman Publishing Company. He testified, however, that the Gubelman Publishing Company were not printing the cards. He testified that Ryerson gave him a blotter with "Expediency Press" on it, advising him that that was the name of the firm that was doing the job for Ryerson (pp. 42-44).

In order to take care of the contracts which he had procured for himself individually, Ryerson had reproduction work done for him by Alfred Gross, President of the Newark Lithographing Company, Mr. Gross so testified (pp. 15-16).

Mr. Gross commenced doing this work for Mr. Ryerson in May, 1928. He testified that Mr.

Ryerson would bring the requirements of the jobs and that he would do the printing; that these jobs were done under Ryerson's own individual name; that he never knew until this case came up that Ryerson was connected with the Gubelman Publishing Company.

Otto Voight testified (pp. 17-19), that as early as February, 1928, and from time to time thereafter, the Crown Press did printing work for Ryerson on jobs which Ryerson brought to them. Exhibits P-3-5-6 are envelope job tickets of the Crown Press showing definite jobs done by the Crown Press for Mr. Ryerson, individually, during the time he was employed by the Gubelman Publishing Company and was receiving a salary from the Gubelman Publishing Company.

Charles H. Blakeman, President of the Union Press, testified (pp. 20-22), that in May, he did printing jobs for Ryerson on jobs brought in by Ryerson. He stated that Ryerson represented that he was a printer's broker. He stated that Ryerson promised to keep him supplied with printing, provided his, the Union Press, prices were right. He testified that Ryerson, as a broker in his opinion, was the same as a salesman, except that he was working for no particular house, securing the contracts and placing the jobs where he could have them done most cheaply.

Benjamin Berkowitz of the Central Paper Company, testified (pp. 37-40) that he sold paper for printing to Mr. Ryerson as early as 1927. He refers to a specific transaction on April 20, 1928. This was during the period while Ryerson was supposed to be working for the Gubelman Publishing Company, but according to Mr. Berkowitz, Mr. Ryerson never mentioned that fact to the Central Paper Company, representing that he was merely a printing broker. Berkowitz referred to

the numerous jobs done thereafter and all during the period of Ryerson's employment by the Gubelman Publishing Company and while he was receiving a salary of $50.00 a week from the Gubelman Publishing Company. In fact, Mr. Berkowitz stated, "I didn't know he was connected with any concern." Ryerson paid cash for these purchases of paper.

Charles E. Conover, a job printer of Irvington, testified (pp. 44-52), that he had known Ryerson since 1918, that as far back as 1921, he did printing jobs for Ryerson, consisting of various types of cards, envelopes, billheads and tickets. Mr. Ryerson would bring the jobs himself, and he would quote a price on them and do the work. On some occasions he would allow Ryerson to do the work himself. Sometimes there were three, four or five jobs at a time. On those occasions, Ryerson would "set the type, rack them up and put them on the press and run them off." (p. 45, l. 34). This relationship with Mr. Conover continued up to 1929. A specimen of Conover's work was offered in evidence as Exhibit P-13. Exhibit P-14 consisted of the job ticket and samples of 5,000 four-page letterheads for the Lauter Piano Company. The job was taken by Ryerson, individually, brought to Conover and printed by Ryerson with Conover's assistance. It is important to note that the Lauter Piano Company were customers of the Gubelman Publishing Company; that this particular contract was taken by Ryerson for himself from his employers' own customers in direct competition with his employers. Exhibits P-15, P-16, P-17, P-18, P-19, P-20, P-21 and P-22 are further specimens of work done in that manner. Exhibits P-19, P-21, P-22 are jobs done for the Hotel Riviera where the contract was personally secured by Ryerson and printed at

Conover's printing shop. Ryerson paid Conover 50¢ an hour when Conover permitted Ryerson to do the printing himself on the Conover press. All of this work, it will be noted, was done while Ryerson was employed by the Gubelman Publishing Company and receiving his regular $50.00 a week salary. Mr. Gubelman testified that none of the jobs so testified to were taken or carried out for the Gubelman Company or to the knowledge of the Company or of Mr. Gubelman.

Mr. Gubelman testified (p. 28) that his first knowledge of Ryerson's conduct was in August, 1929, when a bill and statement from the Ruhl Composition Company came to the attention of Mr. Gubelman. Never having done any business for that company, Mr. Gubelman's curiosity was aroused. The next intimation of Mr. Ryerson's individual activities and competition with his employer came by way of a phone call from the Hotel Riviera (p. 29) asking the Gubelman Publishing Company to take care of some additional work for the Riviera Hotel. Mr. Gubelman testified that he had had no other knowledge of Mr. Ryerson's personal business activities until this time. Ryerson, on being charged by Mr. Gubelman with doing this individual and competitive work, at first denied it, but subsequently admitted that he had done work on the outside for his own benefit during the course of his employment (p. 31, l. 30). Mr. Michael A. McMann testified (p. 53, l. 20) that he heard Ryerson first deny and subsequently admit this course of conduct. Mr. Mills further corroborated this testimony (p. 57, ll. 20-25).

Mr. Gubelman offered in evidence the complete records of his company with respect to Mr. Ryerson's account in which it appeared that between 1927 and his discharge in 1929, Ryerson had re-

ceived in salary some $3,780. more than 10% of his gross business during the same period would have amounted to. Mr. Gubelman took the position that Mr. Ryerson had violated his position of trust and confidence and was not entitled to the salary for any of the period during which he was competing with his employer and operating his own business with his employer's time and with his employer's automobile. He did, however, with entire fairness represent that he was willing that Mr. Ryerson should be credited with 10% of the value of the total volume of the gross business which Ryerson had brought in to Gubelman during this period. In that way, the deficit of $3,780 for 1927, 1928 and 1929 was arrived at. It is interesting to note that during those years, the printing business had enjoyed greater prosperity than ever before.

There can be no doubt as to the nature of Mr. Ryerson's employment. He, himself, testified that at one time, he requested Mr. Gubelman to change him from a salary basis to a commission basis. This was 18 months before Mr. Gubelman learned of Ryerson's individual activities—just about the time when the various witnesses testified that their dealings with Ryerson as an independent broker began to assume substantial proportions. Gubelman refused to alter the salary contract basis, possibly anticipating that Ryerson would dissipate his time and energy so far as the benefit to the Gubelman Publishing Company was concerned, but certainly never dreaming that Ryerson would be so faithless to his position of trust and confidence to a contractual obligation to serve the Gubelman Publishing Company with his full time and best efforts as appears from the testimony to have been the case, notwithstanding the unaltered contractual relationship.

Argument.

This action was one in tort for fraudulently obtaining from the plaintiff money agreed to be paid under the terms of a certain contract of employment. The terms of the contract were not complied with. The defendant knew he was defrauding the plaintiff. His testimony shows this. His counsel endeavors to pass it off by saying that no great harm was done to Gubelman. The defendant continued to draw his regular salary nevertheless, accepting it as though he were earning it in compliance with his contract of employment. Furthermore, Ryerson knew full well that Gubelman had no knowledge of this conduct on Ryerson's part. He even went so far as to deny it in August, 1929, until confronted with evidence which obliged him to admit it. He was then discharged.

The appellant in his brief raises two objections to the verdict and judgment for the plaintiff.

A. *The appellant first contends that there was insufficient evidence to support the verdict.* The second heading in appellant's brief, involving the same facts and argument, was to the effect that the evidence was so deficient in quantity as to have entitled the defendant-appellant to a non-suit, the denial of the granting of which was excepted to. We shall, at the same time, consider both these objections to the evidential side of the case.

B. *The defendant-appellant raises two objections to the law on which the case was submitted to the jury. He contends*

1. That the charge of the Court was improper.
2. That the evidence does not show the case to come within the law set forth by the Court in its charge to the jury.

3. That the evidence did not support a verdict even if the charge had been properly made.

The principle of law involved in a case of fraud is well established.

As was stated by Justice Kalisch in the case of *Lembeck* v. *Gerken,* 86 N. J. L., 112 at page 114:

> "The principle on which an action for deceit is founded requires the presence of three things—first, that the defendant made some representation to the plaintiff, meaning that he should act upon it; second, that such representation was false, and that the defendant, when he made it, knew it to be false; third, that the plaintiff, believing such representation to be true, acted upon it, and was thereby injured. *Byard* v. *Holmes,* 34 N. J. L. 296; *Cowley* v. *Smith,* 46 Id. 380; *Thompson* v. *Kowing,* 79 Id. 246."

That these requirements were fully met with by the evidence introduced by the plaintiff-appellee will appear from the facts already alluded to and hereafter considered in somewhat greater detail.

There is no question that the burden of proof is on the plaintiff. The appellant has devoted several pages in his brief to the citation of authorities to this effect. We quite agree with his position and see no occasion to do more than acknowledge the soundness of these authorities. We contend, however, that the evidence fully meets this requirement and that the jury was justified in so finding.

A. *We will now consider the evidence adduced at the trial in some detail and endeavor to point out that it is amply sufficient to support the various elements necessary in this cause of action.*

The defendant accepted employment with the plaintiff and at the time relevant to the cause of

action received $50.00 a week as a flat salary. There is no question as to this fact. Mr. Gubelman so testified at pages 23, 24 and 25 and his testimony is even referred to by the appellant, Ryerson, on page 18 of his brief.

The defendant, Ryerson, was the sole and only salesman of the Gubelman Publishing Company (p. 33, l. 12).

The defendant was given an automobile and $15.00 extra a month for the garaging of same. This automobile was given to the defendant at his own request in order to enable him to more efficiently serve his employer, the Gubelman Publishing Company (p. 24, l. 37 to p. 25, l. 20). This testimony of Mr. Gubelman was substantiated by Mr. Mills (p. 58, ll. 9-21). Ryerson admits that the Gubelman Publishing Company furnished him with the automobile (p. 68, ll. 3-10), testifying, however, that the automobile was a gift to him.

The complete record of salary paid to Ryerson and the amount of gross sales during this period was offered in evidence as Exhibit P-8. *The jury was in full possession of all the facts necessary to compute the actual money received by Ryerson from the Gubelman Publishing Company.* Mr. Gubelman, himself, testified to what these amounts were. Mr. Ryerson admitted and Mr. Gubelman testified that the salary was greatly in excess of 10% of the gross sales during the periods set forth in Exhibit P-8.

The defendant, Ryerson, operated his own independent business during the period of his employment by Gubelman. We have already set forth in the statement of facts the numerous individuals with whom Ryerson engaged in business, soliciting orders for his personal business, taking contracts in his own name to be performed by him, as

well as by purchasing materials and procuring the execution of the contracts so secured by him. The testimony refers to instances of this character throughout the entire year of 1928 and all of the period of 1929, during which Ryerson was employed by the Gubelman Publishing Company. Ryerson does not deny one single instance so testified to. In fact, he admits them specifically. Ryerson traded under his own trade name. He even did some of the printing work himself. In the face of this evidence, Ryerson testified on direct examination (p. 71) that all of his time was given to the Gubelman Publishing Company. This presents a conflict in his own testimony.

Thus, Ryerson continued to take money from the Gubelman Publishing Company on the representation that he was giving his full time in return for the liberal salary which he received, while at the same time, he was securing for himself bids which it was his sole duty to procure for his employer. Not only did he procure these bids, but he carried out the work required by them on his employer's time.

It is submitted that the appellant misconceives the basis of this cause of action. It appears that he feels that the plaintiff, Gubelman Publishing Company, should have shown every item of work done by Ryerson. That, however, has nothing to do with the cause of action. The cause of action rests solely on the actual monies received by Ryerson under the fraudulent pretence that he was earning these monies in strict and substantial compliance with the terms of his contract of employment. Against this claim, he is entitled to be credited with such work as actually was turned over to the Gubelman Publishing Company. This latter item is set forth in full in Exhibit P-8 and

is freely admitted by the Gubelman Publishing Company to be a credit due Ryerson. That Ryerson had in mind some such scheme of carrying on his own business while working for the Gubelman Publishing Company appears from his own testimony where at page 75 he testified that about a year and a half before he was discharged, he asked to be put on a straight commission basis (p. 75, ll. 8-40). In other words, Ryerson clearly had in mind at that time and so testified that he could make more money on a commission basis and asked Gubelman to make a change from a $50.00 a week flat salary. Thus, it is clear that he understood the basis on which he was hired, although on page 66, when asked by his own attorney on direct examination the nature of the agreement between him and Mr. Gubelman, he said, "There didn't seem to be much of an agreement." This, taken with the fact that the testimony showed that the gross sales which he secured for the Gubelman Publishing Company fell off steadily during this period, makes it doubly apparent that the bulk of his effort was applied to securing business for himself on the outside and that he only gave occasional business to the Gubelman Publishing Company in order to continue to draw his $50.00 a week salary. On page 100 in Exhibit P-8, it appears conclusively that Ryerson had received during 1928 and 1929 alone over $2,200. more in salary than 10% of the bulk business turned in by him during that period. It must be remembered that in addition, he received $15.00 a month for the car. Mr. Gubelman calculated the deficit at $3,780. for the period during which Ryerson had violated his contract of employment and competed with his employer while taking the salary. All these facts were clearly in

evidence before the jury. They had only to determine when, in their opinion, Ryerson first entered upon his nefarious course of conduct. Their conclusion was that the proper amount was $2,840.50 to which was added $74.88 costs and the judgment entered in the amount of $2,928.38.

In view of the great mass of testimony tending to support all of the essential allegations in the plaintiff's case, it is submitted that the granting of a non-suit as requested by the defendant would have been a serious error.

B. *Objections to law on which case was submitted to the jury.*

Appellant contends that the trial court was not familiar with the principles of law involved in the case. Before replying to this charge, it is important to note that:

1. No exceptions were taken at the trial to the charge of the Judge.
2. No exceptions were taken at the trial to the denial of the trial Judge to include in his charge the defendant's requests to charge in a manner consistent with defendant's understanding of the law applicable to the case.

Under the decisions of this state, they cannot now be heard to complain that the jury was not correctly apprised of the principles of law which should govern their deliberations.

The decisions are numerous in this State to the effect that exceptions to the charge of the trial Judge must be taken if the appellant desires to avail himself of any errors in the charge in his appeal. As was stated in the per curiam decision of the Court of Errors and Appeals in the case of *Synnott* v. *Shaw,* 77 N. J. L., 803:

> "The case furnished the court discloses no exceptions sealed by the trial Judge. There being nothing for us to review, the judgment must be affirmed." *McLaughlin* v. *Davis,* 35 Vroom 360.

Chancellor Pitney, speaking for the Court of Errors and Appeals in the case of *Negley* v. *New York Life Ins. Co.,* 82 N. J. L., 390, said:

> "So far, however, as the printed state of the case furnished to the court shows, only one exception was sealed by the trial justice, and this referred to that portion of the charge to the jury relating to the measure of damages. No assignment of error challenges this instruction, and it is admitted in the brief of the plaintiff in error that there is no doubt of its legal correctness.
>
> "The court will not consider assignments of error, based upon alleged exceptions, if the printed book shows no bill of exceptions signed by the trial judge. *McLaughlin* v. *Davis,* 35 Vroom 360; *Davis* v. *Littel,* Id. 595; *Conrad* v. *Brocker,* 41 Id. 823."

The appellant in his brief suggests that the trial court did not know the principles of law involved up until the very end of the case. He contradicts this by setting forth at page 12 of his Brief a statement to the Court which indicates clearly that the Court had exactly in mind the question involved. The court questioned the defendant's attorney early in the case when the latter attempted on cross-examination to bring out testimony as to the amounts received by the defendant on various jobs secured by him personally and carried out by him as an individual and while employed by and receiving his salary from the plaintiff. Plaintiff's attorney suggested that these amounts were of no consequence in the case and that the

particular jobs were referred to me for the purpose of showing that the defendant made so much money for himself, individually, but rather to show that he was engaged in business for himself while supposedly employed solely and exclusively by the plaintiff. The court then stated that it recognized the duty of fidelity from an employee to an employer. The court said, "An employee cannot take money from one man and be absolutely false and untrue to him" (p. 52). It was the appellant's attorney and not the court who misunderstood the principles of law involved.

In the case of *Kvedar* v. *Shapiro,* 98 N. J. L., 225, the plaintiff was defrauded in the purchase of a truck. Justice Katzenbach, speaking for the Court of Errors and Appeals, there indicated that the plaintiff had an election either to sue on contract or in tort. Exactly a similar situation exists in the present case. To quote from the opinion on page 228:

> "When a vendee ascertains that he has been induced to make a contract of purchase by the fraudulent misrepresentations of his vendor, he has a choice of remedies. He may rescind the contract, restore what he has received and recover back what he has paid, or he may affirm the contract, and recover the damages he has sustained by the fraud. . . . Upon an action for damages, for the deceit and fraud which induced the purchase, the measure of damages is what the vendee has lost. It is the difference between that which he had before and that which he had after the contract of purchase was made."

Clearly the language of Justice Katzenbach is particularly appropriate in the case sub judicie. The Plaintiff, Gubelman Publishing Company elected to sue for fraud and deceit, and the dam-

ages requested were exactly the damages which Justice Katzenbach indicated were allowable in such an action. The jury made its finding in exact compliance with this rule of law. It is interesting to observe that the appellant also quoted from this same case, but confined himself to inapplicable dicta and carefully omitted any reference to the principle of law therein set forth.

It is necessary for the defendant to definitely point out by exception the errors which he alleges were made by the trial Judge in the matter of the charge. The appellant failed to do so in this case. That this failure is vital to his right to argue the matter before this Court at this time appears in the further portion of the decision in the same case. *Kvedar* v. *Shapiro,* 98 N. J. L., 225, *supra:*

> "In his brief appellant's counsel says, in speaking of this part of the court's charge: 'The objection to this portion of the charge is that it fails to instruct the jury that one of the conditions precedent to a rescission is a return of the goods in the same condition as when the goods were received, reasonable wear and tear excepted.' The complaint, therefore, is that the charge is not sufficiently comprehensive. The remedy in such a situation is for counsel to present to the trial court a distinct request to charge upon the subject he desires covered by the court's charge. If the court refuses to charge the substance of the request an exception may be taken to the court's refusal and, under this exception, a reviewing court will consider whether or not the court had erred in its refusal to charge as counsel has requested. A general objection on the ground of the insufficiency of a charge does not present a question which is reviewable in an appellate court. *Lieberman* v. *Brill,* 94 N. J. L., 387. Exceptions to a charge must be confined to what the court has said, or has refused to say, when

> requested to charge specific requests, and not to what counsel may feel the court has omitted to say in its charge."

A general complaint as to the inadequacy of the Judge's charge is insufficient to bring before the appellate court any specific complaint with respect to the charge. Such was held in the Supreme Court decision of *Vitolo* v. *Nicotera Loan Company,* 10 Miscl. 624 at p. 625:

> "There are six grounds of appeal. Taking them up in reverse order, the sixth is that the verdict is against the weight of evidence. It is familiar law that weight of evidence is not considered on an appeal at law. The fifth reproduces entire a supplemental charge of the court taking up over a page of the printed book, and stating a number of different propositions. It is also (or should be) familiar law that where part of a charge thus challenged in bulk contains several propositions of law, a reversal cannot be had unless they are all erroneous: and a glance shows that probably all, and certainly most of them were correct. Moreover, the exception was 'To the supplemental charge of the court,' and failed to direct the judge's attention to anything which counsel deemed erroneous. It is settled beyond peradventure that such an exception is futile."

That the exception must be explicit is clearly brought out in the decision of the case of *Thibodeau* v. *Hamley,* 95 N. J. L. 180, at pp. 182, 183 and 184:

> "If appellants' counsel desired a more specific instruction, then the duty devolved upon him to present to the court a request to charge embodying the legal proposition which counsel deemed necessary and applicable to properly answer the jury's inquiry, and if the re-

> quest was refused to have taken an exception to such refusal. This practice is too well settled to need the citation of any authorities . . . ''
>
> ''All these matters might have been proper subjects of requests to charge and could have been presented by counsel to the judge for that purpose, but this plainly was not done. On appeal we are only concerned with errors pointed out and to which the attention of the trial judge in the court below was called by objection to the particular matter assigned as error, so that he may be afforded an opportunity to correct the mistake.''

For the most part, the respondent takes no exception to the authorities cited by the appellant. They are in the main decisions of long standing and correctly set forth the law. The law which they set forth, however, for the most part, has no application to the facts in this case. We do, however, so entirely agree with the appellant with respect to the statement of law cited at page 38 of his Brief that we also quote it herewith:

> ''Williston in his work on 'Contracts', Section 1392, cited Crater *v.* Binninger, supra, in support of the rule he states as follows:
>
> ''Restricting rule of damages for fraud.
>
> ''The contrary view, however, confining the damages in deceit to the value of what the plaintiff paid with less the value of what he received has the support of the Supreme Court of the United States, Smith *v.* Bolles, 132 U. S. 125, and of some other courts (*Crater* v. *Binninger,* 33 N. J. L. 513). This also seems to be the law of England, *Peek* v. *Derry,* 37 Ch. D. 541.''

It is exactly on the basis of this law that this case was submitted to the jury and the verdict reached. The verdict is well supported by the evidence.

The appellant suggests that the proof does not fully and completely support the pleadings. They go to the extent of quoting certain paragraphs of the complaint. We are unable to see in what respect this is true. The pleadings set forth a clear case of fraud. They state that the defendant, Ryerson, did fraudulently and deceitfully accept substantial sums by way of salary when he was supposed to be, by contract, the sole agent and salesman of the plaintiff and was by the terms of the same contract obliged to give his entire and exclusive efforts to his employer. Were there, however, any minor discrepancies in the pleadings, it would be quite within the discretion of this Court and in accordance with its practice to amend the pleadings or mould the verdict since all the substantial elements of this cause of action are fully supported by the evidence offered at the trial.

As was stated by Chancellor Walker in the case of *Boniewsky* v. *Polish Home of Lodi,* 103 N. J. L., 323 at p. 338:

> "From the above, it may be deduced that the rule is, that an appellate court, to sustain a judgment, may regard a verdict expressed in untechnical language as truly finding the fact or facts in issue, or may mold a verdict itself, and affirm accordingly; but where a verdict is to be changed to meet the facts which were introduced by amendment before the trial court, in order to support a judgment which will differ from one which might be entered on the issue sent down in the Circuit record, and which judgment must now be entered upon an amended verdict to be returned with an amended *postea,* the appellate court has power to require the judge who tried the case to mold the verdict and return it with such amended *postea,* so that such proper judgment may be entered."

The appellant also seems to feel that the plaintiff might better have brought this action on contract. This objection also is without merit, although it is interesting to observe that the damages would have been precisely the same, as the plaintiff in a contract action would have been entitled by way of damages to the monies paid out after the rescission of the contract and the defendant would have been entitled to a credit for value actually given by him to the plaintiff.

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT THE PRINCIPLES OF LAW INVOLVED WERE CLEARLY PRESENTED TO THE JURY BY THE COURT; THAT THE JURY HAD AMPLE EVIDENCE TO SUPPORT EACH AND EVERY ELEMENT NECESSARY TO SUSTAIN THE CAUSE OF ACTION, AND THAT THE VERDICT OF THE JURY WAS ENTIRELY CONSISTENT WITH THE PLEADINGS, PRINCIPLES OF LAW AND EVIDENCE PRESENTED.

Wherefore, it is respectfully requested that the judgment of the Supreme Court be affirmed.

Respectfully submitted,

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