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SUMMONS.

Essex County Circuit Court

The State of New Jersey to Louis Rothstein and Rothstein's Inc., a corporation,

(L. S.)

YOU ARE HEREBY SUMMONED to answer the complaint of Rothstein's a corporation, Max Weintraub and Elias Rosenberg, in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiffs may proceed in the suit, and judgment may be entered against you.

WITNESS, NELSON Y. DUNGAN, Judge of our Circuit Court, at Newark, this 10th day of November, 1924.

JOHN H. SCOTT,
Clerk.

ABRAHAM HENIG,
Attorney.

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

ROTHSTEIN'S, a corporation, MAX WEINTRAUB and ELIAS ROSENBERG, *Plaintiffs,* vs. LOUIS ROTHSTEIN and ROTHSTEIN'S, INC., a corporation, *Defendants.*	*Action at Law.* *Complaint.*

The plaintiffs, Rothstein's, a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, and Max Weintraub and Elias Rosenberg, residing in the Borough of Brooklyn, County of Kings and State of New York, say that:

FIRST COUNT.

1. That heretofore and on or about the 21st day of January, 1924, the defendant, Rothsteins Inc., a corporation of the State of New Jersey, and the plaintiffs, Max Weintaub and Elias Rosenberg, entered into an agreement for the sale and purchase of the department store business then being conducted by the said Rothsteins Inc., at No. 413-419 Springfield avenue, Newark, New Jersey, a copy of which agreement is annexed hereto and made part hereof.

2. That previous to the making of the said agreement, the said Rothsteins Inc., was represented in the negotiations for the said sale, by

Louis Rothstein, who at that time, was the president of the said Rothsteins Inc.

3. That at the time of the making of the said agreement, it was contemplated between all of the parties that a corporation would be formed by the plaintiffs, Max Weintraub and Elias Rosenberg, under the name of "Rothstein's" and that the conveyance of the stock of merchandise etc., contemplated, would be made under the terms and provisions of the said agreement, to the corporation so to be formed; and said agreement was made to the knowledge of defendants for the benefit of said corporation so to be formed.

4. That the said plaintiffs, Max Weintraub and Elias Rosenberg did cause a corporation to be formed, to wit, plaintiff under the name of Rothstein's, and the bill of sale and lease subsequently executed by the defendants, was made to the said plaintiff corporation.

5. That the said defendant, Louis Rothstein, acting for and on behalf of the defendant, Rothsteins Inc., did at the time of the making of the said agreement and previous thereto, falsely, fraudulently and deceitfully state and represent to the plaintiffs, that the business heretofore conducted by the said corporation of Rothsteins Inc., was a profitable business; that it had done a total of $350,000.00 worth of business during the past year, which amount included the sales of a basement which was rented out for the month of December for toys, and for which defendants received a 10% net return of the gross sales; that the business had earned during the then past three years, above all expense, a net return of 8% per year on the total gross business.

6. Plaintiffs, Max Weintraub and Elias Rosenberg, believing the statements and representations made to them by the said Louis Rothstein, to be true, the said defendants knowing that they, the plaintiffs, believing the representations and each of them, to be true, and intending that they should believe them and each of them, and rely thereon, and plaintiffs, Max Weintraub and Elias Rosenberg, relying on the truth of said statements and each of them, entered into the agreement for the sale and purchase of the said business on the terms and conditions contained in the agreement annexed hereto and made part hereof, and for the benefit of the plaintiff, Rothstein's.

7. The representations as aforesaid, made by the said Louis Rothstein, and each of them, were false and untrue; in that the business heretofore conducted by the said corporation of Rothsteins, Inc., was not a profitable business, and that the said business had not earned during the past three years, over and above all expenses, a net return of 8% per year on the total gross business, and that the said business had not earned over and above all expenses, a net return of 8% on the total gross business of $350,000.00, during the past year.

Plaintiffs say that they have been damaged by the false and fraudulent representations of the said defendants made as aforesaid, and therefore demand of the defendants the sum of $100,000.00 damages.

SECOND COUNT.

1. Plaintiffs repeat the statements contained in paragraphs 1, 2, 3, and 4 of the first count as therein fully set forth.

2. That in accordance with the terms and provisions of the said agreement, the defendant, Rothsteins Inc., was to execute to the plaintiff, a bill of sale for the said business, free and clear of all debts of whatever kind or nature.

3. That at the time that the defendant, Rothsteins Inc., was conducting the said business, it had made a practice of issuing to its customers certain stamps commonly called "trade stamps" which were redeemable at the office of the defendant, Rothsteins Inc., at the rate of $2.50 for each filled book of said stamps in the possession of the said customers.

4. That the said Rothsteins Inc., had widely advertised the said scheme of issuing the said stamps to its customers, and it was a necessary part of the business of the defendant, Rothsteins Inc., to issue stamps to the customers who made purchases in the said store, and it was necessary that said stamps be redeemed in order to retain the good will of the said business transferred by the defendant in accordance with the agreement and constituted a debt of the business.

5. That after the taking of the possession of the said business by the plaintiffs herein, it was found that the said Rothsteins Inc., had issued a large number of stamps to the said customers, which had not been redeemed by the said Rothsteins Inc., but which were brought in for redemption to the plaintiffs herein, and they being a liability of the said business, the plaintiffs herein did redeem the said stamps at the rate of $2.50 per book.

That by reason of the foregoing, the plaintiffs had paid out and expended, and will be compelled

to pay out and expend large sums of money, the actual amount of which cannot be ascertained at the present time.

Plaintiffs say that they have been damaged by reason of the foregoing, and therefore demand of the defendants, the sum of $10,000.00 damages.

ABRAHAM HENIG,
Attorney.

THIS AGREEMENT, made this Twenty-first day of January, 1924, between Rothsteins, Inc., a corporation of the State of New Jersey, with its principal office in the City of Newark, County of Essex and State of New Jersey, part of the first part, and Elias Rosenberg and Max Weintraub, of the Borough of Brooklyn, County of Kings and State of New York, parties of the second part; WITNESSETH:

WHEREAS the party of the first part is desirous of selling, and the parties of the second part are desirous of purchasing the business now conducted by party of the first part at 413-417 Springfield avenue, Newark, N. J., it is hereby agreed between the parties:

1. That the price of the merchandise is fixed at $117,500, with the proviso that if the parties cannot agree on the price fixed for the various items of merchandise, that so far as said items are concerned each shall select an arbitrator who shall be a merchandise man, who in turn shall select a third arbitrator, also to be a merchandise man, and the decision of any two shall be binding on both parties hereto, and if the net price after agreement and arbitration, if necessary, shall be less than $117,500, party of the first part shall reduce the price by whatever the figure may be, or if the price shall be greater parties of the second part are to pay any such excess.

2. That the price of the fixtures is hereby agreed upon as $25,000.

3. That all insurance, gas and electric bills, are to be adjusted as of January 1, 1924.

4. That the sale shall take effect as of January 1, 1924, and all moneys collected by party of the first part since that date are to be turned over to the parties of the second part, less running expenses, and all bills for merchandise purchased since January 1, 1924, are to be assumed and paid by the parties of the second part.

5. That party of the first part, as a part of the consideration of the sale, agrees to procure a lease from Louis Rothstein and Dora Rothstein, his wife, owners of the premises at 413-417 Springfield avenue, Newark, N. J., leasing to the parties of the second part the building for a term of twenty-one years from January 1, 1924, for the annual rent of $12,000 net, which means that parties of the second part are to pay all taxes and assessments assessed against said premises, all insurance premiums, all water rates, make and pay for all repairs to the building, it being the intention of this agreement that the owners of the premises are to receive $12,000 per year net as rental.

6. Parties of the second part agree to insure the building and pay the premiums therefore to the extent of $80,000, and that the plate glass in said building is to be insured to its true value, by and at the expense of the parties of the second part.

7. Parties of the second part also agree to insure the stock and fixtures in said store for the term of three years for eighty per cent. of the value.

8. It is understood and agreed that the bill of sale for the merchandise and fixtures will be delivered by the party of the first part to a corporation about to be formed by the parties of the second part, and that the payment for the said merchandise and fixtures will be made by the said corporation to the said party of the first party as follows:

$5,000 in cash upon the signing of this agreement, the receipt whereof is hereby acknowledged.

$70,000 on the Twenty-fifth day of January, 1924, at the office of Charles B. Clancy, 810 Broad St., Newark, N. J., between the hours of 10 and 12 in the forenoon.

The balance of said purchase price by the said corporation executing and delivering to the party of the first part its promissory notes each in the sum of $2,000, the first note payable on April 1, 1924, and subsequent notes payable monthly thereafter until the Thirty-first day of December, 1926 when the entire balance remaining due shall be paid. Said notes are to be made by the said corporation so to be formed and to be endorsed personally by the parties of the second part hereto and their wives, and to bear interest at the rate of 6% per annum.

9. That the lease to be executed, as herein provided, shall contain a clause that the owner of the building shall not be responsible for any accidents occurred on or about the premises, and

that they shall comply with all municipal requirements.

10. That the lease to be executed, as herein provided, shall contain the foregoing clauses in addition to the clauses contained in the Chisholm Revised Gilsey Lease No. 99.

11. That parties of the second part shall have the right to use the name "Rothstein, Inc.," and that Louis Rothstein and Dora Rothstein, his wife, who are the majority stockholders of Rothsteins, Inc., agree that they will not engage in the same line of business for a period of twenty-one years within a radius of one-half mile from the present location.

12. It is understood and agreed between the parties hereto that parties of the second part are about to form a corporation and that this agreement may be assigned to said corporation, and all of the terms herein mentioned are to be carried out by said corporation.

13. That in the event of an arbitration being necessary each of the parties hereto are to bear one-half of the expense.

14. That the notes to be given as herein provided are to be held in escrow by Charles B. Clancy, 810 Broad St., Newark, N. J., in the event of an arbitration being necessary, until the arbitration is completed, which shall be not later than February 1, 1924.

15. That Elias Rosenberg and Max Weintraub are to become sureties on the lease herein mentioned to be given to the corporation.

16. In the event that the said parties of the second part hereto shall fail to carry out the terms of this agreement on January 25, 1924, the deposit of $5,000 herein mentioned is to be

retained by the party of the first part and this contract cancelled.

17. That the lease shall contain an exception to the clause which prohibits the subletting or assigning of the lease without the written consent of the landlord to this effect, namely, that the parties of the second part hereto shall have the right to sublet or assign the lease without relieving themselves of liability, after January 1, 1927, without the written consent of the owner, provided that the sublessee or assignee shall be engaged in a similar business and deal in the same class of merchandise to be purchased from reputable jobbers and manufacturers.

IN WITNESS WHEREOF, the said party of the first part has caused these presents to be signed by its president, and the said parties of the second part have hereunto set their hands and seals the day and year first above written.

ROTHSTEINS, INC.,

By

President.

Signed, sealed and delivered in the presence of

Served the within summons and complaint Nov. 12, 1924, upon the within named defendants personally upon Louis Rothstein, president of Rothstein, Inc., a corporation, at his usual place of abode, No. 676 Stuyvesant Ave., Irvington, N. J.

ANSWER.

Filed December 10, 1924.

ESSEX COUNTY CIRCUIT COURT.

ROTHSTEIN'S, a corporation, MAX WEINTRAUB and ELIAS ROSENBERG, *Plaintiffs,* vs. LOUIS ROTHSTEIN and ROTHSTEINS INC., a corporation, *Defendants.*	*Action at Law.* *Answer.*

The defendants, Louis Rothstein, residing in the City of Newark, State of New Jersey and Rothsteins, Inc., a corporation of the State of New Jersey, answer to the plaintiffs' complaint:

1. They admit paragraph one of the first count.

2. They admit paragraph two of the first count.

3. They admit paragraph three of the first count.

4. They admit paragraph four of the first count.

5. They deny paragraph five of the first count.

6. They deny the allegations as set forth in paragraph six of the first count and say that no representations were made other than those contained in the written agreement.

7. They deny the allegations as set forth in paragraph seven of the first count and say that

Answer.

no representations were made other than those contained in the written agreement.

Defendants deny that plaintiffs are entitled to any damages whatever.

SECOND COUNT.

1. They admit paragraph one.
2. They deny paragraph two.
3. They admit paragraph three.
4. They deny paragraph four.
5. They deny paragraph five.

They deny that the plaintiffs are entitled to any damages whatever on this count.

FIRST SEPARATE DEFENSE.

Defendants, Louis Rothstein and Rothsteins, Inc., will move at the trial to strike out the first count of the complaint because it discloses no cause of action as a written contract was entered into between the parties to this action which embodies all of the terms and conditions of the sale.

COUNTER-CLAIM.

By way of counterclaim, defendant Louis Rothstein, says:

1. At the time of the sale of the business of Rothsteins, Inc., to defendants, he sold and delivered to them twelve hundred and nineteen pads of trading stamps, each pad containing five thousand stamps, to the value of twelve dollars and fifty cents for each pad.

Reply.

Defendant, Louis Rothstein, demands as damages on this counter-claim, the sum of fifteen thousand, two hundred and thirty-seven dollars and fifty cents, together with costs of suit.

CHAS. B. CLANCY,
Attorney for Defendants.

REPLY.

Filed December 30, 1924.

ESSEX COUNTY CIRCUIT COURT.

ROTHSTEIN'S, a corporation, MAX WEINTRAUB and ELIAS ROSENBERG,
Plaintiffs,
vs.
LOUIS ROTHSTEIN and ROTHSTEINS INC., a corporation,
Defendants.

Action at Law.

Reply.

The plaintiffs for their reply herein, respectfully say:

1. They deny the allegations contained in paragraph 1 of the counter-claim of the defendants' answer.

ABRAHAM HENIG,
Attorney for Plaintiffs.

Judgment.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

37046

ROTHSTEIN'S, a corporation, MAX WEINTRAUB and ELIAS ROSENBERG,
Plaintiffs,
vs.
LOUIS ROTHSTEIN and ROTHSTEINS INC., a corporation,
Defendants.
Action at Law.

Non-suit costs $84.96
After Verdict Judgment Entered November 12, 1926.
Damage $25,000.00
Costs 114.40

Total $25,114.40

Abraham Henig, by Merritt Lane,
Atty. of Pltf's.

Judgment on non-suit in the above-entitled action was rendered on the twelfth day of November, A. D. nineteen hundred and twenty-six, in favor of the plaintiff Rothstein's, a corporation and against the defendants Louis Rothstein and Rothsteins, Inc., for eighty-four dollars and ninety-six cents costs of suit.

Judgment after verdict in the above-entitled action was rendered on the twelfth day of November, A. D. nineteen hundred and twenty-six, in favor of the plaintiffs Max Weintraub and

Judgment.

Elias Rosenberg and against the defendants Louis Rothstein and Rothstein's, Inc., for the sum of twenty-five thousand dollars ($25,000) damage and one hundred fourteen dollars and forty cents, costs of suit.

Judgment entered and signed November 12, 1926.

WILLIAM S. GUMMERE,
Judge,

JOHN H. SCOTT,
Clerk.

Book 101, page 590.

ESSEX COUNTY CIRCUIT COURT.

Monday, November 8, 1926.

ROTHSTEIN'S, INC., *et al.*,
vs.
LOUIS ROTHSTEIN, *et al.*
Action at Law.

Before Hon. William A. Smith, *J.*, and a Jury.

For the plaintiffs appears Abraham Henig (by Merritt Lane).

For the defendants appears Charles B. Clancy (by Alfred F. Skinner).

(A jury is called and sworn.)

Mr. Lane opens for the plaintiffs.

Mr. Skinner opens for the defendants.

MAX WEINTRAUB, sworn in behalf of the plaintiffs.

Direct examination by Mr. Lane.

Q Mr. Weintraub, where do you live? A 978 East 24th street, Brooklyn.

Q Do you know Mr. Rothstein? A Yes, sir.

Q When did you first come in contact with him? A Some time in January, 1924.

Q Where? A At his store, 415 Springfield avenue.

Q Who were present? A Mr. Rothstein, Mr. Rosenberg and myself.

Q Was there a conversation between you at the time? A Yes, sir.

Q What was the subject matter? A Mr. Rosenberg told Mr. Rothstein that the other gentleman that he had with him last year could not come in as a partner with him, and that he brought me over for that; and Mr. Rothstein told me the story of the business.

Q Did he mention the name of the other gentleman? A Mr. Rosenberg said Mr. Woolwick.

Q Go on and tell us what was said. A Mr. Rothstein said, "Mr. Weintraub, take a look around the store," and I went upstairs and downstairs and looked around and I came back to his office. He asked me what I thought of it. I said I thought it was a very neatly kept store. He asked me where I was located in business. I was in the haberdashery and clothing business in Brooklyn. He said it would be very wonderful for me and Mr. Rosenberg, inasmuch as I knew the haberdashery and clothing business I would be able to take care of these departments wonderfully. I asked him what the business was for the past year. He said, $350,000. I asked him what his expenses were. He said $76,000 and that it had shown him a net profit of eight to ten per cent. on the gross in business, $28,000. He said two young men like Mr. Rosenberg and myself, being young, and he being sick, probably could make more money than he has made in those past three years.

Q And did he say anything with respect to what business he had done from 1921? A 1921 he said he did a business close to $400,000—$393,000 but said in that year he didn't make more money because he had some man managing and he had to pay out a larger expense.

By the Court.

Q More money than what? A Than the years 1922 and 1923.

By Mr. Lane.

Q At that time was anything said with respect to trading stamps? A Yes, he said, "Did you notice the signs 'Stamps' on the second floor?" I said I did. He said, "I am going to tell you all about it; about the moving picture business." He did tell me at that time about the moving picture stamp company; how they had organized and were issuing trading stamps; that he had them solely. He said the moving picture stamp company had gone into bankruptcy and, so as not to lose money, he had this company deposit money in some certain bank that they would have enough money left to redeem the outstanding stamps; that he didn't lose any money on this transaction. He went on to tell us again he was very sick and that two young active men like us could take these stamps and make a big business of it, and sell them to the other stores in the neighborhood that they would have to come to Rothstein's to redeem them, and we would have more customers come into the store, but through his sickness he could not do anything.

Q Was any agreement reached at that time? A No, we asked him what he wants for the store. He said "One hundred cents on the dollar for inventory and $25,000 for the fixtures;" He said $75,000 cash and the rest on terms, to buy the store.

Q Did you have a subsequent meeting? A About two days afterwards.

Q Who were present? A Mr. Rosenberg, Mr. Rothstein and myself.

Q What took place at that meeting? A We told him that we thought the proposition over, and things looked logical and we asked him to show us a book of records; he showed us a green, long book. It showed $343,000. The $7000 he said he got it by renting out his basement for the holidays for the sale of toys and that the toy department made $7000 and that the toy department was charged ten per cent. on the gross and that gave him $7000. That is what his store averaged—between eight and ten per cent. on his gross business.

Q What color was this book he showed you? A Green.

Q I show you a green book and ask you whether this is the green book or not. A This is not the book because the other book didn't have so many figures.

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

(The same is marked Ex. P. 1 for identification.)

Mr. Lane: I call for the production of the green book.

Mr. Skinner: Just to make clear possible confusion we have a subpoena duces tecum which calls upon us to produce a certain green book; green is crossed out and black written in. We don't want to have any confusion as to color.

Mr. Lane: I think you will find there is a green book and a black book we asked you to produce. It is the green book we are asking for now.

The Court: This green book is offered for identification and is not the green book they want and you are called upon to produce a green book. Have you any green book you intend to produce?

Mr. Skinner: No, sir. I would like to have the records show that this book is produced by the plaintiff.

By Mr. Lane.

Q Did you and Mr. Rothstein go over this book that he showed you? A We did.

Q Did you go over the expenses that were shown in that book? A We did.

Q Where did you leave that book? A That was left with Mr. Rothstein.

Q Have you ever after that time seen that of expenses that you saw? A Never.

Mr. Skinner: One page?

Q How many pages were there that showed expenses? A One page.

By the Court.

Q What did it show? A The various expenses for the year 1923, a total of $76,000 and a few hundred.

By Mr. Lane.

Q Have you ever seen that page since? A No, sir.

Q Where did you get this book that is marked Exhibit P. 1 for identification? A That book I noticed two days after we took possession of the store and I went up to the office prepared

to look over the various expenses of the store so that I could familiarize myself with the expenses of the various departments and see what the payroll was in order to reduce it if possible. I asked Miss Feldman, the bookkeeper at that time, and I asked for that book; she opened that book. I said, "That is not the book." I looked for it and I saw a page was carefully cut out. I asked Miss Feldman, "Where is the page with expenses?" She said, "It must have been cut out by Mr. Rothstein but I have another black book here which will show you the expenses of 1923 and other expenses.

By the Court.

Q Was this after the closing? A We closed on a Friday and I believe I went to the office on Monday. We had an office downstairs and she was upstairs.

By Mr. Lane.

Q Did you see the black book? A Yes, sir.

Q What did that show? A $98,000. And I said to Miss Feldman, "Are you sure that is the correct expenses for the year 1923?" She said, "Yes," I said, "My God! something has been wrong here. $76,000 was represented to me as the expenses. I certainly must have been cheated according to this." And then I left the office.

Q Will you look at this green book and point to the place where the page should be.

The Court: Ask him where he got this book.

Q This green book was given to you at that time by Miss Feldman? A Yes, at the office.

By the Court.

Q That is the one marked for identification? A Yes, sir.

Mr. Skinner: If it is to be used why shouldn't it be offered in evidence.

Mr. Lane: I offer it in evidence.

(The book previously marked P. 1 for identification is received in evidence and marked Exhibit P. 1.)

Mr. Skinner: I understand it is a book found by this man after he took over the business.

Mr. Lane: Yes.

Witness: This is the page (indicating).

Q That is preceding the page where the week-end sales, 1923, January? Is that right? A Yes, sir—I beg your pardon, this was not the page, it was carefully cut smooth. This is ragged—this is the page (indicating), preceeding "bought in 1924."

Q Is your recollection as to what was in the green book, other than these expenses, sufficiently accurate or distinct for you to say that this green book, Exhibit P. 1, was or was not the book that was shown to you by Mr. Rothstein or in your statement that it was not based upon the fact that it does not contain the sheet showing the expenses. A The book shown to me by Mr. Rothstein, showing expenses for 1923, expenses $76,000, I never saw again.

Q How is this book different from the one you saw? A The other one is a book like this, but it didn't have so many pages for the years 1924, 1923 and so forth, and for this business for

the year 1923, $76,000, expenses for the year 1923.

Q May you be mistaken in your recollection, and may it not be that this is the book with the page cut out? A It might be the book with the page cut out.

Q Was the green book that you saw an old book or a new book? A A newer book than this.

Q So that your recollection is that this is not the book at all. A This is not the book; it did not have so much writing in for all those various years.

Q Let us go back to the conversation you were having with Mr. Rothstein. Was anything said at that time with respect to trading stamps—at the second meeting? A Yes, sir.

Q Tell us what was said. A He said that—I asked him how he keeps track of these trading stamps outstanding. He said there is a girl in the office by the name of Miss Foster who carries a book and that has various trading stamps. There is a certain number go to the upper office every morning and what she delivers back next morning shows what was given out that day. They know just how many stamps they redeem by knowing the number of stamps going up. He said, "You will find at the end of the year, or January, the outstanding number of trading stamps is between two and three hundred—never more—because the biggest amount of business conducted in this store, and he showed me the October and November months, is during the last part of the year, and you will find after you have been here a while, you will see the same faces every day and the people buying this merchandise usually make their heaviest pur-

chases during November and December and they redeem these books. After December, there is rarely more than two hundred or three hundred dollars outstanding. $200 or $300 is not important don't bother your head about it. I said, "I won't bother my head about it, as you say, in a proposition of this kind."

Q Were any terms discussed at that time? A Yes, sir, he said, "Mr. Weintraub, I want $75,000 in cash and $2000 notes." I offered him $50,000 cash and $1500 per month. He said, "I will not take any such offer when the store makes for me between $28,000 and $30,000 net profit per year. I want only $2000 per month—$24,000 per year. The store is making $28,000. All you have to pay me is $24,000 per year. You will only be paying me out of the profits of the business. If you have $75,000 in cash to put in, you will be on the same footing as I have been, paying the bills every first of the month, you will not have to have any money or go to any banks, only out of the profits of the business.

Q Was there anything said as to the salary drawn by him? A He showed me he draws $150 a week, that was included in the $76,000 on the expense sheet.

Q Did you finally reach any agreement at that conference? A No, we reached no agreement.

Q When did you next see him? A We told him we would like to look over the stock and see how he made his inventory. We made an appointment for two days afterwards. He said he wanted us to come at night so no one would know the store was going to be sold.

Q Who were present at the next meeting? A Mr. Rothstein, Mr. Rosenberg, Mr. Apfelbaum, the agent; his son, and myself.

Q Whose son? A Mr. Murray Apfelbaum's son.

Q What took place then? A I went over to the haberdashery side and the clothing side and compared sheets. Mr. Rothstein said, "Weintraub, what do you think of the stock?" I said, "A lot of articles I may be able to duplicate for less than your cost price but that doesn't make any difference." He said, "I am selling a profitable business, not for auction." He opened a book of cost prices and selling prices. He said, "Figure it out for yourself." Every item of shirts had a ticket of cost price and selling price. The cost price was in a code. "You will find my general mark is between thirty and forty per cent. Take thirty per cent. off $350,000 and you will find what I told you is net. $76,000 is the expenses and the difference between them is $28,000 or $29,000, making between eight and ten per cent. net." Mr. Rosenberg looked over his department and we told him that while the prices could be duplicated for less yet, we were buying a profitable business. We argued and tried to buy for less. He got mad at us and took off his shoe and his sock. He said, "If it wasn't for my sickness—if I stand on my feet for one day I have to be in bed after that." That impressed me that he was selling not for the fact of making any money but he could not attend to his business.

Q What was the basis used in figuring? A From his cost price.

Q What was said about the fixtures? A $25,000.

Q What kind of fixtures were they? A He told us these fixtures had come part from Rothenberg's that went out of business on Fourteenth street before.

Q How long before? A Two years ago or three years ago. He said he had purchased them second-handed.

Q How was the price of the fixtures fixed? A $25,000.

Q How was it fixed? At cost or what? A At cost because he had just prior to that purchased some registers, and they were carried at cost

Q You say he got $25,000 for his fixtures, is that right? A Yes, sir.

Q He got $25,000 from you for his fixtures? A Yes, sir.

Q What was the actual amount that he got? A $25,000 for his fixtures and $117,500 for his inventory stock which he showed us.

Q Wasn't there something about Mr. Apfelbaum's cutting his commission? A I only heard recently he cut his commision about $5,000. They stepped aside that night to talk it over. I don't know what it was.

Q Did you reach any agreement at that time? A We told him we were considering the matter and we would think it over.

Q When did you meet him again? A We again went Saturday morning to Mr. Apfelbaum's office and we said, "Murray—

Mr. Skinner: The following Saturday?

Q The following Saturday? A Yes, of that same week. And we asked him, "Murray, why don't you help us put it through?" He said, "You know what Mr. Rothstein said. He wants $75,000 in cash and $2,000 per month." He said, "I will call Mr. Rothstein up to my office and let us see whether he won't take any less." He called Mr. Rothstein on the telephone and asked him

to come down. In about fifteen minutes Mr. Rothstein came down to the office of Mr. Apfelbaum and we again started to discuss the price. He said, "Forget $50,000 cash and $1,500 in notes. If you fellows have $75,000 in cash and put it into this business, you will always be flushed with money and pay out of the profits of the business." He said, "You don't want my money, you want me to get out of here." He said, "The business is making $28,000 net per year. Why can't you pay me $2,000 per month? You want to get me out of here as quickly as you can." After discussion with Mr. Rosenberg, we agreed to pay him $2,000 per month.

Q Did you reach an agreement on that occasion? A We told him that we would consider the $2,000 per month. Mr. Apfelbaum said, "Weintraub—

Mr. Skinner: Was this afterward reduced to writing?

Mr. Lane: Yes.

The Witness: I said we didn't reach an agreement. I said, "We probably will take it." Mr. Apfelbaum suggested that we put up a deposit. I said I would rather put a deposit up with my attorney. Mr. Apfelbaum said there is another gentleman coming out at two o'clock who will give $100,000. He said, "If you don't put a deposit up you will probably lose it," and he said, "Mr. Rothstein, isn't that so?" He said, "Yes." He said, "I prefer you and Mr. Rosenberg and I have investigated you in Brooklyn." He said, "I would rather sell the store to you and have you as my tenants."

Max Weintraub, direct.

Q What happened? A We left. I should think it was Monday when we received a call from Mr. Rothstein. We finally got in touch with Mr. Henig and we finally went up to the office of Mr. Clancy and drew the agreement.

Q Did you draw the agreement in Mr. Clancy's office? A Yes, sir.

Q I show you an agreement dated the 21st day of January, 1924, and ask you whether that is the agreement. A That is the agreement.

Mr. Lane: I offer it.

(The same is received in evidence and marked P. 2.)

Q Did you sign this agreement that day? A Yes, sir. At that time we signed, he said, "If you fellows—"

Mr. Skinner: I object.

The Court: If it bears on the question of fraud, I will allow it.

Witness: He said, "If you fellows want to get it back, I won't give you back a penny of the $5000 that we put up as a deposit."

Mr. Skinner: The agreement provides for that.

Witness: I don't think so maybe I am wrong, but that is what he said.

By Mr. Lane.

Q When was the transaction closed? A On a Friday of that week.

Q Did you receive a bill of sale? A Yes, sir.

Q Is that it (indicating)? A Yes, sir.

Max Weintraub, direct.

Mr. Lane: I offer it.

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

Mr. Skinner: Subject to corrections, is that agreed.

Mr. Lane: Yes, sir.

Mr. Lane: With respect to this bill of sale, if the court, please, I do not want to read either of these documents to the jury, but I do want to direct the attention of the court and the jury to the fact that in the schedule which is the things conveyed, there is included the entire stock of merchandise and fixtures together with the good will of the business. Judge Skinner said no good will was transferred.

Q After the transaction was closed, you have already told us so I won't have you repeat that about your conversation with Miss Feldman about the black book and all that. After you had had your talk with Miss Feldman did you see Mr. Rothstein? A Yes, sir.

Q Where? A In the lower office.

Q Who were present? A Mr. Rosenberg, Mr. Rothstein, and myself.

Q What was said? A I said to Mr. Rothstein, when you sold us this proposition you told me and showed me a book of expenses $76,000 for the year 1923, and I went up to the office and asked Miss Feldman and she showed me a book showing $98,000." He said, "Where did you see that book?" I said, "Miss Feldman showed it to me." He said, "I thought all the books were removed by Puder & Puder." I said, "She said this book was kept for her personal use and she kept that book." I said

to him, "There is something wrong here." He said, "Listen Weintraub, don't mind anything about the books." He said, "That is for government purposes." He said, "You are too young to understand these things. Never mind what you saw." He said, "Get down to business and you will see that you will make more money than I could." He wrote $350,000 on a piece of paper and $28,000 profit and he said, "Forget about the books and get down to business." I said, "It doesn't sound any too good for me. I don't know whether it is so or not." I said, "Mr. Rothstein, I really believe you cheated Mr. Rosenberg and myself." I said, "We will run this business practically on the same lines and within a period of five months in comparison with the expenses you had and ours we will be in a pretty good position to see whether your expenses were $76,000 as represented to me or $98,000 as they actually were." He just didn't say anything just "All right" and went away.

Q What did you discover with respect to the trading stamp situation? A There was one other meeting I had about the trading stamp situation—

Q Did you have another meeting with Mr. Rothstein about this other thing you have been testifying about? A Yes, about the discount on the merchandise. We paid him cost price on his inventory, not less the discount. The discount he got.

Q When did you have that conversation? A About one day later.

Mr. Skinner: After he had closed?

Witness: After we closed.

Q Where? A At the office upstairs.

Q Who were present? A Mr. Rosenberg, Mr. Rothstein, and myself.

Q What occurred? A I said, "Mr. Rothstein, do you know that you have received—I had looked through the various bills and knew from my own business in Brooklyn that the bills were discounted from two to eight per cent. I said, "You collected discounts every month. I think we are entitled to that." He said, "I don't think you are. At any rate, I am going to call up my brother-in-law Mr. Spitz in Paterson" and he called him up and had some conversation with him in our presence. He said, "All right. I will give you $2500." I said, $2500 is not enough. That is a little less than two per cent." I said, "You have been making between two and eight per cent. He left with $2500. The next day he said, "I wouldn't give you five cents. I have seen my attorney, Mr. Clancy, and I won't give you a nickel." I said, "You already show yourself a man who wants everything." He said, "I don't care a darn about you." I spoke to Mr. Rosenberg about it—

Q When did you have a conversation with Mr. Rothstein about the stamps? A That was during the month of February.

Q What had happened with respect to the stamp situation? A I looked through the books and Miss Feldman showed me that the trading stamps for some $400 odd were redeemed for January, 1924. I said, "Miss Feldman, there must be a lot of stamps outstanding." She said, "Oh, yes. They come in that way every year." I said to Mr. Rothstein, "You said to me that the outstanding stamps was between $200 and $300 and not to bother about it." I said, "It is January, and we paid $400 and here we

have to redeem all these trading stamps you have benefited by. We know nothing about them." I said, "Haven't you any heart?" He said, "Don't bother me, I don't want to know anything about it."

Q I show you a book and ask you whether that is a trading stamp book issued by the old corporation, during Mr. Rothstein's management of the business, but which you redeemed afterward. A It is.

Mr. Lane: I offer it in evidence.

Mr. Skinner: I object to the admission in evidence of this book. Apparently it is offered in evidence without proof that it is a book of stamps redeemed by the plaintiff after closing. There is no proof as to when the stamps were issued; they may have been issued by the plaintiffs themselves after they bought the business. I can't see that on the plaintiff's own story that this is admissible.

Mr. Lane: The witness has testified it was issued prior to his going into the store and was redeemed after.

The Court: Yes, but it is hearsay evidence.

Q How do you know that that book which I have shown you, or the stamps in that book, were issued prior to your going into the store? A We saw immediately that we were absolutely cheated in this trading stamp affair, and I said to Mr. Rosenberg, "We will have to sue Mr. Rothstein in this transaction, and in order to show how many trading stamps we have been redeeming, let us change the color of the stamps

from the printing company which he didn't want to tell us, but which we found out later." I ordered them blue. We were issuing blue stamps, not any more red ones. Any red ones we were to redeem were issued by the old corporation.

Q And this other book I show you which contains blue stamps, were they issued by you? A That is the same stamp which was issued by us.

Cross examination by Mr. Skinner.

(Cross examination on the question of trading stamps.)

Q You say under oath you issued no stamps of the kind Rothstein had been issuing but changed the color and issued an entirely new lot? A We changed the color.

Q Didn't you issue any of the old color? A Maybe for two weeks.

Q Didn't you issue them for several months? A No, sir.

Q Didn't you issue them the entire month of January? A January, yes, because we had no control of the store.

Q Don't you know it was turned over to you as of January 1st and the agreement called for him to do that? A Yes.

Q He ran it for you? A To January 25th.

Q And he accounted to you for everything? A Yes.

Q And he accounted for the redemption of the stamps? A I don't know anything about the redemption of the stamps?

Q Did he in that account show the redemption of trading stamps? A I didn't pay attention to that.

Max Weintraub, direct.

By the Court.

Q You are asked if you don't know that that was included in the accounting? A Whether these old books were in the account?

By Mr. Skinner.

Q Whether there was included in the account for January's business expenditures made by him for the redemption of trading stamps—that kind he had been issuing? A I don't think so.

Q But you said you didn't pay any attention. A No, because the accountants were straightening the books and we relied on Puder & Puder. We had that much confidence in Puder & Puder to take care of us.

Q You mean you relied on Puder & Puder to do anything more than report to you what the expenditures were? A Exactly.

Q But you didn't rely on them to find out whether you had been cheated? A I knew nothing about how these stamps were going to come in.

Q Haven't you been telling us how they were coming in? A Yes.

By the Court.

Q You admit red stamps were issued in January? A Yes.

The Court: Then, Mr. Lane, you haven't proved it. You have got to show that it was issued by the defendant.

Mr. Lane: I won't press it at this time.

By Mr. Lane.

Q What was the next thing that occurred with reference to anything that you discovered as to

Max Weintraub, direct.

the business which Mr. Rothstein had done? A That was some time in May, 1924. Mr. Rothstein came into the store and said, "Did you receive any accounts here from my accountants, Puder & Puder?" I said, "I didn't." He said, "You know very well you did, because they were mailed here by Puder & Puder." I said, "I didn't see them." I said, "But I know by this time you have cheated us." Miss Feldman told me he spoke to her about these various reports. He said they were mailed by mistake, but these were reports we had already in our possession. They were addressed to Rothstein's, Inc. We saw the actual profit he made in 1923, and I knew I was not handed a square deal.

By the Court.

Q As I understand, you kept the reports you received from Puder & Puder? A Yes, sir.

By Mr. Lane.

Q I show you a report of accounts from Puder & Puder and ask you whether that is the report you received in the mail addressed to Rothstein's, Inc? A This is the report.

Mr. Lane: I offer it.

Objected to.

Mr. Lane: I won't press it at this time. I ask that they be marked for identification.

(The same is marked Exhibit P.4 for identification.)

Q Did you take this report up with Mr. Rothstein up at any time? Did you tell him you had it? A I didn't tell him I had it.

Q Did he ever come to you and ask you about it again? A He was in a few days afterward and asked, "Have you found it?" I said I didn't know anything about it.

Q What did he say? A He said, "I know you have it here, somewhere, and you don't want to give it up." I said, "I don't know what you mean, and I haven't got it."

Q What happened next? A June 1st was a Sunday he came in on Monday morning, the second, about 9:30, and he brings in a check made out to himself for $1000 for rent. I said, "Where did you get that?" He said Miss Feldman made it out for him. I said, "I can't give you the rent now, but I will give it to you in a few days." He said, "All right." I said I would give it to him. He said he would come in for it. The reason I didn't want to give him the check at that time was—

Q Just tell us what occurred. A He left.

Q Did you see him again? A Yes.

Q When? A Friday of that week.

Q Did you have a conversation with him? A Yes, sir.

Q What was the conversation? A On the instructions of Mr. Henig—

Q Never mind the instructions. A I came up to his home and I had the rent in my pocket in cash and I said, "Mr. Rothstein, good morning." He said, "Good morning, Mr. Weintraub." I said, "I suppose you know why I am here." He said, "I won't take it from you." He said, "Come in, I want to talk with you." He said, "Listen here, I have just about got you where I want you. Unless you come to my attorney's office and sign that you have nothing against me, I won't accept the rent from you." He said,

"I am Mr. Rothstein, from Newark, and you come from Brooklyn, and I will positively break you." I said, "Will you really have the heart to put us out? After we gave you $75,000 would you have the heart to do that?" He said, "I would have the heart to do anything." I said, "Why don't you leave this to arbitration by a business house; any business house you have been doing business with and I will in turn select a house I have been doing business with, and they together are to select a third and we will go and sign any agreement they say." He said, "I don't care what they say. It is what I say." I said, "You have cheated me, and you want to take the heart out of us." He said, "Weintraub, go out and think it over, otherwise I will surely break you."

Q Then what happened? A He rang me up on Monday afternoon. I said, "Mr. Rothstein, I want to have peace with you. I have decided to do nothing. I just want a square deal from you."

Mr. Skinner: I object to it. I don't see what relevancy this other talk had, loose talk that does not prove anything.

The Court: I will allow it.

Q Did Mr. Rothstein institute a suit in the district court for the possession of the property?

Objected to as immaterial and irrelevant.

The Court: He has testified that the defendant refused the rent; that is, refused to take the rent when he offered it to him, and then wants to prove that he started a suit to

get possession of the property. I don't think that that alone has enough evidential force to warrant its being proved here. I will sustain the objection.

Q Have you kept track of the amount of business you did for the first six months of 1924 and the profit? A Not the profits, but the business.

Q You did? A Yes, sir.

Q Did you ever have any talk with Mr. Rothstein as to those figures? A I did not.

Q Who kept those accounts? A The bookkeeper, Miss Feldman.

Q Did you have an audit made of the business for the year of 1924 by Puder & Puder? A Yes, sir.

Q Who made that audit? A Mr. Armstrong.

Q Of Puder & Puder? A Yes, sir.

Q What records did he have access to? A All the records that were in the store: inventory, amount of business, and general running expenses of the store.

Q Did he have your complete records? A Complete records.

Q Did he have all your records? A All of our records.

Q Were those records showing the conduct of the business accurately? A Yes, sir, accurately.

Q Did he make a report to you? A Yes, sir.

Q I show you a report and ask you whether this is a report that he made, dated February 25, 1925? A Yes, sir.

Mr. Lane: I offer it for identification.

(The same is marked P. 5 for identification.)

Q How long have you been in businss? A For myself?

Q Yes. A About ten years.

Q What has been your business during the ten years preceding the time you bought this store? A Clothing and men's wear—haberdashery.

Q What was the kind of business you bought from Rothstein? A As far as the clothing and haberdashery, it was a nice, clean, neat business.

Q What kind of a business? A A department store.

Mr. Lane: That is all at this time. I have further questions to ask on the item of damages, but I can't without laying a foundation.

Cross examination by Mr. Skinner.

Q In your ten years in the clothing and haberdashery business you had considerable experience as to the profits that can be made? A Yes, sir.

Q You came to this negotiation with the knowledge of the profits that ordinarily can be made in that business? A Yes, sir.

Q And you didn't need any information from Rothstein on that point? A I wouldn't say that.

Q For you already knew the usual profit. A What my profits were in my business.

Q In the kind of business you carried on? A Some stores might have one per cent. and eight per cent.

Q It depended a good deal on the management. A Every business does.

Q You wouldn't expect to have a sick man make as good a manager as a well man? A No.

Q You knew he was sick for years? A He told me so.

Q You knew that during the past three years he had made an average profit of eight to ten per cent. A He told me so.

Q How did that strike you? Was it up to the usual or beyond it? A It didn't strike me. I thought of it as a profitable business.

Q Didn't you say something to yourself as forming some opinion as to whether it was usual or beyond or below? A It was a nice profitable business.

Q Such as you would expect a man to make who was able to take care of his business? A Yes, sir.

Q And a good deal more than you would expect a man to make when he was sick? A I wouldn't say that.

Q Will you tell the jury why? A I don't know what a man could do.

Q When he told you eight per cent. you couldn't tell what you could do. You had to determine what you could do on the basis of your own experience and your knowledge of the business. You didn't know. A Repeat that, please.

(Question withdrawn.)

Q When he told you that he had made eight per cent. you knew that that didn't tell you what you could make, didn't you? A No.

Q For your purchase of this property you depended, did you not, on your own judgment of what you could make of that place? A My first judgment of what a man could make in that particular business?

Q That was the first information you had? A He told me so.

Q That was the first information you had? A The first information from Mr. Rothstein.

Q The first information of any kind as to Rothstein's business? A Yes.

Q After that you got a good deal more information, didn't you? A Practically on the same lines.

Q You examined the books? A I examined the books.

Q And you looked through them? A I looked through them.

Q He showed you the business that had been done? A Yes, sir.

Q Did you say that the book you looked through showed the business that had been done any different from this book that is produced as Exhibit P. 1? A Yes, sir.

Q You say that from memory, do you? A Yes, sir, from actually seeing it.

Q Would you say from memory that the book which you saw is not this one and had a page containing expenses of $76,000? A Yes, sir.

Q That page you pointed to here as having been cut out, do you remember? A I said a page had been cut out from this book.

Q Why did you point to a page that had been cut out? A I asked for expenses—

Q When on the stand, why did you point to a page in this book which you say is not the book that was shown to you— A I asked Miss Feldman for the book of expenses and she said it is kept in this book and when she came across it she said, "It looks like it has been cut out by Mr. Rothstein" and she said, "I have another

book here which I kept personally which will show you the expenses for the year 1923."

Q I again ask you if this was not the book that was shown to you by Mr. Rothstein why did you point to a page cut out in it? A Miss Feldman told me there was a page cut out. I asked her for the book of expenses.

Q Did you mean to give the jury the impression that a page had been cut out to conceal anything from you? A Yes, the expenses.

Q You mean to tell the jury that there was another book that was left showing the true expenses? A Yes, Mr. Rothstein himself was surprised. He said he instructed his accountants to remove every book. Miss Feldman kept that book herself.

Q When you picked out here the page that was cut out why did you point to the wrong page in the first place? A I remember distinctly it was a fine-cut page.

Q Having remembered it was a fine-cut page you pointed to a page that was fine-cut and pointed to a page that was ragged? A I beg your pardon?

Q Didn't these negotiations start a good deal earlier than you said? A January, with me.

Q Weren't you there looking at this very store in December, 1923? A Not me.

Q Didn't you have any communication with Mr. Apfelbaum in December, 1923? A Not me.

Q Who did? A I don't know; not me.

Q Didn't Mr. Apfelbaum bring this store to your notice? A Through Mr. Rosenberg.

Q In December, 1923? A I don't know when he was there.

Q I asked you if Mr. Apfelbaum did not bring, through Mr. Rosenberg, this store to your notice in December, 1923? A No, sir.

Q He brought it to Mr. Rosenberg's notice, didn't he? A I wasn't present.

Q Rosenberg told you about it? A I think he told me in November, I think.

Q Rosenberg told you in November or December that Apfelbaum had brought this store to his notice? A Exactly.

Q And you and Rosenberg considered it? A I told him I couldn't go out to Newark until January when Mr. Rothstein would have his completion of the business of 1923. I had the rush season on at the end of the year.

Q Didn't Rosenberg go out and report afterward to you? A No, sir.

Q Are you sure about that? A Positive.

Q So the first actual observation you had of this business was in January, 1924? A Exactly.

Q And you are sure of that? A Absolutely sure.

Q Didn't you examine at some time or other —thoroughly examine—this store and the place around it as a site for that business? A After I was there I saw Mr. Rothstein.

Q When was that? A In January.

Q How long before the agreement was signed? A After the first meeting.

Q How long before the agreement was signed? A Some time around then; after I had a meeting with Mr. Rothstein.

Q Can't you tell us how long before the agreement was signed? A The whole thing took fifteen days. You can judge for yourself—

Q I will judge for myself if the whole thing took fifteen days the whole thing was fifteen days before the agreement was signed? A Yes, probably.

Q You made a thorough examination? A I don't know what you mean by thorough.

Q What did you do? A I looked at the neighborhood.

Q You saw it was a thickly-populated district with people passing every minute of the day? A No, it is not. You see people walking about but not like Broad and Market street. It was not populated and I wouldn't call it a one hundred per cent. location. In my opinion it would be a sixty per cent. location.

Q You found out something about the location, at any rate, didn't you? You formed an estimate of it? A I didn't; I looked around there.

Q When you say you called it a sixty per cent. location didn't that mean it was what you judged it to be be? A I found it out then, yes.

Q What is a sixty per cent. location? A Why a man could not open up a store immediately and do business. If you open on Broad or Market street you could do business immediately, but not a location like this. You would have to get established.

Q You figured Mr. Rothstein had made $28,000, or eight per cent. on a gross of $350,000? A Yes, sir.

RECESS FROM 1 TO 2 P. M.

AFTER RECESS.

MAX WEINTRAUB resumes the stand.

Cross examination by Mr. Skinner (continued).

Q I have shown you this book Exhibit P. 1, and called your attention to the two pages that

you had pointed out as having been cut out. Did you point to those with the intention of intimating to the jury that Mr. Rothstein was in some way responsible for those pages being cut out? A I was not present—

Q I didn't ask you that. A That I had intimated? I would.

Q Of course, you have no knowledge. All you know is that the pages are cut, is that it? A That's it.

Q You want to put it on Mr. Rothstein? A I didn't want to put it on Mr. Rothstein. The bookkeeper said it was probably cut out by Mr. Rothstein. He is the only one that had access to these books. These were the words used by Miss Feldman.

Q At any rate, the reason for it is to intimate that it was Mr. Rothstein that cut those pages out? A Yes.

Q Is there any reason why he should have cut both pages out? A I said I remembered that was a straight line cut and that was ragged.

Q But it was cut out. A But I said there was a page cut out of that book. I said that does not look like the book because that was a fine-cut page.

Q It was a page that showed expenses for the year 1923, wasn't it? A Right.

Q This is not the book that was shown to you? A No, sir.

Q Can you suggest any reason why Mr. Roththsein should cut the page out of a book so he can show you? A For his own benefits.

Q The other one that you did see was there for you to see? A He showed it to me in his private office.

Q Then that is the one that said $76,000 expenses? A Yes, sir.

Q Why did you pick out this second page here at all, or either of these pages, if what was shown to you was a page in another book? Why do you refer to this book at all? A I asked Miss Feldman for the book where she keeps her expenses. I didn't pay any attention to the book. We came across this cut page and we looked for it.

Q I am asking you for your own mental processes here. Why did you point to the first page? A I pointed to the cut out page; I knew it was in that book.

Q How did you know it was in that book? A I saw the two pages cut out after I took the store.

Q Do you mean to say Mr. Rothstein cut out a page and left the book there for you to see? A It is possible.

Q Left it for you to see that the page had been cut out? A Yes.

Q You turned from the ragged-cut page to the other one as being the correct one. You meant by that, did you not, that was the page that had been cut out corresponding with the page that you had seen? There were two books. A Yes, sir.

Q One showed $76,000 expenses? A Yes, sir.

Q Wasn't it this page that showed $98,000? A It must have been.

Q I want to call your attention to the fact that this ragged-cut page precedes the page marked "sales for 1923"? A Yes.

Q You would rather expect that would be a page that showed the expenses for the same year? A I wasn't expecting anything.

Q Wouldn't you expect to find out that the same pages for sales of that year— A Whether it was prior or after would not make a particle of difference to me.

Q Find the nicely cut page. A There it is (indicating).

Q That precedes the page that gives "Bought in 1924." A That's right and just after the purchases of 1923.

Q There are sales up-to-date 1923. A Very true.

Q We have preceding this a page marked "Sales for 1923" another one "Purchases for 1923" then one "Stock on hand 1923"; then one "Sales up-to-date 1923"; then, "Purchases up-to-date 1923"; and then comes the cut-out page and a page "Bought in 1924" and then "Sold in 1924" and "Sold in 1924" and "Expenses 1924 and Stock on hand." You notice that the page for expenses 1924 comes ahead of stock on hand. A I wasn't keeping the books.

Q You didn't cut those pages out yourself? A I honestly did not.

Q You honestly did not. A No.

Q You found two days after you had bought this business that you were cheated? A Absolutely.

Q Will you explain to this jury why you did not bring suit until November, 1924? A Just on the assertion that Mr. Rothstein told me in the office that that book was entirely different and it was kept for government purposes and I could rely on his statement that the true expenses for that year 1923 were $76,000, not as the books showed.

Q How did you know they were not? A I took his word for it.

Q How did you know they were not? A What was the other book?

Q If he was keeping another book for the government it was to show less profit. A I don't know.

Q You know it is to keep down the income or profit? A That is the usual thing.

Q The usual thing would be to exaggerate the expenses. A Yes.

Q You understood that the book was $96,000 was an untrue statement? A Yes.

Q Do you point to that now as pointing out that the other $76,000 was wrong? A It was wrong.

Q You said the $98,000 was made up for the government.

Mr. Lane: I object to that. He said Mr. Rothstein so stated.

Q I understand. Mr. Rothstein told you that and you took his word for it. You have no reason now to doubt it? A Doubt what?

Q That it was a book made up for the government. A That book $98,000 was the expenses for that business.

Q Then this book was made up for the government. A He told me that $76,000 were the expenses and I found them to be $98,000.

Q You found them to be $98,000 in a book Mr. Rothstein told you was made up for the government. A Exactly.

Q You do not take his word for it, but jumped to the conclusion that that was the true statement of the expenses. A It was the true statement. I took Miss Feldman's word that it was a true statement. Mr. Rosenberg was

not intent on going into court. He wanted to keep on good terms with Mr. Rothstein and he wanted to figure up what our expenses would be for the first few months.

Q You understood that was a book made up for the government and you knew a book for the government would exaggerate the expenses. A Yes.

Q That book you told us was made for the government you are taking as being the true statement? A We found out later it was not made up for the government; it was true. There was nothing padded there. He told me that.

Q That was the book shown to you? A Shown to me by Miss Feldman.

Q And that showed— A $98,000.

Q That was the book that was shown to you by Mr. Rothstein? A Yes, sir.

Q Was this book shown to you by Mr. Rothstein? A A book like that.

Q Were there three books? A Two.

Q There were three books, two green and one black. A Yes.

Q Two days after you took possession you found you had been cheated. That was January, 1924? A Yes, sir.

Q I ask you to tell the jury why it was you waited until November, 1924 to bring this suit? A I spoke to Mr. Henig much before November.

Q Didn't you attend a party given by Mr. Rothstein to his employees before he sailed to Florida? A I don't know where he sailed; it was after we bought the store.

Q You were there. A Yes.

Q Rosenberg was there? A Yes.

Q That was after you found out about being cheated? A Yes, sir.

Q You bid him goodbye and God speed and you wished him luck? A I don't know whether I was or wasn't. I attended the party. I wanted the good will of the store employees; I was one of them.

Q Did you think you would lose the good will of the store employees by disclosing the fact that you had been cheated? A I didn't think it was necessary to go into it with the store employees about that.

Q Did you think the store employees would not sympathize with you if they learned you had been cheated? A I didn't ask them for an opinion.

Q Rosenberg and you put in $75,000? A Yes, I put in $7,000 after that.

Q I mean at the time you bought it. A I put in altogether $44,000.

Q At the time you bought? A $75,000.

Q Half and half between you. A Yes, sir.

Q You provided in the agreement that you contemplated forming a corporation and that it might be transferred to the corporation. A I assume it was.

Q Don't you know? A Yes, sir.

Q At that time you said so in the agreement. A Yes.

Q And you turned it over to the corporation? A On the suggestion of my attorney it was advised to form a corporation like Mr. Rothstein's.

Q You turned it over to your corporation? A It wasn't a new corporation; it was Rosenberg and myself only.

Q You turned it over to the corporation. A Yes, sir, formed by Mr. Henig.

Q It was never turned back? A No.

Q And you got stock in that corporation? A Yes.

Q There were 750 shares of stock issued for $75,000 which had a par value of $100. A Yes.

Q You got 375 shares. A Yes.

Q And put in $37,500? A Yes, sir.

Q After that you sold those shares for $37,500? A I sold them for $30,500.

Q To whom? A To Mr. Klausner and Mr. Epstein.

Q I don't want you to be confused at all. I am asking you about the price at which you sold. I don't want any figuring in your mind but the price for which you passed that stock to Klausner and Epstein. A I paid $37,500. When I got rid of this stock to Klausner and Epstein I was out $7,500.

Q (By the Court.) What was the price they paid? A $32,500.

Q They paid you that? A Yes, sir.

By Mr. Skinner.

Q Rosenberg made up $5,000? A The store did.

Q Rosenberg got a check from the store? A I don't know.

Q Klausner wouldn't pay more than $32,500 for your shares and Rosenberg said rather than get Klausner and Epstein he would put it up. A I don't know anything about the transaction between Mr. Rosenberg and Mr. Klausner.

Q Why did you say the store put up $5,000? A That is what you said.

Q You did not volunteer that? A No, I found out later from Mr. Rosenberg that the store had advanced $5,000.

Q And you found that the store had advanced that to Rosenberg? A He told me that the store had paid up $5,000 for me to get $37,500.

Q You got everything you put in? A Except the $7,000 I had advanced.

Q Why didn't you collect? A They wouldn't give it to me and I was mighty glad I got $37,500.

Q You didn't assign that? A I did.

Q To whom? A To the new owners.

Q Klausner and Epstein? A Yes.

Q What was it? A That I agreed to leave the $7,000 in there and that I had no claim.

Q Was it in writing? A Yes.

Q Will you produce it now or later? A Yes.

Q Why did you agree to leave that there? A That is the only way I could have gotten my price for the stock and I was glad to take that and leave that there.

Q At any rate, the agreement which you complained of as having been obtained by fraud was transferred to a corporation from which you obtained stock for the money you put up and you got back from that corporation or somebody else, the money you put up as the price of that stock? A Yes, sir.

Mr. Lane: I object to that, because the witness has stated time and again that he got back what he put in less $7,000.

Q What interest have you got in any claim against Rothstein for fraud? A What interest have I got?

Q Yes. A At the time he sold me the store, if I did not rely on his representations would I have put in half of $75,000 and given any of my

hard earned services without drawing any interest on the money?

Q I don't know whether you would or not. A I would not.

Q I ask what interest you have against Rothstein for fraud?

Mr. Lane: I object to that. He is telling you—

Q Have you any interest in it? A My interest that I have spent two years for nothing. I paid Mr. Rothstein 100 cents on the dollar on the stock which was worth fifty cents on the dollar.

Q Have you any assignment of interest in that claim from Mr. Rosenberg? A I have.

Q You have taken an assignment from Mr. Rosenberg for the entire claim? A Not the entire claim; he has the half interest in it.

Q What did he assign to you? A At the time the transaction was made the claim was supposed to be assigned by the corporation—

Q What did he assign to you? A His interest in the suit.

Q His interest? A The corporation's interest.

Q Have you that in writing? A Yes.

Q Will you produce that?

Mr. Lane: In time.

Q When was that assignment made? A November, 1925.

Q Are you sure of that? A November, 1925.

Q That was after this suit was begun? A After the suit was begun.

Q After Klausner and Epstein had bought you out? A Yes, sir.

Q So that what you have is an assignment of a corporation of which Klausner and Epstein owned half and Rosenberg owned another half? A From the corporation. He said at that time the corporation would have to give me an assignment, otherwise I could not go on with my suit.

Q Then if Rosenberg assigned his interest to you he had no interest in this suit? A The corporation assigned it. He himself has not assigned. I believe we started suit with Max Weintraub, Rosenberg and the corporation.

Q You say you turned this over to the corporation—this agreement? A Yes.

Q And then you treated that claim as being in the corporation and got an assignment from the corporation. A I treated that as myself and the corporation. The corporation was being formed. There was only Mr. Rosenberg and myself.

Q Was that Mr. Henig's advice? A Of what?

Q Of having a double-barreled assignment from a corporation? A You mean the assignment of the suit?

Q Yes. A That was not advice by Mr. Henig; that was counsel of Klausner and Epstein at Jersey City.

Q What counsel? A Mr. Klausner.

Q A lawyer? A Yes, he was an uncle of his.

Q Did you not understand that Mr. Rothstein had been drawing from this business at the rate of $150 a week? A We did.

Q Didn't you understand that that was part of what he would call his profits from the business? A No, we asked him that question and he said this $150 and we saw was included in the expenses of $76,000.

Q If you saw the account that showed the expenses you also saw the account that showed the business, didn't you? A The total amount of business.

Q You knew enough about business to determine for yourself what the profits would be, didn't you? A I did.

Q And having seen the expenses and the gross, couldn't you come pretty near telling what the profits were? A I didn't know what that man was doing.

Q I didn't ask you that. From your own experience could you not, having seen what the expenses were and having seen the gross of the business, and knowing something about the usual profits, could you not make your own estimate of what the profits was? A I couldn't estimate unless I was shown books.

Q Having been shown books couldn't you make up the estimate? A When he told me eight per cent. it looked logical; he wasn't exaggerating eight per cent. net on $350,000 business.

Q You spent very little time out in Newark, didn't you, after you bought this business? A I spent all my time for quite awhile.

Q For how long? A Six to nine months.

Q That is practically the time you sold out? A No, I sold one year and nine months after that.

Q You knew, didn't you, when you did sell out that Rosenberg wanted to get a more active partner in? A Mr. Rosenberg told me these other people were coming in with him and were going to give him a few ideas as to how to run

it on a higher class style for that neighborhood —that would be better—and also they were undergoing extensive alterations to improve the business.

Q You knew after you had gone into this and saw what the expenses were— A We saw then what the book upstairs had shown, $98,000. They were running about that rate.

Q You knew that before? A By looking at the books.

Q You knew what the expenses per month were? A We knew that the figure that Mr. Rothstein told me—$76,000—and by the other book—$98,000.

Q From your own experience month after month you knew what they were? A Yes.

Q What were they? A They were running $98,000 or over.

Q You started with the actual experience that the expenses were $20,000 more? A I didn't start with that experience.

Q You had from experience that $98,000 or over were the expenses—your own expenses as you ran the business? A As we ran the business.

Q You just said they were around $98,000? A Yes.

Q From the very beginning? A From the very beginning.

Q What profits did you make? A What profits did we make?

Q Yes. A I don't remember now. I think it was $3,000 or $2,000.

Q $3,000? A I just don't remember it was around $3,000 or $4,000; I don't remember exactly.

Q How is it you haven't any recollection of that important item? A I know the profits were so low I didn't pay any attention.

Q Didn't you know the profits were incorrect and untrue? A No, sir.

Q Didn't you know certain receipts never went into the books? A No, sir.

Q Didn't you know the departments were paying a rental to you? A Yes, sir.

Q Didn't you know these rentals didn't show in the books? A We didn't rent them out.

Q Didn't you know these rentals didn't show in the books? A They didn't.

Q Then the profits shown in your books were untrue? A Except that the profits that were not there when we purchased; they were true as to the business.

Q There were receipts that your company had from departments by way of rentals or percentage of sales which were not shown in your books? A Yes, sir.

Q When you say the profits you made were $3,000 your books were untruthful? A They were not untruthful.

Q If they didn't show the receipts they were untrue? A Mr. Rosenberg and myself took them for living expenses; a hundred and a quarter a week I could not live on.

Q You didn't put those rentals through the books? A No.

Q Although it was a receipt? A Yes, sir; the same departments in fact, with an added department.

Q I am pointing out that what you have stated as being the profits from your business is an untrue statement because there were receipts that you kept out of your books. That is plain,

isn't it? A It is very plain but I wouldn't call it untrue.

Q What would you call it? A The rentals were not part of the business.

Q The corporation owned the business you created? A Yes, sir.

Q And the corporation rented its space in the store to the departments you created? A Yes, sir.

Q And the corporation was the landlord to the departments? A Yes.

Q And the departments were the tenants? A Yes.

Q And the landlord gets the rent? A Yes, sir.

Q And the landlord did not get the rent. You and Rosenberg diverted it? A We used it.

Q And the books purported to be the income of the corporation? A Yes, sir.

Q And they were not correct? A I wouldn't call it that.

Q The company that you formed advertised, didn't it? A What kind of advertising have you in mind?

Q What kind have you in mind? A I don't know what you have in mind.

Q Any kind. A Circulars, just as Mr. Rothstein had conducted.

Q And newspaper advertising, too, wasn't it? A We had—

Q Yes or no. A Let me explain this. We had not the prominent newspaper advertising. We had a few little neighborhood papers like the "Chap," which cost $60 a month.

Q You had newspaper advertising? A Not prominent newspaper advertising; neighborhood newspapers. I didn't want ridiculous expenses

like the Evening News or the Newark Star-Eagle. We couldn't afford that.

Q The departments shared in the benefit of that advertising, didn't they? A Yes, sir.

Q And the departments should have shared in the expense of it? A Yes, sir.

Q And did? A And did.

Q And what they paid as their share of the expense of advertising you and Rosenberg took? A Yes, sir.

Q You didn't pay it to the corporation? A Yes.

Q And you or Rosenberg took or diverted the department share of it? A Yes, sir.

Q And the share that should have gone to the corporation went to you and Rosenberg? A Yes, sir.

Q To that extent the books are not true? A Yes, sir.

Q And to that extent your statement of the profits of the corporation is incorrect, isn't it? A For the business—

Mr. Lane: I would like Judge Skinner to state where the statement is as to the profits of this business.

The Court: He said about $3,000.

Cross examination of Max Weintraub, continued by Mr. Skinner.

Q These trading stamps, that you used were turned over to the departments, weren't they, some of them? A Yes, sir.

Q And the departments got the benefit of them? A Yes, sir.

Q Did the departments pay anything for them? A They did.

Q Did that show in the books of the company? A No, sir.

Q They paid it to you and Rosenberg? A Yes, sir.

Q And that was true from the time that you took over this business—from the time that you started? A From the time that we rented the departments; there was one department we rented in 1924 and one we rented in 1925.

By the Court.

Q Were the expenses of the stamps paid for by the company? A Yes, sir.

Q That is, by— A The corporation.

Q Who paid for the red stamps that you used? A Who paid for the red stamps that we used?

Q Yes. A What red stamps are you referring to?

Q The ones you referred to as having been issued. A They were left in the good will of the store.

Q Who paid for them? They were used, you said. A Yes, they were used in the month of January.

Q Did they belong to you? A They did.

Q You had then taken over that trading stamp business? A Yes, sir.

Q By arrangement with Mr. Rothstein? A There was no arrangement; that was one of the good will of the business. Without the trading stamps, you could shut that store up. He told us that himself.

Q You mean that, do you? A I absolutely do.

Q You mean the good will of the business, built up by Mr. Rothstein through the many years

of his personal handling of the business with all the acquaintance between him and the customers was entirely the feature of the trading stamps? A I wouldn't say that; that was part of his business that he said was an asset.

Q Then it was not the good will? A It was a good deal of it.

Q How do you figure it was any part of the good will? A They created customers coming into that store.

Q Why do you throw it away by issuing other stamps? A No, sir, the same stamps, but a different color.

Q That is, you pursued the same method? A Exactly.

Q And that kept your good will? A That was part of the good will.

Q That kept your good will? A Absolutely.

Q Then you got all that you expected to get, good will excluded? A We had to redeem the trading stamps that he had issued.

Q You bought the merchandise, didn't you? A Yes, sir.

Q And you bought it at the inventory value which you understood was cost? A Yes, sir.

Q And you had the privilege of examination? A Yes, sir.

Q And you and Rosenberg together had some experience? A Yes, sir.

Q You were satisfied with the stock you got? A We were satisfied with the stock—because we had a profitable going business.

Q Wasn't there another reason? Wasn't it worth what you paid for it? A Not if it wasn't a profitable going business.

Q Did you not get stock that was worth, in your judgment, what you paid for it? A As

a going business. Without any representation of profits I don't want it. I wasn't in the stock business.

Q I ask you if you didn't know and understand that stock was worth what you paid to anybody who took it and was going in that place what you were charged for it. A It wouldn't be worth anything to me if he wasn't making money.

The Court: The question is what it was actually worth to a going business. You are being asked your opinion.

The Witness: A going business would be called a profitable business.

By Mr. Skinner.

Q Some businesses are profitable and some not? A An ordinary going business wouldn't buy any stock.

Q The value or the price at which you took them could have been inquired into by you. There was a provision in the agreement to arbitrate, if necessary? A Yes.

Q You were satisfied? A Yes.

Q Although you had been cheated? A Mr. Rothstein denied that statement.

Q Didn't you sell those goods? A We did.

Q Didn't you sell them for more than they were inventoried at? A That is the usual method in stores.

Q Didn't you? A We must have.

Q Then you must have gotten for them as a going business more than you paid for them? A We made expenses in order to sell them.

Q I think you said you sold them for more than you paid for them. A The usual retail methods.

Q And the usual retail price? A And some less; when we ran a sale.

Q But you got as much as you expected to get? A We didn't expect anything; we bought a going business.

Q You paid $25,000 for the fixtures and you said that was an agreed price? A Yes, sir.

Q Don't you remember Mr. Rothstein's wanting $30,000? A No, sir.

Q Don't you know Mr. Apfelbaum, when you were refusing to give him $30,000 and Rothstein was insisting upon the $30,000 and that he got impatient and he said he would contribute $5,000 from his commission—throw it off? A That was a private conversation that Mr. Apfelbaum had. Mr. Apfelbaum told me afterward he had to slice $5,000 from his commission—

Q Didn't he say it was in order to give him $30,000 for the fixtures? A No, sir, he had to drop $5,000 in order to let the deal go through.

Q You mentioned a little incident about discounts. You said you told Rothstein he got a discount that he ought to give you. It was after the agreement was signed? A Yes.

Q It was a suggestion by you that he ought to have made a more liberal arrangement? A Yes.

Q You thought he was hard-hearted because he wouldn't give you the discounts? A Yes.

Q You didn't want him to make you a present of it? A I didn't want presents, only the discounts we were entitled to. The net price was taken without the discount.

Q It was after you signed the agreement as being what you ought to have had? A What was the proper thing.

Q You came and asked him for it, and he didn't care to give it? A He said he would call

up Mr. Spitz, his brother-in-law, at Paterson, and later he said he had seen his attorney, Mr. Clancy, and would not give me a nickel.

Q When you went to him and told him you ought to take care of the trading stamps, that was after that? A Yes.

Q And you said he ought to have done it? A Yes, sir.

Q Didn't you say to him in substance that he was hard-hearted? A Yes, I did use that language many times.

Q That is the way you characterized him then and today because he was hard-hearted in not taking care of the trading stamps? A Hard-hearted in what I thought I was entitled to.

Q You had not agreed to get it? A He told me so.

Q When? A I asked him on the second meeting about the stamps—

Q You mean that was before the written agreement was signed? A Exactly.

Q You know that the trading stamps are not mentioned in the agreement, don't you? A They are not mentioned in the agreement.

Q You knew it then? A I knew it then because it was his suggestion that $200 or $300 should not make a difference.

Q You had bought merchandise in business before, hadn't you? A Yes, sir.

Q You regarded, you say, these representations, as being of the utmost importance? A The representations of Mr. Rothstein? Yes.

Q Why didn't you have any statement or warranty of the profits of the business in the contract? A A man's actions. At the conferences and meetings I had with him, playing as a very sick man, and acting that night in the

store, taking his shoe off and his stocking off, and telling us if it hadn't been for his poisoned foot, that he would not sell the business at any price; he also told me he was going to spend his time with various charitable organizations. Fortunately, I had come in contact with many people and I believed his honesty.

Q You formed a very favorable impression of Mr. Rothstein? A I had nothing else to go by; I believed the man.

Q After that discovery that you were entirely wrong, you went right on paying him for your property? A We did.

Q After discovering you had been cheated, and going to this party of the store employees— A I asked Mr. Henig whether I couldn't stop paying these notes—

The Court: Don't tell us of your conversation with Mr. Henig. You continued paying the notes.

The Witness: I continued to pay these notes.

Re-direct examination by Mr. Lane.

Q Why did you continue to pay the notes? A I was interested personally in them and my wife's endorsement was on them, and I thought it was an obligation that I had to meet.

Q Did you have any advice from counsel? A I spoke to Mr. Henig about it, and he said—

Q You had advice? A I had advice, and I continued to pay these notes.

Q Were you in a position where you could have handed this property back and got out of this deal? A We were told we were not in a position any more to hand this deal back.

Q You and Rosenberg were in there to the extent of some $75,000? A That was the first cash payment.

Q Did you have the advice of counsel also as to your handing the property back? A We did.

Q Whether you could or could not? A We could not at that time any more. We could have handed it back immediately.

Q Counsel has asked you why it was you thought this $98,000 book—this black blook—that was kept for Government purposes, as you say Mr. Rothstein said, indicated the true expenses of the business. I ask you whether you did or did not receive in the mail Exhibit P. 4 for identification, and whether that had any influence on your mind as to whether the black book indicated the truth.

The Court: Yes or no.

The Witness: Yes.

Mr. Lane: I offer it in evidence.

Mr. Skinner: That is, as to whether it had any influence upon his mind.

Mr. Lane: Yes. You asked him why it was, if he thought now that the $98,000 shown in the black book exhibited the true expenses, and he said, "Yes," and you asked him why, and he said things he had discovered, and I am now trying to show why.

Mr. Skinner: I object to that as information communicated to him by Puder and Puder.

The Court: I will sustain the objection.

Mr. Lane: Exception.

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

Exception noted as ground of appeal.

Q I asked you whether you received any other information which indicated that the black book showed the true expenses other than this Exhibit P. 4 for identification?

Mr. Skinner: I object unless it be limited to yes or no.

Q Yes or no. A This book here?

By the Court.

Q Meaning what? A Isn't that the one Mr. Lane has reference to?

Q The question is what you had reference to. What did you point to? You pointed to counsel table, but I didn't see what it was. A The account I received from Puder and Puder.

By Mr. Lane.

Q Was there anything else? A And the black book that he had.

Q The black book is the one we have already heard about that showed $98,000. Did you receive this Exhibit P. 5 for identification from Puder and Puder which shows the operation of your own business? A Yes, sir.

Q Did you receive that information, and was that some of the information that you acted upon that the $98,000 was correct? A I acted on the information we received of the 1923 accounts of Rothstein's, and we also knew from this that the $98,000 was correct; not $76,000.

Q That is the report of your own business? A Yes, sir.

Mr. Lane: I offer it in evidence.

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q Was Rothstein your landlord? A Yes, sir.

Q And was the fact that he was your landlord—did that play any part in your being unable, or thinking you were unable to turn this property back? A Yes.

Q Did you have any trouble with your landlord? A We did—

Objected to.

Objection sustained.

Plaintiffs' counsel prays an exception to this ruling of the Court

Exception noted as ground of appeal.

Q What trouble did you have with him as a landlord?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q Counsel asked you whether you wanted the jury to infer that you intimated that Mr. Rothstein had cut this page out of this book, and you said you did. Why do you think that Mr. Rothstein is the one who must have cut that page out of the book? A Because that must have had the true sheet of expenses of $98,000 instead of $76,000.

Q Did you ever have that book in your possession? A Never.

Q Do you know anybody else who could have had any other interest to cut it out except yourself and Rothstein? A I didn't do it.

Q Who did? A Just as Miss Feldman said, he must have. When I opened the book I saw the pages cut out.

Q Does that book contain the expenses for 1923? A No, sir; everything except that.

By Mr. Skinner.

Q Does it contain the expenses for 1924? A Yes, sir.

Q And 1922 and 1921? A No, it doesn't, except the two pages that are missing.

Q It does not contain any record of expenses for any year? A 1924.

By Mr. Lane.

Q You have looked over this book and it does not contain expenses for 1921 and 1922, does it? A No, it does not; I don't believe he kept that system in 1921—

Q Do you observe that in the year of 1921, there is another page torn out? A No, I didn't observe that.

Q As a matter of fact, until you looked at the book at the present moment, did you observe any page other than the 1923 page was torn out? A The only thing I looked at in that book was the 1923 page.

Q As a matter of fact, there is a 1921 page torn out. A Yes.

Q The page with expenses for 1921, 1922 and 1923, is not there? A No, sir.

Q All the other information is there? A Yes, sir.

Q Counsel also asked you a question about whether Mr. Rothstein had left this book with these pages torn out for you to mind. Did Miss Feldman tell you how that book happened to be there?

Mr. Skinner: I object. Miss Feldman is here, she can testify to that herself.

Objection sustained

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

Exception noted as ground of appeal.

Q Counsel has gone into this sale of your interest. Did I understand you to say that you paid $37,500, and that you had advanced another $7,000 which you did not get back? A Yes, sir.

Q And how much did you actually get out of this business per week during the time that you were there? A $125.

Q Is that all? A That's all, except the rentals from that department.

Q How much was that? A That varied. There was a cloak and suit department there that year.

Q At what time did that go in? A March or April, 1924; and we had agreed on a rental of $4,000. When he had started and did not do so well, he said, "Weintraub, the rent is too high. I can't pay it." I said, "If you can't make a living here, I don't want you to stay here."

Q I said, "I will release you." He said, "That isn't it."

By the Court.

Q We don't care about the process. What did you do? A It varied. At certain times, I allowed him so much and at other times he said he could pay so much.

By Mr. Lane.

Q Can't you give me the approximate figure? A About $3,000.

By the Court.

Q For the year 1924? A It would be less. He started April, 1924. At one time it ran at the rate of $2,400.

Q What was the rental of the other department? A $1,500.

Q When did that go into effect? A That started some time in March, 1925.

By the Court.

Q Tell me what was the department and the amount in March, 1925? A Millinery.

Q And the amount of rental? A $1,500 per year.

By Mr. Lane.

Q Was that divided between yourself and Mr. Rosenberg? A I think the man started March or April and until I got out, a period of about six months.

Q Counsel has asked you whether you didn't think those fixtures and that merchandise were worth the amount you paid for them, assuming that the business made a profit of $28,000 or eight per cent., made a profit of about $10,000

per year upon a turnover of $350,000, would those fixtures, in your judgment, and that merchandise, in your judgment, be worth any such amount as you paid for it? A No, sir.

Q Why do you say that? A Because we went into the business there and invested $75,000 in cash and expected a return on not alone the $75,000 but upon our efforts. If the business was making $10,000 a year, I wouldn't pay that.

Q In your experience, would anybody else pay that? A No one I know of.

Q Then the value of merchandise and the value of fixtures, depends upon whether the business is profitable or not? A Absolutely.

Q If there is nothing there— A They are worth only that for an auctioneer to buy.

Q The amount you could get for them? A Yes, sir; that's all.

Re-cross examination by Mr. Skinner.

Q You have said already that you were able to sell those goods at the regulation retail price? A Yes, sir.

Q And that is all you expected? A We expected profits besides.

Q You expected profits by reason, not of getting any more for the goods, but by reason of having your expenses so small that you could make something, is that right? A That's right.

Q So, you were not disappointed in what you received for the goods? A Disappointed all around.

Q So, you were not disappointed in what you received for the goods? A No.

Q As a matter of fact, the expense depended a good deal on you—on you and Rosenberg? A Yes.

Q Your expenses for the year 1924, were more than Rothstein's had been or represented to you that they would be? A They were.

Q They were $100,000? A They were.

Q That was not Rothstein's fault? A We had two drawing instead of one.

Q That was not Rothstein's fault? A No.

Q By two drawings, you mean both Rosenberg and you drawing? A Exactly.

Q You knew that Rothstein had had two drawing and that before 1923 he had with him a Mr. Abraham Rosenblum? A He said to me—

Q Did you or did you not know that? A I don't know the name.

Q He did have somebody in with him that an interest in the business? A He told me a manager he had had in 1921.

Q You have looked at this book for the year 1922, the one you have been looking at, Exhibit P. 1, and you find there, do you not, that the sales, and the purchases for 1921—you have purchases and sales and stock on hand? A Yes.

Q And nothing for expenses? A And nothing for expenses.

Q No page torn out or cut out? A There is one (indicating).

Q That is 1921? A I assume so.

Q In 1922, you found stock on hand? Purchases and sales? A Yes.

Q Nothing for expenses? A Nothing for expenses.

Q And there is a page cut out? A That's right.

The Court: I understand there are three pages cut out?

Mr. Skinner: Yes.

Q The expenses that are in here, are they expenses for 1924? A Yes, sir.

Q And it is those that showed $101,174? A That's right.

Q Where is your drawing account? A Executive salary, $12,576 (indicating).

Q You were drawing how much? A I was drawing $125 and Mr. Rosenberg; that would be $13,000 a year, less January's drawings, when we took over the business.

Q Where is the unexpected expense? It was expected, wasn't it? You were not prepared for $101,000 expense? A We were prepared for $98,000 as we found already; $76,000 was what he told us.

Q You were not prepared for the $98,000, until you heard about the other book or saw it? A No. The reason we did not go any higher than that was that we dispensed with some help.

Q How about your volume of business? A The same as Mr. Rothstein's—$350,000.

Q It increased after that, didn't it? A No; $350,000 is what he did. He rented the toy department, but we did it ourselves, but it was not successful.

Q You said it was not successful? A It didn't make any money for us.

Q It lost some? A No, it did not.

Q Can you show that here? A No.

Q You have no record of it in your books? A We have no record of it in our books.

Q Will you tell us over again the rentals you said you got? You said you got $1,500 in one.

The Court: $4,000 in the other, but he said he rebated part of it when the man could not get along.

Q That is all you instituted? A Yes, sir.

Q How about the departments that were there when you went there? What became of the rentals from them? A They were not paying any rentals; all the money was going into one bag.

Q There were departments that paid ten per cent. on the gross sales as rentals? A When we took the place over?

Q Yes. A Only about the toy department that Mr. Rothstein had.

Q The toy department? A Yes.

Q What rental did that pay? A That didn't come to me because he got out after Christmas.

Q You discontinued the toy department? A I had nothing to do with it; the basement was empty when I got there.

Q The place the toy department had been in? A Yes, we put in a house furnishing and toy department that was in the business.

Q You put in that place of the toy department, a house furnishing and toy department? A Yes, sir.

Q Did that pay rent to you? A No, sir; we knew something about toys and house furnishings, and we ran it ourselves.

Q The other departments, that paid rent were not run by you at all? A No, sir.

Q And they paid rent? A Yes, sir.

Re-direct examination by Mr. Lane.

Q Counsel has asked you whether your expenses were not higher than any of the expenses

that Mr. Rothstein ever had or represented to you. The difference between your expenses and the expenses that Mr. Rothstein had for 1923, is the difference between $98,000 and $101,000—$3,000. A $3,000; that's the difference.

Q Have you any knowledge at all as to what expenses Mr. Rothstein had in 1922 or 1921? A No, he didn't tell us anything about it.

Q Do you know that your net sales were $347,000 as against $345,000 for Mr. Rothstein in 1923? A The book was $343,000 and $7,000 was the toys.

Re-cross examination by Mr. Skinner.

Q When you say $343,000 and $7,000, you mean $343,000 and ten per cent. of the $7,000? A He got ten per cent. off the $7,000 and he got $700.

Q $343,000 for his own business and $700 rent from this basement? A Exactly.

RHODA HERSH, sworn in behalf of plaintiffs.

Direct examination by Mr. Lane.

Q Mrs. Hersh, where do you live? A 297 Hawthorne avenue.

Q You are married now? A Yes, sir.

Q At one time you were the bookkeeper for Mr. Rothstein? A Yes, sir.

Q When did you become his bookkeeper? A In the year 1919.

Q How long did you continue to keep the books? A Up until May, 1926.

Q Were your books audited? A Yes, sir.

Q Who audited the books? A Puder and Puder.

Q During what period of time—how often did they audit the books? A Every month.

Q When they audited the books, what books did they use? A Cash disbursements, cash receipts, journals, expense books, income book, and charge sales books.

Q Did you give Puder & Puder certain of the books to audit for the year 1923? A Yes, sir.

Q Did they have the books of the business at the time they made that audit? (indicating the 1923 audit). A Yes, sir.

Q I show you Exhibit P. 4 for identification and ask you whether you have ever seen that audit of Puder & Puder? A No, I didn't.

Q Did you see any audit made by Puder & Puder for the year 1923 that was received in the mail? A No, sir.

Q Did you know Puder & Puder had made an audit in 1923? A Yes, sir.

Q And you never saw the result of it? A No, sir.

Q I show you a book which has been called "the green book" and ask you whether you kept that book? A I did.

The Court: That is Exhibit P. 1?

Mr. Lane: Yes.

Q For whom did you keep it? A For Mr. Rothstein.

Q Was that book for his private use? A Yes, sir.

Q Did it form any part of the bookkeeping of the establishment or was it simply for his private

use? A It was a duplicate of the business bought and sold records.

Q Who kept that book, the green book; that is, who had it physically? A I did.

Q Did anybody else have access to that book except you and Mr. Rothstein? A No, sir.

By the Court.

Q In other words, it did not go to the accountants? A No, sir.

By Mr. Lane.

Q Did you enter in that book the information with respect to the year 1923, just prior to or just subsequent to December, 1923? A You mean the year 1923?

Q Yes. A Yes.

Q What information was it your practice to put in that book? A Bought and sold of each department and expenses of the year.

Q What was your practice to put it in? What period of the month would you put it in? A Usually from the 1st to the 15th of the following month.

Q Did you receive any instructions after or prior to the time Mr. Rothstein sold the store to pack up the books and deliver them to anybody? A Yes, I did.

Q From whom did you receive those instructions? A From Mr. Armstrong.

Q Who was Mr. Armstrong? A He was with Puder & Puder.

Q What were the instructions you received? A To take all the books of the old business and tie them up and have them ready for the messenger that was to come and get them.

Q Did you tie all the old books up? A Yes, sir.

Q Did you tie this book up with them? A No, sir.

Q Is there any other book you didn't tie up? A Yes, sir.

Q What was the other book you didn't tie up? A A duplicate of this in a black one.

Q That is the black book? A Yes.

Q How is it you didn't tie them up and deliver them to Puder & Puder? A They were overlooked in the first place; in the second place they were not books that the accountants referred to and that is why they were overlooked.

Q Do you remember, about a week after the store was sold, Mr. Weintraub's coming to say something to you about the store expenses for 1923? A I don't remember the exact date or how soon after.

Q You remember his coming? A Yes, sir.

Q What did he ask for? A I don't remember whether he brought the books with him or just came in and asked for it.

Q What did he ask for? A He asked for the expenses of 1923.

Q Did you show him this green book? A Yes, sir.

Q Just tell us what happened. A We started to look for the expenses of 1923. While looking for that I came upon the stub of the page and I looked and saw the expenses were not there. I said it looks as if the expenses were torn out, and I gave it to him from the black book.

Q What did he say? A He said, "Where is it?"

Q What did you say? A I said, "I don't know where it is."

Q What did you say about the black book? A I said, "I have another book here that I can give you the expenses of 1923 from," and I did.

Q Did you produce the black book then? A I did.

Q Did you get to the page that showed the expenses of 1923? A Yes, sir.

Q What were those expenses shown on that page? A $98,400 and something; I don't exactly remember.

Q What did Mr. Weintraub say then? A He seemed very much surprised—

By the Court.

Q What he said, please. A I don't remember the exact words.

Mr. Skinner: I object to what Mr. Weintraub said.

Objection sustained.

By Mr. Lane.

Q What did Mr. Weintraub do then? A He didn't do anything. He spoke about it; he was very much surprised—

By the Court.

Q We want to know what he did? A He walked away and went to the side of the office and spoke to us about it.

By Mr. Lane.

Q Did he take the black book away with him or did he leave the books with you? A He didn't take anything.

Q You made a statement which you signed shortly after this took place or some time after this took place, did you not? A Yes, sir.

Q At the time you made that statement did you have before you this black book and the figures in the black book so that you spoke accurately and made a statement of the exact figures? A Yes, sir.

Q Can you remember now exactly what those figures were? A I think $98,423.

Q Can you remember the cents? A Two cents or twelve cents.

Q At the time you made your statement, did you accurately put down the exact figures? A Yes, sir.

Q I show you this paper and ask you whether that is your statement and your signature? A Yes, sir.

Q Can you, by reference to that statement, give us the exact figure?

Objected to.

The Court: I will allow her to refresh her memory.

Q What was it? A $98,423.12.

Cross examination by Mr. Skinner.

Q You made that up from the black book? A Yes, sir.

Q You had it then? A Yes, sir.

Q Where is it now? A (No answer.)

Re-direct examination by Mr. Lane.

Q Where did you last see that black book? A In the office.

Q When was that? A May, 1926.

Q When you left? A Yes, sir.

Q Did you tear out those pages in that green book? A No, sir.

Q Did you know those pages had been torn out before you looked at it when Mr. Weintraub was in the office? A No, sir.

Q As you kept that book during the years 1921, 1922 and 1923, did you put in the expenses for each year? A I don't remember that.

Q Have you observed that there is a page torn out in each year? A No, sir.

Q You haven't even seen that year? A No, sir.

Q You did see there was one torn out in 1923? A Yes, sir.

Re-cross examination by Mr. Skinner.

Q You have also seen, have you not, that the black book was a duplicate of this one? A Yes, sir.

Q And showed everything as to expenses for the business that this one showed? A Yes, sir.

Q Showed the $98,000 and so many odd? A Yes, sir.

Q And that black book was under your care? A Yes, sir.

Q And that book was left by Mr. Rothstein among the books that were turned over to Mr. Weintraub?

Objected to as leading and not cross examination.

The Court: I will allow it. It goes to what was done with the account books.

The Witness: Yes, sir.

Q And that black book was among the books of the company during the period that Mr. Weintraub and Mr. Rosenberg were inquiring into the business of the company? A Yes, sir.

Q You saw them there? A Yes, sir.

Q You knew that they examined the books of the company? A I don't know.

Q Was that done at night after you had gone? A I don't know.

The Court: Are you referring to before the sale?

Mr. Skinner: I am bringing out that that book which was the basis of comparison with this one was open for inspection to the purchasers at the time they were inquiring about the purchase.

Q This mutilation didn't deprive them of the information?

Mr. Lane: She said she didn't know.

Q When you say you don't know whether they examined the books do you mean there was no examination so far as you saw in the daytime? A No, sir.

Q That is what you mean? A Yes, sir.

Q You said that Puder & Puder audited the books every month? A Yes, sir.

Q And those audits showed expenses, didn't they? A Yes, sir.

Q What became of them? Were they kept in the office? A The audits?

Q Yes. A I never got the audits.

Q You don't know what became of them? A No, sir.

Q You said among the books of the company was an expense book? A Yes, sir.

Q Was that something different from this and its duplicate? A It was an expense book by itself.

Q This book gives sales, stocks, and purchases and expenses? A Yes, sir.

Q This other book gave only expenses? A Yes, sir.

Q That as part of the bookkeeping equipment? A Yes, sir.

Q And was there all the time you were there? A Yes.

Q And from that you could tell the expenses for 1923? A Yes.

Q And so far as you know it correctly stated that, did it not, $98,000 and some odd? Did the expense book show the expenses for each year? A Yes, sir.

Q It included 1923, did it not? A Yes, sir.

Q So, that anybody could look there and find what the expenses were for 1921, 1922 and 1923, as well as looking in one of these books, P. 1, or its duplicate? A Yes. It was the same thing.

By the Court.

Q So, that the expense book would show $98,423.12, as far as you know now? A Yes, sir.

Q For 1923? A Yes, sir.

By Mr. Skinner.

Q When you left in May, 1926, that book was still there, wasn't it? A No, sir.

Q What had become of it? A That was sent to Puder & Puder with the rest of the books.

Q By whom? A By me.

Q You mean at this time you spoke of? A Yes, sir.

Q That was what year? A I don't remember.

Q Right after the sale? A Yes, sir.

Q That expense book went to Puder & Puder? A Yes, sir.

Q The black book remained in the office all the time until you left? A Yes, sir.

Q That is a duplicate of this? A Yes, sir.

Q Did you look at that to see whether that was mutilated? A The black book?

Q Yes. A Yes, sir.

Q It was not mutilated, was it? A No, sir.

Q How long after January 1, 1923, was it, that those books were sent to Puder & Puder? A It was soon after; I don't remember how long.

Q By soon, do you mean two or three days, two or three weeks or a month or two? A I can't remember the exact time at all.

Q Roughly, can you give us some idea? A I can't remember.

Q At any time while you were in Rothstein's employ or in the employ of Rothstein's, Incorporated, were you instructed by him to make any secret entries or juggling of books or false entries of any kind? A No, sir.

Q Were the books a true record of the business? A Yes, sir.

Q To help you fix the date the books went to Puder & Puder, don't you remember Mr. Rothstein went to Florida after selling out? A Yes.

Q Don't you recall his going away in the latter part of February? A I don't remember.

Q Was it before or after Mr. Armstrong came for the books? A I don't remember.

Q He had gone to Florida when Armstrong sent for the books? A I don't remember seeing him at all; I don't remember whether he had gone to Florida or not.

Q At any rate, he had left the business? A He wasn't there.

Q Mr. Rothstein stayed at the store for some time after he sold out? A Yes, sir.

Q Keeping watch over things a little bit for Mr. Weintraub and Mr. Rosenberg? A Yes, sir.

Q He stayed two or three weeks? A About that.

Q You think he must have left when Mr. Armstrong came to get the books? A Yes.

Q That would make it some time the end of February, 1924? A Yes, sir.

Q Mrs. Hersh, do you remember overhearing a conversation between Mr. Weintraub and Mr. Rothstein when Mr. Rothstein said something about buying out Weintraub's interest in the business? That was shortly after Weintraub and Rosenberg bought the store. A I don't remember.

Q Did you hear Mr. Rothstein make any offer to buy out Mr. Weintraub if he was not satisfied? A No, sir.

Q You don't remember or do you mean he didn't say it? A I didn't hear anything of the kind.

Re-direct examination by Mr. Lane.

Q Mrs. Hirsch, don't you remember that this expense book which was a part of the general office bookkeeping system and which was sent to Puder & Puder, just that one book, only had in it the expenses of sales and excluded the administrative expenses, office wages, general wages, executive salaries, and such items as that; that is true, isn't it? A Yes, sir.

Q And that expense book showed the 1923 expenses to be $73,903.47? A Yes, sir.

Q And that was a book sent to Puder & Puder just after this sale, isn't that so? A Yes, sir.

Q Have you ever seen those books since they were sent to Puder & Puder? A No, sir.

Q Were they ever returned to the office of Rothstein, Incorporated, to your knowledge? A No, sir.

The Court: What were the items?

(Stenographer reads as follows: "Administrative expenses, office wages, general wages, executive salaries.")

The Witness: And others.

By the Court.

Q Do I understand you to say that these items which have been referred to were not in the expense books sent to Puder & Puder? Were those items in this book and the black book or not? A Yes, sir.

Q They were in these two books? A Yes, sir.

By Mr. Lane.

Q But not in the book called the expense book? A Yes.

By the Court.

Q Then you were mistaken when you said the books sent to Puder & Puder would show $98,423.12? A Yes, sir.

Rhoda Hersh, re-cross.

Re-cross examination by Mr. Skinner.

Q Can you tell us a little more in detail what kind of expenses were not included? A Salaries, payrolls, sales payroll—

Q What did the sales payroll include? A All the help in the store; sales clerks—

Q From your recollection, what do you think that would amount to roughly? A I don't remember; I wouldn't take a guess at that.

Q It would go into those, wouldn't it? A For the year?

Q Yes. A Oh, yes, sir.

Q You were speaking about this as an expense book showing the expenses for the year, $73,000 odd without the sales payroll? A If I had the book in front of me—

Q Which one? A The expense book.

Mr. Lane: You have it, Judge Skinner. I subpoenaed it and call for it.

Mr. Skinner: I should think you could subpoena Puder & Puder.

Q Besides the sales payroll and the salary payroll, what else was omitted from that expense book? A (No answer.)

Q Perhaps you can't tell more definitely. From your recollection of it, would you think the items of expense omitted would make up the difference between $73,000 and $98,000? A Perhaps it would.

Q Do you think it would make up more than that? A I don't know.

Q But your expectation would be it would amount to the difference? A Perhaps.

Q How many were there employed in the store? The sales payroll covered how many help? A About twenty-five.

Rhoda Hersh, re-cross.

Q Each of them receiving at least $15 or $20 a week, weren't they? A Less than that, too.

Q They averaged $15 or $20 a week? A Yes, sir.

Q There were twenty-five of them? A Yes, sir.

Q By executive salary—what did it include? A Salary of the executives.

Q Did that include higher than the sales force, floorwalkers? A Yes, sir.

Q Buyers? A No, sir.

Q Superintendents of departments— A Just the employer.

Q Mr. Rothstein himself? A Yes, sir.

Q And Mr. Rosenblum while he was there? A That year.

Q You remember what Mr. Rothstein drew, don't you? A I think I do.

Q What was it? A $142.31.

Q A week? A A week.

Q You kept these books, didn't you? A Yes, sir.

Q Did you start the books or did somebody else start them for you to keep? A When.

Q When they first started? A They were started by Puder & Puder.

Q Do you know any reason why the expense did not include these items? A No, I don't.

Q It was apparent on its face that it did not include all the expenses? A Yes, sir.

Q Yet, you think nothing you can suggest in explanation? A No, sir.

Q You are sure you are right, are you? A Yes.

Q You know you said at first that the expense book would show the same figure? A I stopped to think and I didn't remember, because I haven't seen that book for quite awhile.

Rhoda Hersh, re-cross.

Q Did Puder & Puder direct you in the keeping of that book? A Yes, sir.

Q Not Mr. Rothstein? A No, sir.

Q You kept it as they told you to? A Yes, sir.

Q Did they tell you what to leave out? A Well, when I took the books over they were that way.

Q So there was just that kind of expense books with the omitted items before you went into Mr. Rothstein's employ? A Yes, sir.

By the Court.

Q Did Puder & Puder have access to these books like the green book and the black book? A No, sir.

By Mr. Skinner.

Q You never asked any questions as to why you were keeping that book with part of the expenses only? A No, sir, I never did.

Q How long were you there? A Seven years.

Q Was that some kind of an expense book kept there from the time you went there until you left? A No, sir.

Q It was there when you left? A It wasn't discontinued; it wasn't started until after I came.

Q After selling out to Weintraub and Rosenberg was it kept up the same way? A Yes, sir.

Q After this time that Mr. Weintraub came and asked to see this book, or at that time, did you call his attention to the fact that there was this expense book? A No, sir.

Q At any rate, after that, was it kept in just the same way? A Yes, sir.

Rhoda Hersh, re-cross.

Q You must have gotten back from Puder & Puder if you kept it. You couldn't keep it if it was left permanently in their possession? A We started a new set of books after it was sold and I don't remember whether we went ahead in that book or started a new one.

Q You don't remember whether you kept that same book or started a new one? A No, sir.

Q At any rate, if the books of the corporation of Weintraub and Rosenberg were produced you could tell whether it was a new book or an old book? A Yes, sir.

Mr. Skinner: I ask for the production of the expense book of the present corporation. I gave notice to produce it by subpoena *duces tecum.*

Adjourned until Tuesday, November 9, 1926, at 10 o'clock, A. M.

SECOND DAY.

Tuesday, November 9, 1926.

Continued pursuant to adjournment.

Present, counsel as before stated.

RHODA HERSCH, resumes the stand.

Mr. Lane: If the Court please, I ask leave to open the direct examination of Mrs. Hersch with respect to the trading stamps. Your Honor will remember it took me by surprise that they had issued any red stamps.

Mr. Skinner: No objection.

Re-direct examination by Mr. Lane.

Q I show you a bill of the Eureka Specialty Printing Company which appears on its face dated 3/17/24, for trading stamps. In connection with it I show you cash voucher for $6.06 for expressage, which appears to have been paid 3/22/24 and ask you whether by looking at that bill and voucher you can tell me when it was Mr. Weintraub gave up issuing the trading stamps.

Mr. Skinner: I object to that. I do not understand that bills prove themselves. This witness may have her memory refreshed.

By the Court.

Q Without looking at these bills do you remember the date? A No, as soon as we received the blue stamps we gave them right out.

Q You don't remember the exact date? A It was in March.

Q Would these papers help you to remember? A They would.

Q You had those in your hands at the time? A At the time I did.

Q Very well. A On March 22, 1924.

By Mr. Lane.

Q I show you what has been called the green book, Exhibit P. 1, and ask you if, by referring to that green book under the title of "Sales to date, 1924," whether you can tell me how much business was done by Weintraub and Rosenberg up to the 23rd day of March, 1924.

Mr. Lane: I ask that the witness be permitted to add those figures later.

The Court: Very well.

Q On each $100 of business sold, how much in trading stamps were issued? A $2.50.

Q Did everybody take stamps? A Three-quarters of the trade.

Q Were all the stamps that were sent out redeemed?

Mr. Skinner: Pardon me, it seems to me it ought to appear whether or not there is a record of what this lady is testifying to. If there is a record it should be produced.

Mr. Lane: I am only going to show that some people did not take stamps. That we have given credit for what we have been charged with. There is no way by which we can say whether three-quarters or two-thirds took them. We have got to assume that everybody took them.

Mr. Skinner: I object to the question.

Objection sustained.

Q Did you keep a memorandum of the red stamps redeemed, yourself? A Yes, sir.

Q Is this the book in which it was kept? A Yes, sir.

Q Have you taken off of that book figures showing the amount that was paid by Rosenberg and Weintraub for the redemption of red stamps from April 1, 1924, to January 1, 1926? A I didn't take it out of that book.

Q What books did you take it from? A We counted as they came in.

Q Then did you enter it on these slips? A Yes, sir.

Rhoda Hersh, re-cross.

Q And have you made a calculation showing the total that was paid out for the redemption of red stamps during that period? A Yes, sir.

Q Is that the calculation? A Yes, sir.

Q Will you tell me how much was paid out by Weintraub and Rosenberg during that period of time for the redemption of red stamps?

Mr. Skinner: I object unless the proof is supplemented to show what business they were in connection with.

By the Court.

Q Do you know whether these stamps that you redeemed during this period were all issued before January 1, 1925, or were some issued afterwards, or can't you tell? A We can't tell.

The Court: Objection sustained.

Re-cross examination by Mr. Skinner.

Q You say that the stamps were issued at the rate of $2.50 for every $100 worth of goods sold? A Yes, sir.

Q You say that and you realize you are under oath? A Yes, sir.

Q Don't you know that there were many, many, many days that double stamps were issued and that it was quite a regular thing to issue double stamps? A It was.

Q Then you can't tell yet from recollection or from anything you have there how many stamps were issued of these red stamps between January 1, 1924, and some day in March, 1924, when the blue stamps were begun. You can't tell that, can you? A We can figure it out.

Rhoda Herch, re-cross.

Q Did you do any figuring at the time they were given out? A At the time what was given out?

Q The red stamps. A Yes, we figured every day how many stamps were given out.

Q Whom do you mean by "We"? A Another girl and I in the office.

Q You kept a record? A Yes, sir.

Q Of the stamps given out? A Yes, sir.

Q What do you mean by given out? A Given out for sales.

Q To the departments? A No, given from the stamp desk.

Q Were you at the stamp desk? A No, sir.

Q Then those records were kept by somebody else? A I looked them over.

Q You had no personal knowledge whether they were correct or not. A I went over her figures and everything that she figured to see that they were correct.

Q Who was that girl? A Miss Foster.

Q Is she there now? A I think she is.

Q As a matter of fact, when you said $2.50 of stamps for every $100 of sales, did you ever compare the number of stamps that you had made a record of—red stamps issued in January with the sales in January? A I did not.

Q Have you any knowledge whether the amounts of $2.50 for every $100 of goods sold— A We figured $2.50 for every $100 of goods sold.

Q You figured $100 of goods had been sold for every $2.50 of stamps? A We gave $2.50 of stamps for every $100 of goods sold.

Q When single stamps were given out the amount of stamps was $2.50 for every $100 worth of goods sold, is that right? A Yes, sir.

Rhoda Herch, re-cross.

Q You talked about estimating. What was it that you estimated? A I don't know what you are referring to.

Q I understood you to say you and the other girl counted $2.50 worth of stamps for every $100 worth of goods sold, or perhaps it was the other way? A Yes, sir.

Q Why did you do that estimating? Didn't you have a record of the number of books that went out from the desk or the office, or from Mr. Rothstein? A We didn't do that estimating. Every customer with a book of stamps brings in the books for her $2.50 and we paid that.

Q That is, the stamps turned in? A Yes.

Q How did the customer get the stamps? A By buying merchandise.

Q They got them at the counter? A No, at the stamp desk.

Q Each customer took to the stamp desk the check showing what purchases had been made? A Yes.

Q How did the stamps get to the stamp desk? A They were kept there.

Q The red stamps that Mr. Rothstein had while he was doing the business? A Yes.

Q That was so before Mr. Rothstein turned the business over? A Yes, sir.

Q There were a good many of them? A I don't remember; a good many of them all the time.

Q Whatever were in Mr. Rothstein's possession were left at the stamp desk? A Yes; and there was a stock of them in the basement.

Q That was left by Mr. Rothstein? A Yes, sir.

Q Some of those that were in the basement were used, weren't they? A I don't remember. I believe we had enough upstairs at the time.

Rhoda Hersh, re-direct.

Q You are not sure of that? A No.

Re-direct examination by Mr. Lane.

Q Can you turn to the day book and tell us exactly what stamps were issued between January 1, 1924, and March 23, 1924?

By Mr. Skinner.

Q You didn't keep the books, did you? A I did.

Q You looked it over, you said? A No.

By Mr. Lane.

Q I am talking about a record of all the stamps issued. A This book?

Q Yes. That book was kept by Miss Foster and checked by you? A Yes.

Q Can you take that book and figure out exactly how many stamps actually were issued? A I can.

Mr. Lane: I ask that the witness be excused to make that calculation.

The Court: Very well.

Mr. Skinner: I want to be sure that this evidence is of the kind to be found in books. I understand that the testimony is to show the number of stamps issued.

The Court: There is no question before me.

Mr. Skinner: I object to the giving of any evidence of the kind she has been asked to supply after leaving the stand on the ground that the evidence so sought to be shown is entirely immaterial and irrelevant.

The Court: I will sustain the objection.

Mr. Lane: I don't understand that there is anything before the Court.

The Court: You were going to have her testify as to the number of stamps from that book.

Mr. Lane: I would like to know the real ground of the objection.

Mr. Skinner: It seems to me that the evidence sought to be shown does not prove anything of the character that counsel intends to prove. It is entirely immaterial and irrelevant how many stamps were issued; the question is how many were redeemed.

The Court: There is no proof before us how many stamps were redeemed.

Mr. Lane: I have got to prove one step at a time. I propose to follow it up.

The Court: I will take the proofs then.

Mr. Skinner: There still is no proof to show any connection between the two.

The Court: I will take the proof.

Mr. Skinner: If your Honor please, my objection to the evidence was noted, I take it; and I take it your Honor didn't preclude me from striking out.

The Court: No.

JOHN W. ARMSTRONG, sworn in behalf of plaintiffs.

Direct examination by Mr. Lane.

Q Where do you live, Mr. Armstrong? A Nutley.

Q What is your business or profession? A Public accountant.

Q How long have you been practicing your profession? A For about nineteen years.

Q In the years 1922 and 1923 were you employed by Puder & Puder? A I was.

Q Did you examine the books and records of Rothstein's, Inc., for the period from January 1, 1923, to December 31, 1923? A I did.

Q Did you make an audit of the books and a report of the conditions of business and the operation of the business during that period of time? A I did.

Q I show you Exhibit P. 4 for identification and ask you to look at that report and tell me whether it shows a correct audit of the books of Rothstein's, Inc., for that period of time? A It does.

Mr. Lane: I offer the audit.

Mr. Skinner: May I cross examine the witness?

The Court: Yes.

Cross examination by Mr. Skinner.

Q You made up this audit from books? A Yes.

Q The books were in your possession? A No, in Mr. Rothstein's possession.

Q They were not sent to Puder & Puder's place? A After the audit, they were.

Q Where did you make that audit? A At his place on Springfield avenue.

Q Have you still got the books? A I don't know. You will have to ask Mr. Mortonson.

Q Are you still in their employ? A No.

Q Were they there when you left? A I don't know.

Q When did you leave? A The 1st of February, this year.

Q Didn't you have any occasion to notice them? A No occasion.

Q So far as you knew, they were there? A As far as I know they were not there. I brought the books down to Puder & Puder and that is that last I know of them.

Q You mean you physically brought them down from Springfield avenue? A Yes.

Q When was that? A It was in February, 1924, Weintraub came in—it was right after they came in.

Q It was at Weintraub's request you did this work? A No, I got my instructions from the office. It was after Weintraub came into the business that I brought the books back.

Q Certain books were sent you? A I brought down all the books.

Q Do you recall what books you brought? A All the books that were worked on.

Q You don't recall what they were? A I can't name them: Cash receipt books, cash disbursement books; general ledger, expense register; and the journal. That would be about all.

Q You have heard Mrs. Hersch's testimony? A Not much; I couldn't hear her.

Q She said there was among the books of the company a book she called "Expense book"

which did not include the wages paid to the sales clerks or the executive salaries. Do you recall such a book? A No, I don't recall such a book at all, Mr. Skinner.

Q At any rate, whatever you have in this report showing expenses was taken by you from books you got in the office of the new corporation Weintraub and Rosenberg were running? A Yes.

Q They purported to be books kept by Rothstein in that business in the year 1923, before Weintraub took the business? A Yes, sir.

Mr. Lane: I offer it.

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

The Court: As I understand it, this witness was employed by Mr. Rothstein, I mean as a firm.

Mr. Skinner: Not at the time this examination was made.

The Witness: Oh, yes.

By Mr. Skinner.

Q Then you got the instructions from the office, but you understood they came from Rothstein? A I imagine they did.

Q You had no knowledge of it? A I didn't ask where the orders came from; I did what I was told.

Q Did you send your bill to Rothstein? A I don't; you would have to ask the firm that.

Re-direct examination by Mr. Lane.

Q I show you this Exhibit P. 4, you have here, have you not, two separate items of expense? A Yes, sir.

Q And the one item of expense is what you call "Selling expense" and amounting to $73,-970.70. A Yes, sir.

Q Which makes a net profit on sales of $24,-335.72 after deducting selling expense? A Yes, sir.

Q Then you have general and administrative expenses which you then take out of that? A Yes, sir.

Q And then expenses amounting to $22,823.51? A Yes, sir.

Q And among those general administrative expenses are such items as these: Wages, general wages; executive salaries, and so forth, telephone, and so forth; auditing; and labor; and that reduces your net profit on operation $15.

Q You have added a net financial income of $7,660.77. Will you tell me what that is? A The financial income was from the toy department, $522; interest on bonds, $36; discount on purchases, $9,432; trading stamps sold, $442; interest on bank balances, $299; waste material sold, $141; commission on telephone, $7; commission on chewing gum, $9; a total of $10,891. From that we subtract: Discount on sales, $313; taxes, $2,006; interest paid, $317; bad debts written off, $592; a total of $3,231, leaving an excess of income over other charges of $7,660.77.

Q And then you added that to your income from operation and got a total income of $9,-172.98? A That's right.

Q Did you prepare the income tax return for Mr. Rothstein for the year 1923? A Personally?

Q Yes. A I don't know whether I did or not. If we have it here, I can tell you in a minute.

Q I show you what purports to be a copy of a corporation income tax return for the calendar year 1923, of Rothstein's, Inc., and ask you whether by reference to it you can say whether you prepared that income tax return or not?

Mr. Skinner: If your Honor please, I understand that the point of this is the intent to show what were the profits from the business of Rothstein's, Inc. I submit that that has been shown as clearly as anything can be shown from statements.

The Court: I suppose you mean the company.

The Witness: Yes, I guess I made this up.

By the Court.

Q Do you know whether you made this up? A If you will give me the one written in pencil, I can be sure.

By Mr. Lane.

Q Here is the whole folder. A Yes, I did.

By Mr. Skinner.

Q Did what? A Made up the return.

Q For whom? A For Rothstein's, Inc.

Q That is the new corporation? A No, that is the old corporation.

By Mr. Lane.

Q Is that a copy of the return which was filed with the Government? A Yes, sir.

Mr. Lane: I offer it.

Mr. Skinner: I object.

Objection sustained.

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

Exception noted as ground of appeal.

The Court: You said it was a copy. I think the original is the best evidence.

Mr. Lane: The original return can't be obtained without the consent of Mr. Rothstein and this is offered as an admission of Rothstein's because Rothstein himself caused this to be filed just as any other piece of paper signed by Rothstein—

The Court: I don't think it is admissible in evidence.

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

(The same is marked Exhibit P. 6 for identification.)

By Mr. Lane.

Q After Mr. Weintraub and Mr. Rosenberg went into possession of the property did you make an audit of their books for the period of January 1, 1924, to December 31, 1924? A I did.

Q I show you Exhibit P. 5 for identification and ask you whether that is a correct audit of their books made by you? A Yes, sir.

Q At the time you made that audit did you have all of their books? A I did.

Mr. Lane: I offer it.

Mr. Skinner: I object unless the books are produced. I object to anything but the best evidence.

Mr. Lane: I won't press it.

Re-cross examination by Mr. Skinner.

Q You made up P. 4 from books that you took from the Rothstein office; that is, the office of Rothstein's, Inc.? A Yes, sir.

Q As you recall it, were they a complete set of books? A Yes, sir.

Q Did you have any trouble at all in ascertaining from those books what the expenses of the company had been? A No, sir.

Q And you divided them into two? A Yes, sir.

Q Was that your own division? Did you separate the selling expense from the overhead or the administrators' expense? A Yes, sir.

Q You found them altogether in one book and you did the separating yourself? A Yes, sir.

Q That book showed a total expense of some $96,000? A Yes, sir.

Q And anybody who looked at the books could see that? A No. You see, these figures are taken from the ledger and in the ledger you will find these items in separate pages.

Q You didn't have to go to the ledger to find it? A Yes.

Q Weren't the expenses in an expense book? A No, I worked on the ledger.

Q You understood that the ledger had postings from some other books? A Yes, they are.

Q Take the moneys paid the sales clerks. Those appear in the ledger in a total for the week, do they not? A No.

Q For the month? A Once a month.

Q And they would be taken to the ledger from an expense account kept in some regular book of the company? A Up there, no; it was taken from the cash book.

Q Sure of that?

By the Court.

Q That is, it would show how much was paid on the payroll each week? A The check would be alongside the payroll and the amount.

By Mr. Skinner.

Q Do you recall definitely whether or not there was any book that showed by itself as a separate account or record the expenses month by month, or day by day or for the year? A I can't recall any books like that.

Q It might have been, without your recalling it? A It wasn't a part of the system of accountancy. If this book had been in existence it didn't apply to the system of accounting because we would naturally have to check postings from there to the ledger.

Q Did you check postings? A Yes, from a journal book. Whatever book we got it from was part of the system.

Q Was your entire audit made from the ledger? A Yes, sir.

Q And this sum of $9,172.98 is shown by this audit as the net profit for the year 1923? A That's right.

Q Is there a profit and loss account in the ledger? A You mean by profit and loss account a regular profit and loss account? Every set of books has a profit and loss account, it is simply a dumping ground for the closed accounts.

Q Isn't there something in these books that gave the net profit of $9,172.98? A You would find that in the surplus account.

Q That is where you found it? A No, I made that up myself.

Q Anyone else could find it? A If they looked for it.

Q They wouldn't have to look hard, would they? A Oh, no.

Q I show you two books. First, this rather long book, was that one of the books you had before you when you made this audit? A There is no year on it.

Q Did you you have a book of that character? A Oh, yes.

Q What do you call that book? A That is the cash disbursement book.

Q Does it purport to be a record of the disbursements of all kinds for the business during the period it covers? A Yes.

Q And you had just that kind of a book? A Yes.

Q Are the disbursements classified in this book? A Here is accounts payable; expense—this is the creditors he bought stuff from and it was an expense of the business. Here is executive salaries; payrolls; and an exchange account—

Q I turned to page 42 at random and I find there the date August, 1922. With that to guide you— A This would be 1923. It only goes to the end of August, 1923.

Q So this goes from March 1, 1922, to August, 1923? A Yes, sir.

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

Mr. Lane: I offer it in evidence. That is one of the books I asked to be produced yesterday. They were not exhibited to us.

Mr. Skinner: These books were here yesterday awaiting your call.

Mr. Lane: I call for them now; all that you have. I want to offer them all in evidence.

RHODA HERSH, a witness previously sworn in behalf of the plaintiff, resumes the stand.

Re-cross examination (continued) by Mr. Skinner.

Q Mrs. Hersch, I show you a book which has just been examined by Mr. Armstrong, which he called the cash disbursement book. Was it kept by you? A Yes, sir.

Q Under your supervision? A Yes, sir.

Q What did you call it? A Cash disbursement book.

Q What is it? A A record of cash going out.

Q What period does that book cover? A From March 1, 1922, up until August 31, 1923.

Mr. Lane: I offer anything identified by this witness.

Q I show you another book. Look at it, please, and tell us what it is. A In this book we kept a record of the amount of stamps received.

Q What about the book that you identified before as a record of stamps? That was of stamps issued? A Yes, sir.

Q That was not of stamps redeemed? A No, sir.

Mr. Lane: I offer it.

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

Q What period does Exhibit P. 8 cover? A January 1, 1921 to January 31, 1926.

By Mr. Lane.

Q Does that contain business done after Rosenberg and Weintraub took over the store? A Yes, sir.

Q Do you know how Mr. Rothstein got that book? A I don't know.

Mr. Skinner: We will show that it came from Puder & Puder.

By the Court.

Q What was the name of that book, we called it?

By Mr. Skinner.

Q It is a record of money paid out for the redemption of stamps, but called an income book? A Yes, sir.

Q Just look at it again and see whether you have correctly characterized it. I turned to page one and I see a column headed, "Express." A This isn't mine. I didn't keep this part of it anyway.

Q You mean the first part of it you didn't keep? A No, sir.

Q Your description is from some other part of the book? A The only thing we took out of this book was the redemption of the stamps.

Q I just ask you to describe the books and tell us how it was known in your office? A It was known as the income book and was for the redemption of stamps.

Q Did it contain a record of expenses? A I don't know about that. That was started by the bookkeeper before me, but I don't know for what reason.

Q Does it contain a record of expenses? A It does.

Q That is, through 1921, you see expenses. Just look ahead and see whether, if at all, it ceases to be a record of expenses? A Yes, it does.

Q You have practically the whole of 1921's expenses there? A Yes.

Q For the whole of the year? A Yes.

Q Does that contain all of the expenses; expenses of all kinds? A I don't know.

Q Look at it. Isn't there an indication there of what it contains? A Express, due bills, refunds, stamp books—

Q There is one column marked "Expenses." Can you tell from looking at that whether the total expenses are petty cash expenses? A They are petty cash expenses.

Q Going into 1922, apparently it ceases—no, they are there in February, 1922. A Yes.

Q And in March? A March.

Q Also a record of the weather in one column. A Yes.

Q So, from April, 1922, the petty cash expenses seem to be dropped out? A Yes.

Q Here is a summary for the year, isn't it? A Yes.

Q Does that give the business for the year, receipts and sales? A I don't think that is the correct amount of business; I didn't take the business out of this book at all.

Q It looks like a statement of receipts, doesn't it? A Yes.

By Mr. Lane.

Q What year is that? A 1921.

By Mr. Skinner.

Q Here begins January, 1923. Did you keep that? A Yes.

Q Now, tell us just exactly what that is. A That is a memorandum of C. O. D.'s, charges, cash, due bills, refunds, and stamp books.

Q What does that cash column mean? A That is the cash receipts of the day.

Q And so, from that, you can tell what the receipts for the year were? A Yes.

Q Are they added up? A This was just cash by itself, not including the total amount of sales.

Q Because there were some on credit? A Yes.

Q But this gives the total of cash? A Yes.

Q Can you tell from that what the total cash sales for the year? A Yes.

Q Will you tell us how much? A $322,-790.39.

Q Some other book would give the credit sales? A The other book would give it including the charges and C. O. D's.

Q This includes it? A No, it is itemized separately.

Q This book gives C. O. D's, charges— A $4,949.00.

Q And for charges? A $6,802.53.

Q What does "Due bills" mean? A For goods returned we would give them a due bill and they would buy whatever merchandise they wanted.

Q A liability, wasn't it? A Yes.

Q Then comes 1924? A Yes.

Q The same kind of a record? A Yes.

Q And a summary at the end of the year? A No, in 1924 nobody wanted this stuff here. It was just kept.

Q It was discontinued in 1924? A Yes.

Q When in 1924? A Starting July 1st.

Q And after that time kept only as a record of books? A Yes, sir.

Q That means stamp books issued? A Issued.

Q What is this column of customers? A The number of customers that came into the store.

Q Then this gives the stamp books issued for the month of January, February, March— A Redeemed; not issued.

Q Redeemed? A Yes, that is what we paid out for stamp books.

Q That isn't redeeming them. That is paying for them as you got them for Rothstein? A As we got them from the customer.

Q Are you sure of that? A Positively.

Q You noticed, and I called your attention to the fact that they are all in round figures? A Yes, sir.

Q You mean the stamps redeemed each day come in in regular round numbers? A Yes, sir.

Mr. Lane: $2.50 a book.

Q Multiples of $2.50? A Yes, full books only.

Q Why this item of $33.50? A Sometimes we made an allowance when a customer lost a book.

Q I show you a third book. What is that? A The journal.

Q Is that a book that was kept under your supervision? A Yes, sir.

Q I see here on page two a typewritten paper pasted in, marked "L. Rothstein, Inc., Exhibit A." It goes on to show money received and disbursed, applicable to Rosenberg and Weintraub for the period January 1, 1924 to January 26, 1924. Do you remember that being put in the book? A Yes, sir.

Q Was that prepared under your supervision? A It was prepared by Puder & Puder.

Q I suppose the figures on which this is based—these are more or less summarized, aren't they? A Yes, sir.

Q Do you find the details in the book? A Yes, sir.

Q This seems to start out with 1924, doesn't it? A Yes, sir.

Q Then this does not contain—it isn't the journal that was used prior to January 1, 1924?

Mr. Lane: It is one of our books produced by you.

Mr. Skinner: Obtained from Puder & Puder.

Mr. Lane: When?

Mr. Skinner: I can't tell you because I didn't get them. Mr. Rothstein can tell you.

Q Here is another book. It has pasteboard covers wrapped in paper. A This was a book giving a daily record of each clerk's sales; daily and monthly.

Q Keep under your supervision? A It was not started by me.

Q It begins back of your time. Does it come down through your time? A No, it does not.

Q Its oldest entries are in the early part of February, 1920? A Yes, sir.

Q Here is another book. What is that? A That was before my time. I didn't handle this book at all.

Q Go to the end and make sure. A No.

Q What kind of a book is it? A The same as the others; the one with the redemption of the stamps.

Q This covers a period back of the other? A Yes, sir.

Q What is that? A This is the charge sales book of employees.

Q For what period? A Starting March, 1920; ending December 31, 1923.

Q So that we may further identify, it shows all charges of 1923? A Yes, sir.

Q And a total at the end? A No, sir; this is just monthly; a total of the employees here and a total of the customers here.

Q That is the charge account for 1923 and some of 1922.

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

Q Here is a book larger than any yet. What is that? A Purchase book.

Q Showing the stock on hand? A Showing the purchases.

Q Of stock? A Of merchandise bought.

Q Covering what period? A Starting March, 1922.

Q And ending when? A August 31, 1922.

Q Have I shown you that book? A I think you showed me the one before this. This is the continuation of the clerk's sales.

Q For what period? A Starting February, 1920, and ending December 31, 1923.

Q That, you say, shows the record of each clerk's sales, day by day? A Yes, day by day.

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

Q This is the stock purchase book? A Yes, sir.

(The same is received in evidence and marked Exhibit P. 11.)

Q This book I show you is what? A Journal.

Q Commencing when? A January 1, 1922.

Q And it ends when? A Ending December 31, 1923.

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

Re-direct examination by Mr. Lane.

Q Are these all the books that you had in your establishment? A I had them, yes, sir.

Q Are those all you had, or were there some other books? A There should be a cash receipt book also.

Q And a ledger? A A ledger and the petty cash expense book.

Q A ledger, a petty cash expense book, and a cash receipt book? A Yes, sir.

Rhoda Hersh, re-cross.

Mr. Lane: I call for those books.

Mr. Skinner: I haven't them.

Q Do you know of any way, which your familiarity with those books, by which you could in a second or in a few moments get expenses, we will say, for the year 1923? A That book isn't here.

Q And the only way you could get the expenses for the year 1923, would be laboriously to go through the journal entries and pick them out one by one? A Yes, sir.

Q When you leave the stand, will you go down to the rear of the court room and look at those books and see whether those are some of them, please? A Yes, sir.

Re-cross examination by Mr. Skinner.

Q Vice-Chancellor Lane asked you whether you would not have to go laboriously through them item by item? A From these I couldn't get them at all.

Q You could get them from the expense book? A It is just petty cash expenses.

Q Before, when you were on the stand, you described I think, an expense book? A A black book.

Q An expense book? A It isn't an expense book; its a book showing sales and purchases and expenses for the year.

Q That is a summary? A Yes, sir.

Q It shows them in summarized form? A Yes, sir.

Q From those you could tell at a glance what they were? A Yes, sir.

Rhoda Hersh, re-cross.

Mr. Lane: The witness has said several times that they did not include all the expenses.

Q What didn't they include? A You are talking about two books. One is a petty cash book; that does not include all the expenses; the other book includes sales and purchases and expenses.

Q All expenses? A Yes, sir.

Q That is the book you were speaking of last? A Yes, sir.

Q If you had that book you could tell what all the expenses were for the year 1923? A Yes, sir.

Q And so could anybody else? A Yes, sir.

By the Court.

Q That is the book you referred to as the black book? A Yes, sir.

Q A duplicate of the green book? A Yes, sir.

By Mr. Lane.

Q That is the book that never went to the auditors? A Yes, sir.

Mr. Lane: We call for the production of that book.

Mr. Skinner: It may be that some of the things called for may be producible by the other side. We have produced all we have.

The Court: You haven't it?

Mr. Skinner: No, sir; we haven't got it. I want to produce another book that we got by subpoena *duces tecum* served upon the corporation and it is one of our books.

Mr. Lane: If you have any others under your control, produce them.

By Mr. Skinner.

Q What is that book (handing book to witness)? A This is the black book.

Mr. Lane: We have subpoeaned the black book and we have subpoenaed the same person Judge Skinner has subpoenaed; and also Judge Skinner's client.

Mr. Skinner: I am informed by Mr. Klausner, one of the present owners of the business, that this is a book produced on our subpoena *duces tecum.*

Mr. Lane: We served him with subpoena and they searched for it and couldn't find it.

Q This is the black book and it shows the expenses for the year 1923? A Yes, sir.

Q All of them? A Yes, sir.

Q And that is the only book at which you could tell at a glance just what they were? A Yes, sir.

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

Re-direct examination by Mr. Lane.

Q Will you turn to this book, Exhibit P. 13 and tell me how you can, by reference to the book, give me the expenses for the year 1923? A They were entered in this book.

Q And the sum total on page 135 is $98,243.-12, the figure you gave yesterday? A Yes, sir.

Q And this is the book you said you overlooked sending to Puder & Puder when you

were instructed to send the books down by Mr. Armstrong?

Objected to as leading.

Objection overruled.

(Question withdrawn.)

Q How was it the books happened to be left at the store? A It wasn't referred to by the accountants at all.

Q It was a private book for Mr. Rothstein? A Yes, and for the store's records also.

Q This is the book that contains the same information that is contained in the green book, or was contained in the green book, before the pages were cut out? A Yes, sir.

Q And this is the book you showed Mr. Weintraub when he came to you and asked you some questions with respect to the expenses for 1923? A This is the book I showed him after the green book.

By Mr. Skinner.

Q It wasn't so private but that it was right there for him to see? A Yes.

Q Why did you call it private? A It wasn't referred to by the accountants.

Q There was no secrecy about it? A It was no secret book. Employers and sometimes department heads were allowed to look at it.

By Mr. Lane.

Q And the employer was Mr. Rothstein? A Yes, sir.

Q Where did you have that book before you showed it to Mr. Weintraub? A It was on my desk.

Rhoda Hersh, re-direct.

Q How is it you went to the black book, or rather, the green book, before you went to the black book? A Because that was right in front of me.

Q The green book? A Yes, sir, and he took the nearest one.

Q Did you make the entries in the green book after the entries had been made in the black book? A After the entries had been made in the black book I put them in the green book.

Q Why, if that isn't a part of the bookkeeping system, was the books kept at all? What was the purpose of keeping this book that was not part of the bookkeeping system? Why, if it didn't go to the accountants? A We wanted to have a record of the sales, departmental, daily, monthly and yearly.

Q How about the expenses? A That was for the stores record it was for a record.

Q But not a part of the bookkeeping system? A No, sir.

Q I am wondering why you wanted a record that was not a part of the bookkeeping system? Why wasn't it all part of the bookkeeping system? If you know what was the purpose of keeping a book that was not part of the bookkeeping system because it could have given the auditors some assistance, because it was a compilation for the year? A Because we wanted the sales departmental as I said.

Q Do you know what the purpose was in keeping two books containing the same information? A The black book we referred to every day. We entered the daily sales, and it was constantly in the office.

Q Why keep two books containing the same information, neither of them a part of the bookkeeping system? A I don't know.

Rhoda Hersh, re-cross—re-direct.

Q Both books contained the same information and neither of the books was part of the bookkeeping system? A No, sir.

Re-cross examination by Mr. Skinner.

Q When you say they were not part of the bookkeeping system, do you not mean they were not part of the regular, orthodox set of books such as any accountant would open for any business? A Yes, sir.

By the Court.

Q In other words, they were not required to give the balance? A No, sir.

By Mr. Skinner.

Q They were useful in giving the owner of the store a bird's eye view of the business so that he might see at a glance the receipts and expenses for the different years, comparing year by year and month by month. A Yes, sir.

Q Wouldn't you think that was the purpose of the books? A Yes, sir.

Re-direct examination by Mr. Lane.

Q There is still a ledger unaccounted for? A Yes, sir.

Q And that ledger is the control over the whole bookkeeping system? A Yes, sir.

Q And in order to get the expense, for instance, of sales, as distinct from the expense of the general administrative expenses, didn't you carry an account in your ledger of expenses for sales? A What kind of sales?

Q The expense of the operation of your sales; the expense of actually selling the goods. What would you call the expense of sales? A We didn't have an account for the expense of sales.

Q What were your controlling accounts? A They were individually listed under each item what the expense was for.

Q Weren't they drawn together in an account somewhere in that ledger? A No, sir.

Q Give me some of the accounts you carried in your ledger. A Expressage, freight, window cleaning, telephone—all those minor expenses; salaries, executive salaries—

Q Isn't there some place in that ledger where some of these accounts were drawn together? A No, sir.

Q Was there any book in which that was done that you recollect? A Yes, there was.

Q Which one? A The black book.

Q In none except the black book? A No, sir.

Q When did you last see the ledger? A That time.

Q We have had the black book produced. Will you look at these books again now and tell me whether there are any books missing other than the ledger? A The cash receipt book is missing and the petty cash expense book.

Re-cross examination by Mr. Skinner.

Q Do you mean that both of those books are missing? A Yes, sir, and the ledger.

Q Weren't there some accounts in those books you called petty cash expense? A No, sir, there was a separate book for that.

Q You are sure of that, are you? A Positive.

Q You stayed in the employ of the company after Mr. Rothstein sold out? A Yes, sir.

Q And were in the employ of the new company formed by Weintraub and Rosenberg? A Yes, sir.

Q Some time, early in 1926? A Yes, sir.

Q Weren't some of the books that were in use when Mr. Rothstein left, continued in use by the new concern? A Not that I could remember.

Q Books that had not been filled up? A Not that I could remember.

Q Would you be sure? A No, I am not sure.

Q In some of these that were produced here had entries in for after Rothstein left the business, didn't they? A What year is that?

Q 1924. A I don't remember any entries here for 1924.

Q I thought we found among the books—

Mr. Lane: One book went down to 1926, which, my information is, was the only book left.

Q We will agree that there was one book that continued to be used. You didn't remember that, did you? A Now I do.

Q There may have been others? A I don't know.

Q As a matter of fact, these books that were used by Mr. Rothstein up to the time he left, were all left in your hands for some time after Weintraub and Rosenberg came there, weren't they? A They were taken right out.

Q It was a month, or a week, or two weeks, or something like that. A I don't know the amount of time.

JOHN W. ARMSTRONG, previously sworn in behalf of plaintiffs, resumes the stand.

Re-direct examination by Mr. Lane.

Q Mr. Armstrong, how long was it after Mr. Weintraub and Mr. Rosenberg went into this place that you took the books, or ordered the books sent up. A If I remember correctly, I should think around the middle of February.

Q I want you to look at those books which have been produced. From your recollection, tell me what books, if any, are not there, which were a part of the bookkeeping system of this concern? A The general ledger, cash receipt book; offhand, I would say that is all.

Q Do you remember a petty cash expense book? A I don't recall whether I used that or not. If I had the ledger I could tell easily enough.

Q I show you a book which has been produced by Judge Skinner and ask you whether you ever had that book in connection with Rothstein's Incorporated, before Rosenberg and Weintraub had anything to do with it. A This is the new corporation's journal.

Q Did you ever have that book in working on Rothstein's affairs; the former owner? A No.

Q It has nothing in it, has it, that has anything to do with the corporation? A No, it is all new stuff.

Mr. Lane: I ask that it be marked for identification as a book produced by the defendant.

(The same is marked Exhibit P. 14. for identification.)

Re-cross examination by Mr. Skinner.

Q You say that there is no cash book here? A Cash receipt.

Q There is a cash disbursement book, Exhibit P. 7. A Yes.

Q Look at this one, Exhibit P. 8, and take that column marked "Cash". What is that? A It does not enter into the system of accounts at all. It looks to me like the cash sales.

Q Cash sales or cash receipts, aren't they? A Oh, yes.

Q All of the cash receipts are there? A I don't know anything about that book.

Q It purports to be a statement of the cash sales and cash receipts, among other things, doesn't it? A I wouldn't say one way or the other. I don't know what that book is. It is not part of the accounting system.

Q How do you know it isn't? A Because there isn't any mark to show that they posted them into the general ledger. Up to 1921—we came in there in 1921, I think it was, and put a system in, and then, in 1923, it became part of the accounting system so far as the trading stamps were concerned?

Q You put a system in in 1921? A I think it was 1921.

Q Do you mean that this book was discontinued? A It is very evident that it was.

Q You find here 1922, don't you? A Yes.

Q It is evident, then, that it was not discontinued. A We will say it was not discontinued in 1922. That was part of the accounting system in 1922, regarding the trading stamps.

Q I want to get your answer. According to your bookkeeping experience and observation and your knowledge of the books you saw of

this concern, is that a book that purports to be a record of cash receipts for a certain period? A I wouldn't say it was. I see cash, express, expenses, due bills, refunds, and stamp books.

Q What do you think that column "books" means? A I guess that was the stamp books.

Q That is plain, isn't it? A No, the names, "Income book" was not income book more than anything else. They started with that. If you get the general ledger we can tell in a second just what accounts that affected, page numbers 38 and 42.

Q I am anxious to find out from you what justification you have for saying it is not a statement of cash receipts? A Because I didn't do work on it.

Q You didn't hesitate to say what the other column is. A We worked on that.

Q Take the column expenses. A Yes.

Q You know what it is, don't you? A Maybe and maybe not.

Q The express may be taxi fares? A You can't tell.

Q And the column that says, "Cash day by day" $368 for January 1, $471.14 for the next—that doesn't show anything at all as being apparently the statement of the receipts day by day? A Maybe. If you have the ledger here I could check it up.

Q You wouldn't hesitate to say it is a statement of cash receipts? A As far as the correctness is concerned—

Q I think I asked you when you last saw the ledger? A You mean Mr. Rothstein?

Q The ledger from which you made the audit Exhibit P. 4. A I think I took it to the office with me. It was a loose leaf ledger.

Q The office of Puder & Puder? A Yes.

Q And you said, so far as you knew, that is where it was? A Yes.

Q Whatever made up the wording on any of these columns on any of these books, there was a separate cash book? A Yes.

Q On which you worked? A Yes, sir.

Q And which was a part of the bookkeeping system? A Yes, sir.

GUSTAVE MORTONSON, sworn in behalf of plaintiffs.

Direct examination by Mr. Lane.

Q Where do you live, Mr. Mortonson? A Jersey City.

Q What is your business or profession? A Public accountant.

Q With what firm are you connected? A Puder & Puder.

Q Were you connected with Puder & Puder in 1923 and 1924? A I was.

Q Do you know the books that were delivered to Puder & Puder in connection with the audit for Rothstein's, Inc., for the year 1923? A I recall their being delivered.

Q Are those books still in the possession of Puder & Puder? A They are not.

Q Do you know to whom and where they were delivered? A To Mr. Rothstein in an office he had on Broad street below Market. I don't recall the address.

Q About what time? A About around the middle of 1924.

Cross examination by Mr. Skinner.

Q Did you deliver them? A Myself.

Q Did you have a list of them? A I didn't have a list.

Q Who gave them to you? A Mr. Armstrong brought them down from the store two or three at a time.

Q He brought them to you bundled? A Yes.

Q You didn't see what was in them? A Yes.

Q You never opened them? A Yes.

Q You can't say of your own knowledge what they contained? A No, sir.

Re-direct examinaton by Mr. Lane.

Q All the books that were in the possession of Puder & Puder were delivered at that time? A Absolutely—

Objected to as leading.

Q Without identifying the particular books, will you tell me, after the books were delivered whether there was any book left? A No book.

Re-cross examination by Mr. Skinner.

Q You can't tell, except what someone else told you? A The books delivered were given to me by Mr. Armstrong.

Q You have no knowledge as to how many books there should be in the bundles or how many there were? A No.

Q All you can say is that they were delivered by you to Rothstein? A Yes.

JOHN W. ARMSTRONG, a witness previously sworn in behalf of plaintiffs, resumes the stand.

Re-direct examination by Mr. Lane.

Q Do you remember delivering to Mr. Mortonson the books that you had in the Rothstein matter for delivery to Mr. Rothstein?

Objected to.

Objection sustained.

Q Did you deliver to Mr. Mortonson any books in this Rothstein matter for delivery to Mr. Rothstein later? A No.

Q Do you remember what you did with the books? A Yes, I brought them and put them in the office. We had a place set off for different books we had down there and put them in the corner.

Q Who was in charge of them? A Nobody. Nobody had charge of the little rack as we called it. It wasn't important enough.

Q Who was general manager? A Mr. Mortonson.

Q Where did you leave the books? A On the rack.

Q Were they all together? A Yes, sir.

Q And were they bundled up in one bundle?

Mr. Skinner: Oh, no.

Q Describe them. A I went over to Rothstein's and wrapped the books up and brought them down to the office and put them away. I wrote the name of Rothstein on them and put them away and that is the last I ever thought of them.

Elias Rosenberg, direct.

Q You wrote the name Rothstein on them at the time you brought them down to Puder & Puder? Yes.

Q How did you come to get those books to take them to Puder & Puder? A I got my instructions at the office to go up and get them.

Q What were your instructions as to what to get? A All the books pertaining to Mr. Rothstein.

Q After you got them into the office of Puder & Puder, do I understand no work was done on them? A As far as I understand, it was not. I had finished the job. They were of no use to us. The only reason we would probably keep them would be for tax purposes.

Q So they were not taken to Puder & Puder for any work to be done? A No.

Re-cross examination for Mr. Skinner.

Q Your audit was made on the books while they were up in the Rothstein store? A Yes, on Springfield avenue.

ELIAS ROSENBERG, sworn in behalf of plaintiffs.

Direct examination by Mr. Lane.

Q Where do you live, Mr. Rosenberg? A 1754 East 14th street, Flatbush, Brooklyn.

Q What is your business? A Operate a general department store.

Q Do you know Mr. Rothstein? A I do, sir.

Q When did you first come in contact with him? A October, 1923.

Elias Rosenberg, direct.

Q How? A Mr. Woolwick, Mr. Murray Apfelbaum, and myself, came to Mr. Rothstein's place of business. Mr. Apfelbaum introduced Mr. Woolwick and myself to Mr. Rothstein, that we were interested to buy his store. Mr. Rothstein suggested that we look through the store. Mr. Woolwick and myself went through the store. Upon our return he asked us what we thought of the store—is there any criticism? I told him that there was no criticism; that I was interested to hear some particulars about the store. He then said that he was twenty odd years in business. He says, that the store that he was operating was a very good paying store; due to his sickness he was compelled to sell out. We asked him what the deal would involve about. He said the deal would involve about between $140,000 and $145,000; that it would require $75,000 cash and the balance could be arranged in notes payable. We asked him how much business he had done. He said he had done in 1922 $350,000; that at the rate he was doing in 1923 it would be about the same amount. In the year 1921, he said he did more business, but he hadn't made any more money than he has made in 1922. He says that his business was making a profit which netted between eight and ten per cent.

By the Court.

Q On what? A Net, on the amount of $350,000 a year business. He said he would give us a lease for twenty-one years; he would charge us a rental of $12,000, and we would have to pay the taxes. That is what he charged himself. Only due to his sickness that he was compelled to sell it. The proposition was very interesting

at that meeting. I asked him about would he sell us his stock; that he is twenty years in business, no doubt there is an accumulation of old merchandise. He said, "I been making between $28,000 and $30,000 a year profit." He said, "When you get a business like that you will have to pay me one hundred cents on the dollar just what it costs me." It was getting late toward evening and I told him I would consider the proposition and let him know. We left the store. Mr. Woolwick then was not in a position to finance his share and I got after Mr. Weintraub. I told him the proposition and I laid—

By Mr. Lane.

Q Never mind what you told him. Just tell us about your next meeting with Rothstein. A At the next meeting—Mr. Weintraub didn't want to get at it until January. Mr. Weintraub wanted to see the figures of 1923, what business he did, how much expenses he has had and what profit he made. In January, Mr. Weintraub and myself came to Mr. Rothstein. I introduced Mr. Weintraub to Mr. Rothstein, that Mr. Woolwick was not in a position to finance his end. Mr. Rothstein asked Mr. Weintraub his business and where he was located. He wrote it on a piece of paper. He again suggested that Mr. Weintraub and myself look through the store. We did. When we came down he said "Now that you are in the clothing and haberdashery business and Mr. Rosenberg is general merchandise man, this is what this requires, but you know you are two young hustlers." Again he said only for his sickness he is compelled to sell this beautiful business. Mr. Weintraub asked how much business did you do in the last year and Mr. Rothstein said he did $350,000. He said, "I had $76,000 expenses for the year 1923. I have made eight per cent. net, which netted me $28,000 for the year 1923." Mr. Weintraub commented that is was a very nice business for the small expense and also that the profit was interesting. Mr. Rothstein again said that only for his sickness he is compelled to sell his business. He said, "Did you notice a sign upstairs, 'Stamps?'" Mr. Weintraub said, "I did." Mr. Rothstein said, "I will explain something to you about it. We have a home trade. We draw a lot of people through the store. For every ten cent purchase they get a stamp or more. When they save up these stamps they come in and redeem them. For two young fellows like you you ought to take these stamps and go out and sell them to the small merchants. The people would be compelled to come and redeem them. Look what a business you would make for the store. I am sick and my hands are tied. I am making a lot of money. You young men could dispense with two young men I have here."

By Mr. Skinner.

Q You haven't memorized it in advance, have you? A It hurts down there (indicating).

Mr. Lane: I object to the remark of the counsel.

Witness: If you had that experience you would also—

The Court: Never mind.

Witness: Mr. Rothstein said, "You would immediately dispense with two men who each draw $3000 apiece and again, there

is another additional saving. You could make more money than I have made." I asked what men he was referring to. He said being Mr. Weintraub is a clothing and haberdashery man, he has a man in the clothing department getting about $3000 a year and also a buyer in the men's furnishing department getting about $3000 a year, these men could be replaced with cheaper men. It was interesting and we told him we would consider it. He was a very reputable man; that he was working in various Jewish charitable societies. He was, it looked to me, as if he was telling the truth—

The Court: Confine yourself to the conversation.

Witness: Mr. Rothstein said that he belonged to various Jewish societies—

By Mr. Lane.

Q Tell us what happened? A We left at that meeting. We told him we would consider it.

Q Did you see him again? A We did see him a few days later.

Q What was said then? A When we came there Mr. Rothstein said. "Now, I have my figures. My stocks," he says, "Amounts to $117,500. My fixtures amount to $25,000." Mr. Weintraub asked him has he got any way the figures could be seen. He says, "I have it in book form." He showed us a book—a green book—in that book we saw $343,000 of business. We saw in that book $76,000 expenses. Mr. Rothstein repeated the same as he has at the first meeting, that this business is making for him eight per cent. He has made $28,000, he

says. The store has practically done $350,000. He rented away the toy department, which did gross $7000. "I got ten per cent. net which brought me $700 and all the departments through the store makes that—from eight to ten per cent." Mr. Weintraub then asked him, "As to those stamps, Mr. Rothstein, you were telling us about the last time, what records do you have?" He said, "I have my records. The month of October, November and December, most of those stamps are redeemed because our heavy business, if you will note, is done practically in those three months." Then he said, "How much have you got outstanding of those stamps that might come in in 1924?" Mr. Rothstein said, "In my past experience it has never been outstanding more than $200 or $300. However, in a big deal like this what does $50 make or $150." Mr. Weintraub agreed with him, "$150 or $200 won't make a difference. I will be as much sport as you are, provided you are sure." He said, "I am sure $200 or $300 of books of stamps oustanding that will be coming in."

Q Did you reach an agreement then? A We haven't. Mr. Weintraub then suggested that we would have to look through the stock. Mr. Rothstein said it would have to take place at night. An appointment was made to go through stocks some evening and it was set for seven o'clock. A few days later, Mr. Weintraub, Mr. Apfelbaum, Mr. Apfelbaum's son, and myself came to the store. Mr. Rothstein gave us the stock sheets. We went through the inventory. Mr. Rothstein showed us a book where he had mark-ups on profits, and the mark-ups went between thirty and forty per cent. Mr. Rothstein said, "Look, Weintraub; assume we were working on thirty per cent. average profits.

$350,000, thirty per cent., shows $135,000. Deduct the $76,000 expenses and there is your net profit of $28,000 I told you in our previous meeting." Mr. Rothstein, Mr. Wentraub, and myself got into a discussion that the merchandise which Mr. Rothstein charged on the inventory were not worth what he charged them. He said, "To get this business, whether you buy it or anybody else buys it, must buy this stock from me because this is a business that makes $28,000 to $30,000 a year." We left the stock alone and talked to Mr. Rothstein about the fixtures. In the fury of excitement he removed his shoe and stocking and said, "Do I have to argue with you fellows? I wouldn't sell this business to any of you if it weren't for my sickness; and another thing, the heads of my store got to be so that they are tightening a rope around my neck. They are choking me and I am forced to sell. And I am only asking just what I ask you for."

Q Did you come to an agreement? A No, we left him about one or two in the morning.

Q When did you next see him? A At Mr. Apfelbaum's office the following Saturday.

Q Did you come to an agreement then? A We did.

Q What was said? A Mr. Weintraub said to Mr. Rothstein—I forgot, the same thing was said in previous meetings—"Will you take $50,000 cash and $1500 per month?" He said, "I won't take a cent less than $75,000 cash and $2000 a month. This business makes for me $28,000 a year and you are not going to pay me anything except the profit from the business. You pay me $24,000 and have a surplus of $4000. All I want from you is what the business makes and you will have three years' time to pay it off. $24,000 a year and you will make $28,000

to $30,000. You will pay all your bills e. o. m. like I did and you will be always flushed with money and never have to go to the banks."

Q Was the transaction closed? A No, Mr. Apfelbaum said, "If you don't close today there is another gentleman coming here with $100,000 in cash. Isn't that right, Mr. Rothstein?" he said. He said, "Yes." Mr. Rothstein said, "I would sooner give you young fellows the store with $75,000 cash than this other man with $100,000 cash." We said we couldn't place the deposit without our attorney. On Monday morning Mr. Apfelbaum called up and we told him we would come Tuesday morning and we got as our attorney Mr. Henig and paid the deposit for the business at Mr. Clancy's office.

Q Then the deal was closed? A Yes, at Mr. Clancy's office.

Q When did you go into possession of the business? A A few days later—that was Tuesday—Friday we have closed the deal by paying the balance of the money and we took possession Friday evening.

Q How long did you continue in that business? A I have continued in that business until March, 1926.

Q How much did you invest in that business? A My share of the investment was $37,500.

Q When did you sell out? A The beginning of March, 1926.

Q What did you get? A I got for my share $19,000.

Q Or a loss of how much? A Outside of hard labor for two years I lost $18,500 from my capital.

Q When did you first see this particular green book, Exhibit P. 1, which has the pages

cut out? A This book I saw the following Monday.

Q Where? A In Miss Feldman's office.

Q How was it brought to your attention? A Mr. Weintraub called me upstairs. We were looking for the expenses to familiarize ourselves how much each department had expenses and we found the page cut out.

By Mr. Skinner.

Q The following Monday? A The following Monday in January.

By Mr. Lane.

Q Did you go into that store at all before you closed? It was after you closed you had this conversation? A After the deal was closed.

The Court: What is the date of the bill of sale?

Mr. Henig: January 25, 1924.

Q Was that the first time you had seen that green book? A Yes, sir.

Q Who was it that brought it to your attention? A Miss Feldman and Mr. Weintraub.

Q At the time that book was brought to your attention were these pages cut out? A I knew of one page; I learned later that more had been cut.

Q Which page had you found cut out? A A nice, smooth page.

Q You mean a smooth-cut page? A Yes.

At one o'clock, P. M., the court takes a recess of one hour.

AFTER RECESS.

ELIAS ROSENBERG resumes the stand.

Direct examination (continued) by Mr. Lane.

Q Have you found that page or did you find it before recess? A I have it.

Q Did you ever know until yesterday that any other pages had been cut from that book? A I have learned that yesterday, sir.

Q If you had known that this store was not, in fact, making eight per cent., or approximately, but that its profits for the year ending December 31, 1923, was $9,172.98 instead of $28,000, including in that profit financial income about which you have heard testimony this morning, would you have purchased that at one hundred per cent. cost of stock and fixtures? A I would not, sir.

Q Why not? A I wouldn't have purchased because I wouldn't want to buy a store that wasn't showing a profitable income. The only inducement there was that there was $30,000 profits shown.

Q How many years have you been in the business of department stores? A Twenty odd years, sir.

Q Have you had experience in valuing fixtures and merchandise in stores? A I have, sir.

Q Does the sale value of the merchandise and the sale value of the fixtures vary with the amount of profits that a store is making? A Yes, sir.

Q If the store is making, we will say, four per cent. instead of eight per cent. what effect would that have on the value of the fixures? A Between fifty and sixty cents on the dollar.

Q I am talking of your experience in business. What would it be worth? A Fifty cents on the dollar.

Q What about the fixtures? A Ten cents on the dollar; probably less.

Q If the store were making two per cent., what would it be worth? A Scrap purposes.

Q And for scrap purposes what would it be worth? A You would have to pay to take them away.

Cross examination by Mr. Skinner.

Q You say that the merchandise would only be worth fifty cents on the dollar under certain circumstances. What were the circumstances if the profits were how much? A I don't know what you mean, sir.

Q When you say the stock would be worth only fifty cents on the dollar. A If the store didn't show a profit which Mr. Rothstein represented to me.

Q Eight per cent.? A That's right.

Q That is, if it were only seven and a half per cent. the stock would be worth only fifty cents on the dollar? A Not so close.

Q At what point of profitableness of the business would you value the stock at fifty cents on the dollar? A The way the Vice Chancellor suggested before; if the business was two per cent. it would be worth fifty cents on the dollar.

Q You could sell it for me? A Only an auctioneer would buy it.

Q As a matter of fact you paid for these goods? A Yes.

Q And you sold them again? A We did.

Q You got the retail price for them? A Oh, no.

Q You differ from Mr. Weintraub? A I don't agree what he said. We sold some of it ten cents on the dollar; we gave some of it away; some went to an auctioneer.

Q For the stock you gave away you paid 100 cents on the dollar? A Yes. We sold to an auctioneer shoes on ten cents on the dollar.

Q You sold that merchandise as you carried that business on for less than $117,500? A I am not speaking of the whole thing.

Q I am. I am asking you now? A No, we didn't.

Q Then you got the $117,500 and more, too? A I couldn't tell you.

Q Why did you say you didn't sell it for less than that, but you sold— A Goods kept coming in; first class merchandise kept coming in. Mr. Rothstein was twenty years in business, he had stock that had horns on it. We had to dispose of the junk; we had to sell it at any price or throw it out.

Q But you wouldn't say you didn't get $117,-500 for the stock of merchandise as a whole? A We had expenses on it.

Q Did you sell it for $117,500 or more? A I couldn't really tell you, sir.

Q You haven't much recollection of how much you did get, have you? A We bought the goods at wholesale and sold at retail.

Q That retail price was considerably more than the wholesale price? A That's right.

Q And the wholesale price was the price that figured $117,500? A That's right.

Q How do you know it was? A Because Mr. Rothstein showed us figures and we compared prices where he showed us what the charge was to us for the goods.

Q Do you know whether or not any of the goods that were inventoried by Rothstein were inventoried at less than the wholesale price? A No, sir.

Q Did you examine it at the time? A I did.

Q You thought that the valuation was fair? A No, siree.

Q You had a right to submit it to an arbitrator. Did you ever ask for arbitration? A Not at that point.

Q At any point? A At later disputes. Mr. Weintraub asked Mr. Rothstein—

Q Were you there? A I was in the store.

Q Did you hear it? A I did.

Q Where and when? A In our private office.

Q When? A It was when Mr. Rothstein tried to throw us out of the building.

Q How long had you been in? A It was in June.

Q 1924? A 1924.

Q That was six months after you took the property? A We took the property at the end of January and that was June.

Q You took the property as of January 1st? A We weren't there.

Q You took the property as of January 1st? A Yes, sir.

Q And Rothstein handled the business for you from January 1st? A Yes, sir.

Q And you didn't dispute at all the value of the goods or their worth at $117,500 and didn't ask for arbitration until he tried to put you out? A I didn't dispute—I disputed to Mr. Rothstein the night of the purchase as to the value of the goods.

Q Who was present? A Murray Apfelbaum, his son, Mr. Weintraub, and myself.

Q Wasn't there then some attempt to have it valued at $120,000? A There was no $120,000 value. There was $117,500.

Q No $120,000 mentioned? A No, sir.

Q You said that you paid $37,500 for half of the corporation stock. A That was my investment.

Q And you sold it for $19,000? A That's what I took.

Q When was it that you sold out? A In the beginning of March, 1926.

Q Had you not had a disastrous fire up there? A We did.

Q You lost a lot of money? A The fire helped.

Q You made money on the fire? A Yes, sir.

Q Will you tell us how that is done? A There was so much junk of Mr. Rothstein's left that it helped.

Q You got good money from the fire insurance company for what was junk? A That's right.

Q That was some of Rothstein's material left? A You said it.

Q You say it. A I say it.

Q You don't lay it up against Mr. Rothstein at all that you got more than it was worth? A I don't understand.

Q You didn't suffer? A I lost $18,500 and two years of heart agony.

Q You realized you were cheated, then, a couple of days after you had closed this deal? A I was.

Q You didn't do anything about it until November, 1924? A We did.

Q What did you do? A When this page was torn out that Mr. Rothstein didn't want us to

see the honest expenses, we spoke to him. It was either Monday or Tuesday. Mr. Weintraub and myself called him into the office. We told him, "Mr. Rothstein, you represented to us and showed us in a book that you have had $76,000 a year expenses in the year 1923. We have seen a book upstairs where it shows $98,000." He said, "Where did you see that book again?" After pausing a little while, Mr. Weintraub said the book is upstairs and Miss Feldman showed it to him. He says, "Weintraub, you are a young fellow and you never conducted a large business. This book upstairs is for government purposes. Do I have to tell you anything else?" He writes on a piece of paper, $350,000, eight per cent. $28,000. He says, "That's what I have been making and you are going to make it—even more."

Q This was after you had bought the property? A Yes.

Q You had been telling us that this was before the contract was closed. A I didn't sir.

Q So he said he made $28,000 or words to that effect, before you bought? A He said it before and he said it again when we found the page cut.

Q You identify this book, do you, that was then discovered by you and Weintraub with the page cut—Exhibit P. 1? A That was the book with the honest expenses and he cut the page out of it, but it wasn't the book with the $76,000 expenses.

Q You didn't see him cut it? A No, sir.

Q You think, and you point to the fact, as tending to show that Rothstein cut them out? A Circumstantial proof.

Q And you want the jury to believe that he cut it out to conceal the expenses. A An angel surely didn't cut it.

Q You didn't cut it? A Surely not.

Q It looks bad for Mr. Rothstein? A Lots of things look bad for him.

Q You didn't help make things look bad for him? A I wouldn't have started doing business with him.

Q When Weintraub was all out, had you been making money? A Never made money in that store.

Q Did you blame Weintraub at all? A No, sir.

Q Didn't you contribute $5,000 towards buying Weintraub out? A I did not.

Q You mean that? A I said it.

Q Who did? A The firm of Rothstein.

Q It was taken out as a loan to you? A No, it was a check issued to chip in to buy Mr. Weintraub's share out; instead of getting $44,500 he only got $37,500 for his share in the business.

Q He got $37,500? A I know what he got.

Q You understand that was in entire satisfaction not only for the purchase of the stock but any money he had loaned. He got $37,500 in full satisfaction of $44,500? A Yes.

Q So that ended any claim of his for money advanced? A That's right.

Q By the way, did you assign to Weintraub your interest in any claim against Rothstein for fraud? A In the name of the corporation.

Q Did you have any corporate meetings? A Did we have any corporate meetings?

Q That's what I asked. A What meeting?

Q Any meeting. A The company had a meeting at Mr. Klausner's office.

Q Have you any minutes? A The minutes are in the possession of the company.

Q No. They are in ours. I tell you now so as to warn you we have the minute book of the corporation. With that warning, was there any meeting of the corporation of any kind? A There was no meeting of any kind.

Q Why did you say— A Mr. Klausner's office—Mr. Klausner—Mr. Epstein and I were there. That's the time we closed the deal.

Q When I tell you we have the minute book you say there was not any meeting of the corporation. A I still say there was a meeting at Mr. Klausner's when Mr. Weintraub got his deposit.

Q In other words, the purchase of Weintraub's stock was closed at Klausner's office? A Yes.

Q You wouldn't call that a meeting of the corporation? A Any business man would say that is a meeting, I don't know what you would say.

Q The agreement that was originally made, contemplated, did it not, that you and Weintraub would form a corporation? A Yes.

Q And you formed a corporation? A Yes.

Q And the transfer from Rothstein was made right to the corporation? A The store was bought on the corporation with myself, my wife's, Mr. Weintraub's and Mrs. Weintraub's guaranty for the balance of the money.

Q The transfer was made direct to the corporation, wasn't it? A I think so.

Mr. Skinner: I think I called yesterday for the production of the assignment that was said to have been made.

Mr. Lane: I think that is it.

Q Don't you remember, Mr. Rosenberg, that it was agreed when Weintraub sold to Klausner and Epstein and to yourself, or rather when this agreement was made between you parties, it was agreed Max Weintraub was to have no claim against the corporation for the said sum of $7,500? A That's right.

Q And it was also agreed that Epstein, Klausner and Rosenberg assign, transfer, and set over unto the said Max Weintraub all their right, title and interest in and to a certain cause of action and claim now pending in the Essex County Circuit Court against Louis Rothstein and Rothstein, Inc., a corporation different and separate from the above-mentioned Rothstein's corporation? A That's right.

Q And that took out of you all interest in that suit? A No, I still have my rights to the suit personally.

Q Any rights outside of this suit? A Right after this I had an understanding with Mr. Weintraub that I am to get my loss of the suit.

Q You mean you handed it over and held it back? A Call it anything you want, but I call it my rights to the suit.

Q I have in mind what is handed to me by Vice-Chancellor Lane; the original agreement.

Mr. Lane: I ask that it be marked in evidence.

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

Q Then, after having assigned all your interest in this suit and to the claim that it is based on, to Weintraub, you had an understanding with Weintraub that after all, you were going

to share with him if he succeeds? A In regaining our loss, yes, sir.

Q There was a party, wasn't there, given to Mr. Rothstein after he had sold out? You remember it, don't you? A A party given to him, did you say? The party was made by Mr. Rothstein with the help of the money that was supposed to be spent in case of sickness. Mr. Rothstein, as president, made the help treat him to taxi drives and caused the expenses; and the poor employees had to pay for it. That's the party that Mr. Rothstein made.

Q Have you had any assignment from the help of their claim against Rothstein for that? A There was so much criticism that the store was—

Q How ever it was financed, it was a nice party, wasn't it? A It was—for Mr. Rothstein.

Q It wasn't for you, you mean? A No, siree.

Q Why not? A The help was very much displeased with his actions.

Q So that the only reason you had for dissatisfaction was that? A The only reason I was displeased was because the help was displeased.

Q Did those who were there say goodbye to Mr. Rothstein? A Less than half-hearted.

Q Aren't you speaking for yourself, John? A No, I have them at heart.

Q It was Mr. Rothstein's health that was drunk? A What else were they going to do.

Q Were you there? A I was.

Q Why? A I think I must have been hypnotized by him.

Q So that you forgot that two days before you found you had been cheated? A Later, too.

Q Had you ever been hypnotized? A Never by anyone except Mr. Rothstein.

Re-direct examination by Mr. Lane.

Q In buying merchandise and in operating stores, do you expect to sell that merchandise for just what you paid for it? A No, we have to make a profit.

Q Could you get along for any time if you did? A No.

Q What is the profit you have to get over and above the cost to pay the expenses? A It is customary half above the cost, or thirty-three above cost.

Q Can you tell me how far down you can get before you lose money? A If you sell goods at twenty-five per cent. you are bound to sustain a loss.

Q Twenty-five per cent. above costs you will be just breaking even? A Instead of thirty-three and a third per cent.

Q Do you think you would be breaking even or sustain a loss? A You would be bound to sustain a loss.

Q At this meeting that took place at Mr. Klausner's office, was everybody interested in the transaction, including everybody in the corporation, present? A Yes, sir.

Q So that, for all practical purposes, everybody was there to speak for the corporation? A Yes, sir.

Q Judge Skinner has asked you whether you were not obliged to contribute $5,000 as a part of this deal by which Mr. Weintraub got out. I call your attention to such a clause which was stricken out. A It surely was.

Q You wouldn't say it? A I certainly wouldn't say it. It was struck right out.

Q And initialled? A By Mr. Klausner.

Q Judge Skinner has asked you whether you were not, in effect, on good terms with Mr. Rothstein. Do you remember the trouble with respect to the lease? A Why, no.

Q Do you remember the trouble? A Do I remember?

Q When did that occur? A In June.

Q What happened?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q Was there litigation between you and Mr. Rothstein? A There was—

Objected to.

Q When? A In June, sir.

Objection sustained.

The Court: It is sustained unless it is connected with this transaction. As I understand it, when you made the offer before it was a question whether the lease was carried out. I don't think that has any bearing on this issue.

Mr. Lane: No, except to rebut the assumption that Judge Skinner has attempted to get to the jury.

Mr. Skinner: I am perfectly willing to admit that there was trouble between them.

ABRAHAM KAPNER, sworn in behalf of plaintiffs.

Direct examination by Mr. Lane.

Q Mr. Kapner, where do you live? A 95 Huntington Terrace.

Q What is your business? A Assistant merchandise manager, Kresge Department Store.

Q Do you know Mr. Rothstein? A I do.

Q Were you ever interested in his corporation? A Yes.

Q When? A The years, 1922, 1923 and 1924— I presume three years.

Q Did you learn that the Rothstein store had been sold to Rosenberg and Weintraub? A I did, sir.

Q Subsequent to learning of it did you have a conversation with Mr. Rothstein? A Yes, sir.

Q Where was that conversation? A At Rothstein's office.

Q Did you talk about the sale? A I did, sir.

Q What did you say to him? A I said to Mr. Rothstein after he sold out, "Mr. Rothstein, why didn't you give us boys a chance, as you said you would?"

Q What did he answer? A He said, "The expense of the store was too tremendous for you boys to handle. Maybe its better I didn't."

Q Did he say anything about the expenses of the store with reference to whether it was possible to make money there?

Objected to as leading.

Objection sustained.

Q What else did he say? A That's all I can recollect: it was advisable for us boys to let the

store alone as the expense was too tremendous for us to handle with the capital we would invest at the time.

Cross examination by Mr. Skinner.

Q You had been there some time? A Twenty years.

Q At the time you had the talk with him, did you know that Mr. Weintraub and Mr. Rosenberg had paid for the merchandise and fixtures? A I didn't know the sum involved.

Q You heard it was $117,500? A I heard so many—

Q If you were interested you would pay attention. A After the transaction was closed, so far as I was concerned, I wasn't interested.

Q Did you not know that it had been sold for $117,500 for the merchandise and $25,000 or $30,000 for the fixtures? A I did not, sir.

Q Had you heard those sums? A I heard something similar like that, yes, sir.

Q Having heard that, you regretted that the boys had not been given a chance to buy it? A Yes, sir.

Re-direct examination by Mr. Lane.

Q Did you have any talk with Mr. Rothstein about purchasing the store prior to the sale to Weintraub and Rosenberg? A Not directly. Mr. Rothstein spoke to Mr. Gilson and myself at the time and asked if we were interested. Of course, we were, while the sale was going on we were still under the impression that we were to get a chance of buying the store.

Q Had any terms been discussed with you? A No, sir, none whatever.

Re-cross examination by Mr. Skinner.

Q By the way, didn't you and Mr. Gilson make up the inventory of the store for the year 1923? A I made it up for the department I was buyer of and also helped in other departments.

Q Gilson helped, too? A Yes, sir.

Q So the taking of the inventory was under the supervision of you and Mr. Gilson? A The main floor, especially.

Q You don't mean only the main floor? A That is what I supervised.

Q And Gilson supervised elsewhere? A I don't remember what he supervised.

By the Court.

Q You were head of one of the departments? A Several departments; a general manager.

Q When you said the "boys" you meant some of the employees? A Yes, sir.

By Mr. Skinner.

Q When you took that inventory, didn't you have some instructions from Mr. Rothstein about it? A I did.

Q Did he tell you to take it at cost or value, whichever was lowest? A Mr. Rothstein told me to take the stock as if we were going to buy it ourselves. That is what led me to believe we were going to take over the store.

Q Wasn't there some suggestion— A Regardless of the value in the market, take the store as if you were going to buy it yourself.

Q So that the valuation for that business, or merchandise and fixtures, was put by you and Mr. Gilson from the point of view that you, as buyers would buy? A Yes, sir.

Re-direct examination by Mr. Lane.

Q Did you know what that store was making in 1923? A In dollars and cents, no, sir.

Q 1922? A No, sir.

Q 1921? A No, sir.

Q Did Mr. Rothstein ever tell you what was the profit in 1923? A I never questioned it.

Q You didn't know what the rate of return was? A No, sir.

Q Either in dollars and cents or per centage? A Either dollars and cents or any other way.

Q What basis were you using on figuring inventory or fixtures, or what not, for the sale of the entire store, if you didn't know anything about whether the store was profitable? A We did a wonderful business and we had a wonderful following.

Q You were depending on the outward appearance of the store? A Yes.

Q And the outward appearance of the store led you to believe—

Objected to.

Objection sustained.

Mr. Lane: Counsel did not cross examine. He brought these things out on his own direct examination and I am allowed to examine him on that now.

The Court: I have sustained the objection.

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

Exception noted as ground of appeal.

Q What basis did you, in fact, use in making up this inventory? A According to the

market value at the time being. I had been buyer there for the last eighteen years and I sort of used my own judgment in placing the value.

Q In market value? A Some things below; some things at market value.

By the Court.

Q By market value you mean the price if you went out to buy it yourself? A Yes, sir. The day we took the stock.

By Mr. Skinner.

Q Don't you mean that if the market value was lower than the cost—

Objected to as leading.

Objection sustained.

HARRY GILSON, sworn in behalf of plaintiffs.

Direct examination by Mr. Lane.

Q Mr. Gilson, where do you live? A 21 Seymour avenue.

Q What is your business? A Buyer.

Q Do you know Mr. Rothstein? A Yes, sir.

Q Were you connected with that business in any way? A I was a member of the firm.

Q What do you mean by a member of the firm? A In the corporation I was a stockholder.

Q At the time you bought your stock did you have any agreement with Mr. Rothstein

as to what percentage you would get on your money? A Yes, sir.

Q How much? A Providing the firm did not make any money I would be guaranteed six per cent. on my investment.

Q Were you there during the year 1921? A Yes, sir.

Q Did you ask Mr. Rothstein whether there had been any money made in 1921?

Mr. Skinner: I object. I don't see how what was made in 1921 has any weight here. The representations set up in the complaint is for two years average.

The Court: I will allow it.

The Witness: I did.

Q What was the reply? A We didn't make any money that year as we had some outstanding expense; he had done some alteration in the store and he claimed there was poor management. We had some poor merchandise which was bought and had to be sacrificed.

Q At the close of the year 1922 did you ask Mr. Rothstein whether any money had been made then? A I don't exactly recollect whether I asked him any more after that.

Q Did you get anything more than your six per cent? A No, sir.

Q Did you make any inquiries why you didn't make more than your six per cent? A I didn't make any inquiry about it at all any more.

Q Why not? A I don't know. I didn't think I had a fortune invested and I didn't think it meant anything; I will be frank about it.

Q Do you remember whether you made any inquiry with respect to 1923? A I am almost

sure I did not. I asked for it only after the first year; after that I didn't bother any more.

Cross examination by Mr. Skinner.

Q You haven't any present interest in this suit? A No, sir.

Q You haven't any feeling against Mr. Rothstein? A I haven't any hard feelings against anybody.

Q Your relations with him were pleasant and cordial? A Yes, sir.

Mr. Skinner: I would like to ask this witness about the party.

The Court: You will have to make him your witness.

Mr. Lane: If I have the right to cross examine.

By Mr. Skinner.

Q Mr. Gilson, what was the feeling of the employees towards Mr. Rothstein? Were they cordial and friendly? A Well, I will tell you, it was both ways, you know how it is; like in a club; there are two cliques. One clique was satisfied and the other wasn't it.

Q Did you belong to the clique that was satisfied? A I was and I wasn't.

By Mr. Lane.

Q Just what do you mean by "I was and I wasn't"? A I don't know, really, how to express it, you know. I wouldn't know how to express it at all.

Q What was it that indicated your dissatisfaction? A There was no dissatisfaction, really;

some employees thought we should make the banquet for him and some didn't.

Q Whose money was it? A Rothstein's Mutual Aid Association.

Q Who was the Mutual Aid Association? A The employees.

Q What was the purpose of it? A Sick benefits and deaths.

Q That money was used to give a banquet to Mr. Rothstein? A To be frank, I didn't know that money was going to be used.

Q You found out afterwards? A Yes, sir.

Q If you had found it out before you would not have been happy about the banquet, would you? A (No answer.)

By Mr. Skinner.

Q But not knowing anything about it before you were happy? A Oh, yes; I had a good time.

Q And the spirit of the banquet was cordiality toward Mr. Rothstein? A Yes.

Q Shared in and joined in by those present? A Yes.

Q Including Mr. Rosenberg and Mr. Weintraub? A They were there; how they enjoyed it I couldn't tell you.

By Mr. Lane.

Q These employees whose association money was used, continued to be employees of this store? A Yes.

Q And Weintraub and Rosenberg had to continue to deal with those employees? A Yes.

By Mr. Skinner.

Q I gathered that the dissatisfaction made two cliques; some satisfied and some not satisfied about the use at this banquet about the employees mutual aid funds? A Not exactly that, you know.

Q What was it? A Well, I will tell you. I felt a little funny because I always thought I would be interested in the firm to the extent of making my life there and I felt a little bad—

Q About the employees that you said some were satisfied and some dissatisfied. I meant over the mutual aid funds. A I couldn't tell you that; I don't know.

Q You joined with Mr. Kapner in taking the stock inventory, didn't you? A I just took the inventory of my departments—shoe departments and clothing departments.

Q Did you at any time take it at cost or market value, whichever was lowest? A Mr. Rothstein came to me and he said, "Take the stock as if you were going to buy the store," and I took it as if I were going to expect to make a legitimate profit the following year.

Q Giving it the value you would be willing to pay for it? A Yes, sir.

By Mr. Lane.

Q How would you know how much you would pay for it if you didn't know whether the store was making money or not? A Fixtures, I couldn't tell you anything about.

Q Merchandise. A My merchandise, in having past experience in selling it.

Q Doesn't the question whether the store is operating at a loss or at a profit go into the

business? A I knew only about my own department; I couldn't tell you much about the other departments.

Q Did you take the value as if it were a profitable business? A I did.

Q Didn't you know a profitable business should net eight or nine per cent.? A I figured a percentage above the cost of my own merchandise; I didn't figure on the store; only of my own departments.

Q Only the overhead of your own departments? A Yes, sir.

Q You had enough experience to know that would be only a small item in making the valuation for the store? A I was figuring only on my departments and I knew they were doing well.

By Mr. Skinner.

Q You had no doubt you could make money from your experience and your ability to make it a profitable business if you should buy? A Yes, sir.

Q You didn't need to know how much he had made? A I figured he had made money and I didn't see why we should not.

Q You knew it depended on your own efforts? A Positively.

By Mr. Lane.

Q You mean to tell me there is no effect of what an established business is making upon a sale price? A (No answer.)

RHODA HERSH, a witness previously sworn in behalf of plaintiffs, resumes the stand.

Re-direct examination by Mr. Lane.

Q Mrs. Hersh, have you, from this book, which you testified this morning was the book in which records were kept of the stamps issued made a calculation of the number of stamps that were issued from January 1, 1924, to March 22, 1924? A Yes, sir.

Q And in dollars and cents, what is the amount of stamps which were issued during that period of time? A $1,722.50.

Q That is the value of stamps in dollars and cents issued from January 1, 1924, to March 22, 1924? A Yes, sir.

By the Court.

Q Their redemption value? A Yes, sir.

Q In other words, $2.50 per $100 of sales. A Yes, sir.

By Mr. Lane.

Q I ask you whether you have calculated the amount of money paid by the store from April 1, 1924, to January 1, 1926, in the redemption of red trading stamps? A Yes, sir.

Q What is the amount of money which was paid in the redemption of those red trading stamps? A $6,904.46.

Re-cross examination by Mr. Skinner.

Q I show you a letter dated April 29, 1926, signed in typewriting "Rothstein" with the ini-

tials "R. F." on the left-hand corner. Do you recognize it? A Yes, sir, I do.

Q You recognize it? A Yes, sir.

Q This bill (indicating) accompanied it, didn't it? A Yes, sir.

Q And that bill was in your handwriting? A Yes, sir.

Q That bill states, does it not, "Stamp books redeemed for your account"? A Yes, sir.

Q That was April 1, 1926? A Yes, sir.

Q Was that a correct statement of what had been redeemed for Rothstein? A Yes, sir.

Q And that is all? A Yes, sir.

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

(The same is marked Exhibit D. 1 for identification.)

Re-direct examination by Mr. Lane.

Q How many other letters were written of that kind to Mr. Rothstein? A I don't remember.

Q Wasn't a letter sent to Mr. Rothstein every single month by Rothstein's, Inc., enclosing a bill for stamps? A I know a bill was sent every month, but I don't remember whether a letter went with it or not.

Q A bill was sent every month? A Yes, sir.

Q Is the total of the bills sent every month the total you have given me here? A Yes, sir.

Mr. Lane: Judge Skinner, I don't want to make any mistake about this. This bill of April 1, 1924, apparently on its face is

a bill for one month's stamps, which agrees with this bill here (indicating).

(The bill previously marked D. 1 for identification is received in evidence and marked P. 16.)

(Mr. Lane reads Exhibit P. 16.)

Q The bill enclosed is stamp books redeemed, $486.46? I show you a bill which you have produced as part of your files, "$486.46." Isn't that a copy of your bill? A Yes, sir.

Q I show you others and ask you whether they were not sent to Mr. Rothstein month by month.

Objected to as leading.

Objection overruled.

Q Is that right? A Yes, sir.

Mr. Lane: I offer them in evidence.

Re-cross examination by Mr. Skinner.

Q You say they were sent monthly? A Yes, sir.

Q Although you have read right there in April, 1924, "February and March" which had intervened, that that was a statement according to the letter of the stamps redeemed up to that date?

Objected to.

Q Didn't you see they were not sent before? A Yes, sir.

Q How do you know they were sent monthly? A I sent them.

Q There were always some each month? A Yes, sir.

Q That continued, how long? A Up to and including January 1, 1926.

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

Q Sure that you sent statements every month? A Yes, sir.

Q And when we were looking, both of us, at this bill, I thought that it looked like April, 1926, and you did, too. A 1924. I didn't hear you say 1926.

Mr. Skinner: The Vice-Chancellor knows I wouldn't deliberately state anything like that.

Re-direct examination by Mr. Lane.

Q I show you a letter from Mr. Charles B. Clancy, dated November 22, 1924, to Rothstein's and ask you whether you ever saw that letter before? A No, sir.

Q You didn't? A No, sir.

Mr. Lane: Will you admit you sent that letter to my client? It is from Mr. Clancy, attorney for Mr. Rothstein, to Rothstein's, Incorporated.

Mr. Skinner: We have no objection to it.

Mr. Lane: I offer it in evidence.

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

(Mr. Lane reads Exhibit P. 17.)

Mr. Lane: Will you admit that this letter was sent?

Mr. Skinner: Yes.

Mr. Lane: I offer this in evidence.

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

By Mr. Lane.

Q Mrs. Hersh, there is a figure in the letter of May 2, 1924, Exhibit P. 17, $15,237.50. Can you tell me what that figure represents? A No, sir.

Q Do you remember whether Mr. Rothstein called you up to get that figure at some time? A No, sir.

Q Have you ever gone over these red stamp books and attempted to find out where that $15,000 comes from? What basis there is for that $15,000? A No, sir.

Mr. Lane: I offer this letter.

Mr. Skinner: If your Honor please, I have an objection to the other two letters. I now object for the purpose of saying that I cannot see what relevancy they have. They are letters from Mr. Clancy. He says he will redeem the stamps and pay for the stamps.

(The letter is marked Exhibit P. 19 for identification.)

Mr. Lane: I call for the letters of May 5, 1924, and May 13, 1924, from Mr. Henig to Mr. Clancy.

(Letters are produced by defendant's counsel.)

Mr. Lane: I offer these letters.

Mr. Skinner; I object to them.

Mr. Lane: I ask that they be marked for identification.

(Letter of May 5, 1924, is marked Exhibit P. 20 for identification.)

(Letter of May 13, 1924, is marked Exhibit P. 21 for identification.)

Mr. Lane: If I have not already offered them, I offer these duplicate bills that were sent to Mr. Rothstein. Formally I call upon you to produce those that were sent, if not, I will offer the copies.

Mr. Skinner: If your Honor please, I still have the objection that I had before, that there is no pertinency. They can't prove how much of the redemptions that are shown are for stamps issued before and how much after.

The Court: Have them marked for identification and we can dispose of the stamp business when he gets all his proof in.

Mr. Lane: I don't want Judge Skinner to labor under the impression that I haven't proof. I have proved the number of red stamps issued by us between January 1 and March 22, 1924, and I have given them credit for every one. I am deducting those from the whole of the red stamps.

The Court: You issued $1,700 worth and you redeemed $6,000.

(One bundle of bills marked Exhibit P. 22 for identification.)

HARRY B. KOSSOVE, sworn in behalf of plaintiffs.

Direct examination by Mr. Lane.

Q Mr. Kossove, where do you live? A 270 Fort Washington avenue, New York City.

Q What is your business? A Systematizer and auditor of department stores and chain stores.

Q What has been your experience for the last twenty years in the department store business? A I had done no other work for the past fifteen years except systematizing and auditing department stores and chain stores every day.

Q Have you had experience in the negotiations for the sale of stores similar to this involved in this case—merchandise and fixtures? A I have.

Q What is your experience? A The Amsterdam Department Store, corner of Amsterdam avenue and Ninety-seventh street, New York City, sold in April, 1920. The conditions were practically similar with the exception of the amount of sales which in that case were $250,000.

Q What did you have to do with that? A I had been the systematizer and auditor of the concern owning the department store for two years prior to that. At the time of the sale I had to prepare my financial statement showing the assets and liabilities, operating expenses and exhibiting the various schedules pertaining thereto.

Q Will you tell me of any other stores you have in mind that you have done similar work with? A The Strauss Department Store, 111th

street and Broadway; the building was torn down to put up a new skyscraper on the space. That store was in business twenty years and had a stock valued at $75,000.

Q Any others? A The stores I am working with at the present moment.

Q What stores? Mention some of them. A Helfer Department Store; Strauss Department Store, 135 Main street, White Plains; Strauss Markets, chain stores, butchers and grocers; Rex Drug Stores; Cammeyer Shoes; Siegel Paint Stores, building contractor conducting retail stores in connection with his business.

Q Your experience in this business covers a period of how many years? A Fifteen years.

Q In your experience of fifteen years have you acquired information as to how the prices of stores as going concerns are fixed—

Mr. Skinner: I object to him as not qualified.

Q In your experience during the last fifteen years have you come in contact with stores which were sold and in contact with people who bought department stores, and so forth? A I have.

Q Have you come in contact with them and figured with them as to what should be paid, and so forth? A During the past ten years numerous statements have been brought to my attention by people who were not my clients and who were directly recommended by clients or by men who brought them to me.

Q Has your experience been such that you have a general knowledge of the way in which the values are fixed under circumstances which I have stated? A My opinion has been very valuable to clients.

Q I only asked you whether you have the experience? A I have the experience.

Q Tell us in more detail how you obtained it. A On many occasions partnerships were formed under conditions where one partner stepped out and another came in. Determination of the value of the stock and fixtures and the good will, necessarily had to be obtained in order to admit the new partner. On other occasions where a client of mine would recommend a friend who was about to buy or open a store, as to facts and figures having to do with the transaction, the figures were given me already prepared.

Q In what cities have you operated? A I believe White Plains, New York, would be my best conception of similarity of the two stores. It is on Main street opposite Keith's Theatre on the busiest block of White Plains. The sales are not as high—only about $225,000 and the store is probably smaller. Otherwise conditions are practically identical. They also sublease departments.

Q And your experience of over ten years has extended over what territory? A New York, White Plains, Passaic, Brooklyn—of course, I have done a good deal of litigation in connection with taxes. I am admitted to practice before the Treasury Department.

Q Is there any difference in which way this subject of sales of department stores is approached whether you are in New Jersey or New York? A Location naturally has to be considered. Also size, condition of the store, reputation of the store, and so forth.

Q I am not speaking of the different conditions. Is there any difference in different localities? A Not that I could say so. I believe

there is no difference because the stock and expenses are known. The gross amount to be expended is always an established fact. We do not know the amount of sales, only the cost of goods. The cost of the goods plus the gross expenses of the business would tell us the amount we would have to have in order to do business.

By the Court.

Q Doesn't the cost of doing business vary a great deal according to the location as to whether it is on this side of the river or on the other side of the river? A It would make no difference. Given a set of figures, regardless of where it is, I could tell—whether Bamberger's or a side street store was considered. After finding the cost of operating the store we could tell how much goods must be marked up in order to make a profit.

Cross examination by Mr. Skinner.

Q You say that if you know certain things—have certain things given you—you can reach a conclusion? A Yes, sir.

Q What are the certain things? A The amounts of rents paid; all general expenses; the amount of executive salaries that should be allowed to a working executive; that is, replacement value of similar services.

Q Then you say you would be able to conclude what? A And taking the cost of goods into consideration I would be able to determine what profit is obtained.

Q That profit depends on what price can be gotten for the goods? A Correct.

Q And the price depends very much on the character of the neighborhood? A Not necessarily.

Q Don't you get a better class of patronage in one place than in another? A You do.

Q Doesn't that mean that higher-priced goods can be sold in one neighborhood than in another? A It does.

Q Doesn't it mean that a higher profit can be made in one neighborhood than another? A No.

Q Don't you think stores on Fifth avenue make more than stores on the east side? A I don't; the overhead is higher.

Q When you consider the cost price and the retail price— A You make a bigger gross profit.

Q If you were going to establish a business of your own and knew you had a stock of goods that cost so much you wouldn't try to find out at all whether those goods were suitable to the neighborhood? A I certainly would.

Q Because neighborhood makes a big difference? A We haven't spoken about the condition of the merchandise or the type of merchandise. We talked about fault-finding.

Q I am speaking of location as an element. A It would make a difference according to the merchandise and the fixtures and even the clerks you employed.

Q It might make a difference in the profits you reaped? A It does in a way.

Q Your experience has been in other neighborhoods and not in Newark? A In Metropolitan districts.

Q Not on Springfield avenue? A No.

Mr. Skinner: I object to this witness as not qualified.

The Court: He spoke about one partner's retiring and another coming in and about the way prices were fixed. Under the circumstances I will allow him to testify.

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

Exception noted as ground of appeal.

Re-direct examination by Mr. Lane.

Q What is considered, if there is anything considered, as a profit that a department store of this kind should make net after all deductions?

Objected to.

Q Have you been here and heard all this testimony and know what we are talking about? A I do; I have been here since yesterday morning.

Q A department store of that character, what profit should it make in order to be called a profitable store? Is there any fixed percentage in the trade? A Anywhere from eight to eleven per cent.

By the Court.

Q On what? A On gross sales.

By Mr. Lane.

Q In that anywhere from eight to eleven per cent. what deductions are taken off before that profit is figured? A Cost of goods sold; general expenses, which would consist of rent, payrolls, lights, fuel and power, wrapping paper, and petty cash, expressage and freight, delivery service, if any, office salaries, cost of auditing, coming down to executive salaries, if there are any such, depreciation on fixtures, on merchandise, if any, such as sunbleached goods, window goods—all stores have a good deal of it, in fact, all expenses pertaining to the conduct of the business.

Q Suppose the capital stock is controlled by one man who draws an executive salary and this salary was $13,500, in figuring the net profit of eight to eleven per cent. do you consider that above the profits? A That goes in as part of the expenses.

Q Does the amount of profit that a store is making have any effect upon the sale value of the merchandise and fixtures in that store for going business purposes? A Naturally, as a part of its good will.

Q If a store is operated at a profit of eight per cent. net is the merchandise and fixtures in that store worth approximately 100 per cent. cost?

Objected to.

Objection sustained.

Q What would it be worth in percentage of cost? A Cost of merchandise less cash discount.

Q What do you mean by that? A Invoice price less cash discount—the actual cash paid.

Q If a store is making four per cent. net instead of eight per cent. the value of its fixtures and good will would be 100 per cent. of cost less discount; what would the fixtures and the merchandise be worth? A About sixty-five per cent.

Q Of costs? A Of costs.

Q What would the fixtures be worth? A About one-half of their cost value provided they haven't been depreciated that much. If a store is in business ten years and depreciated the fixtures they would be junked in that ten years. That is permitted by the Federal Government.

Q Suppose the store is making three per cent. instead of four per cent.? A It would bring it down to an unprofitable store and make him sell out the merchandise at retail instead of under the hammer.

Q What effect would that have? A Between fifty and sixty per cent.

Q How about the fixtures? A Fixtures are worthless except for scrap.

Q Is there a recognized scrap value? A Usually ten per cent. if everything is less than six years old.

Q Do you think it could continue as a profitable business? A I don't know of anybody who would invest that much in order to obtain a $10,000 net profit.

Q Suppose the percentage of profit is about two per cent. net, according to the system applied by you, what effect would that have upon the value of fixtures and merchandise? A That would not be a store producing a profit at all.

Q What would be the effect on the fixtures and merchandise? A It would be worth fifty per cent. to the auctioneer; I don't know of anybody who would pay anything for a store of that kind.

Q What would be the value of the fixtures? A I should think it would be worth around ten per cent. twenty per cent. would be a large figure.

Q In this case it appears that according to the auditor's report that the net profit on operation was $1512.21 from the general business; net sales of $343,176.61. Assuming that to be the net profit on that amount of sales, what percentage would you say of cost were those fixtures and merchandise worth? A They would be fit to go into the hands of auctioneers.

Q At what percentage? A Usually thirty-three and one-third to fifty per cent.

Q There is included in this expense office wages of $2565.77. Is that a proper sum to be included in these expenses? A What are the total expenses?

Q General administrating expense $22,823.51. A That would be proper.

Q Was whatever was paid out as office salaries a proper item? A Yes, sir.

Q $1628.25 was charged as general wages. Would that be a proper expense? A Are they general wages in the office or delivery help?

Q I don't know. A May I ask the total payroll?

Q I don't know. If that expense was made would it be a proper expense? A If that expense was incurred in conducting the business.

Q Executive salaries $13,499.99, of which a part was the salary of the president of the company; is that a proper charge to be made? A If he gave his full time to the business as general manager.

Q Would $7500 be a proper charge? A I think so, for such services.

Q Are such services as ice, carfares, towels, water, office supplies, general expenses, telephone, auditing, and labor proper to be included? A They are all regular expenses.

Q There are two small items, one charge of $23 for charity and one charge of $50 for dues and subscriptions. What would you say as to those being proper charges against business? A I would consider it O. K. because that is advertising such as local church benefits or similar affairs.

Q Assuming that there is in addition to that operating income say, a net profit on operations of $7660.77, made up as follows: net income from toy department $522.67, income, interest on bonds $36.10, $9432.15 for discount purchases; an item, trading stamps sold $442.69; an item waste materials sold $141.74; interest on bank balances $299.02; an item, commission telephone $7.74; commission chewing gum $9.67; against which there are charges: discount sales $313.93; taxes $2006.51; interest paid $317.87; bad debts $592.70; or total charges of $3231.01 leaving a total or net of $7660.77 said to be a financial income, would it be proper to add this income to the operating income? A That is usually classified as other than trade income.

Q Is that proper to be incorporated? A The discounts would naturally be considered as reducing the cost of goods sold.

Q The items of interest, taxes, and so forth, are proper items and charges? A They are.

Q Let us assume that this company has a net profit on operation on an annual turnover of $343,176.61, a net profit on operation of $1512.21 and a net financial income of $7660.77, or a total of $9172.98, in what class of business would that fall as to percentage of costs that the fixtures and the merchandise would be worth upon a sale? A This would really amount to about two and a half per cent. on the net profit. It would come into the class of the sell-out and

necessarily an auctioneer's business. But a person who is disposing of his stock at retail, taking such reduction from the price as is warranted by the business; men buying goods before Christmas may hold them at the higher price; afterwards they would naturally reduce it twenty or thirty per cent. as the stock became depleted.

Q What would you then consider the cost of the goods? A Sixty-five per cent. on goods and twenty per cent. on fixtures.

Q What percentage, if you know, is it customary to figure on the cost of goods on a retail sale? A Fifty per cent. on cost and thirty-three on sale.

Q Is there a figure below which, or a percentage below which you cannot get without running into a loss? A As I explained before if the usual mark-up is after knowledge of the budget, after knowing what it costs to conduct the business, if we say thirty-three per cent. of sales it means after all the expenses of the business are considered, depending on the practice of the house. You take out ten per cent. of the thirty-three per cent. mark up and you have no profit at all regardless of the line of business.

Q Is that generally known? A It is known to any merchandising man in the country.

By the Court.

Q You say it has to exceed fifty per cent. of the cost or thirty-three and a third per cent. of the selling price? A Exactly.

By Mr. Lane.

Q That figure, in percentage, is what? A Twenty-three or twenty-four per cent.

Adjourned to Wednesday, November 10, 1926, at ten o'clock, A. M.

SECOND DAY

Wednesday, November 10, 1926

Continued pursuant to adjournment.

Present, counsel as before stated.

HARRY B. KOSSOVE.

Cross examination by Mr. Skinner.

Q Your experience in connection with the subject you have been discussing has been as an accountant examining businesses? A Not necessarily as an accountant. I have been installing systems and auditing.

Q Have you ever run a department store yourself? A I have not.

Q Have you had any practical experience in the kind of thing you had been examining? A I don't sell goods.

Q You never ran a store? A No.

Q You have given the jury some figures as to the methods pursued and the result usually attained. Let me ask you this: You gave a statement of what was the average profit, did you not? A I did.

Q I understood, if I recall rightly that it was eight to ten per cent? A That's right.

Q I think you told the court it made no difference as to location. A As to what profit is to be obtained on the goods.

Q Isn't it a fact that there is a big difference between department stores doing business in great shipping centers and those that are merely neighborhood service stores, in this respect: The store in the big shipping center has a much bigger turnover. A Possibly so.

Q Surely so. A It depends on the conditions of the individual neighborhood. The turnover of merchandise would only indicate the volume. The profits derived from a large store or a small store would be the same.

Q You have testified your major point. You don't have to argue it with me. A I don't want to do that.

Q The location does make a difference. A Not at a profit.

Q But in the frequency of turnover? A Yes.

Q If you can make eight turnovers in a year instead of two, don't you think it can make more? A The store in the large shipping center would have a larger overhead and a larger rent, which would necessitate its greater turnover.

Q Suppose one is eight times a year and the other is in the extreme twice a year, do you think the overhead expense would increase fourfold with the fourfold increase of turnover? A The major item being rent; certain rentals would be $50,000 for a tiny store and a store in a poorer section may have $5000.

Q Do you think that is an answer to my question? A I answered as best I could.

Q Wouldn't the store that made eight turnovers a year; that is, four times as much business as the other store, regardless of the amount of a single turnover—four times the turnover—wouldn't that do it with very small increase in overhead from the same store that did, say, only six turnovers? A I wouldn't agree with you. It may affect the sales force; they may not be of the same quality in the small store, but other items are to be considered, like rent; also executive salaries.

Q Then rentals are considered seriously? A Yes.

Q And the rentals depend upon the location and the value of the location or the character of the location. All these affect the rental just because and as much as there is a greater chance of turnover in that location? A Surely.

Q A man who pays $50,000 rent for a location is going to make more money if he has eight turnovers than if he had six. A He may have more assurance, but not necessarily.

Q I say, a man is going to make more money in that location with eight turnovers instead of six. A I cannot agree with that.

Q What is the average expense; that is, the average ratio of expense, to gross business done. A Anywhere from fifteen to twenty per cent. depending upon the type of the store and various expenses.

Q Has that always been so? A It is generally assumed that it is so. The gross overhead usually is fifteen to twenty per cent., leaving a balance, of which probably five per cent. is on fixtures and the balance profit.

Q Then with $350,000 a year in a neighborhood department store what would you expect to find the per cent. of expense? A Probably fifteen to twenty per cent.

Q In order to have the same meaning to the word you include all expenses? A All expenses.

Q That fifteen per cent. would be what? A About $4500.

Q Then thirty per cent. would be about $10,500? A Yes.

Q These figures of average expense you give us, are they matters of knowledge you have

gained by your special experience, or are they generally known? A I should say both.

Q But a general merchandise man, who has been in that kind of business, counts on a sort of business maximum to keep his expenses down to fifteen or twenty per cent. A He is told by the accounting department what his expenses are and guides himself accordingly.

Q Then in just a small neighborhood store without such guidance do they figure on fifteen or twenty per cent? A Yes.

Q You know the Dry Goods Economist? A Yes.

Q It is a pretty well known paper? A Yes.

Q I am reading from the average expense. It is called the twenty-five typical stores. I want you to look at the tabulation of total expenses. I call your attention to the fact that it says, "Total expenses 29.5 per cent. for the year 1926." A There is life insurance included; depreciation is included; I excluded it for my percentage.

Q I asked you personally whether you figured all expenses. A Depreciation is not called an expense—it is made up—it includes considerable advertising expense which is not included in a small store.

Q You have been testifying as to what was the average expense in all stores? A The conditions applying to these stores would not be the same. It probably would cut it down with the depreciation, taking off life insurance, too, and advertising.

Q Life insurance is down here as figuring one tenth of one per cent. from 29.5 which would bring it down to 29.4; depreciation is 1.4 per cent; that would bring it down from 29.4 to 28.1.

We have made allowance, you see. A We have three per cent of advertising.

Q You would not have Rothstein's advertise at all? A I would not to the extent of three per cent. Three per cent. of $350,000 would be over $10,000. I don't think a neighborhood store would spend that much.

Q How much? A They usually do circular advertising in some neighborhood paper at about $10 a page.

Q Reducing it 1.3 we get the 28 down to 26.1. Have you anything else you can take off of that? A It would be an unfair comparison because the assumption of office expenses and executive salaries would naturally vary and specific business houses may have different condition to contend with.

Q And may not? A And may not. However, the figures are on the basis of thirty-three and one-third overhead and some forty per cent.

Q What is your general comment? I gather from what you say, although this is called the figures of twenty-five typical stores, they are not typical. A They are not official, so far as I can ascertain, except the Dry Goods Economist writing to merchants and getting their figures, and they sometimes don't give exact figures.

Q What you say it not official so far as you are concerned— A I don't doubt it is correct for the twenty-five taken.

Mr. Lane: In order that I may understand, is that percentage on turnover, or what?

Mr. Skinner: It is on the gross business, I suppose.

Mr. Lane: That is on turnover.

Witness: Turnover does not enter this calculation. Every dollar of sales cost so much. According to this list it is about twenty-eight per cent.

By Mr. Skinner.

Q You told us here yesterday that the value of the merchandise on the shelves of a store is determined, partly at least, and I understood you to say largely, by the extent to which the business carried on there before had been profitable. Do you remember? A That's right.

Q A store that you said was making four per cent. profit on the sales for the year, the merchandise on the shelves would only be worth, I think you said, sixty-five cents on the dollar? A Yes.

Q While if the store was making eight per cent. the stock would be worth 100 cents on the dollar? A Cash, less discount.

Q I think you said in one of your answers something that showed you were assuming that the man was going to carry on the business right in that store. A In that sixty-five percentage?

Q In either. A It depends, because if he had purchased the store only on four per cent. profit he may take it only for disposing of the goods, but not with the idea of continuing the store for a period.

Q Isn't it common sense and common experience that if he wants to dispose of the goods he can do it from those shelves and from those counters and getting advantage of the good will, rather than by taking it somewhere else? A I mean just what I said.

Q Then what he is counting on in his expectation of getting 100 cents on the dollar if the store

has done a profitable business or what he is counting on when he finds the store has been making four per cent. depends on the good will? A Yes.

Q The more profitable and successful a store has been before, the more valuable the good will? A True.

Q When we say the good will is more valuable, we mean more people have gotten in the habit of coming in to buy goods. A Not necessarily; hundreds of people might come in and buy, producing no profit at all. There are many stores selling goods at cost value without any profit, but this is because of retarded business conditions; because of conditions in their neighborhoods and such.

Q We are not talking of that kind, are we? A The value of good will would not be dependent on the number of people coming in, but the type of merchandise they buy, leaving a profit to the proprietor.

Q But those are all phases of good will, aren't they? A They are.

Q After all, the things a man thinks of are not, "Did this man make four per cent. profit or eight per cent.?" He translates it into how much is there of good will here, is that right? A That's right.

Q It is a matter of common experience, isn't it, that large department stores will buy up entire stocks of concerns going out of business, paying him dollar for dollar on the inventory? A I never heard of it. They will pay forty or fifty per cent.; they may take some goods off at higher prices.

Q Isn't it common experience that department stores will buy up the entire stock of a concern going out of business, paying for it one hundred cents on the dollar, because they expect to advertise that it is the stock of so and so's store, to get the good will of people who commonly went to that store to buy? A They may give the man a better figure than an auctioneer might offer for that particular stock of goods for the good will that this might bring. They never pay one hundred cents on the dollar and the selling cost on that class of goods would be thirty per cent.

Re-direct examination by Mr. Lane.

Q I show you this paper which was shown to you by counsel and ask you whether the legend on the type of the expense figures of twenty-five typical stores affected by bad weather, has anything to do with it? A I was only shown the expense figures.

Q You were not shown the legend saying that these expenses were affected by bad weather? A The article deals with that.

Q If we will assume, for the sake of argument, that an average general expense is twenty-nine per cent. then on a turnover of $343,176.61, what would be the expense of operation? A About $100 for a thousand.

Q Can you tell me what value there is in good will if you can't make a profit? A None, except for advertising purposes.

Q They expect to make a profit on something else? A The value of good will within the given business when it is not profitable, is worth nothing.

Q Can you tell me how a man can tell what the good will is worth if he doesn't know the other profits? A No way.

Re-cross examination by Mr. Skinner.

Q Past performance is a good basis? A It is.

Q I call your attention to something that is in this article—I— A I didn't see it all.

Q When you said you were not shown the legend— A Your question concerned itself with the expense only; I looked at figures only.

Q When you said you were not shown anything but the expenses, you meant you did not look at it. It is there in big type. A It is. I didn't read the article, except the figures.

Q It is a comparison between 1926 and 1925, isn't it? A That's right.

Q 1926 with bad weather, 1925 without, and the difference is between 29.5 and 27.1, so that for 1925 it was 27.1, unaffected by bad weather? A That's right.

Q In this statement it says that a comfortable ratio for stores in the million dollar class is twenty-seven per cent., is that right? A It wouldn't apply to this particular type of store.

Q Wouldn't you agree with that statement? A I cannot agree with it. It is not an official statement. These requests for information come in every day of the week to my clients. They say our average business was so much and our average expense twenty-five per cent.

Q Then you don't think much of the magazine? A I think it is all right when it is general. The facts and figures can only be corrected by submitting complete data and costs for operating, and so forth.

Q Just so that I won't have to be worried about my figures, 28.1 per cent. on a $350,000 business would come to $98,000 and a little over? A About $98,000.

Q Would you expect a store that was doing a turnover, or a total business of $350,000 in the year, and had a ratio of expense to a business of 27 or 28 per cent. to make 8 per cent. profit? A I would not. I would think the ratio of expense would be too high.

Q So that anybody who approached the purchase of goods in that store, with the experience set out in the Dry Goods Economist, would have no reason to expect 8 per cent. profit? A No reason.

Q And that would refer to anybody who was going to buy the goods of any store as mentioned? A Those goods would not make eight per cent. I am discounting that article as being a fair idea only.

The Court: How is this re-cross examination? He said the average and the expected profit would be eight per cent. It seems to me it is more a matter of argument than of testimony.

By Mr. Lane.

Q Will you read this article at the point I have marked, and then tell us whether this article was not properly a distinction between the stores in the million dollar class and other stores? A There is a definite distinction.

By Mr. Skinner.

Q This store is not in the million dollar class? A It is not.

Q You say there is a definite statement? A There is a distinction.

Q Did you mean in your judgment it is, or do you find it here? A I find it here.

Q What is the distinction? A The condition affecting the stores in the million dollar class did not necessarily affect the stores of other turnovers.

Q You don't find that, do you? A May I read it to you?

Q They are talking about million dollar stores all the time? A Yes.

Q Can you see any distinction there between million dollar stores and neighborhood stores? A There is a distinction. It says, "While many other stores are enjoying prosperity increases," I assume that "other stores" would be neighborhood stores. That would be my construction.

Q Do you think that is said with reference to the expense ratio or with reference to the volume of business? A If our sales fall down, our expenses would jump up in proportion to our sales.

Mr. Lane: I call now for the general ledger. Have you got that?

Mr. Skinner: Not since yesterday.

Mr. Lane: Have you got any other books?

The Court: I suppose you are referring to the three other books that the accountant said were not there.

Mr. Skinner: The books we had yesterday are here.

The Court: There were three or four books in the accounting system that were not here. Now, you are asked for those books and you do not produce them.

Mr. Skinner: No.

Mr. Lane: I have two more witnesses who are on their way over from New York. I

am through with the exception of those two witnesses.

The Court: Mr. Skinner, you have no objection to his reserving that right?

Mr. Skinner: I think I can use the time in a way that will not distort our case.

PLAINTIFF RESTS.

The Court: We didn't dispose of the question of stamps.

Defendant's counsel moves that plaintiff be non-suited on the second count of the complaint on the following grounds:

1. That the bill of sale does not include the stamps or the good will.

2. That the good will created by the stamp business is entirely distinct from the stamp business.

(Argument by counsel.)

The Court: The second count is an action charging that the stamps were a liability of the business. The bill of sale provides that the conveyance of the goods shall be free of debts. The stamps were not a debt of the goods. I think that must be conceded. The stamps, as far as I can see, are not, by the agreement as made, a liability of this business that was turned over. and in order to maintain the good will, it may have been necessary to have redeemed those stamps; but it seems to me that was up to the plaintiff to decide that for himself. I can't stretch good will so far as to create a liability upon the person who gave the bill of sale to pay for this.

The testimony in this case shows that the defendant here, Mr. Rothstein, said that he would not bother about the stamps. He suggested they not bother about them; that it was not so much. So, that negatived before the transaction was closed, any meeting of the minds that the defendant was to pay for the redemption of these stamps.

This is an action of deceit, of course, and it therefore seems to me there is no proof of an obligation to pay. It does seem, however, that there is some rights to recover for the stamps issued between January 1 and January 22nd. It may be desirable for the plaintiff to revamp his suit. It seems to me, as against that, there is also the statement of the conversation between the parties where they had contemplated the plaintiff's redeeming the stamps. I will therefore grant the motion for the non-suit as to the second count.

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

Exception noted as ground of appeal.

The Court: We will probably strike out the evidence on the motion for a non-suit. Now, as to the individual plaintiffs. Can they be joined in this suit?

Mr. Lane: Yes. The contract, while in the name of a corporation, was with them in person. Whether he is party to a contract or not, any person injured by fraud or deceit, is entitled to demages.

The Court: He was acting for the company.

Mr. Lane: There was no company in existence.

The Court: He was acting for the company that was contemplated.

Mr. Lane: There can be but one recovery, of course, in this particular case. If Weintraub and Rosenberg were induced to incorporate in order to take over the business and invest in the company $37,500 each upon the false representations of Rothstein, they, individually, are entitled to what they lost because of those misrepresentations.

The Court: The rule of damages would be different as to them than they would be as to the company. Supposing they were suing alone; their claim would be for the loss they had sustained, and that would be the difference between what they paid in and what they got out.

Mr. Lane: He is entitled to the loss of profit which he would have made if it had been the fact that the representations were true.

The Court: The rule of damages to the plaintiff corporation is the loss of its bargain; that is, what they should have gotten and what they did get.

Mr. Lane: Exactly.

The Court: And that would take in all of the damage that should be paid, because the other plaintiffs owned stock in that company and took the stock of that company. Then, why can they be parties plaintiffs here? The money would have to paid to the corporation, if it is paid here.

Mr. Lane: I still think, legally, they are entitled to be parties plaintiffs because of the interest they have in the loss which they themselves sustained.

The Court: I can't recognize an assignment of a right of action.

Mr. Lane: I think it is wholly immaterial.

The Court: It seems to me that their position is that of agents. When they made that transaction they were acting for the corporation, and therefore I do not think they are properly parties to this suit. It doesn't make any difference in this case because from conversations pro and con, they were acting for the corporation.

Mr. Lane: In this case it makes very little difference who the parties plaintiffs are.

The Court: If the judgment should go in favor of the plaintiffs it would be only in favor of the plaintiff corporation.

Mr. Skinner: I had it in mind to move for a non-suit on the first count on a theory somewhat different. If this is, as your Honor suggests, a claim only due to or held by the corporation, then there ought to be some proof that the corporation is really presenting the claim—is really prosecuting it. There has not been anything in this case, except the proof of the presentation of, and a prosecution of, a claim; this claim to be assigned by the corporation, and that, I think, would justify a non-suit on the corporation. The representative of that corporation will be here to say that the corporation has not desire to press the claim.

Mr. Lane: Quite to the contrary. Then I go back to my original theory that the plaintiffs are entitled to recover on their loss.

The Court: If that is the case, I would not preclude two individuals from recovering

their loss. The claim is a general claim for damages. It is up to the Court to define how the damages should be recovered, and therefore, I do not think the question of damage is one upon which a non-suit should be granted. And it may be up to me at the close of the case to require no action as to whose claim shall go to the jury. But, I do not think that is before me now. On the plaintiffs' case, there is nothing to show that the corporation is not advancing this claim because counsel has filed a complaint in the name of the corporation and counsel's signature is sufficient.

Mr. Skinner: I have this other ground, which is not the only one to take, but I think it may appeal to your Honor: There is a case before the Court on proofs already made. The Court might perhaps change the pleadings under certain circumstances, but it cannot change the proofs, and would dispose, I take it, of the case, on the combination of the two elements: the merits of the case and the form in which it is presented to the Court, whether it is sufficient to recover. It is one of the settled rules of the law that the measure of damages, where there is a charge of false representation, is, if there be a cause of action at all, the difference between the contract price and the true value; that is the common law rule, well settled in this state and not affected by the Sales Act. In this case, the contract in question called for the transfer of tangible personal property—goods on the shelf, and fixtures. No amount of argument can convert this into an action in equity. Who had that cause of

action? The agreement undoubtedly—the negotiations were made with Weintraub and with Rosenberg. The representations were made to them. What Weintraub and Rosenberg did, was to plan in advance that they would turn over to a corporation bargains that they made and would take their profits of the bargain in corporate form. Weintraub and Rosenberg may be regarded, then, as being the ones entitled to whatever there was of cause of action. Weintraub and Rosenberg chose to convert their interest in the goods, by virtue of their agreement, into stock of the corporation. That was their own choice and their own method. What they got at the end of this—counting from the beginning of the negotiations to the consummation of the deal, was stock in the corporation. Weintraub put up $37,500 and received $37,500 shares of the stock of the par value of $100. And Weintraub later sold his stock for what he could get, $37,500. I submit that Weintraub had got back all he paid and had suffered no diminution between the contract price and the true value.

The Court: He lost some interest. He didn't sell it immediately; he operated it for nine months.

Mr. Lane: Even so, if he had to contribute $7,000 to capital—

Mr. Skinner: And the loss that he suffered has nothing to do with the case. It is not a false representation made to him at the time of the purchase. It was a loan made by him a long time after he got into the business and knew all about it.

The Court: What are the grounds?

Mr. Skinner: As to Weintraub, surely, it seems to me that he has failed to show any loss. Now, as to Rosenberg, he transferred whatever interest he had to Weintraub. Weintraub became, by the acts of the parties, the sole owner of this claim. He paid nothing for it. He paid nothing for what he got, to Rosenberg. It is just sheer arrangement. The so-called assignment from the corporation was without any consideration at all. Weintraub, I take it, is the only one, until they got into the hands of counsel, who was capable of understanding the situation and tried to beat that by some sort of device in this sort of action, but the proofs is in Weintraub, who was clearly shown not to have suffered any loss.

The Court: The assignment cannot be recognized in the law courts.

Mr. Skinner: If your Honor please, I have authorities on that. I remember being before Judge Swayze where the question was raised. It was in the Black Tom litigation. The Lehigh Valley Railroad Company was being sued and there was an assignment by the parties whose goods were destroyed by the Black Tom explosion. The suit was brought by the insurance company. They maintained that the claim could not be assigned. I know that the suit went on and was tried to a conclusion and judgment to recover was paid. My recollection is that the action could stay in the common law court under the name of the assignor suing in the name of the assignee.

The Court: That settles the question. It can stay here, then, regardless of the assign-

ment. The two individuals and the corporation cannot both recover in this case. With that I am satisfied. I think the way I will dispose of it will be either to hold the motion for the non-suit until the close of the case—

Mr. Skinner: I have further grounds.

The Court: Raise those at the close of the case.

(Plaintiffs case reopened.)

LOUIS G. WOOLWICK, sworn in behalf of plaintiffs.

Direct examination by Mr. Lane.

Q Mr. Woolwick, where do you live? A 554 Crown street, Brooklyn.

Q What is your business? A Real estate.

Q Do you known Mr. Rothstein? A Yes, sir.

Q Do you know Mr. Rosenberg? A Yes, sir.

Q In October, 1923, did you have a talk with Mr. Rothstein and Mr. Rosenberg? A Yes, sir.

Q Where? A In Mr. Rothstein's store.

Q Will you tell me what was said?

Mr. Skinner: I understand this is an entirely separate negotiation; nothing came of it later.

The Court: It was a statement made to the plaintiff. I will allow it.

By the Court.

Q When was this? A October, 1923; I don't remember the date. Mr. Rosenberg and

myself wanted to buy the store, through Mr. Apfelbaum, the broker. Mr. Apfelbaum introduced us to Mr. Rothstein. We went through the store and looked around and came back to the office and spoke to Mr. Rothstein—and we, Mr. Rosenberg and I, spoke to Mr. Rothstein. And we asked him how much business the store does and he told us, "About $350,000 it was a year previous—1922." We asked him how is this year's business. He said, "It looks like about the same thing." We asked him how much profit it makes. He said, "About eight to ten per cent—$28,000 to $30,000." We asked him how is the salary drawn. He said, "It is all from the expense." And then we went away.

Q Have you told us all you remember as to the conversation? Was anything said as to expenses? A No, we didn't go near enough to the point. We wanted to know how much the store would profit and how much business it does.

Cross examination by Mr. Skinner.

Q You went simply with the idea of buying? A Yes.

Q And did not buy? A No.

Q Although the representation was made that the business was paying $350,000? A Yes.

Q You relied on your own judgment? A Yes. I would have bought, but I bought some lots and I was engaged to do some building.

Q You had those lots on your hands? A I took my choice to go to the building business instead of the department store business.

Q How many times did you see Rothstein? A Once.

Q I suppose if you hadn't made your choice you would have looked further into the business for yourself. A Yes, I would probably be with Mr. Rosenberg today instead of with Mr. Weintraub.

Q You would, at least, have made further inquiries? A Sure.

Q And you would have based your judgment on what you saw and your experience? A Yes.

Re-direct examination by Mr. Lane.

Q Did the amount which Rothstein asked have anything to do with it? A No, I had a choice to go into the building business; it looked so good.

RUBEN FEDERMAN, sworn in behalf of plaintiffs.

Direct examination by Mr. Lane.

Q Mr. Federman, where do you live? A 473 West End avenue, New York City.

Q What is your business? A I am interested with my brothers and my father in operating department stores.

Q How long have you been interested in the operation of department stores? A Practically all my life.

Q And that means how long? A I have been in business since I was eight years old.

Q How old are you now? A Twenty-nine.

Q Have you had any experience in the buying and selling of department stores? A Yes, sir.

Q Just tell me, generally, what your experience has been? A Well, in a general way, my

business has been the operating of department stores personally and also personally the buying of department stores; carrying on negotiations for buying and selling of department stores.

Q Is there a relation between the amount of profits that a store is making and the amount a purchaser will pay for the fixtures and the merchandise in the store? A Yes, sir.

Q Assuming that a store and fixtures and merchandise of a store is worth one hundred per cent. of cost, if the store is making a profit of eight per cent., what in your opinion, would be the percentage of cost of those fixtures and merchandise, if, in fact, the store was not making more than three per cent? A If a store were making eight per cent. which is a very good profit, the store would be worth, if I understand your question correctly, 100 cents on the dollar of what it costs the party that is selling to you. In the event that the store would be making only three per cent. that store would not be worth nearly as much.

Q Can you give me a percentage that the store would be worth making only three per cent? A It would be in proportion. If you were paying a hundred cents on the dollar for merchandise, figuring that for every $100 that has been sold, that your net profit (you are talking about net profit, I presume) it would be worth 100 cents on the dollar; if the three per cent.; the proportion would be on a lower basis.

Q What would be the lower basis by percentage of cost applying it to the fixtures and merchandise? A The merchandise might be worth more than the fixtures. You might get sixty or seventy cents on the dollar on the merchandise and the fixtures would not be worth that much in this case.

Q How much would they be worth? A I should judge, offhand, about sixty or seventy per cent. for merchandise, and your fixtures would perhaps be worth forty or fifty per cent.

Cross examination by Mr. Skinner.

Q You have known instances, haven't you, of goods that were sold like merchandise on the shelves; that were sold out by a man going out of business at cost; that is, what they were carried on on the books, although he had made very little money? A He could, of course, perhaps be able to sell that to the public for that price.

Q If a man wanted to get that place of business and wanted to get the benefit of the good will that had been built up for years, he might want to pay for the book value of the merchandise? A The good will is no more than earning power.

Q And earning power is dependent, is it not, upon the individual management? A More or less.

Q More more than less. A Not necessarily.

Q If one had been making eight per cent. in one location, it does not necessarily mean another can. A No.

Q That is common knowledge, too, isn't it? A I should imagine so.

Q And anybody who goes to buy, ought to know; and probably does know; that no matter what the other fellow had been making, he must depend on his personal ability and experience to make as much or more. A I believe so.

Q Then, really, he is counting upon the facts; namely, that there is good will that the store has been running; that it has built up the good will. That is the tendency of the people to come to

that store and buy. That is one element. And the other element is his ability to manage the store successfully. A Your first statement would have to be explained a little more. You say that the good will that was built up through the store being there. If that store was not a money making store, there would be no good will.

Q Do you mean to say that a store where a man has failed has no good will of any value at all? A Absolutely not.

Q Although the failure is his own fault? It may be a good neighborhood. He may have been extravagant in his expenses and made no money. A Then he hasn't been a good business man.

Q It may be. But the business has been coming there. Do you mean to say that that good will is not worth anything? A A man who has ability which has allowed him to work up a good business would sort of offset, or rather, he has shown business ability, to build up a business, that he is a capable businessman and I can't get the connection between having a good business and having extravagant expenses.

Q Many a man has had a good business and has not made money by not knowing how to run it. A How could he have built the good business?

Q A man being extravagant in his salaries and having useless employees, not being a good buyer— A The people are not coming in to patronize him, if that is so.

Q People don't come in to patronize a man who is extravagant in his payroll? A You also mentioned good buying.

Q I mean buying at a good price, a price that would enable him to make a profit. I didn't

mean anything about the character of the goods. A If he had that ability, I can't get the connection between that and the excess expenses.

Q You said this profit of eight per cent. was a good profit? A Very good.

Q What is the average profit, usually? A That depends. R. H. Macy of New York City, who do a business of over sixty million, strictly cash, showed a little over six per cent. on the total amount in business; Gimbel Brothers with sixty-four stores exceeded that business and showed a profit of five and a half per cent; the chain stores, such as Kresge or Woolworth, show a much larger profit. Kresge showed a profit for 1925 of approximately nine or nine and a half per cent.

Q Is that due, in your judgment, to the difference in running them? A I would have to answer that with somewhat of an explanation. By that I mean that the end of the chain store business is all in New York City. They are not operating the stores themselves and therefore, their class of help, in my opinion, is not of the best, but their tremendous buying and selling advantage overcomes that.

Q That is an advantage peculiar to the chain store business? A Yes.

Q Take the small neighborhood department store. Would they do as well as Gimbel's? A It has been my experience that the small store would show a better advantage than the larger store.

Q Would you say that the small store, doing an average of $300,000 or $400,000 a year— A I imagine it would be in the neighborhood of seven per cent. for such a store.

Q And the expense. Would that be around twenty-eight, twenty-nine or thirty per cent. of the gross business? A I should not imagine so.

Q Why not? A Because a large store has operating expenses that a neighborhood store does not have. They have elaborate delivery systems; rest rooms; their service charges for any one producing department are tremendous. Last week I saw one of John Wanamaker's advertisements that they were giving a concert in the store. They need men for every individual thing. They need their floorwalkers; they need their information desks; they need other things; they need a man—for instance, they may have in their window trimming department no less than twelve or fifteen or eighteen men to write signs; also in the advertising department twelve or fifteen copywriters; and managers. Whereas, in the small store they can combine that perhaps into a personnel of two or three men. To illustrate, a store doing a business of $300,000 or $400,000 can get one man to do the window trimming and the copywriting.

Q These large stores are not wasting money? A It depends upon the class of business.

Q Ordinarily, they do it because they are going to get a return. A They don't expect a definite direct return.

Q It is part of that building up of that indirect return? A I should say it is the punishment they have inflicted upon themselves for growing so large.

Q Do you think they are fools in their business? A They have proven they are not.

Q Do they get any return? A Five and a half or six per cent. upon millions would be a fair return.

Q I mean, don't they justify those expenditures? A Not in their balance sheets.

Q Isn't that the way they built up the volume of their business? A No, they didn't start like that.

Q Isn't that done for the purpose of building up their business? Isn't it part of the advertising? A At the present time it would be.

Q At the past it would be? A I don't think so, sir.

Q You mean 1926 only? A Stores have been in existence some fifty years; some seventy-five years, and some a hundred years.

Q That has been true as long as they have been in business and not for the present time only. A (No answer.)

Q Would you, under any circumstances, buy the merchandise of a store that had failed; that had been doing an unprofitable business for years—slowly dying and finally died on its feet? A To buy a store? I don't believe we would, no.

Q I mean the merchandise and fixtures. A I don't believe we would.

Q Or the merchandise at all? A I don't think so.

Q Haven't you and your father done that? A I don't think so.

Q You would know, wouldn't you? A Perhaps if I would give a little time to think it over the chances are I would be able to tell you more exactly.

By the Court.

Q As I understand it, there is a certain percentage of general expense, that is, expense of running the business, to gross sales below which

a concern cannot go and be profitable. Am I right in that? A Yes, sir.

Q As you increase the gross sales in a going business, the general expense, ordinarily, does not increase in the same proportion. A It should get a little less.

Q So the more business you do, the greater amount of profit you get on that business up to the capacity of the store? A Not necessarily.

Q What is the general rule? A A store may be operating on a twenty-nine per cent. basis or on a twenty-three per cent. basis, and yet make the same profit.

Q If a store were operating on a twenty-nine per cent. basis and its capacity were doubled, you would not expect it to operate on the double capacity. A It might increase; there is such a possibility.

Q What I was asking is what is the general rule, in your experience? What is the rule if you increase your sales? A If the desire is to lower the percentage of doing business; but sometimes that does not happen.

Q I ask what is the general rule? A That is the general rule.

By Mr. Lane.

Q Is there a limit beyond which that general rule does apply at all? A You mean the question his Honor asked me?

Q Yes. Where the volume of sales grows so large it would tend to increase instead of decrease your percentage. A That was my idea.

By the Court.

Q I was speaking about the capacity of a given store. When they increase to the point

of where Gimbel's is, getting a lower percentage of profits, they generally increase their capacity. A Yes.

Q I am speaking of a store with a given capacity. A A store that has a certain number of square feet, if operated in the proper manner, it is hardly conceivable to me that a store would increase its capacity of doing business over one hundred per cent. of what it formerly was.

Q I didn't say a hundred per cent. I said if that kind of a business increased its sales where it had an increased capacity, you would naturally expect an increase in the ratio of expense and sales. A It would increase, yes, sir.

Re-direct examination by Mr. Lane.

Q Where the large store gets five per cent. or five and a half per cent. on their turnover, the amount of money, of course, which is received, is of considerable, is it not; the turnover is large, in other words? A Not necessarily. They may have a world of goods in that place?

Q You are referring to Macy's $60,000,000 turnover? A Yes.

Q In order to run a store, and run it properly, there has got to be a certain amount of ready money before the percentage on turnovers can be considered. In other words, you have salaries to pay; you have to have ready money to meet those expenses. A Certainly.

Q So there is point where the profit of the large store has got to be larger than the profit of the small store in order to meet the expenses?

The Court: That is indefinite.

Q I mean the percentage on turnovers; the percentage on goods sold—

Objected to as leading.

Objection sustained.

Mr. Skinner: I understand that the motion for non-suit may be renewed or joined in the motion to direct a verdict.

The Court: Yes, I am holding the motion for a non-suit.

Plaintiff rests.

ALFRED S. CRONHEIM, sworn in behalf of defendants.

Direct examination by Mr. Skinner.

Q Mr. Cronheim, where is your business? A I am with the Goerke Company in Newark and the Goerke-Kirch Company in Elizabeth and we have a chain of stores in the South.

Q How long have you been in that business? A Eighteen years.

Q What has been your experience? A I am general financial man for all our companies.

Q Have you had any experience in the purchase of stock in other stores? A I have supervised it.

Q To what extent? A Provided the funds.

By the Court.

Q Your knowledge of the sales. A You mean stores in their entirety?

By Mr. Skinner.

Q Buying up goods on the shelves of stores? A No.

Q Have you had a contract with them? A Yes, I have supervised it.

Q What was the volume of it? A It is rather an indefinite question.

Q Can you tell us from your experience whether or not there is any average of ratio of profits to gross business? A Yes, I can.

Q What is it?

Cross examination by Mr. Lane.

Q What has been your experience outside of your own store? A Of our own company in Newark?

Q Yes. A We have a chain of stores in the South, of which I am treasurer, doing about $20,000,000 a year business.

Q All you know is what has occurred in your own stores? A I wouldn't call the stores in the South my own stores.

Q Are those stores you have been personally connected with? A Directly, yes.

By the Court.

Q Have you had experience purchasing complete stocks of stores? A Yes, we have purchased complete stocks of stores.

The Court: I think I will allow him to testify.

Mr. Lane: I am not interposing any objection. I simply want to know the weight to be given his testimony.

Re-direct examination by Mr. Skinner.

Q What is that average? A The ratio of costs to operation?

Q The ratio of profits to the volume of business done. In other words, what would you say is the average ratio of the profits to the volume of business?

The Court: You mean the per cent. of volume of business that must be profit?

Witness: I would say offhand the net profit is about four per cent.

By Mr. Skinner.

Q Does it differ? Is it more in large stores in big centers, like New York and Chicago than it is in smaller stores? A No, that all depends upon the management.

Q In the purchase of stock of goods of a store, which you say you have been engaged in or seen handled, does it make any difference in the value to the buyer of the goods that are being purchased what profit has been reaped by the man that has had the business? A That would have something to do with it, but the all-important part is the management. If you have men of high caliber—we took over the W. V. Snyder Company after it was operated by Oscar Michael. He ran it for two months and failed. Twenty years before that W. V. Snyder Company operated this properly. We took it after Michael's failure and made plenty of money.

Q It has been testified here that if a man is running his business and making a profit of eight per cent. on the gross amount of sales that the stock of goods on the shelves, if he tries to sell it, might be worth one hundred cents on the dollar of inventory. Assuming that inventory value to be reasonably based, where is he if the profit he has been making is only four

per cent. and the value of the same goods would be only sixty-five cents on the dollar. What would you say? A I say the theory is entirely wrong.

Q Why? A If a department makes eight per cent. on their turnover the stock would have to be only a hundred per cent. to make that while they may still make four per cent. if the goods is one hundred per cent. It depends on how the store is operated.

Q If you were buying the stock of goods of another store and were also intending to continue the business, would you, among other things, inquire what the man from whom you were buying, what profit he made? A I certainly would.

Q Would you depend upon that or would you depend upon your own—

Objected to as leading.

Objection sustanied.

Q To what extent would that influence you? A Past history is always interesting to the purchaser of a store.

Q In what way? A It gives you some idea of what can be done with the property and gives you an opportunity to make a comparison of expenses. You have a general average as to what can be done with the premises.

Q Does it give you any idea at all as to the value of the good will? A Of course, there is a theory that good will is based on operating revenue. There are other things that may be good will. That is a particularly long drawn out subject.

Q Have you, within your own experience, seen the purchase of goods on the shelves of stores going out of business, that was one hundred cents on the dollar of their inventory or book value? A I have seen it happen.

Q Only once? A More than once.

Q Can you give us any idea? A We had a case of Kaufman-Strauss store of Louisville, Kentucky. It had been there seventy years. We bought control last year. The prior management took a $300,000 mark-down, although they paid full value for it; but there was no consideration for good will.

Q You paid for the goods at the book value? A Yes. The good will was not capitalized.

Re-cross examination by Mr. Lane.

Q You paid for the full value of the merchandise and marked them down a third? A No, we took the loss of $300,000.

Q Why did you do that? A The only way we could buy the business.

Q You wanted control of that particular business? A Yes.

Q For purposes of your own? A That's the idea.

Q If you hadn't been interested in buying that business for particular purposes of your own would you have gone in and purchased the merchandise for sale or any other purposes? A Not in my sane mind I wouldn't.

Q What was the net profit last year of Goerke's?

Objected to.

The Court: I will allow it.

Witness: The net profit from operation last year was—

Mr. Skinner: I respectfully suggest that the figures be only percentage.

The Court: The amount does not do us any good any way. What we want is percentage of profits.

Mr. Lane: My next question will be what the turnover was.

Witness: Our net profit on sales last year was nothing. We published those reports.

Q You were losing money? A On an increased business.

Q You were losing money? A We lost money last year.

Q What was your net profit on operations altogether? A On total operations?

Q Yes. A About, I think, I reported on our income statement a profit last year—

Mr. Skinner: I don't understand the entire operations.

The Court: He was asking on one store.

Mr. Skinner: We are interested only in the ratio of profits on sales to the volume of sales.

The Court: Read the question, please.

(The stenographer reads the question as follows: "What was your net profit on operations altogether?")

Mr. Skinner: I object.

Objection sustained.

Q What was your net profit of the corporation, figuring in whatever other financial income you had?

Objected to.

Objection sustained.

Plaintiffs counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. Lane: Your Honor will remember that in this case there is a misprofit on operations and a net profit after adding to operations any financial income.

The Court: I know. This company may have built up a large line of investments. I think you will have to lay a basis for it.

Q What do you figure when you say net profit from operations? A From sales.

Q What do you charge off against sales? A Labor, rent, advertising, publicity, cost of goods sold, repairs, amortization, depreciation, interest, taxes; those are about the main items.

Q Whether you show a profit on operations depends somewhat upon the rate at which you depreciate and amortize? A It does.

Q It is quite an item? A In some cases it is quite an item.

Q Items subject to no fixed rules, is that so? A That's right.

Q And those items which the management of the company determines in the first instance to charge off, are charged off? A Especially in a closed corporation.

Q And your corporation is a closed corporation? A Very tight.

Q And the less income you report the less you pay. A No, you can keep your books any way you please, but for tax purposes there is a regulation way.

Q Does the income you have given here differ from the percentages you have given the government? A It does.

Q What other stores have you used as a basis for your statement that the average profit is four per cent? A I used the figures supplied by the National Retail Dry Goods Association in connection with the Harvard Research.

Q What else did you use? A That is the only basis I have used for the average.

Q All that you have told us is something you have read in a paper? A When you speak of average throughout the United States, it is pretty good authority.

Q Including Alabama and Mississippi? A And California.

Q And Louisanna and Nevada as well as the Metropolitan district? A That's right.

Q And that is the only basis? A The only basis anybody can get for an average.

Q Do you think a dry goods store operating in the Everglades of Florida is to be compared with one operating in Newark? A I do.

Q The percentage of profit of gross sales there, in order to keep the store going, would have to be considerably larger than the gross sales in a store in Newark. A No; strange as it may seem.

Q So you think if you have a store with an average business of $12,000 you could operate it profitably on four per cent? A Why, I don't think that is a comparison at all. The $12,000 business could not be compared with a large business.

Q Neither do I. Neither is the comparison between a $300,000 store and a $1,000,000 store. A In the volume.

Q In order to make a place of that kind at all profitable, no matter what your annual sales may be, you have got to get a certain amount of money in specie, haven't you? A You do.

Q Can you tell me any other instances where the Goerke stores have taken over the stock of concerns which have failed at one hundred per cent. of cost? A No, we only took over one store we operated ourselves. We wouldn't operate a bankrupt stock at one hundred cents on the dollar unless we were particularly anxious to take that.

Q Why not? A We would be fools.

Q Of course. I understood that that had no influence at all with respect to the stock and fixtures. A It would have no influence if I was interested in operating it after I bought the stock and fixtures.

Q Assume now that a store is making no profit at all and has not been making a profit, or a very small amount of money, for three years. Can you conceive yourself being interested in the purchase of that store at one hundred per cent. of the cost of stock and fixtures unless you wanted that store for competitive reasons? A I wouldn't buy any store at one hundred per cent. on the dollar unless I wanted to operate the business.

Q I asked whether you want to operate it. A I can't answer that. There may be a thousand things enter into that.

Q The past performance of a store to a purchaser is of importance, isn't it? A Of great importance and great interest.

Q And it would make considerable difference. Assuming now that a man has no motive such as removing a place from competition, or buying

for the purpose of throwing it into a big concern, but merely for his own little business, it would make a considerable difference to him if the profit was eight per cent. or the profit was three per cent. A It would, unless he had unusual ability and had a good idea of what his ability was.

Q He would have to have a great ego to say he could make eight per cent. where the former owner had made three per cent.; he would have to have great faith in his own ability? A He would have to have great faith in his own ability.

Q It would have some influence upon the amount that would finally be agreed upon as the sales price of that store? A Quite naturally it would.

Q You never heard of a receiver's sale in which one hundred per cent, value was obtained, have you? A No, I haven't.

JOSEPH KLAUSNER, sworn in behalf of defendants.

Direct examination by Mr. Skinner.

Q Mr. Klausner, where do you live? A 1156 Eastern Parkway.

Q What business are you in? A Dry goods.

Q Where are you now in business? A 413 Springfield avenue.

Q The place where Mr. Rothstein formerly carried on his business? A Yes, sir.

Q Was anybody associated with you there? A Mr. Epstein.

Q How long have you known the business conducted at 413 Springfield avenue? A Since last November.

Q You knew Weintraub and Rosenberg, didn't you? A I knew Rosenberg.

Q Did you not know about the negotiations at the time they purchased from Rothstein? A I did.

Q Did you know anything about the business then? A No, sir.

Q I don't mean close information. Were you acquainted with the location and the character of business done there? A No, sir.

Q Who now owns the stock of the corporation know as Rothstein's? A Mr. Epstein and I.

Q Did you acquire it by purchase? A Yes, sir.

Q From whom? A Fifty per cent from Weintraub and fifty per cent. from Rosenberg.

Q When was the fifty per cent. from Weintraub purchased? A November of last year.

Q 1925? A 1925.

Q What did you pay? A We paid $32,500. out of our own capital and $5,000 out of the store's capital promised to pay back to the store by Mr. Rosenberg.

By the Court.

Q Which stock do you refer to? A The first fifty per cent.

Q That was whose? A Weintraub's fifty per cent.

Q You had some negotiations preceeding that purchase, didn't you? A Yes, sir.

Q At that time Rosenberg and Weintraub together owned the stock of that company? A Yes, sir.

Q Did Rosenberg participate in any way in your acquisition of the Weintraub stock? A

Yes, sir, he was the man who induced me to buy it.

Q Did he say anything to you as to why he wanted to have you buy Weintraub out?

Objected to as immaterial.

Objection sustained.

Q Just tell us how that contribution of Rosenberg's $5000 was brought about. A We found that the stock at the time was not worth $75,000 equity that they had in it and going through the figures with their accountant and our accountant it showed a difference of about $10,000. We couldn't see why we should pay for something we don't get. We have showed them our figures. Mr. Weintraub said, "I don't care anything about figures" all he knows is that it was paying well and is still paying and that he don't know why Rosenberg wants to figure out.

Mr. Lane: I object to that. I offered the figures and they were excluded. I object to all this and ask that it be stricken out.

The Court: I will sustain the objection. Strike it out.

Q You spoke of an equity they had. What did you understand that was?

Objected to as wholly immaterial.

Mr. Skinner: If these gentlemen, Weintraub and Rosenberg represented to this man that they had a business that was worth $75,000, and there was any evidence of what they had lost it can be brought out.

Q Was there any representation to you as to the net worth of the business?

Objected to.

The Court: I will allow it.

Witness: Yes, they told me it was worth the $75,000 they paid for it.

Q Was anything said as to whether or not it was worth that when they got it? A I haven't asked them that.

Q As to whether they got a bargain or not. A No, sir.

Q Did you understand, then, or were you told anything then as to what Weintraub was drawing from the business? A Yes, sir.

Q What were you told? A $125 a week.

Q Were you told anything or not as to whether he was active in it? A Yes, sir.

Q What was told you? A That he was not active at all; that they had to mail the checks to his house.

By Mr. Lane.

Q Who told you that? A Mr. Rosenberg.

By Mr. Skinner.

Q Did Rosenberg tell you anything as to whether or not that business has been going down or up since they purchased? A It has been going up a little.

Q Did you examine the books before buying? A I didn't; the accountants did.

Q You had it done? A Yes, sir.

Q Did you find or see, yourself, anything at all as to any incompleteness about the books? A No, sir.

Q Did you talk with Rosenberg about any incompleteness? A No, sir.

Q Did you have any information from your accountants? A Yes.

Q About anything that did not go through the books? A No, sir.

Q Did you see any statement of the business; its income and its expenses? A Yes, I did.

Q Did you notice whether or not the statement included any revenue from rentals or departments? A It didn't include.

Q Did you notice whether or not the statement excluded any contribution by the departments to their share of the advertising expenses? A No, sir, it did not exclude.

Q Did you notice anything at all in your ascertainment from that statement of the value of the business; the amount of the business; anything as to whether or not there were any receipts from the departments for the stamps that were issued to them? A No, sir.

Q Taking into account these sources of income, did that figure at all in your estimate of the value? A Yes, sir.

Q Did Mr. Weintraub tell you anything as to whether or not they got a bargain, or what kind of a bargain they got when they bought from Rothstein? A No, sir.

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

Q At the time that you were negotiating with these two men, did you make any inquiry of Rosenberg as to whether or not there was an action pending against Rothstein? A No, it was at the time of making the contract.

Q Well, at the time of making the contract, what was said that you recall? A He told me that there was an action pending in the courts for a stamp loss. When it came to the signing of

the contract, Mr. Epstein wanted to know definitely what the case was, claiming that we are taking over a store which the owner of it is going to be our landlord and if there is any case he wants to know what it is and he didn't want to be on the outs with anybody. He was assured it was a stamp law suit case. No other action.

Q Who assured you of that? A Mr. Rosenberg.

Q Have you had previous experience in operating department stores? A Yes, sir.

Q Where? A In Brooklyn.

Q For how long a period? A I have been in it about eighteen years.

Q What has been your experience as to the average or usual rate of profit of a store like Rothstein's? A Eight per cent. is a good average.

Q Would you say the average was as good as that or better? A It might run better or less, but eight per cent. is considered a good average.

Q Did your audit show whether or not business had been losing?

Objected to as calling for the production of a paper.

(Question withdrawn.)

Q Did you talk to Weintraub at all as to whether or not the business had been profitable or losing? A Yes, sir.

Q Did he tell you anything about it, if so, what did he say? A He told me that the business has been a good, profitable business to him; has been up to the time that I got it.

Q Did Rosenberg tell you anything more with reference to the suit that he called a suit over stamps, as to his attitude in it? A Yes, sir, he did.

Q What did he say? A He said that he didn't care to sue at all; it was Weintraub that was pressing it.

Cross examination by Mr. Lane.

Q Did you ask Mr. Weintraub or Mr. Rosenberg, which ever one you spoke to, whether it was a profitable business? Did you ask to see his books? A I didn't.

Q Did anybody ask to see his books? A Yes, sir.

Q Did you look at the books? A I didn't.

Q Did anybody? A Yes, sir.

Q Who? A The accountant.

Q Who was the accountant? A A fellow by the name of Robinson together with one of Puder & Puder's men.

Q Were you informed by Puder & Puder's men, or by your accountant, that there had been an audit of the books from January 1, 1924 to December 31, 1924? A No, sir.

Q Did you ask to see any audits that had previously been made? A No, sir.

Q Was anything said about that at all? A Not to me.

Q In your presence or to your knowledge? A No, sir, it wasn't.

Q Who had charge of ascertaining what the business had actually made? A Mr. Epstein.

Q And no one showed you this Exhibit P. 5 for identification which purports to be an audit from the period of January 1, 1924 to December 31, 1924, made from the books? A No, sir.

Q You didn't see that? A No, sir.

Q You were not told that there was an operating loss in 1924? A No, sir.

Q I show you a paper on the letterhead of R. C. Robbins, auditor and accountant, and ask you whether or not you have not seen that before? A No, sir, I didn't see it.

Q Robbins was your accountant? A Yes, but I had no charge of it.

Q Robbins was your accountant? A Yes, sir, he was.

Q And this, upon its face, purports to be an audit made by Robbins of the books, isn't that right? A Yes.

Q That is what it is? A Yes, sir.

Q Did anybody call your attention to the fact that during these negotiations that the books showed a net operating deficit? A Yes, sir, Mr. Epstein did.

Q So that there was a net operating deficit? A Yes, sir.

Q Which appeared upon the books? A I haven't seen it.

Q But you were told it? A Yes, sir.

Q And yet it had been a profitable business? A That is what was told to me; that it was a profitable business.

Q You took the word of these men that it was a profitable business in the face of the facts showing the deficit? A That is how I got the $5000 down on the price.

Q Then you knocked down $5000? You paid $5000 less because there was an operating deficit? A Because they lost on their investment. It wasn't worth as much as they paid.

Q You say Rosenberg was to make good the $5000? A Yes, sir.

Joseph Klausner, cross.

Q I show you Exhibit P. 15, which is signed by you, and ask you if Rosenberg was to make good the deficit, why that was crossed out? A Because he insisted that does not come in the contract; it is a contract between us and him.

Q Although Mr. Rosenberg is a party to it? A Yes, but Weintraub didn't want to know anything about it and didn't see why it should go in his contract.

Q So you crossed it out. A Yes.

Q Where did you put it in writing somewhere else? A Nowheres; I took his word.

Q Why didn't you take Rosenberg's word before it was put in this agreement? A I did take his word. Rosenberg said he doesn't want it in and crossed it out. And I have taken his word for more than that.

Q So you first had it put in and then taken out and then took Mr. Rosenberg's word— A Taken out by the objection of Mr. Weintraub.

Q You knew that Mr. Weintraub had been obliged to advance $7000 to the corporation? A Yes, sir.

Q He didn't get that back, did he? A No, sir.

Q Did you make any inquiry as to the nature of this suit that was pending in this court? A Yes, sir.

Q Of anybody except Rosenberg? A Later on I did.

Q I don't mean later on. A At the time of purchase?

Q Yes. A Only of Mr. Rosenberg.

Q How long after did you make inquiries? A After I was in the store.

Q How long afterwards? A Probably in January.

Joseph Klausner, cross.

Q Of whom? A Another party.

Q Whom? A I wouldn't like to tell the party's name, because I told him I wouldn't tell his name, because it happens to be a friend of mine and he is also friendly with Mr. Rothstein.

Mr. Skinner: It seems to me it is immaterial.

The Court: I will allow it.

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

Exception noted as ground of appeal.

Witness: I haven't asked this party. He told me deliberately without my asking. It is Morris Hauft, of New York.

By the Court.

Q You inquired of him? A No, sir, he called me up. He said, "I understand you bought Rothstein's store"—

By Mr. Lane.

Q That is the first indication you had to the real nature of this suit? A Yes.

Q That was in January, 1925? A Yes.

Q You bought out Mr. Rosenberg, too, didn't you? A That was some time in April.

Q You bought him out? A Yes.

Q You paid him $19,000? A Yes.

Q So that you paid $32,500 to Mr. Weintraub and $19,000 to Mr. Rosenberg, or $51,500? A That's right.

Q You were subpoenaed by us to produce whatever books there were in your possession, weren't you? A Yes, sir.

Q Did you know Mr. Mulcahy? A Yes, sir.

Q He went to your office or to your place of business and served you with a subpoena to search for the black book, didn't you? A I haven't searched, I told him to go up and search for it.

Q It was not found? A That's what he told me.

Q You got it yesterday? A After he told me where he saw it.

Q When did he tell you that the black book was in the safe? A He said, "There is a black book in the safe." I said, "I have no charge of any books." I asked him, "Did you see any books there?" He said, "There is books in your safe."

Q Did you go up with him? A No, he went with one of the girls.

Q Did he bring down the book? A No.

Q How did you happen to find the book and bring it yesterday? A I saw them in the safe. I said, "Why didn't you take them?" He said he had no authority to take them and he asked me to bring them down.

Q When did you see Mr. Rothstein? A Last week.

Q Did you talk to him about the books then? A No, sir.

Q He didn't say a word to you about the books? A No, sir.

Q How did you happen to see him last week? A He came around to the store.

Q He came to see you? A Naturally.

Re-direct examination by Mr. Skinner.

Q I think you said you didn't see this audit? A Yes, sir.

Q In making that purchase of the stock, did you depend upon any audit or did you depend upon your own observation and experience? A I depended upon part of my own observation and then part on Mr. Rosenberg. Mr. Rosenberg was going to stay with me and I took his word for a whole lot of things.

Q He is no longer with the company? A No, sir.

Q You and Epstein alone only? A Yes, sir.

Q Has the corporation any interest in this suit or its further prosecution? A No, sir.

By Mr. Lane.

Q You took Mr. Rosenberg's word to the extent that you hired and paid, I suppose, an accountant to examine the books? A I don't get the question.

Q You depended on Rosenberg's word, but also got an accountant to examine the books? A Mr. Rosenberg advised me to do it.

Q So much more honest for him. You got the audit, anyhow? A Yes, sir.

At 1 o'clock P. M., the Court takes a recess of one hour.

AFTER RECESS.

ABRAHAM ROSENBLUM, sworn in behalf of defendants.

Direct examination by Mr. Skinner.

Q Mr. Rosenblum, where do you live? A 71 Milford avenue, Newark.

Q What is your business? A Financial and real estate, just at the present time.

Q Were you at any time in the department store business? A All my life with the exception of the last three years.

Q Were you at any time associated in business with Mr. Louis Rothstein? A I was.

Q How long? A Two and a half years.

Q Where? A 413 Springfield avenue.

Q What other experience have you had in the department store business? A In what way do you want that answered?

Q Just give us a general idea of your contact with the department store business. A I have practically spent my entire commercial life in connection with a department store. I started from cash boy to buyer, to superintendent, to general merchandise manager, and to general manager of stores doing anywhere from $100,000 a year until my last, prior to my going with Mr. Rothstein, to a store that did $4,500,000.

Q Where is that? A Cohen-Koshfark Company.

Q As what? A General manager.

Q What other concern? A Greenhut Company, New York; I was buyer there.

Q Are they still in business? A No.

Q Where were they? A Sixth avenue, New York; Greenhut-Siegel-Cooper Company.

Q You were buyer there of what? A Four departments, until afterward I bought for fourteen departments.

Q Where else? A Outlet Company, Providence, Rhode Island.

Q Was that small or large? A I was general merchandise manager.

Q Was it a large concern or small? A Doing $28,000,000 now.

Q What was it doing then? A $7,000,000 when I was with it.

Q Have you had any experience at all in the buying or selling of stocks of goods on the shelves of other stores? A Yes.

Q To what extent? What contacts have you had with it? A In the course of my connection with department stores I was in the capacity of buyer, and in my capacity as the merchandise man I helped buy stocks of stores.

Q Is that the extent of your experience? A Yes.

Q What in your experience has been the usual average of calculating profits on the percentage of gross sales for the year?

Cross examination by Mr. Lane.

Q What does general merchandise manager mean? A General supervision of all the buyers in the store; control of purchases; control of percentages; and control of turnover of stocks. All general buyers in the department stores are under supervision of the merchandise managers. They cannot buy without the allotments from merchandise managers. Their percentage of profits is given to them as to what they have to show. All is given to them by the merchandise manager.

Q From whom does the general merchandise manager receive his orders? A From the firm.

Q Does he get his instructions from the firm as to what general mark-up is desired? A To a better mark, if possible, like a captain.

Q He is acting under the orders of a commodore? A Absolutely.

Re-direct examination by Mr. Skinner.

Q What in your experience has been the usual average in calculating the profit on the percentage of gross sales for the year? A I might answer that in two ways. It all depends as to the store.

Q Explain that. A If it is a local store or a store catering to a local amount of business, that is, not from outlying suburbs—a general shopping district—the percentages of profits can be controlled to a greater extent and can be expected a trifle more than they would be in a busy shopping center.

Q That does not tell us the usual average. A In a general shopping center, that is, a store compared to what we would assume to L. Bamberger here or Plaut's here in Newark, I would call that a general shopping center. A store like that would be very well satisfied to see five or six per cent. A store in the neighborhood where expenses can be controlled personally, or under direct supervision of the management, in other words, where the firm can replace certain expense of executives, your percentages will run a trifle higher. They may run six or seven per cent. That would be considered a very, very good profit.

Q Where would you say the business conducted by Louis Rothstein at 413 Springfield avenue would come? A You are in a neighborhood there that is not a shopping center and still not a neighborhood store. If I may explain the reasons—

Q Go on. A The fact of a store of that neighborhood is that it is a large store in a neighborhood location, it covers a large amount of

area and requires possibly more than the usual amount of help in a neighborhood store.

Q When you say covers a large area, you mean the physical area. A Of the store itself. And it requires a large number of people to control it than in a neighborhood store. When you run into a store of that kind you have almost got to give the public something similar to what they get in a place downtown. You have to give them deliveries; you have got to do advertising, which in a neighborhood store is expensive; and you have got to do various things there that you wouldn't have to do were you in an exclusive neighborhood store; were you in a store of a size adequate to the vicinity itself.

Q Is this average of profits you have described here a matter of your personal observation or is it a matter of general knowledge throughout the department store trade. A It is both my personal practical experience and the general knowledge known throughout the trade.

Q What is the usual or average percentage of expense to gross business? A Again it depends on the two classes.

Q The same two? A The same two.

Q Take it in the small class? A I would assume that a store in that class, which, through my practical knowledge, will run anywhere from twenty-four to twenty-six per cent.

Q In the purchase of goods; that is, goods on the shelf of another store, is the price that those goods will obtain, influenced at all by the profitableness of the business theretofore carried on? A It all depends on whether I wanted to buy that store as a going business myself.

Q Suppose you were to buy it as a going business? A Yes and no.

Q First, give us the reason for yes. A If I wanted the store and wanted the location I would not consider the price of the merchandise at all because, as a going business, I can dispose of that merchandise by itself or with additional purchases, at a profit, and if I didn't want it as a going business it would be a little different aspect to it.

Q Does the fact that a business has been profitable, in any way affect the value of the good will of that business? A Yes.

Q Does the value of the good will in any way influence the mind of a buyer of the goods, if he is going to be able to carry on the business in the same place? A I don't think it should have any bearing at all.

Q You were at one time, you said, with Mr. Rothstein? A Yes, sir.

Q Did you have money in the business? A I owned a one-share interest in the business.

Q How much did you have in it? A I had $30,000 in it.

Q Was there any agreement with you at the time you went with him as to the terms upon which you might be bought out? A Yes.

Q How long after you went with him was it that you retired? A Two and a half years afterward.

Q Were you then bought out? A Yes, Mr. Rothstein bought my interest out.

Q When was that? A That was in February, I believe it was, 1923. I wouldn't be positive; I would have to have my recollection brought back as to figures. I think it was February, 1923.

Q What was paid you then? A Mr. Rothstein paid me my full amount I had invested, plus twenty per cent. additional.

By the Court.

Q That would be how much? A $6000 plus $30,000.

By Mr. Skinner.

Q That was in accordance with the terms of your agreement? A Yes. In other words, I took advantage of the terms of that agreement. If I may add to that—

Mr. Lane: I would like to have the agreement.

By Mr. Skinner.

Q Have you got it? A No, I haven't.

Q What did you do with? A I might say that I took advantage of Mr. Rothstein's agreement with me. When I purchased my interest, Mr. Rothstein took me from a very responsible position—

By the Court.

Q What was the advantage you had from the $30,000? A This agreement was that at the expiration of two years, if I felt I wanted to release myself or wanted Mr. Rothstein to buy my interest, he was to pay me the twenty per cent. additional.

By Mr. Skinner.

Q Do you remember what the gross business for the year 1920 was? A I believe it was—I am also not quite sure—I think it was somewhere around $401,000 or $403,000.

Q And for 1921? A $393,000 and some odd.

Q And for 1922? A I believe it was—

Objected to on the ground that the books are the best evidence.

Objection sustained.

Q Why did you get out? A For the reason that I wanted to buy the store for myself. That's the plain reason.

Q Did you have any dissatisfaction as to the way the store was being managed as to expense? A As to expense? Yes and no.

Q What do you mean by that? A When I say yes, there were certain expenditures in the store in the way of employees there that had been there for, I might say, fifteen or twenty years; employees that did not show to my sense of business judgment, enough returns for the salaries they were receiving. Since I had only a one-third interest in the business I couldn't control those expenditures.

Q Did you try? A I did.

Q What was the trouble? A Mr. Rothstein did not feel as if he wanted to dispense with the services of employees who had been there that many years.

Q What would you say as to the business value of the neighborhood? A It is a very good neighborhood store, in fact, I might assume, it is a little more than a neighborhood store. In my experience with it we drew business from a vicinity of possibly five miles—a radius of five miles around. That is what we drew and it was a quite good business from Irvington and quite a good business from the section over towards Orange street, which is quite a distance away; and we drew quite a business from the Weequahic section, which is quite a ways over. So I would term it more than a neighborhood store.

Q What about competition? A Competition was keen there.

Q Did you have any feeling at all as to whether the profits of the business could be increased under a different management? A Absolutely; that was uppermost in my mind at the time I wanted to buy the store for myself.

Q While you were there, do you know whether or not the books were fairly and honestly kept? A I had supervised them myself, so, they couldn't be kept any other way.

Q They were kept straight and clean? A Every bit of it.

Cross examination by Mr. Lane.

Q You know, then, that the net profit for the year 1923 was not more than 2.75 per cent? A I can't answer that; I dissolved my connection in February, 1923.

Q You were, then, perfectly satisfied if the business had netted 2.75 per cent. on turnover of sales? A I want you to explain.

Q You were, then, perfectly satisfied that if the business had netted 2.75 on turnover of sales. A If I had control of it myself, yes.

Q You would be satisfied to be paid for this business one hundred per cent. of value of fixtures and value of merchandise if it were paying but 2.75 per cent? A Knowing the possibilties of it—

Q Would you or would you not? A Knowing the store, yes.

Q You would be willing to pay the same price for any store? A No.

Q The price you paid for stock and merchandise would make a considerable difference to you as to whether it had been making two or

three per cent. and the fact that it had been making eight per cent. A It wouldn't be natural that it would make eight per cent.

Q I didn't ask you that. A It would make quite a difference.

Q It would affect the price you would be willing to pay for fixtures and merchandise? A Yes.

Q Didn't you tell us that it would not? A That store.

Q Any store? A That is what I answered.

Q Then this is a different store and you would apply a different rule to this store? A Knowing the possibilities, yes.

Q This store stands out by itself? A It does, absolutely.

Q As a peculiar thing, general rules do not apply to it. A No, not general rules.

Q It is a fact, general rules have some effect; that a person would be willing to pay for the fixtures and merchandise? A Yes.

Q That general rule does not apply to this store? A No.

Q One would have to have peculiar knowledge of this store, wouldn't he? A Any good merchant would know it.

Q Any good merchant would not be influenced in his mind as to the profits this store was making? A He would be only influenced by the volume of sales. There are no two managements alike.

Q These stores get to be more or less like machines, don't they? A Every store is a machine.

Q And the management is more or less alike? A As to systems.

Q The systems used in operating all these department stores are very much alike? A Yes.

Q If you can tell what a store has, in fact, been making, you can pretty nearly tell what a store will make, can't you? A Yes.

Q But this store was so peculiar, that, although it was, in fact, making as profits in 1923, 2.75 per cent., it could well be expected to make at least double that during the year 1924, is that right? A If I had management, yes.

Q Are you the only person in your mind who could have brought it up to a profitable basis? A Having worked there, I knew the possibilities.

Q When did you offer to purchase it? A In February, 1923, and Mr. Rothstein—

Q I didn't ask you that. It was in February, 1923, you say you took advantage of the provision of the contract to obtain from Mr. Rothstein what the contract required him to pay you when you elected to take it, is that right? A That's right.

Q When did you enter into that contract? A Two years prior.

Q How long was the contract to run? A Three years.

Q Did you enter it in February, 1920? A 1921.

Q If it was three years it was February, 1920? A Yes.

Q You got out in February, 1923? A Correct.

Q And that was just the expiration of the three-year period? A No, the second year. I was with Mr. Rothstein two and a half years.

Q Have you that contract? A No.

Q Where is it? A I never had it. When we dissolved it was all given up.

Q You had no copy of it? A No.

Q What is your business now? A Real state and financing.

Q Didn't the contract provide that at the end of two years you could get the $30,000? A It gave me the expiration at the end of the third year, and it was an increase.

Q At the end of the third year you had a right to go out with so much more? A Yes.

Q You went out at the first opportunity you had to go out? A I did not.

Q You had a right to go out the first year? A Yes.

Q At a smaller amount? A Yes.

Q Did you ever get any return on that $30,000? A No.

Q Didn't the contract provide that? A Only the percentages.

Q What you were to get, then, was a loan of money, or what? A I had a third interest in the business and I was to get one-third of the profits.

Q Did you get any profits? A No.

Q Did you get any profits in 1920? A No.

Q Did you get any profits in 1921? A No.

Q Did you get any profits in 1922? A No.

Q Why not? A Because we had utilized all the profits for the expansion of it.

Q The profits was not there for distribution? A There was, we utilized it.

Q Did you know what the contract with Mr. Gilson was? A Yes, sir.

Q You knew he was entitled to profits? A Yes, sir.

Q Did you know of the contract with Mr. Kapner? A Yes.

Q You knew he was entitled to profit? A Yes, sir.

Q They didn't get any? A Yes.

Q That had no influence whatever upon your getting out at the expiration of the second year, the fact that you did not get any profits on your $30,000? That no influence on you at all? A It did not, no.

Q You told me that the profits for the two years, 1921 and 1922, were used in betterments, is that right? A Yes, sir.

Q Used as capitalized expenditures? A Used as business expenditures.

Q Do you know the difference between what is usually called "capital expenditures" and "business expenditures"? A Yes, sir.

Q Were they used as capital expenditures or business expenditures? A For business.

Q They were used for expenses and never became profits? A They did become an asset.

Q Are you figuring on the idea of bookkeeping systems that never can be lost? A No, but I know if I put an additional chandelier in the store, it is an asset.

Q That is capital. A That is what you call it.

Q Was it used for capital or business expenditures? A I call it business expenditures.

Q You had an interest although your profits had been diverted to capital? A Right, sir.

Q And you went out without it. A I was perfectly satisfied to.

Q You did go out and leave your capital expenditures stay there? A I did, sir; and there was a reason for it.

Q You say you are in the real estate business and, I think you said, financial— A Right, sir.

Q What is that? A Loaning money on accounts receivable and on loans.

Q For yourself? A Yes, sir.

Q Where? A I was formerly located at 156 Market street.

Q Where now? A At my own home.

Q You haven't any office? A No, I don't need any.

Q I don't suppose you needed any assistance to make this store a more profitable store in 1924 than it was in 1923? A I must have help.

Q I mean someone with mere manual labor, not knowledge, no. You had the knowledge? A Yes, sir.

Q Have you any real estate office? A At my own home.

Q You answered a question of Judge Skinner's in reply to his question as to whether the profits that a store was making would have any influence in purchasing the merchandise. You said, "Yes and no." And if you would not consider it at all if you wanted the site? A Yes.

Q And you said it would make a little difference. What did you mean by that? A As a merchant I would want to buy.

Q You said you didn't want it as a going business and you were going to buy the stock to dispose of it somewhere else and it would make only a little difference in the amount you paid? A I still repeat it and I can answer that.

Q You would pay ninety-five per cent.? A I might pay ninety-five or eighty.

Q You would pay ninety-five per cent. for a bankrupt stock to sell?

Objected to.

Q As a stock in a going business. You didn't intend to continue a stock you could buy in the

market? A It all depends as to how and why I wanted it.

Q For no particular reason? A Then I might not buy it at all.

Q You might buy it at fifty cents on the dollar? A I don't think any but fools would sell it.

Q If you had experience in buying the stock of bankrupt concerns. Have you had such experience? A Bankrupt? Yes.

Q You knew Mr. Weintraub and Mr. Rosenberg, didn't you? A Oh, yes, I have met them.

Q During the year 1925 they called on you, didn't they? A They sent for me first.

Q Did you go to see them? A I did.

Q Where? A At their place of business.

Q Did they ask you at that time whether you were there during the year 1921? A They knew I was there.

Q Did they ask you that? A I can't remember the question or I can't remember the conversation.

Q No part of it? A Outside of the fact that they spoke of certain general things.

Q Did they ask you whether the business made any profits during 1921? A Yes, I didn't answer.

Q You didn't answer the question? A It was of no interest to me.

Q Why not? A I simply told them I didn't want to be mixed in.

Q Did you tell them, "I won't answer it?" A I told them that I cannot answer it.

Q Why not? A Because it was none of my affair.

Q If the business had made a profit, as I understood you to say to Judge Skinner, just what would have prevented you from saying, "Why,

yes''? A What reason would I have to say it? It interested me neither one way or the other.

Q Don't you give any information to anybody sometimes? A It all depends. If another business man comes to me for confidential information, but it is information for me to try to utilize it? For other purposes, no.

Q You knew if you told the truth you would have said there was a profit. It would not have helped Weintraub and Rosenberg one bit. A I will contradict it, because the question was entirely different.

Q I take it they asked if the store had made any money during 1921. A No such question was asked me.

Q You said they had asked that. A They asked me to tell them different things about Mr. Rothstein.

Q I asked you distinctly whether or not they had asked you whether that business had not made money during 1921, and you said they did. A That's right, I do remember that.

Q And I asked you what your reply was, and you said, ''I didn't answer at all. I refused to answer.'' Now, you say you refused because you thought they would lead into it. If you had answered as you did now, you would not have been. A I will answer that. What I told Weintraub and Rosenberg, what I told them—

Q I am asking you why you did not tell Weintraub and Rosenberg, that it had made— A I gave you the beginning of the sentence. The balance is: Weintraub and Rosenberg asked me to come here and make a declaration as to the fact that the business was not paying. I said, ''You better not draw me into it because I have no time to go to court affairs.'' They said they would

subpoena me. I said, ''If you subpoena me it may be more injurious to you than good, because if I tell the truth it will be more injurious.''

Q Why didn't you tell them there was a profit? A I told them that. They were up to see me three or four times.

Q Why did you tell me a few moments ago when I asked you whether there had been a profit you refused to answer? A I did.

Q If you didn't want to be drawn into it and couldn't help them, why didn't you tell them there was a profit? A I didn't tell them; I told them I didn't want to be drawn in.

Q Do you remember telling them it was too bad they didn't see you before they bought; that the place never made any money and never would? A That's ridiculous.

Q Did you say it? A I did not.

Q Was there any talk about the property or the business making money or not? A Yes, they had asked me those questions.

Q You sat there and listened? A Yes.

Q And said nothing? A And said nothing.

Q Do you remember telling them, ''I was lucky to get my money out of here''? A That would be again ridiculous.

Q Did you say it? A I did not.

Q Was there any talk of your getting the money out? A I don't remember that.

Q Mr. Clancy had something to do with the drawing of this agreement, didn't he? A Yes.

Q Do you remember saying that, ''Although Mr. Clancy thought he was very wise in the agreement between myself and Rothstein he played right into my hands and I got my money out without a loss''? A They broadened it out. I said Mr. Clancy made a pretty good agreement

and I had no legal representative at all. Mr. Clancy had acted very fair. That is what I answered.

Q And had drawn an agreement that permitted you to get out without a loss. Do you remember that? A Yes.

Q You said that? A I did not say it. I said Mr. Clancy made a very broad agreement protecting both interests.

Q Did they then ask you whether you were coming to testify? A They did.

Q You then said you would let them know next week? A Yes, the first time I asked I told them that.

Q You were going to let them know next week whether you would come, although you told them that if you did come it would not do them a bit of good? A I thought of drawing them off not to bother me; they kept pestering me.

Q You met them again? A Yes, they came to me.

Q Do you remember telling them if they would pay you for your services you would go to court? A No.

Q Nothing was said about that? A No.

Q That's right? A Absolutely right. I said if they would draw me on a subpoena it would do them more injury than good.

Q Nothing was said about your being paid if you went to court? A Not to me.

Q How long did that conversation take? A I don't think over a few moments.

Q Do you remember their asking you what you thought your services were worth? A I don't.

Q Do you remember saying if they lost your services would be worth $5,000? A I didn't.

Q How did that talk end? A Just as I explained to you before.

Q The last thing, I am talking about now. A The conferences were identical.

Q You were going to let them know— A That was the first time. They came over and they asked me to come over to your office. I told them I refused to attend; that I had no time for court affairs. I told them the next time—I said, "Call me up again next week," and when they came again I told them just as I have repeated, that I would not go and be mixed up in it because one is just as friendly to me one way or the other. It was of no interest who lost.

Q You kept on talking two or three times. You discussed coming over to my office, although when you first saw them, if you had told them in the first place that there had been a profit made, it would have ended the whole thing? A But I hadn't told them.

Q But you kept negotiating as to whether you should come and testify for them, didn't you? You led them to believe you would testify for them? A I told them in the first instance I don't want to be mixed up in it.

Re-direct examination by Mr. Skinner.

Q Are you here under subpoena? A Yes, under subpoena from Mr. Clancy.

Q You said business got to be a machine. They don't get to be an automatic machine? A If they become automatic they become passe—that is, go out of business.

Q You were asked whether you ever made a profit and whether that influenced your getting out. You said no. Why not? A I had a very broad agreement.

Q What do you mean? A I had a broad agreement there that I could release myself or get out of the business, with my money at the expiration of three years with an increased ratio of profits at each year. I was in the business there two and a half years. For six months I was there without a contract. We had none of my money in the business. I was there to balance the business and size the business up. I came there on the 1st of September and on the 1st of January I drew up a contract with Mr. Rothstein and we formed a corporation of Rothstein's Inc. at that time.

Q And was it then that you put the money in? A Then I put the money in.

Q You spoke about the profits being used for business expenditures. What kind of expenditures were they? A Those expeditures were for—I think the first year we added on a number of six or eight drawer cash registers, and we changed the departments of the two floors, completely. In other words, we ripped a lot of fixtures up and built other additional fixtures.

Q As to the character of expenditures you had in mind are those the ones? A Yes.

Q You said you left those profits behind and there was a reason for doing it. A A very selfish one. Under my contract I could have withdrawn under the expiration of one, two or three years. I had absolute control of the entire business.

Q I asked you what was your reason for leaving the profits behind willingly? A I asked Mr. Rothstein—

By the Court.

Q What was the reason? A The reason was I wanted to buy the business; if the profits went

into the store as assets I would get it any way and if I could have purchased it—

By the Court.

Q You have answered the question.

Re-cross examination by Mr. Lane.

Q You went there six months before you made the contract? A I was there the 1st of September.

Q How many months was that? A Four months.

Q Four months before you made the contract? Before you had a dollar in, is that right? A Yes.

Q You went there to study the business? A To size it up.

Q You had this vast experience? A Yes.

Q You studied the business carefully? A Yes.

Q Then you made a contract for $30,000 with a string to it? A I did.

Q You didn't put your money at risk for the four months you studied the business? A No.

Q And it was a profitable business? A It was.

By the Court.

Q Your one-third interest was not one-third of the capital but in the profits? A One-third of the profits of the business.

Q You just had a capital interest of $30,000? A I controlled one-third of the capital stock. I had a voting right—

Q Did you own one-third of the assets? Was it ownership of one-third of the assets or one-

third of the profits? A Let us put it this way: one-third of the profits and there were two kinds of stocks—preferred and common. The preferred was controlled by Mr. Rothstein. The common was the voting stock and I had one-third of the common stock.

Q But you did not have one-third of the outstanding assets of the company; that is, one-third of the stock? A Yes, I had individually one-third of the common stock.

Q One-third of all the stock? A No.

Q In other words, your interest did not represent one-third of the entire assets of the company? A Oh, no.

JOSEPH KLAUSNER, recalled in behalf of defendants.

Direct examination by Mr. Skinner.

Q Mr. Klausner, I call your attention to the fact that this agreement marked Ex. P. 15 has a clause in it which says: "The said Joseph Klausner, Morris Epstein, and Elias Rosenberg, hereby agree to assign, transfer, and set over unto the said Max Weintraub all their right, title and interest in and to a certain cause of action and claim now pending in the Essex County Circuit Court against Louis Rothstein and Rothstein Inc., a corporation different and separate from the above-mentioned Rothstein's corporation." Have you ever executed any such assignment? A No, sir, only this one here.

Q Only this paper? A Yes, sir.

Q Would you be willing to execute any assignment of anything other than your interest, if any, in a suit for stamps? A Stamps only.

Q I don't suppose you can speak for Mr. Epstein? A No, sir.

Q When you bought Rosenberg out you paid $19,000, I think you said? A Yes.

Q How did you arrive at your figure? A That was the valuation of the capital at that time.

Q How did you reach that valuation? A Why, we have been practically sold out at that time. We had had a fire before that. After settling with the insurance company we ran a fire sale. When we were through with the fire sale, deducting all we owed, there was $38,000 left, or thereabouts.

Q You say deducting what you owed. What did you deduct it from? A From the insurance money and from the money realized from the fire sale.

Q Was that all your assets? A The same fixtures we left.

Q So you took an accounting of the assets left? A Yes, sir.

Q Did you take an accounting of that? A Yes, sir.

Q So you took the proceeds of the fire sale and added it to what you had collected from the insurance company? A Yes, sir.

Q The insurance company paid you for the damage to the goods and the fire sale was a salvage? A Yes, sir.

By the Court.

Q When Mr. Rosenberg sold out to you he did not sell out on the same basis as Mr. Weintraub? That is, for an inventory of the goods at cost price. A There was no goods to be inventoried.

Joseph Klausner, cross.

Q You were just settling the remaining assets, which you received from the goods? A That's right.

By Mr. Skinner.

Q When you bought Mr. Weintraub's stock it was before you went into the company? A Yes.

Q You have testified you took Mr. Rosenberg's word for the value? A That the stock was taken and right.

Q That was when? A November, 1925.

Q And the fire was when? A January, 1926.

Q And between November, when you went in, and the fire sale, had any inventory been taken? A No, sir.

Q So that the only way you had of determining the value of the goods that were there was from the fire insurance company and the fire sale and the goods left? A I could only ascertain what was left, what we can realize for it.

Cross examination by Mr. Lane.

Q The fire was in February, wasn't it? A January.

Q You had an inventory? A No, sir.

Q No inventory at all? A No, sir.

Q Will you tell me what this means on your accountant's statement of November 16, 1925: merchandise inventoried? A According to the book; we even filed a statement to the government. We got permission to take an inventory February and March.

Q You got an inventory? A From the merchandise sale and the goods purchased. We haven't taken physical stock.

Joseph Klausner, cross.

Q You had an inventory you used as a basis and then you took your purchases and your sales and made your net results? A We have the same inventory as we had when we did it. We didn't take any inventory.

Q From the book of November, 1925— A We kept on adding to that what we bought.

Q And you added what you bought and subtracted what you sold? A Yes, sir, but that was not a general inventory.

Q But that was an inventory? A If you figure it that way, yes.

Q You wouldn't take an inventory until the expiration of the year? A No.

Q When you made your insurance list you used those figures? A Yes, sir.

Q And the insurance company paid you? A No, they couldn't see those figures.

Q But they paid you with those figures before them? A After bargaining on those figures, they did.

Q I believe you told me you never saw this. A No, sir.

Q Were you ever told that the net loss on operation for 1925 was $13,192? A No, sir.

Q Weren't you present when this audit was handed over to Mr. Weintraub and Mr. Rosenberg? A No, sir, I been in a different business there.

Q You were subpoenaed to produce all the books you had of this concern? A Yes.

Q Have you produced all you had? A Yes, sir.

Q Where are they? A Right here in the court. I left them in charge of an officer.

Q What books are those? A I don't know, sir.

Joseph Klausner, cross.

Q Where did you get them? A From the safe.

Mr. Skinner: You want to make him your witness?

Mr. Lane: Yes, for the purpose of identifying these books as having been produced by him.

(The witness produces a book.)

By Mr. Skinner.

Q May I ask whose books these are? A I got them in the safe.

Q Are they the books of the present Rothstein's Incorporated only, or are they those books and some others? A I don't know, sir. I was asked to bring the books from the safe.

By Mr. Lane.

Q The first book which is identified is the book called "Expense books" of the new corporation, commencing January, 1924.

(The same is marked Ex. P. 23 for identification.)

Mr. Lane: The next is a book called "Cash disbursement book, 1924."

(The same is marked Ex. P. 24 for identification.)

Mr. Lane: The next is a book called "Cash receipts" beginning January, 1924.

(The same is marked Ex. P. 25 for identification.)

Mr. Lane: The next is a minute and stock book with which I am not concerned.

Joseph Klausner, cross.

Q Have you found any ledger for 1923? A No, I haven't, sir.

Q Have you found any ledger at all? A If I didn't bring it, it isn't there.

By Mr. Skinner.

Q You were asked by Vice-Chancellor Lane if you had seen this audit. Were you told of the amount of profit or deficit or otherwise? A No, sir.

Q Were you told anything about profits? A I was told it was a very poorly paying business.

Q Did Mr. Rosenberg tell you anything about the profits? A Yes, sir.

Q What did he say? A He said it was paying very well.

Q Did he give you any specifications of profits? A Yes, he told me my accountant didn't know what he was talking about. He knows it is a well paying business. The only reason is that they had certain assets in in the books and he explained to me about the rents, stamps, and Weintraub's salary that he is drawing and not earning. He said, "Put all this together and you have a good profit."

By Mr. Lane.

Q Are you thinking of suing Weintraub now for false representations in turning this business over to you? A No, I bought this business as a non-paying business.

LOUIS SPITZ, sworn in behalf of defendants.

Direct examination by Mr. Skinner.

Q Mr. Spitz, where do you live? A Paterson, New Jersey.

Q What is your business? A Department store.

Q What department store? A The Quackenbush Company.

Q Is that a large store or a small store? A We have five hundred help.

Q About what gross business for the year 1925 did you have? A Over four million.

Q Have you been in that business other than in Quackenbush's? A Yes, sir.

Q How long? A About twenty-eight years.

Q To what extent have you been identified with that business? A I was the owner.

Q Just give us some idea of your experience? A I started to work with my father when I was sixteen years old in a dry goods store and then we became a department store, and then, in 1919, I purchased the Quackenbush establishment.

Q Since that time you have been with that establishment? A I was president at the beginning; I am the sole owner now.

Q In your experience, so far, have you had occasion to buy the stock of other stores? A Yes, sir, I purchased the Quackenbush Company.

Q Besides that. A Buy stock?

Q In the management of your business? A Yes.

Q In your experience, has the amount of profits that the man who is giving up business and selling out has made, influenced or affected the price that the people who wanted to buy the

goods, who wanted to carry on at the same place? A I didn't get that.

Q In your experience, does the amount of profit that a man has made, affect the price that a man can get for the goods when he wants to go out of business? A It all depends on the volume and amount of business and the profit he has made.

Q How does the fact that he made a profit, or the amount of profits interest the buyer in determining what he is willing to pay? A If it is a growing business it is up to the buyer to analyze what the establishment is. I bought the place and paid for it, for all the merchandise and the firm was forty-two years in business. I paid full price for the fixtures, being in town and knowing what I could do with the business. The management was in strange hands, knowing these conditions I paid this price.

Q That indicates that the knowledge you had of the possibilities there, plus the knowledge of poor management in the past, was what influenced you? A Correct.

Q Do you know whether or not the man who was selling had been carrying on a profitable business? A Yes, I had known from information.

Q Do you know the amount of profit or the rate of profit? A The rate of profit in the last three years average was less than three per cent.

Q Knowing that it was less than three per cent. you were willing to pay dollar for dollar on the inventory value of the goods? A I did.

Q Did the fact that that concern had been running for so many years in that neighborhood indicate that it had anything of good will? A Yes, sir.

Q Did the fact that you were going to buy and carry on that business influence you at all with reference to the good will? A Absolutely.

Q What, in your experience, is the usual average percentage of the profits to the gross business for the year for department stores? A The average is considered good volume of profits on a large business of six per cent.

Q You say "A large business." What do you mean? A For a business that goes into millions.

Q Suppose it is a small store doing $300,000 or $400,000. A It all depends on the operating and the management of the place. Some make eight per cent. or a little over and a little less.

Q What percentage does the expense bear to the gross business for the year? A It is figured from twenty-six to twenty-nine per cent. for department stores.

Q That range depends on what factors? A The management of the business.

Q Does it depend at all on the size of the business? A No, sir.

Cross examination by Mr. Lane.

Q Size is no factor whatever on percentage of expense to gross sales? A Not in all cases.

Q I didn't ask you in all cases. A Are you referring to my own business?

Q I thought you were testifying, generally, as an expert.

By Mr. Skinner.

Q Are you related to Mr. Rothstein? A Yes, he is a brother-in-law of mine. I put him in business.

By Mr. Lane.

Q Has Mr. Rothstein any interest in the store that you are the sole owner of? A He did have an interest.

Q He hasn't now? A No, sir.

Q When did he have an interest? A Up until 1925.

Q From when? A September, 1925, when his interest ceased.

Q When did it begin? A In 1919; in February.

Q Generally, the percentage of expense to gross sales is affected by the size of the gross sales, isn't it? A No, sir.

Q Do you expect a percentage in a store doing $300,000 business instead of a store doing two or three million—you would expect to find the percentage of expense to gross would vary as the volume of gross sales, wouldn't it? A Not in all cases.

Q Generally, you would expect to find that. A Not generally.

Q Then you would expect to find, generally, that the percentage of profits to gross sales in a business doing $300,000 a year would be precisely the same as a store with $5,000,000? A Not in all cases.

Q Almost, you might say, in any case, isn't that true? A No.

Q There would be circumstances that would make them the same? A Exactly.

Q If a man fixes the value upon fixtures and merchandise at 100 per cent. of cost upon the assumption that that store was making eight per cent. profit on the gross amount of sales, you would be willing to pay the same one hundred

per cent. of value of fixtures and merchandise, if, upon investigation, you found that the store was making 2.75 per cent. A If I wanted the business I would pay possibly more.

Q In a desire to get rid of competition or add it to a department store, but simply if you were going in there with your own little business, would you pay the same if it were making 2.75 per cent. as if it were making eight per cent? A If, upon investigaton, I found the conditions such as would please, I would be guided by that.

Q It would make no difference to you if he asked 100 per cent., representing that it was making eight per cent. and you found it was making only 2.75 per cent? A I would know and base the buying on the conditions; on what the situation was at the time, if I thought it was a growing business.

Q Do you think three per cent. is a good profit? A Many merchants when they haven't a good year are glad to make three per cent.

Q I am asking you whether the general average of three per cent. is a good profit? A It is, if you can't get any more. I couldn't answer differently.

By the Court.

Q Is it a good profit in the trade? A No.

MURRAY APFELBAUM, sworn in behalf of the defendant.

Direct examination by Mr. Skinner.

Q You are in the real estate business, are you? A Yes, sir.

Q Have you been in that business for a number of years? A Yes, sir.

Q Here in Newark? A Yes, sir.

Q You were the broker in the negotiations between Weintraub and Rosenberg and Rothstein and the other gentlemen? A Yes, sir.

Q For the Springfield avenue department store? A Yes, sir.

Q When did those negotiations begin and how did they come about? A About in October, 1923, Mr. Rosenberg and Mr. Woolwick came to my office and asked me if I had any department stores to sell. At that time I showed them one in Paterson; that is, I submitted the one in Paterson, and along about December, Mr. Rothstein gave me his property to lease and to sell out as a department store. At that time I got in touch with Mr. Rosenberg.

Q What was the result of that? Did you bring them together? A As the result of that —at that time I told them what I had and they promised to come over and see us.

Q Did they come? A I don't believe they came until about January.

Q The latter part, the early part, or the middle, or what? A In the beginning of January.

Q Where was the meeting? A I received a phone call from Mr.—

By the Court.

Q Where was the meeting? A We didn't have any meeting at all.

By Mr. Skinner.

Q I am trying to find out about the first meeting? A My first meeting was in December.

Q The first time that Rosenberg and Weintraub and Rothstein were brought together by you? A Early in January.

Q Where was that? A I believe it was in my office.

Q Was there some talk then about buying Mr. Rothstein's business? A Yes, sir.

Q And they talked about prices? A At that time Mr. Rothstein phoned me that Mr. Rosenberg and a gentleman by the name of Mr. Weintraub were up to see him and made him a proposition and he also informed me that they were coming down to the office.

Q Just get to that place, when they were together in your presence, I want to cut out anything I can. Was there anything said by Mr. Rothstein about the— A Rothstein wasn't there.

Q Was there anything said by you as to the profits of his business or the volume of his business? A He had a sheet of paper there with about the approximate business he did.

Q From whom had you got that? A From Mr. Rothstein.

Q Did you tell them anything from that paper? A Yes, sir.

Q What did you tell them? A I told them that here is a business to be bought that I thought it was very reasonable; that he was doing

quite a business in the neighborhood of $350,000 to $400,000 and also that I could obtain a lease of twenty-one years on that property at $12,000 a year net. At that meeting I was a little bit that Mr. Woolwick, whom I had been dealing with on another department store and he told me Woolwick had changed his mind and negotiations between myself and Mr. Rothstein went on a few days.

Q Was there any other time when these gentlemen were with you and Mr. Rothstein was present? A Yes; at another place I made an appointment for them to meet Mr. Rothstein at his store at six o'clock.

Q You made that arrangement? A Yes.

Q For what purpose? A For the purpose of showing Mr. Rosenberg and Mr. Weintraub the business.

Q Was anything said at that time by Rothstein about giving access to his books? A Yes, sir. While up there, Mr. Rothstein went through his stock and went, in fact, all over the entire building; and Rothstein told them that they could see his books.

Q Told whom? A Rosenberg and Weintraub.

Q Was any arrangement made about seeing the books? A That was in the course of showing them through the property.

Q Was a price named by Mr. Rothstein then? A A price was named by Mr. Rothstein, that he wanted a hundred cents on the dollar for his stock and $30,000 for fixtures.

Q Was any figure mentioned as being the hundred cents on the dollar? A Yes, at that time he wanted dollar for dollar for his merchandise.

Q How much did that come to? A The stock hadn't been taken and he didn't know exactly what it was going to amount to.

Q At that time did Mr. Rothstein accompany you? A I think he did accompany us through the basement and the second floor. I just can't remember.

Q Was anything said by Mr. Rothstein as to his reason for retiring? A Yes.

Q What did he say? A He was a sickly man and he says he was going to have an operation performed on his foot and that is the reason he wanted to dispose of his business.

Q He was lame at the time, was he not? A Yes, he was.

Q Was that the only interview? A No. I believe a couple of days later Mr. Rosenberg and Mr. Weintraub came to the office and, I think, we had Mr. Rothstein to come down to see us.

Q Are you able to recall and distinguish one call from another so you can tell just what took place at each? A No, sir.

Q Were there more calls than what you have named? A I don't recollect whether there was up to that time.

Q Finally, was there an agreement? A Yes, sir.

Q At any of these calls did Mr. Rothstein say anything at all about the rate of profit he had made at any year of the three preceeding years? A I don't remember that at all. I figured about eight per cent. on $350,000.

Q Did you do that figuring, or did he? A In fact, I think, we all did that figuring.

Q Did Mr. Rothstein make any representation that the rate of profit he had made for any year or three years, was eight per cent? A No, he

didn't do that. We took it for granted at that time that he had made a lot of business. He told us at that time that the money he had accumulated was only through his business.

Q On any of those occasions besides Rothstein's telling them that they could see the books, did he take them in where the books were? A I saw them go upstairs and I stayed downstairs, I think.

Q Did he say why they went up? A He was going to show them his books.

Q Do you remember the day, or night, when the contract was signed? A I think it was on the 21st day of January.

Q You recall the occasion? A Yes.

Q Did you have a meeting the night before? A I don't know.

Q Or shortly before? A Probably shortly before, we had.

Q Do you remember at any time when the figure of $117,500 was mentioned? A The figure was not $117,500; it was around $125,000 and $30,000 for the fixtures.

Q And the agreement finally reached was $117,500 for the stock and $30,000 for the fixtures. A That came on the last meeting we had in Judge Clancy's office. Some figures were tallied up on account of stock taken.

Q Without guessing, tell us what took place that night? A I don't know exactly.

Q Did they get together easily? A No, sir, they didn't.

Q A good deal of bargaining about it? A Yes, sir.

Q In the bargaining, was the figure of $125,000 adhered to by Mr. Rothstein or was there some change? A There was some change.

Q Is that the way you get to the $117,500? A Yes, sir.

Q In that bargaining, did he ask for $30,000 for the fixtures? A Yes, sir.

Q Was that adjusted? A Yes, sir, they came to me and wanted me to take $5000 off my commission.

Q Who did? A Mr. Rothstein, Mr. Weintraub and Mr. Rosenberg. Rosenberg said they wouldn't take it unless the fixtures were $25,000. So they began to bargain with me to knock off $5000.

Q And you did? A I did.

Q So the figures for the fixtures remained at $30,000 but your commission went down $5,000? A Yes.

Q Following that was there a meeting at Judge Clancy' office? A I think a couple of days later.

Q Were you present? A Mr. Weintraub and Rosenberg came down together, and another serious thing happened. Mr. Rothstein wanted $2000 a month paid off on his notes.

Q That is, the balance of the purchase price? A It would be $75,000 in cash and $2000 notes over a period of three years. Weintraub and Rosenberg wanted to give $1500 a month. That was when they were there at that meeting. Mr. Rosenberg and Mr. Weintraub came and I called up Mr. Rothstein and told him the proposition we had and I asked him to come down.

Q How did they get together? A Oh they got together and Weintraub and Rosenberg agreed to give the $2000 a month instead of $1500.

Q Did you have anything to do with persuading them to do that? A Yes, sir.

Q What was the method of persuasion? A I figured that doing $350,000 business and I figured eight per cent. off to be the profit. That would take care of the notes of $24,000 a year.

Q And at the meeting at Judge Clancy's office there was some suggestion, was there not, that the wives should endorse the notes? A Yes, Mr. Rothstein refused to take any notes unless their wives signed the notes.

Q Do you remember anything Weintraub said at that point? A I don't remember.

Q Do you remember whether you suggested anything at all as to whether they were able to equal or exceed the business done by Rothstein? A Yes, sir.

Q What did you say about that? A At probably the first or second time, at the meeting, I think it was the second time, after we had a meeting there that Mr. Rothstein told Rosenberg and Weintraub that he thought they could do a bigger business than he had been doing because they were young fellows and he was sickly and he couldn't attend to business.

Q Did you remind them of that at all while you were trying to adjust the differences between the notes? A Yes, sir.

Q How? A I figured they were very substantial. Mr. Weintraub was running two stores in Brooklyn successfully; Mr. Rosenberg also had two stores running successfully and they ought to make a go of it.

Q Didn't that bring about some suggestion by you of a reasonable hope that they might have and the profits they might get? A We figured up they ought to do more business than Mr. Rothstein.

Q Was the figure of $400,000 mentioned at all? A Not at that time because we had the figures from Mr. Rothstein.

Q Did you get any other later figures? A No, sir, not as I remember.

Q Having told us that the talk was that they might do a larger volume of business than the $350,000 that Rothstein had done, approximately, didn't you get to figuring the volume of business at $400,000? A I think we did come to that—

Mr. Lane: I object to that as not what the witness said.

Q Assuming now that somebody said that they ought to make more money than Rothstein, was that said with respect to the amount of profits they would make or with reference to the amount of business they would do? A I don't remember whether it was profit or business.

Cross examination by Mr. Lane.

Q When Mr. Rothstein told them they might go up to see the books, what had just preceded that? A I think Mr. Rothstein was sitting on a chair and I think just before that he took off his shoe. I think that is what happened. He couldn't get around very well.

Q And he took off his shoe, at any rate? A Yes, sir.

Q What led to this going up to see the books? A I think Rosenberg and Weintraub wanted to see the amount of business he was doing.

Q They were also interested in the profits he was making? A Yes.

Q And the expense? A Yes, sir.

Q And then there must have been some talk at that time as to profits, expenses, and volume of business, was there not? A Volume of business they spoke about; and they spoke about expenses.

Q The only purpose of talking of volume of business and profits is— A That I don't know.

Q Are you interested in volume of business and expenses except to find out what the profit is? A I don't think it had anything to do with it at that time. They wanted to see how much business all the departments were doing and the matter of expenses, and Mr. Rothstein was going to show them his books.

Q Then you had been figuring on a profit of eight per cent. A Between seven and eight per cent.

Q You had been figuring that all along? A Yes, sir, all along.

Q After Mr. Weintraub and Mr. Rosenberg left the room and came downstairs, didn't they say, "It's all wrong. There isn't any profit like that. Expenses are up to $98,000 and it only shows a very small profit." Do you remember their saying that? A I don't remember.

Q Did any such talk take place; any explosion of that kind take place? A No, sir.

Q Still, you had been figuring on a profit of seven or eight per cent. and they were upstairs to see the books and came down again. A They were up some time.

Q And then they came down again and never said anything like what I have said? A No, sir.

Q And I suppose Rothstein, during the time you were sitting there and you were figuring on a profit of seven or eight per cent., never interrupted and said he had been making two or three

per cent.? A I think he said he didn't make so much; he didn't make a whole lot of money or he wouldn't have sold.

Q Let me ask you what he said his profit was in 1920? A I don't remember.

Mr. Skinner: I object to that question as assuming that he said what the profit was.

Q I am asking what, if anything, he said his profit was in 1920? A I don't remember.

Q Did he say anything with respect to 1919? A I don't remember.

Q In talking about these expenses, do you remember a talk as to what was included in the expenses? A I think he was drawing a salary out of the business.

Q Do you remember what figures he said his salary was that was included in the expenses? A No, sir.

Q When this discussion came up as to whether the amount of the note would be $2,000 or $1,500 you told me, I think, that you called up Mr. Rothstein? A Yes, I did.

Q And then you told me you had called up Mr. Weintraub or Mr. Rosenberg and told them that the profit would be between $28,000 or $30,000 a year and that would take care of the $2,000 a month? A Something to that effect.

Q Did Mr. Rothstein tell you that over the telephone? A I don't think he did.

Q What reason did he give for insisting upon the $2,000 a month? A I know the reason.

Q I think I do, too. I want to know what he said. A I don't remember what was said.

Q You don't remember what he said at this telephone conversation? A No.

Q Let me see if I can refresh your recollection that he said to you what you said to Mr. Weintraub when you got through talking with him, that they could make $30,000 a year and why should he take less than $2,000. A I don't remember whether he said it or whether I said it.

Q This discussion as to the amount of the inventory, that was not a change in the principle upon which the amount of money was to be paid for the merchandise, was it? It was a difference in which the way the figures had been taken? A Yes, sir.

Q And the dispute as to the way the figures had been applied? A Yes, sir.

Q And so far as the $30,000 for the fixtures was concerned, Rothstein got it, didn't he? A He got the $30,000.

Q You contributed $5,000 to put the deal through? A Yes, sir.

Q When you were talking with Mr. Woolwick and Mr. Rosenberg, back in October, did you see Mr. Rothstein with Mr. Woolwick and Mr. Rosenberg? A I don't remember.

Q You have closed a great many deals between that time in 1924 and this time, haven't you? A Yes.

Q And some of the details you may have forgotten? A Yes, sir.

Q Your main interest when you got out of this thing with the loss of your $5,000 was to forget it, wasn't it? A Yes, sir.

By the Court.

Q You referred to some paper you quoted from with regard to the details of this sale to Mr. Rosenberg. A Yes, sir.

Q What figures did you quote? A All the figures that each department had done—the sales.

Q Didn't it have the terms? A No, sir, it didn't have any terms, just approximately $400,000 worth of business and had it itemized as to what each department had done.

Re-direct examination by Mr. Skinner.

Q You said in answer to my question, I think twice, that at no time during any of these interviews did Mr. Rothstein make any statement as to what rate of profit he had made in any year, or any three years, and I want to call your attention to the fact that in answer to Vice-Chancellor Lane's question you said, "I don't remember whether he said it or I said it." Did he say it or did you say it?

Objected to.

Objection overruled.

Q First you told me that Mr. Rothstein did not say at any time what percentage he had made and in answer to Vice-Chancellor Lane's question you said you don't remember as to whether you said eight per cent. or he said eight per cent. A I think I said that.

Q You already testified that he was selling because he was sick? A Yes.

Re-cross examination by Mr. Lane.

Q Was he there at the time you said eight per cent.? Was he present? A I don't remember.

Q You don't remember whether he was there or not? A No, sir.

Q Although there was a discussion of the amount of business done? Discussion of the expenses, even of going upstairs to look at the books when Mr. Rothstein was present, you can't remember whether these men turned to Mr. Rothstein or Mr. Rothstein did not volunteer as to the profit he had actually made? A I don't remember.

Q That was an important element, wasn't it? A No, sir.

Q It was not important as to what had been made? A No, sir.

Q It is never important as to the sale of any department stores as to what profit had been made? A Not on this business in particular.

Re-direct examination by Mr. Skinner.

Q You said that at the time the eight per cent. was mentioned you were talking about the general run of business and then you were stopped. Were you talking about what Mr. Rothstein had made or Mr. Rothstein figured on what they might make? A What the boys might make.

Re-cross examination by Mr. Lane.

Q What Mr. Rothstein had made played no part in what Mr. Weintraub and Mr. Rosenberg could make. The only purpose was to find out what had been made? A No, sir.

By Mr. Skinner.

Q When you say, "No, sir," do you mean that isn't right? A That isn't right.

Adjourned until Friday, November 12, 1926, at 10 o'clock A. M.

Friday, November 12, 1926.

Continued pursuant to adjournment.

Present, counsel as before stated.

LOUIS ROTHSTEIN, sworn in his own behalf.

Direct examination by Mr. Skinner.

Q Mr. Rothstein, you are the defendant in this suit? A Yes, sir.

Q And you were in business at 413 Springfield avenue? A Yes, sir.

Q That was a department store? A Yes, sir.

Q How long had you been in the department store business when you sold out the goods and the fixtures to Mr. Weintraub and Mr. Rosenberg? A Just about twenty years less one month.

Q You had been in what city? A In the same block.

Q Where did you start the business? A At 410 Springfield avenue.

Q It was a large store or a small store? A About thirteen foot front and about forty foot depth.

Q And what was the volume of business? A About $9,000 the first year.

Q Did you business grow? A I was at 410 Springfield avenue for four years. The fourth year I closed up at 410 I done about $28,000.

Q Then what did you do? A I moved to the corner of Fairmount avenue and Springfield avenue. That was formerly Simon & Joseph.

Q About how near was that that you went to 410? A About 200 feet or less.

Q How long were you there? A Six years.

Q Where did you go from there? A To my new building; the present building, now.

Q When you left the Fairmount avenue corner to go to 413, what business were you doing? A About $140,000.

Q When you went into 413, how much did you do? A Very close to $160,000.

Q In 1923, the testimony already in is to the effect that you had done business for that year amounting to $343,000. A Yes, sir.

Q Had you done more? A In 1920 I had done $407,000.

Q Do you remember 1921? A Yes, $393,000.

Q 1922? A $350,000.

Q Are you giving exact amounts? A Very close; it would be a difference in hundreds of dollars. We have done $7,000 in the basement in the toys and I received $700. Actually I made $350,000.

Q What were the gross sales downstairs? A $7,000.

Q And ten per cent. of $7,000 is what? A $700.

Q That is what you got? A Yes, sir.

Q That is to be added to the $343,000? A Well, you don't add $700; you add the $7,000. The ten per cent. gross income of $7,000 is worth more than $7,000 business.

Q The $7,000 was done by the people you rented out to? A Yes; that was the first year I done it.

Q What was your condition of health in 1923? A It wasn't its best.

Q Something has been said about your having taken off a shoe and shown your foot or toe when Mr. Weintraub and Mr. Rosenberg were with you. Do you remember that? A I do.

Q What was the trouble? A A gangrenous ulcer, that's my trouble.

Q You still have that? A Unfortunately I have it at the present time.

Q How long have you had it? A My first trouble up to late 1911. I have been in perfect health all my life.

Q When did you have this trouble? A The first starting? The first trouble with my foot?

Q Yes. A In 1911.

Q Tell us how much it affected your health in 1923. A I couldn't stand on my foot.

Q Was it any worse than it had been or the same? A It was getting always worse.

Q Had this ailment in any way affected your ability to take care of your business and handle it? A It certainly did.

Q Was it in any way an inducement or influence causing you to wish to sell? A Absolutely.

Q Did you have any other reason for selling than that? A None whatsoever.

Q Whatever there was of incapacity or limitation of your capacity from that, did it affect the profit of your business? A It certainly did.

Q Did this trouble with your foot require you to go away from the business for any length of time? A I was compelled every year to go to the South. At first, two or three weeks, and after awhile the duration had to be lengthened, until I couldn't stand the winter at all. It is an affection of the artery from the ankle. They call it in medical thrombolymphangitis. The artery doesn't function from the ankle down and therefore my foot is always cold. When the weather is cold and the circulation doesn't reach there an ulcer breaks out and it is subject to gangrene.

Q Where did you go? A To Florida to bake it in the sun. There isn't a cure in the world for it except sunshine.

Q How long were you away in 1923? A About ten weeks.

Q So that the longest you had been away up to that time was ten weeks? A Three months was the longest.

Q Did you put your business in the hands of Mr. Apfelbaum for sale? A Yes, sir.

Q Did you have some meetings with Mr. Weintraub and Mr. Rosenberg in late 1923 or early 1924? A The first I met was Mr. Rosenberg and Mr. Woolwick; he wasn't interested.

Q Passing that by, when did Weintraub and Rosenberg— A The early part of January, I believe it was the first week in January.

Q Did you at one time have Mr. Rosenblum with you? A Yes, sir.

Q He had an interest in your business? A Yes, sir.

Q You bought him out? A Yes, sir.

Q What was the condition of the business at that time as to the profits it was making? I don't mean the amount of it. Were they less or greater or what? A My profits—

By the Court.

Q More or less than 1922. A It wasn't.

By Mr. Skinner.

Q It wasn't what? A The profits were not any larger than during the time that Mr. Rosenblum was connected with me. It is shown on the books.

Q Rosenblum testified that he wanted to have a larger control in the business. You and he differed about management? A We did.

Q When you first met Mr. Weintraub and Mr. Rosenberg where was it? A At my store.

Q At your store? A Yes, we had a balcony in the rear of the store and my office was on the balcony.

Q Where was the bookkeeping force with reference to your office? A On the second; exactly on the top of my office.

Q This was on which floor? A On the first floor, but on a little flight leading to the balcony.

Q And the bookkeeping force was a floor above? A A floor above me.

Q It was at your store. I am speaking of Weintraub and Rosenberg when you first met them? A At my store.

Q Was there any talk about the volume of your business? A There was.

Q What did you tell them about the volume of your business? A That I had done $350,000.

Q Did you say in what year? A That was in 1923, because the figures by the time Mr. Weintraub came up with Mr. Rosenberg—the figures were already on my desk of 1923 because $343,000 was store business and $7,000 from the basement which made $350,000.

Q The figures had come to your desk in what form? A In the form of a green book; and it came in another form of a big yesterday book.

Q I show you a book marked Ex. P. 1 and ask you if that is the book you refer to? A It is.

Q There are certain pages torn out in that book, as was brought out here at an earlier stage of the trial. Did you cut those pages out? A No, sir.

Q Did you have them cut out? A No, sir.

Q Did you know they were cut out until testimny was given here? A No, sir.

Q Did you leave that book behind you when you sold out to Weintraub and Rosenberg? A I did.

Q It was produced by them, do you remember? A Yes.

Q Had you seen it between the time you left there and the time it was produced here in court? A No, sir.

Q The volume of business you say was shown at $350,000? Did you at that time represent, or say to Mr. Weintraub or Mr. Rosenberg that the expenses of the business for 1923 were $76,000? A I did.

Q Did you say that at any time? A I did not.

Q Did you tell them then that your profits averaged for three years past had amounted to eight per cent. on the gross amount of business? A No, sir.

Q Did you tell them that at any time? A No, sir.

Q At that time did they make any inspection of the store? A They did.

Q What did they do? A At the time of the first meeting? No inspection with me.

Q Did they have any examination or access to the books other than what you had there? A This is the only book; and also a big yesterday book. It's here.

By Mr. Lane.

Q That is the title of the book? A Yes, right there in the newspaper (indicating). I got it from Mr. Klausner.

Louis Rothstein, direct.

Q When? A When was our last meeting here? On Wednesday.

By Mr. Skinner.

Q Is this the book you refer to? A Yes, sir.
Q The title is, "Beat yesterday"? A Yes, that was instituted by Mr. Rosenblum.
Q What is that book? A It gives you at a glance the receipts of every day, every month, and every year on one page.
Q Does it show expenses? A This book?
Q Yes. A No, sir.

Mr. Lane: Is that book offered?
Mr. Skinner: I will offer it.

By Mr. Lane.

Q May I ask whether Mr. Rothstein has any more books now? A If I have any more?
Q Yes; or under your control. A No, that is not in my control.

By Mr. Skinner.

Q Did you produce in court here when called for on the first day of the trial some books? A I believe I did.
Q Don't you know? A I sent my boy down; I didn't go myself.
Q They were produced for you? A Yes.
Q Have you, at any time, during this trial had in your possession any other books than those? A No, sir.
Q You got this book from Mr. Klausner on Wednesday? A Yes.
Q Mr. Klausner was here on subpoena *duces tecum* to produce all he had? A Yes.

Louis Rothstein, direct.

By the Court.

Q You said that at the first meeting you had the green book before you, and this black book? A Yes, sir.
Q You had those two books there? A Yes, sir.
Q Did the plaintiffs inspect them? A Yes, sir.
Q I mean, did they look at them? A Yes, sir.

Mr. Skinner: I offer in evidence "Beats yesterday" book.

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

By Mr. Skinner.

Q I suppose there was some talk about what you wanted for the business at the first interview. A Yes, sir.
Q Did you make any statements about the amount of your merchandise? A I did.
Q Did you tell them? A I told them that the merchandise would be about $120,000 or $125,000, as we were taking stock and the figures were not ready.
Q What did you say about fixtures? A I told them I would sell them for $30,000 as that was what we carried them on the books.
Q Was there any objection at that time on their part about the figures you named? A On the fixtures?
Q Yes. A It was. They asked me if I didn't think $30,000 was too much. I told them the fixtures was on our books at figures $30,000, and in the previous year or year and a half

we had installed twelve registers for $1140. I also told them that I had installed in the office a couple of adding machines at a cost of about $800. I also told them at the time that since we put these fixtures on the books we had an addressograph machine which made its own plates and 20,000 plates. I also told them that about six months prior to their visit we installed two show cases for over $1000. I told them I considered the fixtures was a very reasonable price.

Q When did you next see them? How long, roughly? A A few days later Mr. Apfelbaum called me up and told me to meet them at the store.

Q Who came? A Mr. Rosenberg, Mr. Weintraub, Mr. Apfelbaum and his son.

Q At that time was there any inspection of the store and merchandise? A As soon as they entered the store we started to go through the merchandise.

By the Court.

Q You said you met at the store? A Yes. We went into the store and started to look over the merchandise at once and we went through the entire first floor and then we proceeded to the second floor. Then we went down the basement. We had stock rooms where we had reserve stocks. That procedure took over three hours.

By Mr. Skinner.

Q At that time was there anything said about the books? A At that visit?

Q Yes. A It was not.

Q Was anything more said then about the character of the merchandise and the price that you were asking for it? A They complimented

me at that time upon the nature of the goods and the appearance of the goods; that they have not seen a store that long in existence should have such clean stock and such staple stock.

Q Did they ask any questions as you were going through the departments? A Yes. They asked me what certain things cost. What I could, I answered; where I wasn't the buyer we had a code mark and a book with certain numbers which showed the cost and the selling price.

Q Was any use made of the books or of the code at that time? I want to know what use you made of any information, or what information you gave them at that time. A I simply went behind the buyer's counter and showed them what it cost.

Q Were there any questions at all about the salaries you paid? A At the first meeting? Yes. Questions was asked about salaries. The buyer of the department in particular, he asked me what he was getting.

Q Was that about one buyer only? A They asked for other buyers, too.

Q Did you understand that they came from Brooklyn? A I did.

Q Did they want to know about the prices you got in that neighborhood? A Yes.

Q Were your goods marked? A Every price was marked.

Q Were they marked in code? A The selling price was in plain figures and the cost was in code.

Q Did they examine the markings of selling prices? A They did.

Q What was the extent of their examination? Was it large or small? A Very much.

Q At that time, or at any other time, that you talked with them did you give them any more information as to expenses; salaries paid to clerks, bookkeepers, and so forth. A At the first meeting on the balcony I told them my expenses reached twenty-six or twenty-seven per cent.

Q As they inspected the store at this time or any other times, if there were any other times, did you give them any more information about the salaries of buyers? A They didn't ask me any information about the expense at the time they examined the merchandise.

Q I ask you whether you gave them any information at all as to salaries other than the buyers? A They asked me what sales clerks were getting. I told them what they were getting —what they were charging at.

Q Was this green book gotten up for any special purpose? A It was.

Q When? A I believe a couple of years already, about 1920 or 1921. If I looked at the book I could tell you—1921.

Q What was the special purpose? A It was the purpose that it should give me—this book was laying at one desk in my office and it was to give me a summarizing of the entire business of bought, sold and expenses. The purpose of it was that my feet wasn't strong enough to run upstairs to look at the figures. The second purpose was—that was my main doing in the store—watching the selling and buying and expenses. If a buyer would buy any equivalent the same amount as he has sold, I immediately called him up and took the pages and compared the same months of buying and selling and that he was overbought. If he bought the equivalent

he overbought 33 1-3 per cent. and he must reduce the next month.

Q That gave you a bird's-eye view of the business. A Yes.

Q Did you say anything to Weintraub or Rosenberg as to what this book was made up from? A Yes, I told him that these figures was taken from—well, the head bookkeeper enters in this book from the bookkeeping department upstairs and they are at liberty to check up every figure. They should only ask me to give them the opportunity and I would give them the opportunity.

Q Was there any other examination by them of the stock than this one that you have described? A It was.

Q When? A That was, I believe the 18th or 19th of January.

Q Did they say anything at all; express any opinion about it. A That was actually the last time when they were at the store at night to examine the goods. At that time I had had already the figures of my inventory and I told them the stock was a little over $120,000.

Q I asked you whether they expressed themselves at all about the stock or the price? A They were satisfied with the stock.

Q Were they satisfied with the price? A Yes.

Q Both as to stock and fixtures? A The first argument we had was about the fixtures. They offered me $25,000 and I told them, "Please don't try to bicker with me. It will not do any good. I have set the price as low as possible." That is the time I got up in the air and pulled my shoe off and pulled my stocking off and I said, "If this condition would not be in my foot I would not sell the store."

Q How much time did they spend in examination of the stock in that case? A A couple of hours.

Q At any time did they go to the books or the bookkeeper's office? A On two occasions.

Q Which was the first? A The first one Mr. Weintraub came up himself prior to this meeting at the store.

Q Prior to the last meeting? A Prior to the second meeting at the store. He came up noon time and sat down and started to ask more questions and started to bicker into the books some more. I went upstairs, and the girls was out for lunch. I took down three books, the ledger, the journal and another book, and I showed him he can look at the figures and I told him if he wants more he can look downstairs.

Q Another book was introduced by Mr. Klausner, called the "black book" containing the sales and expenses, and I forget what else. Was that shown to them? A That I don't remember. That was in the possession upstairs. I had no possession of that book.

Q I know. But at this time you went up there you can't say that that book was shown? A I cannot recollect.

Q Was there any time when they went upstairs to look at the books when you were not there with them? A Before possession of the store?

Q Yes. A No.

Q When you told them they could check up with the figures you had given them, did you see any attempt to check up? A At that time, no.

Q At any time? A The second meeting, when he was alone in the office, we looked in the books and I presume, he was checking.

Q What was the third book? A I don't recollect the third book. I just took them right from the girl's desk.

Q You can't say, then, whether the third book was the black book that was produced here, or not? A I cannot say for sure.

Q Then the agreement was signed in Judge Clancy's office, wasn't it? A In Judge Clancy's office.

Q That provided for turning over the business to them as of January 1st? A Yes, sir.

Q That was executed on January 21? A Yes, sir.

Q And the money was actually paid on January 25? A Yes, sir.

Q And during the time between January 1st and January 25th, who ran the business? A I did.

Q And you accounted to them for the receipts and the expenses? A I did.

Q In what manner? A The same manner as we have been running the store before.

Q How did you account to them? Did you make any statements to them? A Puder & Puder made the statement out.

Q When was that given to them? A After they took possession of the store.

Q How long after? A I don't recollect exactly the date; I believe it was around the 1st of February.

Q Did that contain a statement of expenses? A Of course.

Q How did the expenses of the store for that month, January, 1924, compare with the expenses of December, 1923?

Mr. Lane: I object unless the statement is produced. He had testified about a written document shown not to be in existence.

Q What became of that statement? A I left it in the office on my desk.

Q When? A At the time it was presented to me.

Q When you came away, where was it? A When I left the store I left it there.

Mr. Skinner: Having accounted for its not being in our possession, I call for it.

The Court: Have you given notice?

Mr. Skinner: Yes.

Mr. Lane: We never had it.

Witness: You have a duplicate?

Mr. Lane: I am talking about the original, now.

Mr. Skinner: The statement made by Puder & Puder.

The Court: The plaintiff does not produce and says they never had it, so you may examine him as to the contents of the original.

By Mr. Skinner.

Q How did the expenses for the month of January, 1924, as shown by that statement, compare with the previous months? A The same.

Q Did you make any changes in the number of people employed? A I did.

Q Did you make any changes in the salaries you paid any of them? A I did not.

Q Did this statement show the salaries and all the expenses? A Yes, sir.

Q There was a meeting that Mr. Apfelbaum told about. I think he said it was in the office where the terms were discussed of the payment other than cash. Were fixtures discussed at that

time, and do you recall that meeting? A Yes, sir.

Q Where was it? A At Mr. Apfelbaum's office.

Q They wanted to give $1500 a month and you wanted $2000. A Correct.

Q At that meeting was any statement made by Mr. Apfelbaum or you as to the amount of profits you had made in previous years? A The statement was made by Mr. Apfelbaum, but not about the profit of that year.

Q What was the statement? A Mr. Apfelbaum made a statement that the general department store profits are between six, seven and eight per cent. He said at the present year I have done $350,000 business. He said, "You have stated that you are going to put on some new departments and the profits will increase." And he figured they would make six or seven or eight per cent.

Q Was anything said at that time about your health? A It was.

Q What was it? A Mr. Apfelbaum also pointed out that this business was run down for the past few years, just because Mr. Rothstein is run down. He said, "But you gentlemen are young and in good health." He thought they would do better than I did.

Q Was anything said about the amount of profits? I don't mean the rate of profits but the amount of profits in thousands of dollars, that you had made before that in any year? A No, sir.

Q Was anything said about the amount of profits that they might make? A Mr. Apfelbaum made that statement and after discussion he said that would leave at least $24,000 or $28,000 a year and they ought to be able to pay

those notes. I pointed out to them not to depend on the first year, to pay those notes the first.

Q Tell us exactly what was said? A The first year they would take over the store they might be disappointed in their expectations of doing the same amount of business they were anticipating and I told them they would have to go to the bank and borrow $10,000 or $15,000 or $25,000 and I told them the account of Rothstein's was very valuable to the Springfield Avenue Trust Company and I told them they would surely accommodate them.

Q The matter closed on the 25th of January? A Yes, sir.

Q And you made your settlement with them on February 1st that is, your accounting to them for the business for the month of January? A Yes, sir.

Q And after the deal closed in January, 1925, were they in the store? A Yes, sir.

Q Much of the time or only a little? A All the time.

Q What did they do? What did Weintraub do and what did Rosenberg do? A In the 26th of January, that was the day after they took over the store, the time they took over the store was four or five o'clock in the afternoon.

Q That was the 26th? A The 25th. I gave them the keys the next morning, when I was in my office about five minutes, I called up Mr. Weintraub and Mr. Rosenberg. Not to have to jump down all the time, I had a window on the balcony and I called to Mr. Rosenberg and Mr. Weintraub and I told them, "I am going to give you a little advice. You can accept or reject." I told them, "I think Mr. Weintraub would be a man for the office work and general manager.

He could hire and fire the help and Rosenberg would be a very good man on the floor watching the trade is properly served." When I told them that they seemed to accept my advice and Mr. Weintraub went immediately upstairs and he was there as long as I was in the store for three weeks after. He paid more attention to the office and the bookkeeping department than I ever did in the whole term of my business.

Q And during that time, January 25th to February 1st, with Rosenberg on the floor and Weintraub in the office and on the books, was any complaint made to you? A Until when?

Q Between January 25th and February 1st? A Not until the 31st of January.

Q What was it then? A On the 31st of January, about five o'clock in the afternoon, Mr. Weintraub or Mr. Rosenberg came up to the office and Mr. Weintraub sat down and said, "We are satisfied to take stock at the price we have set in our agreement, provided you will give us a discount."

Q Without any details, did you give it to them? A I didn't at first refuse them.

Q Did you agree to allow them any discount? A I did at one time. They told me about the discounts I was puzzled. It was the first mention about discount so, I said, "I don't know if you are entitled to it. They said, "Didn't you get discounts when you paid?" I said, "I did." They said, "Didn't you get three per cent. when you paid cash?" I said, "Yes." They said, "These notes carry interest. Aren't we entitled to discount?" I said, "I will call up my brother-in-law in Paterson." I asked him what happened when he bought the Quackenbush Company. He said he bought the stock dollar for dollar and he didn't receive any discount.

By the Court.

Q What did you tell them then? A That I would allow them $1500. The last note which is due $1500 to tear it up and compromise about it.

By Mr. Lane.

Q We have had some discussion about your statement that statement is contained in a book that was produced by Judge Skinner, a book of ours, commencing January 21, 1924, which was not marked in evidence and there is the statement right here.

Mr. Skinner: Probably that is so. Probably Vice-Chancellor Lane has satisfied himself that it is—

The Court: What statement?

Mr. Lane: The statement Mr. Rothstein refers to as having been from January 1 to January 25th.

By the Court.

Q In what book is that?

Mr. Lane: A book of ours which has been produced.

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

By Mr. Skinner.

Q Where did you get that book from? A Judge Clancy's office.

Q That is where you got them from last. Where have they been before they were in Judge Clancy's office? A When I left the store I didn't take a single book or statement or paper of any

kind with me. When I was in the South I wrote to Puder & Puder that after the books had served the new company their purpose he should take them to his office as I would be called upon by the Revenue Department; I would have to produce them; I called up Puder & Puder on the 2nd of April and they didn't have the books yet.

Q Did you get them? A On the 1st of June.

Q From whom? A Mr. Mortenson brought them down to the car.

Q Where did you have them at that time? A I hired an office in Clancy's office apartment and I bought some fixtures there and I had a safe cabinet and I put them in the safe cabinet and I was there about six months, and I got sick and had to give up the office and I went South.

Q What became of the books? A They remained in the safe cabinet, but I sold all the fixtures a year before to Judge Clancy.

Q They stayed there? A Yes, sir.

Mr. Lane: May I have identified the books referred to?

Mr. Skinner: I haven't referred to them.

Mr. Skinner: May we just return to this? There may be a confusion. We might find out a little more definitely whether this was a book produced among those as having been produced from his possession or produced by us in answer to their call, or obtained by us.

The Court: I don't know whether the record will show.

Mr. Skinner: I doubt very much whether the record justifies the statement that this book was produced.

The Court: That books runs to 1926 and I imagine it was produced by Mr. Klausner.

Mr. Lane: I want to know what the books are that he now says he had control of.

By the Court.

Q What we want to know is whether you know what the books were that you let remain in Mr. Clancy's office. Could you name them? A No, sir.

Mr. Lane: At least, there were some.

Mr. Skinner: Yes; and at least this book kept down to 1926 was not in Mr. Rothstein's possession.

Mr. Lane: That particular book must have come from Mr. Klausner.

By Mr. Skinner.

Q You were telling about the discount—the word you got from your brother-in-law, and you told them you would throw off the last note of $1,500, is that right? A Yes, sir.

Q And then after that? A Mr. Weintraub said, "Oh, no. I want $3,500, no less." And he entered into an argument with me that he was entitled to it and was going to get it.

Q This was after the deal had closed? A Yes, sir.

Q They were in possession? A Yes, sir.

Q What next happened? A Just at that argument the bell rang at the closing of the store—I said, "Mr. Weintraub—

Q What did you do next? Did you consult counsel? A I happened to meet counsel the same evening.

Q Did you meet Weintraub and Rosenberg the next day? A Yes sir; I told them it is all off, and I said, "My counsel said you are not entitled to it," and I said I was going to take stock.

Q What did they say as to the taking of the stock? A They left me there when I told them and I waited two or three hours and I went downstairs and found them on the floor. I said to Weintraub if he is ready to take stock. He said, "We have got time." Mr. Rosenberg remained. Mr. Weintraub walked off. I said to Mr. Rosenberg, "Isn't Mr. Weintraub satisfied? Aren't you satisfied?" Mr. Rosenberg said, "I am satisfied, but Mr. Weintraub is not." I said, "You looked good enough to me, so I will pay out Mr. Weintraub if you want me to." I saw Mr. Rosenberg taking care of the floor and I felt it was the future man to take care of the store, and I waived it. About five o'clock they came up to the office and patted me on the back and said, "Let's shake hands. We are perfectly satisfied. Let's be friends. You are at liberty to leave now and go home." I said, "I didn't make sailing reservations. I will wait two or three weeks until I break you in." I came in every day. We had open Wednesday and Saturday evenings, so I took those nights off.

Q Until when? A The Saturday before the 22nd of February.

Q During that time who ran the business? A They ran the business.

Q And during that time did you hear any complaint from Weintraub that he had been cheated? A No, sir.

Q Did you hear any complaint from him that you had made any false representations about

the volume of business or the amount of profit or the percentage of profit? A No, sir.

Q What was the first you heard any complaint at all that you had deceived them? A When I was presented with the complaint.

Q With the complaint in this suit? A In this suit.

Q And was there, before you left, a dinner tendered you? A It was.

Q By whom? A By the employees.

Q How did it come to you? Who made the tender? A Mr. Kapner told me if I shall take my wife and come down to dinner. The employees wants to give me a sendoff.

Q Did you go? A I did.

Q Was your wife with you? A Yes, sir.

Q Was a nice time had by all? A I think we had a pleasant time.

Q Were Weintraub and Rosenberg there? A Mr. Weintraub and his wife and Mr. Rosenberg and his wife.

Q Were there any toasts drunk to your health? A Mr. Kapner was toastmaster and he called on Mr. Rosenberg and he talked pretty nicely of me about my future and health.

Q Did he talk pretty well? A I don't know whether he talked pretty well. Mr. Weintraub was called, too, and he talked very congenial remarks. And Mr. Kapner presented me with a silk robe and in return I thanked them all and I also asked the employees—

Q Did Rosenberg or Weintraub, in the course of their remarks, express any satisfaction or dissatisfaction with the business they had taken over? A Fullest satisfaction; they expressed satisfaction only.

Q After that did you give a check of any kind, or on any funds for the payment of the expenses of the dinner? A I did.

Q Why was that? Were the funds in your possession? A The funds were in my possession.

Q This employees' aid association had dues, didn't it? A They had small dues. The funds did not come ten per cent. from the dues.

Q Where did they come from? A I started them with a couple of hundred dollars myself and every year we made a ball at Krueger's Auditorium and we sold a lot of tickets to wholesalers. Part was used and part was sick benefit. The amount was so small that when an employee got sick I paid it out of the regular payroll and that is why the funds of the Mutual were prosperous and every year the directors of the Mutual Aid went out to dinner. Of course, I and my wife was included. We were honorary members. Every May 1st we had a picnic.

Q Where did the picnic come from? A Also from the Mutual Aid.

Q The Mutual Aid funds were kept in your bank or bank account? A In my personal bank account; but an account was held by the head bookkeeper. Miss Feldman was the last, and prior to her the last bookkeeper was always the secretary.

Q Did you know anything about this party or dinner? A I didn't know until an invitation was presented to me to come.

Q When you paid for the expenses did you do it by check or how? A By check.

Q Was that on anybody's call? A On Mr. Gilson's call.

Q What did he do? A He signed a voucher and presented me a voucher I should pay him money. That was the regulation.

Q And that was the way you had done before? A Yes, sir.

Q When Mr. Rosenblum had an interest in this business at one time—when he came into it—how much was the business valued at? The stock and the fixtures? A $120,000 for the stock and I figure $20,000 for the fixtures.

Q I call your attention to one or two things that were testified to by Mr. Weintraub here. What have you to say when it is specifically called to your attention? Weintraub says, "I said to Mr. Rothstein, 'Mr. Rothstein, when you sold us this proposition you told me and showed me a book of expenses for the year 1923 ($76,000 for the year 1923). I went up to the office and asked Miss Feldman for a book and she showed me a book showing $98,000'." Did you at any time say to Mr. Weintraub or Mr. Rosenberg that your expenses for the year 1923 were $76,000? A No, sir.

Q Did you at any time show them a book in which there were expenses of $76,000 shown? A No, sir.

Q Weintraub says that when he told you that he had been up at the office and that Feldman showed him books showing $98,000 expenses, you said, "Where did you see that book?" Did you say anything like that? A No, sir.

Q He says that he replied, "Miss Feldman showed it to me" and then you said, "I thought all the books were removed by Puder & Puder?" Did you say that? A No, sir.

Q Then he says that he said to you, "She said (meaning Miss Feldman) this book was

kept for her personal use and she kept that book." Did Weintraub tell you that? A No, sir.

Q And then he added, "There is something wrong here" and you replied, "Listen, Weintraub; don't mind anything about the books. That is for government purposes. You are too young to understand these things. Never mind what you saw." And you added, "Get down to business and you will see you can make more money than I could." Did you say anything like that? A That discussion never came in.

Q Then he says you wrote $350,000 on a piece of paper and $28,000 profits and you said, "Get down to business; forget about the books and get down to business." Did that conversation take place? A No, sir.

Q Then he said that he said, "It doesn't sound any too good for me. I don't know whether it is so or not." And he added, "Mr. Rothstein, I really believe you cheated Mr. Rosenberg and myself." Did he say that to you then? A No, sir.

Q Or at any other time? A No, sir.

Q And he says that he then said to you, "We will run this business practically on the same line and then after a period of five months with the comparison of your expenses and ours we will be in a pretty good position to see whether your expenses were $76,000 as you represented to me or $98,000 as they actually were." Did you say that or did he say anything like that? A No, sir.

Q And that you didn't say anything except "all right" and went away. Did that take place? A No, sir.

Q Then he said that some time in May, 1924, you came into the store and said to him, "Did

you receive any accounts here from my accountants, Puder & Puder,'' and he replied that he didn't. Did you go there and make that inquiry? A In April, right after I got from the South.

Q You did? A Yes.

Q And then he says that you replied, ''Well, you know very well you did, because they were mailed here by Puder & Puder.'' And he replied that he did not receive them. Did that take place? A Yes.

Q And then he says, ''By this time I know that you have cheated us.'' Did he say that? A No, sir.

Q Then he says, that a few days afterwards you came in, after that inquiry on your part, and asked if he had found the report and he said he didn't know anything about it. Did you make a further inquiry? A I only made one inquiry.

Q You said on that second occasion, ''I know you have it here and you don't want to give it up.'' Did you say that? A No, sir.

Q Then he says that in June, 1924, that you brought in a check made out to yourself for the rent—that Miss Feldman had made out for you —and that he said he would give you the rent in a few days. Then, that he came up to your house and had the rent in his pocket in cash a short time after that Friday and he said to you, ''I suppose you know why I am here.'' And you replied, ''I won't take it from you.'' Then you said, ''Come in. I want to talk to you. I have just about got you where I want you. Unless you come to my attorney's office and sign that you have nothing against me, I won't accept the rent from you.'' And you said: ''I am Mr. Rothstein from Newark and you

come from Brooklyn and I will positively break you.'' Then he said, ''Will you really have the heart to put us out after we gave you $75,000, would you have the heart to do that?'' Did that conversation take place? A The conversation took place but you don't want me to say yes on all the questions you have placed.

Q There was a conversation? A Yes.

Q Tell us the conversation. A It was on the 1st of June—

Q All I am concerned with in this conversation is whether you told him all the things I asked you about. Did you say to him that you wouldn't take the rent from him? A I did.

Q What did you mean? A Because it was in Clancy's hands already.

Q What do you mean, ''It was in Clancy's hands?'' A Clancy had made a demand for the rent. They refused to pay me the rent. And I went and told it to Mr. Clancy.

Q You put it in your attorney's hands? A Yes, sir.

By the Court.

Q You referred the payment of rent to your attorney? A Yes, sir.

By Mr. Skinner.

Q Did you say, ''I have just about got you where I want you?'' A No, sir.

Q Did you say, ''Unless you come to my attorney's office and sign that you have nothing against me I won't accept the rent from you.'' A I didn't say that in that term. I said, unless he apologized for the insult that he gave me—

Q Apologized for what? A When I went there for my rent and he refused to give me my

rent and when I made another demand he simply walked away from me and wouldn't talk to me and I thought it was an insult."

Q Did you say, "You are Mr. Weintraub from Brooklyn and I am Mr. Rothstein from Newark and I will positively break you?" A No.

Q Did he say "Will you have the heart to do that" and you said, "I would have the heart to do anything." Did you say that? A I don't think—I didn't.

Q Suppose you tell us just what did take place? A On the 3rd of June I went upstairs and asked Miss Feldman—

Q Just tell us what took place between you and Weintraub. A At the house?

Q Yes, sir. A He came up to my house and he came in and he said, "I suppose you know what I am here for." I said, "Maybe I do and maybe I don't." He said, "If you don't want a check I will give you cash." I said, "You better go and pay it to Clancy." And I wouldn't accept the rent because it was in my lawyer's hands.

Q Anything else? A That's all.

Q Then he said he suggested leaving it to arbitration and he said, "You select any business house you have been doing business with and I will select the house I have been doing business with and they to select a third business house" and you replied— A No, sir.

Q Did you say that? A No, sir.

Q Then he said, "You have cheated me and you want to take the heart out of me." Did you say that? A No, sir.

Q You said, "Weintraub, go and think it over; otherwise I will surely break you." Did you say that? A No, sir.

Cross examination by Mr. Lane.

Q At the time of this last conversation you knew that if you did dispossess them you would break them, didn't you? Yes or no. A I had no intention to break them or dispossess them.

Q I asked you whether you didn't know as a business man that if you put them out of that store when they had a twenty year lease on it which they obtained at the same time they bought the business it would break them. Answer yes or no. A No.

Q You didn't know it as a business man? A I didn't think at the time.

Q That rent was due on the 2nd of June, was it? A Yes.

Q And on the 4th of June you received a check for $1000, the rent, didn't you? A No, sir.

Q I show you this check and I show you the letter of your counsel dated June 5, returning the check to Rothstein's and ask you to read the letter and ask you if you did not turn it over to your counsel to return? A On the 5th—on the same day, he answered.

Q We will say the 5th. And you directed your counsel to return it and continue the dispossess proceedings, isn't that right?

Objected to as irrelvant.

Objection overruled.

Q Isn't that right? A I don't remember if I instructed him to proceed.

Q Read the letter. A Yes, sir.

Q And it took an injunction from the Court of Chancery to stop you, didn't it? Isn't that right? A Yes, sir.

Q But you didn't think it would break them because they were five days late in their rent of $1000? A My intent was not to break them.

Q Your intent was not to break them? A Yes, sir.

Q When you first went on the 2nd of June to get your rent you saw Miss Feldman first, didn't you? A Yes.

Q Miss Feldman drew the check, didn't she? A Yes, sir.

Q And then didn't you take that check and go to find Mr. Weintraub or Mr. Rosenberg? A No, sir.

Q Who did? A Miss Feldman.

Q She came back then and saw you? A Yes, sir.

Q And she told you what? A That Mr. Weintraub refused to sign the check.

Q And then you went looking for him? A Not right away.

Q But you did eventually? A Yes, sir, a couple of hours I waited.

Q Did you say that when you did find him he would not talk to you at all? A I took him by the hand and called him to the office and I asked, "What does that mean?" He said, "Can't you wait ten days?" I said, "I will wait any amount of time you want." I said, "Between the 1st and the 10th Rothstein's had plenty of money to pay rent because when you pay the bank on the 10th of the month has it." I said, "I am sure you can pay it or something else is behind it."

Q What did you think was behind it? A The stamps. I received a letter with the statement. Before that Rosenberg and I were on the best of terms. I didn't refer the letter to Weintraub. I said, "Rosenberg, what does that

mean?" He said, "Exactly what it means." I said, "What is it?" He says, "What it says." I was a little sore already and I walked out.

Q This took place on the 2nd of June? A At the end of April.

Q I want to know what took place the 2nd of June? A He said, "I will give you the check."

Q You said, "All right" you would wait ten days? A I said, "I would have waited if I thought that was his intention that he didn't really have the money."

Q You knew it was his intention, when on the 5th you got a check for $1,000? A That, I suppose, was after Mr. Clancy wrote him a letter.

Q Then there was considerable more conversation on the 2nd of June than you told us on your direct examination. You told us on your direct examination that you asked them to sign a check and that Weintraub walked away and that was an insult. A If you read the testimony, I haven't testified that way.

Q What was it you considered the insult? A That I had to wait two hours in the store and asked the girls in the aisle to watch for him that I would get him before he went to lunch and a girl said, "Here is Mr. Weintraub," and I saw him and I called him up into the office. I asked, "Why didn't you sign the check?" I said, "If you haven't the money I am willing to wait, but I know this store pays all the bills up to the cents." I went out to Clancy's office, being my office was there, and I told him what happened. He said, "If they don't pay the rent they are breaking the lease." I said, "I don't want to break the lease," and I didn't tell the judge at that time to do anything until I went to the

Springfield Avenue Trust Company. There I met Mr. Gnichtel, who is a friend of mine, and I told him the entire story how they started to bicker with the checks. He says, "Rothstein, I know you are right in your heart to those men and if they don't understand the business I would give them a little lesson." I called Judge Clancy immediately on the phone. I said, "I am coming down to sign the affidavit for a dispossess." But no intention was to dispossess in my heart.

Q And you kept on until the Court of Chancery stopped you? A I didn't.

Q Somebody did? A Yes.

Q When were you going to make your intent conform with your acts? A (No answer.)

(Question withdrawn.)

Q In this conversation you had with Mr. Weintraub or Mr. Rosenberg, I have forgotten which, in which you discussed this rent, don't you remember you asked them to sign a release? A I asked them only for an apology.

Q When you asked them for an apology? A Yes, I asked them to sign a release on the stamps. I recollect now.

Q You asked them to sign a release? A On that $469. They sent me a bill for stamps.

Q The word "release" was used, wasn't it? A No, to destroy the stamps.

Q And you refused to deal with the rent at all unless they agreed to sign a release on something entirely different. A With the rent I told them it is up to Clancy.

Q And they wouldn't sign a release, would they? A At that time, no.

Q I understand that during the course of these negotiations, preceding this contract, nothing was said as to your profits. A No, sir.

Q Not a thing? A No, sir.

Q Sure of that? A Positively.

Q No representation of any kind, or description, at any time preceding the making of the contract? A To what effect?

Q As to what you had made in that store? A In my term of business?

Q Yes. A Yes, sir.

Q During the year 1923? A The year 1923, I told Mr. Weintraub that I didn't make much money.

Q Then something was said? A Yes.

Q Which is it? Was something said or wasn't there? A Was it for the twenty years or for 1921 or for 1922 or what it is?

Q I am confining it to the year 1923. A I told them I didn't make much money.

Q You knew exactly how much you had made? A At the time? When?

Q Before this contract was actually signed, on the 21st of January. A I didn't have the figures.

Q You had the books which would show? A Not the profits.

Q By figuring your disbursements and the receipts. A Will this book be able to tell me if goods had been reduced or goods stolen in the store by shoplifters? What profit is derived?

Q I am talking not about unfortuitous circumstances. What I want to know is, the profit would be told by your book, wouldn't it? A Yes.

Q And nothing was said as to the percentage of profit? A No, sir.

Q Although they were figuring on an eight per cent. profit themselves, weren't they? A I don't know what they were figuring on.

Q Seven or eight, at any rate. You said they were present when you were figuring with Mr. Apfelbaum, and seven or eight per cent. was mentioned. You sat there when that figure was being given? A I sat there.

Q And you heard it? A Yes.

Q And during all that figuring not one word was said as to the percentage of profits that had been actually made in that store during 1923, is that right? A Yes, sir.

Q Do you think that it was reasonable that you and all these people should be figuring on a prospective profit without any inquiry as to the actual profits? A I thought it was reasonable.

Q Although the books were right before you which would have given you the exact profit you had made during 1923? A Not the exact profits.

Q The approximate profits? A When it comes to the end of the year, no merchant knows until he takes stock.

Q During the course of that talk, and when Mr. Weintraub and Mr. Rosenberg went out and saw these books—saw the green book and saw all of the bookkeeping system—did Rosenberg or Weintraub come down and say to Murray Apfelbaum, "Now, that's very pretty. You are prognosticating a profit of eight per cent. next year and the books show only that the profit has been less than three per cent." Did they suggest that as some reason that you come down in your price? A They did not.

Q Nothing remotely sounding like that was said, is that right? A Yes, sir.

Q They didn't try to use the fact that you told them you had to give it up? A Yes, sir.

Q You were sick and you couldn't keep it up? A I would have to keep it up—

Q I know, it was running down because you couldn't take care of it? A It was running down in the profit only. Business goes down if it loses the trade.

Q Even if you lose money? A Your trade is valuable. Even if you sell at a loss; if you have a customer coming in so you can make a profit.

Q If the tide changes some time in the future; if you keep on at that rate, how long can you keep going? A I never had a loss in that store in my experience of twenty years.

Q At any rate, you told them that the only reason you were disposing of the business was that you were sick and couldn't keep it up? A Yes, sir.

Q And the profit was less in 1923 because you were sick? A I told them the last three years.

Q And they never tried to use an argument for getting a reasonable price that the business was in that situation? They never used that argument? A They did not.

Q You mean that? A Absolutely.

Q Although there were at least four or five discussions at which the price was argued about? A Yes, sir.

Q Particularly the price of the fixtures? A Yes, sir, the fixtures. The merchandise was not discussed until the date of the agreement.

Q Do you know how much money was in that mutual aid fund at the time this banquet was given to you? A I did, approximately.

Q It was $300 or $400, wasn't it? A No, almost $1,000.

Q Who kept that fund? A I kept that fund.

Q Where is it now? A It has been disposed of.

Q Who got it? A Do you want me to produce who got it?

Q Yes. A I don't know.

Q Is it kept up yet? A It was in the old mutual aid; I don't know what they are doing in the store now.

Q Do you know what the cost of this banquet was for which you signed the check? A I know the next day I signed some vouchers.

Q It made quite a hole in the fund, didn't it? A Yes.

Q And everything was lovely and no dissatisfaction expressed by any of the employees over the use of that fund? A I didn't know of any dissatisfaction only when I was here in court and heard the testimony.

Q That is the first you heard of it? A Yes, sir.

Q You said something about paying sick expenses, and so forth, out of your own pocket for help, so it would not be a drain on the fund. Did you ever pay any sick expenses you were not obliged to pay under the Workmen's Compensation Act? A We have never had a case which came under the Workmen's Compensation.

Q Did you ever have a case in which you paid out of your own pockets? A Out of the store funds. If an employee stayed away for a week I would pay him from the store; and two weeks, too. The highest mutual aid paid was $12 a week. It wasn't reasonable for an employee getting $60 a week to get $12 a week.

Q You never deducted for absence? A Unless I found it was overdone.

Q Let me ask you once again where the ledger is. A I couldn't tell you.

Q You did have a ledger, didn't you? A I suppose—I certainly did.

Q You know you had a ledger? A Yes.

Q And that ledger contained a profit and loss account? A I presume so.

Q And that ledger ran for the years 1919, 1920, 1921, 1922 and 1923, didn't it? A Yes.

Q And if we had that ledger here, by turning to the profit and loss account of those various years, we might be able to ascertain with some degree of certainty as to whether your store had made a profit for those years and what that profit was, couldn't we? A You could, but not by my fault—

Q We could, couldn't we? A I suppose so; certainly if you had the figures.

Q If we had that ledger here we might be able to ascertain whether there is not an account in that ledger of certain of the expenses of your business for the year 1923 which aggregated $76,000? A I suppose you would.

Q Do you remember that there was such an account? A No, sir.

Q You are sure of that? A Absolutely.

Q That ledger is the only book we haven't here, isn't it?

Mr. Skinner: We don't know that.

Q Isn't it?

Mr. Skinner: It assumes that he is the only one that can produce books—some of these books.

Q I am asking you if that isn't the only book of your bookkeeping system we haven't here? A I don't know.

Q Do you remember on Wednesday afternoon, I think it was, taking Miss Foster and go-

ing up to your house or some other place for the purpose of examining some books to find out whether any of the books up there were books connected with this business? Do you remember my being told that that was what you were going to do? A What?

Q Did Miss Foster go up to look at the books? A I don't know.

Q Have you some books anywhere else than in this court room that may have something to do with this case? A I have not.

Q Do you mean to say that you did not have your counsel inform you on Wednesday afternoon, or Tuesday, I don't know which, that they were going to have Miss Foster examine some books to see whether they had anything to do with this case? A I have no information about it.

Q These books which you have, in fact, produced here, were books which you instructed Puder & Puder to take to the other offices— A I sent inspections when I was down South; that was any time in March.

Q You are sure of that? A Yes.

Q And can you tell me when it was that Puder & Puder delivered the books to you? A On the 1st of June, by Mr. Mortonson.

Q Did you examine the books at that time? A I did not; they were in a bundle wrapped up with the name on it.

Q When did you examine them? A I haven't examined them at all.

Q When was the bundle opened? A I believe it was very late in the fall; that very fall, or the next spring, by a revenue inspector who communicated with me he would meet me in the office.

Q Did he go over them then? A Yes.

Q Did he say there was no ledger? A He said there was books missing and I told him what the condition was; how I brought the books to the office.

Q You knew, when you talked to the revenue inspector, that the ledger was missing? A No, he said some books was.

Q Did he say the control books was missing, the most important book of the system was missing? A He didn't say that to me.

Q Did he examine the books? A Yes.

Q How long was he examining the books? A I left him there in the morning. I asked if I could assist him and he said he could get along himself.

Q You didn't know at that time that the ledger was one of the missing books? A He told me when I returned.

Q That the ledger was missing? A No, he had difficulties with the examination.

Q I want to know whether this government inspector did not attract your attention to the fact that the most important book in the system, the ledger, was missing? A He didn't tell me the ledger was missing, or any important book directly.

Q Or indirectly? A He told me some books were missing and that is why it took him longer to check up.

Q Did he ask you where he thought you might locate the ledger? A Yes.

Q Do you mean that? A Yes, the books missing.

Q Did you tell him to go to Puder & Puder? A Yes.

Q Did he ever go to Puder & Puder? A He did not.

Q Did he ever come back to you? A After he was through he never came back.

Q After you told him to go to Puder & Puder and find the missing books? A At the time I told him to go to Puder & Puder he told me he didn't think it would be necessary.

Q When did you get this book Exhibit D. 1? A Mr. Klausner had it here on Wednesday.

Q On Wednesday? A Yes.

Q Did you get it from Mr. Klausner the same time you got the black book from Mr. Klausner, or was the black book in your control? A I got this book from my boy and he told me Klausner gave him that "Beat Yesterday" book.

Q Is Exhibit P. 13 what we have been calling the "black book"?

Objected to.

(Question withdrawn.)

Mr. Skinner: The Vice-Chancellor knows as well as anybody here that that is what we have been calling the "black book".

The Court: I think the question is improper.

Q Is that the book that has been referred to as the "black book"? A Yes, sir.

Mr. Lane: That is Ex. P. 13.

Q When was it you got physical control of this book?

Mr. Skinner: Pardon me. I think it ought to be made clear as to whether he

means when he got physical control of it physically, or in connection with this suit, or for production here.

Q In connection with this suit? A Physically, or just seeing it?

Q In connection with this suit. Just seeing it. A The time I was sitting there, Miss Foster pointed out "There is the black book". I thought it was blacker than this. I was really worried about a black book.

Q The only other book that is of this type, that was produced by Mr. Klausner, was this book, which was referred to this morning and offered in evidence as Exhibit P. 14, isn't that right?

Mr. Skinner: What was that?

(Question withdrawn.)

Q Are you able to pick out of these books those which you had and got through Puder & Puder? A To say that this is exactly the books I got from Puder & Puder?

Q Exactly. A I cannot pick them out.

Q How long had those fixtures been in your store? A All of the fixtures?

Q No. I am not talking about the cash registers; I am talking about the store fixtures. A Fixtures was put into the store at the time I built the store, but fixtures almost every year or two years are changed around or taken away. Fixtures do not remain in a progressive store for several years.

Q So you can't tell how long they have been in the store? A They had been installed at the time I opened the store in 1913.

Q Were they new then? A Some new and some second-hand.

Q Was the bulk of them bought second-hand? A Yes, sir.

Q In 1913? A Yes, sir.

Mr. Skinner: I don't know. Is it now suggested that these plaintiffs were swindled on those fixtures?

Mr. Lane: On your direct you got your clients to testify that the figure at which he sold the fixtures—

The Court: I will allow the question.

Q The bulk of them were second-hand and the bulk of them had been in the store at the time of the building of the store? A Yes, sir.

Q You did tell these gentlemen your expenses were about twenty-seven per cent.? A Yes, sir.

Q Didn't they say right away, "Twenty-seven per cent. of $353,000 is $94,000 or $95,000 and you were making about 2.75 per cent. profit"? A No, sir.

Q They didn't figure that out in their minds? A No, sir.

Q And Apfelbaum, who is a real estate man, did not figure out or say anything about it that they made that mental calculation when you said twenty-seven per cent? A If they did, I didn't know it.

Mr. Skinner: Does the Vice-Chancellor mean that any one could figure twenty-seven per cent. without figuring the cost of the goods?

Mr. Lane: Of course not. The cost of the goods was before them.

Q Do you know any way of figuring net profit without knowing your selling expense and without knowing the cost of your goods? A Yes.

Q Just how? A When you take stock and figure up your figures you can tell the profits.

Q If you know your gross business and selling expense and cost of goods you can figure your profits, can't you? A Approximately.

Q You had the cost of the goods right before you? A Yes, sir.

Q And the gross business before you? A Yes, sir.

Q And you had your expense for selling expense and operating expense? A Yes, sir.

Q You had everything before you to figure the approximate profits. A Yes, sir.

Q And yet nobody did it? A I didn't.

Q And nobody else in your presence? A No, sir.

Q Although they were figuring eight per cent. on what they were going to get? A They were figuring eight per cent. on the average store of what they should have.

Q Did anybody suggest how much they would have to reduce the operating expenses or reduce the cost of goods in order to raise the profit to eight per cent? A I don't know about raising the profit to eight per cent., but they were talking about reducing the expenses.

Q As I understood your direct examination, one of the books, or two or the books, that were shown to these men, were the ledger and the journal. A It was the ledger and the other books, I don't know.

Q I thought you said, "Ledger and journal." A Ledger and journal and the third one I didn't know.

Q I am very much interested in that third book. Haven't you any idea what that third book was? A The ledger I would recognize only by its thickness and the journal was a long book with on the outside saying it is a journal; and the other book had nothing to indicate what book it was. I have spent very little time in my bookkeeping office; very little time in fact, none.

Q The net result, is that you can't pick out of these books the third book and you haven't any thought as to what book it might have been? A No, except the ledger I could pick out because she would pick this heavy book up every time I wanted to know something.

Q This third book could not have been a book that could have had your expenses as $76,000, could it? A I don't know what way the office would have it.

Q It could not be such a book, could it? A I don't think so.

Q You had talked to Mr. Rosenberg back in 1923, hadn't you? A Rosenberg?

Q Yes. A 1923.

Q Yes. With Mr. Woolwick? A In October? I don't think even Apfelbaum had any advice from me.

Q Do you know Mr. Woolwick, the witness who was on the stand here? A Yes, I met him once.

Q When did you meet him? A In the early part of December.

Q You had some talk with him about the sale of this business? A That was the first meeting with Mr. Rosenberg and him together.

Q Don't you remember that there had been some talk as to what you had been drawing yourself? A Yes.

Q Do you remember that the figure you gave them was $7500? A Yes.

Q They went into that item of expense. A Yes, sir.

Q Did they ask you if that was included in your expenses? A Yes. sir.

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

Q Did they tell you what they wanted that information for? A No.

Q Is there any possible reason they could want that information except to figure profit? Would you imagine any? A No.

Mr. Skinner: I object to that. The witness does not have to imagine.

Objection sustained.

Q As I understand it, neither Mr. Weintraub nor Mr. Rosenberg at any time came to you and said anything about their discovering this green book, is that right? A Yes, sir.

Q And nothing was said at any talk at all as to what Miss Feldman had told Weintraub when he discovered the green book? A No, sir.

Q No such conversation as that took place? A No, sir.

Q Not a word? A Not a word.

Q When did you first hear that story? A About the green book?

Q Yes. A Last Monday, a week ago, I went down to see Miss Feldman. Somebody told me she had signed an affidavit or something. I asked her what it was. She said Mr. Weintraub showed her a book, with a page cut out. He asked who cut it out. She said Mr. Rothstein had handled the books. He asked, "Did you cut it out?"

Q She told you practically the same story she told here on the stand? A Yes.

Q Yet Weintraub never said a word to you about that before? A No, sir.

Q How did you know Miss Feldman was going to say anything like that? A I didn't know until she told me.

Q Where did you get the information that she had signed an affidavit? A Mr. Kapner told me.

Q Did you see Mr. Kapner? A Yes.

Q Did you see Mr. Klausner? A Yes.

Q As a matter of fact, you saw every one of my witnesses? A No, sir.

The Court: Do you mean interviewed?

Q Tell me one of my witnesses you did not interview? A There was many on the stand I didn't know.

Mr. Skinner: You mean employees?

Witness: Employees—all the witnesses you had.

Q You had seen them all before they went on the stand? A Yes, nothing wrong about that, is there?

Q They did talk to you about the discount they wanted you to allow them a few days after the sale was put through. A About five days or six days.

Q Did they give you any reason? A Just the reason that I received it and I ought to give it back to them.

Q Everything was peaceful and harmonious? A Absolutely.

Q Even after you said you would see about it and would not give them anything, everything was lovely. A Only for about twenty-four hours the air was a little cloudy until they came over and apologized.

Q They did apologize? A Not exactly apologized, but asked that I forget all about it, and shake hands with them.

Re-direct examination by Mr. Skinner.

Q The books that you produced here we understand, I do, at least, were brought here from Judge Clancy's office? A Yes, sir.

Q Did you personally make an inspection of those books or have anything to do with determining what they were, or did you just arrange to have them brought here? A Just arranged to have them brought here.

Q Did you know before the case came on for trial that Mr. Klausner had been subpoenaed to bring in any books he had in his possession? A I did not.

Q Whatever was done about that was done by your counsel? A Yes, sir.

Q You have been asked whether you could tell what books you produced and you said no. Could you tell from examination what books were produced by Mr. Klausner in answer to our call? A I could not.

Q Could you tell how they got here on the table at all? A It was a surprise to me.

Q Perhaps your counsel knows about that? A Maybe he does.

Q And this stopping of the rent suit, you say you had consulted with someone and you thought it was just as well to teach them a lesson. You

didn't actually intend to put them out. A That's right.

Q At that time was it simply with you a question of whether or not you ever got your rent money or were there other things involved? A Other things involved.

Q Had Mr. Rosenberg or Mr. Weintraub taken any position about whether or not you would get your money? A The rent?

Q Yes. A Yes, sir, he said I would get my money.

Q You didn't get it, did you? A I will get it in the future or at that time.

Objected to.

Objection sustained.

Mr. Skinner: I only meant before the suit was begun.

The Court: It has been covered already.

Q Do you know how long a time intervened before the commencement of your suit for rent and the injunction out of the Court of Chancery? Was it a long time or a short time? A Less than a week; a couple of days.

Mr. Skinner: May I ask for a little further cross examination of Mr. Kossove on the subject of operating expenses of department stores?

The Court: I don't think we ought to go into that now.

DEFENDANT RESTS.

Mr. Lane: I want to offer in evidence for the purpose of qualifying the record with respect to dates, the summons in the District Court showing the issuance of the summons in the dispossess proceedings, the 12th of June, 1924. The date of the filing of the bill of complaint in the Court of Chancery is June 17, 1924.

Mr. Skinner: Does that give more than the filing of the bill?

Mr. Lane: Yes; an order to show cause on the same day; and then it was resisted and affidavits were filed on the 8th day of July. After argument, the order was granted for an injunction.

Mr. Skinner: Without preliminary restraint?

Mr. Lane: Yes, made permanent on the 8th day of July.

The Court: Then the plaintiff also rests?

Mr. Lane: Yes, sir.

Mr. Skinner: May we have, in comparison with those dates, the date of the commencement of this suit?

The Court: November 10, 1924, summons was issued in this suit.

Mr. Skinner: If your Honor please, there is just one thing about these books. Some of these books were produced as probably your Honor saw, by counsel. I wanted to ask your Honor's leave to open the case for the sake of putting on the stand Judge Clancy to tell the jury how this book got on this desk, or, I will make this statement to Vice-Chancellor Lane.

Mr. Lane. I have no objection if they make also my statement as to what Mr. Klausner said but I asked him for it.

Mr. Skinner: I have the Vice-Chancellor's consent to make the statement that the black

book came to the front here by reason of Judge Clancy going down to the rear of the room and asking Mr. Klausner for the books he had, and bringing them down here and this was handed forth and identified by Miss Feldman as being the black book.

The Court: I suppose the counter claim is withdrawn.

Mr. Skinner: Yes, sir.

Mr. Skinner: I want to put upon the record a motion for a direction of a verdict on the ground that, first of all, these plaintiffs have failed to show a sufficient right to the action that is brought in their names and that of the corporation. There are three persons named as plaintiffs: Weintraub, Rosenberg, and the corporation. I respectfully submit that the inquiry as to the effect of an assignment is not the same in this situation as it would be if the assignment were being relied upon as the basis for the right to sue but that the inquiry is the proper one as to who is there, after all, that is, rightfully or otherwise, interested in this suit. There can't be anybody considered except anybody who is a party in this suit. The evidence has shown that there is no one that is interested in this suit. The corporation that is suing has not the slightest interest in the suit as expressed by Mr. Klausner, one of the owners of the corporation.

That doesn't stand by itself. There is a further proof in this case, admitted to be made by the plaintiffs themselves to show that the corporation has assigned this claim. Can plaintiffs come in and show in their own case that the corporation has assigned it and add it to that suit? And then, there is the statement by one of the men to whom the corporation has been sold. The

two added together, it seems to me, is an ample basis for concluding that that corporation's name is being used without authority.

As to the other two, your Honor knows the situation; when your Honor announced tentatively that Weintraub and Rosenberg were not parties to that suit—

The Court: No. I raised the question as to who was interested.

Mr. Skinner: Rosenberg appears to have assigned direct to Weintraub; Weintraub seems to have been the individual that got the full amount of his money. There has been a lot testified to as to loss of hard-earned labor. I respectfully submit that the measure of damages is well settled by law that it does not include mental anguish or hard labor but is simply the difference between what they paid for it and what it was worth at the time. They bring nothing to show that it was worth any less than was paid for it at the time; or, rather, if they do show that, it means nothing. The only person left holding this suit is Weintraub, who paid $37,500 into it and got $37,500 for it. He might have left $7,000 behind to the corporation, but that is in no way connected with it.

You have two men, Rosenberg and Weintraub, and a corporation. Rosenberg and Weintraub made a bargain which contemplated that it shall go to a corporation. The bill of sale includes the good will. They agreed to buy and all they were entitled to get was the goods on the shelf, and fixtures. Then, if they got good will by the bill of sale, they got something thrown in. If you look upon it as a purchase of goods on the shelf and of fixtures, is there any proof that the goods

on the shelf, and the fixtures, were worth less than the price paid for them?

If you figure in the transmutation they put it through in bringing this corporate entity into being, instead of buying the goods on the shelf and the fixtures, Rosenberg and Weintraub got stock in the corporation. How much did Weintraub pay for the stock? $37,500. How much did he get for it? $37,500.

The Court: You ought to elect which parties are the proper plaintiffs.

Mr. Lane: My theory is that Weintraub and Rosenberg are the plaintiffs here. The corporation need not be here at all.

The Court: In other words, what they did was their own method.

Mr. Lane: Yes.

The Court: I agree with you.

Mr. Lane: Then if I have to elect, I will have the plaintiffs as individuals.

The Court: You may submit to a non-suit on the corporation. I think the suit should be by the individuals. Or do you elect to withdraw the corporation.

Mr. Lane: I withdraw the corporation.

The Court: Voluntary non-suit is granted as to the corporation.

Mr. Lane: I move that I be permitted to leave all the parties in and determine the names to be left upon motion for judgment.

The Court: Denied.

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

Exception noted as ground of appeal.

The Court: The record will show that plaintiffs move to be allowed to leave the corporation in the suit until the motion for an entry of judgment and that I will deny.

Mr. Lane: Exception.

The Court: Then the next motion is for a voluntary non-suit as to the corporation and that I will grant.

Mr. Skinner: And the record will show my motion is made for the direction of a verdict as to the individuals on the ground that there is no proof of loss as to Weintraub. If your Honor thinks judgment for the direction of a verdict is not a proper method, I move for the direction of a verdict for six cents damages as to Weintraub, and as to Rosenberg, I move for the direction of a verdict on the ground that he has not shown any loss whatever in connection with this alleged fraud and on the further ground that he is shown to have parted with all his beneficial interest in the case and I ask for the direction of nominal damages on the same ground.

The Court: Denied.

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

Exception noted as ground of appeal.

COURT'S CHARGE TO JURY.

The Court charges the jury as follows:

SMITH, *J.*:

Members of the jury. This action as it now stands, is a suit brought by Max Weintraub and Elias Rosenberg against Rothstein's, Inc., and Louis Rothstein. The corporation which was originally a party plaintiff has been removed from the case and so these are the parties before you now.

The action is one called deceit; or to recover damages for false representation. It is claimed that false representations were made by Louis Rothstein, acting for the company and himself; that he was the agent of the company. The agreement and the bill of sale were made by the company, Mr. Rothstein himself being the owner of the stock of the corporation, as I think appears before you. There were some negotiations leading up to an agreement of sale that was made January 21, 1924, which is before you as Exhibit P. 2.

The contract price was made up in this way: They took a figure for the stock of merchandise in the store; they took a figure for the fixtures in the store; and then the defendant company agreed to get a lease of the building from Mr. Rothstein and his wife and the terms of that lease were provided for. The money price to be paid was $117,500 for the stock of merchandise and $25,000 for the fixtures, or a total of $142,500. This was paid $75,000 in cash and the balance in monthly notes of $2,000 each, which have been paid from time to time as they became due. The agreement was followed by a bill of sale

which was delivered. The lease, too, was delivered, I assume, as it is called for.

The plaintiffs claim that before they entered into the agreement of sale certain representations were made to them. These are stated in the complaint as follows:

"That the busines heretofore conducted by the said corporation of Rothsteins Inc., was a profitable business; that it had done a total of $350,000.00 worth of business during the past year, viz., 1923, which amount included the sales of a basement which was rented out for the month of December for toys, and for which defendants received a ten per cent. net return of the gross sales; that the business had earned during the then past three years, above all expenses, a net return of eight per cent. per year on the total gross business."

The latter one I think you will find is the most important of the representations. I do not say that it is myself, but I suppose you will find it so.

There has been testimony given here by the plaintiffs as to what they claim Mr. Rothstein told them. I will not repeat it, but it substantially tends to support the allegations of the complaint. Just to show the relationship and materiality of the representations made, I wish to call your attention to the fact that if the earnings were eight per cent. net on $350,000 they would be $28,000.

A claim is made that it was said that the expenses were $76,000 or in that neighborhood. The difference as applied to 1923 is around $25,000. That is, if the expense was around $75,000 the profits would be $23,000 greater than if the expense were around $98,000. So you see the

effect of that statement. You will have before you the audit of 1923 made by Puder and Puder, a copy or the original of which is in evidence, and you can see for yourself from that just what these figures may be.

The defendant's answer to this claim is that he did say there were $350,000 gross sales and I do not think it is disputed that there was that amount of sales, if the sales in the toy department were added; so it was not a misrepresentation. He says the business was profitable, but he says that that was not his representation. I think he said that he had not made much money in the past year.

He denies any other representation as to profits except that when he first saw Rosenberg he told him that the expenses were 25 to 27 per cent. of the gross sales. This would be $94,000 to $97,500; that is, figuring 25 to 27 per cent. of $350,000. He further states that the figures of six, seven, or eight per cent. profit were used by Apfelbaum for figuring the profit of department stores generally; that it was in his presence, but that it was a statement from Mr. Apfelbaum.

These are the respective claims pro and con. They form disputed questions of fact and it is the province and the duty of a jury to decide what the true facts in a case are. My duty is to instruct you as to what is the law in the case. You will rely upon your own recollection of the testimony and not as I may have stated it to you, because the responsibility is yours and not mine. You must, as I say, rely on your own recollection as to that.

You are also judges of the credibility of the witnesses and the weight of the evidence. In determining the weight or credibility you will

give to the testimony of any particular witness you may take into consideration the interest of such witness in the outcome of the suit; the relationship or connection with the witness of any of the parties; the way the witness impresses you upon the stand or whether his version of the affair was correct; whether the witness was in a position to see what he says he saw or to hear what he says he heard, or whether he was in a position not to hear or not to see what he says he did not hear or did not see; also the probability of the testimony of any witness. You are not required to determine in favor of the number of witnesses if you believe differently as to the evidence. If you believe a witness swore falsely in one material particular you may, if you see fit, disbelieve him in the balance of his testimony. I say material, because that is important.

The burden of proof is upon the plaintiffs. They must establish their case by a fair preponderance of the evidence, and they must prove each element necessary to sustain the action. They must prove, as I said, the deceit, the fraudulent representations, and the other elements as I will give them to you; but fraud may be deduced from circumstances and conditions which afford a strong presumption of its existence.

Fraudulent representation might be said to be a deceitful or false statement or practice to deprive another of a right or property or money. There are two kinds of these: That which avers a fact to be true when it is not true; and that which avers a fact to be true when he does not know it is true.

To sustain the action the plaintiffs must prove these. They must prove first, that the defendant, by himself or by his agent, in this case the de-

fendant himself, made some representation to the plaintiffs. That requires that the representation was made with the intent to be acted upon. The next is that the representation was false when he made it and that he knew it to be false. That requires proof of the falsity and proof of the defendant's knowledge that it was false. The third is that the plaintiffs believed such representation to be true and acted upon it and were injured thereby.

In connection with the proof under that item it is important for you to consider the opportunities they had for investigation, because you see that that requires that the plaintiffs believed the representations were true. If they made an investigation themselves and were led to believe otherwise, it is a matter for you to consider. There must be a fraudulent design. If false representation was made, it was made to commit a fraud to gain the benefit of it or to put through the transaction. If the plaintiffs relied on their own or their agent's investigation, they cannot offer the false representation of the defendant as ground for deceit. The representation must be one of fact, not of opinion, and must be in reference to a subject matter susceptible of knowledge.

If you will apply these rules as I have given them to you to determine what the true facts are in the case, then you will, and should, come to some decision as to the question of liability.

If you come to the decision that the plaintiffs have not proved their case by a fair preponderance of the evidence, then, of course, your verdict will be for the defendant; if you find that they have sustained the burden of proof, as I have told you, then your verdict will be for the

plaintiffs. If you bring in a verdict for the plaintiffs it will be in one sum in favor of both plaintiffs; you will not divide it between the plaintiffs.

The damages which are recoverable are compensation in money damages for the natural and proximate consequences of the defendant's act; namely, compensation for the loss actually sustained. In this case it will be the difference between the price paid and the real value of the property acquired.

This property was purchased by the plaintiffs, but they took title in the name of a corporation and they took the stock in that corporation. That was their method of taking possession of the property, and they did not thereby lose their right to recover their loss in the case if it was caused by the fraudulent representation of the defendant.

The price paid was $117,500 for the stock and $25,000 for the fixtures, as I have told you. That is a total of $142,500. It is quite probable that you will find that this represents the true value of the stock and fixtures of a going concern netting eight per cent. profit on the gross sales of $350,000; that is, that the value of stock and fixtures is one hundred per cent. of their true value. Of course, you have to take into consideration that you cannot apply the same rule to a big stock of merchandise as you would to a pair of socks which cost 25 cents and sold at a dollar, because the big stock of merchandise cannot turn over quickly. If it is big you have to work it out. You have heard the testimony of the way in which the people of the dry goods business or department store business figure value.

Where a concern earns a certain per cent. of profit on its gross sales, they are usually apt to take one hundred per cent. of the value of the stock and fixtures. That, of course, I do not mean to define as a rule. I mean to say that that is the testimony as to what is done. A person might be making eight per cent. One might want to sell more than the other wants to buy, but there is testimony to show that that is the true value of a going concern.

It was not the purchasing of so much stock and fixtures. It had the conveyance of good will and a lease for a long term. The business was going on; it was not being sold to be resold in bulk. So, therefore, you have that evidence before you in determining what the true value of this property was and that you can judge yourself from what you find the income of this property was, if you apply that.

You are not obliged to apply that method, but if you apply that method you can find what the income of that property was. If the claim is made that the profit was less than one-half of one per cent. you will see, by applying the testimony of the witnesses, as to what that business was worth; it would be what you could get for a business that as going to close up and auction off.

The fact that the plaintiffs sold out their interest in this property for less than the $75,000, their initial cash payment, should not have any consideration in your mind to fix the damages they are entitled to. This transaction took place in January, 1924. It was not immediately resold on discovery of the fraud. They went on and managed the business. What happened afterward was not under the control of the defend-

ant. It may be that a loss occurred because of poor management; or a profit may have been made because of good management. That does not concern us. The method of assessing the damages is the difference between the price paid and the value of the goods at the time of the sale.

I have been requested to charge certain requests on behalf of the defendant.

The first I will charge. "The burden of proof is upon the plaintiffs to establish by a preponderance of the testimony every element of their charge of false and fraudulent representation, that it is a false representation, known to be false, properly relied upon by the plaintiffs to their damage."

The second, third, and fourth requests I have charged in effect.

The fifth I will charge. "In determining whether the plaintiffs were induced by or relied upon the alleged false representation, you should consider the testimony as to the opportunity that they had to determine the facts for themselves as to the volume of the business and the profits therefrom and the extent to which they availed themselves of that opportunity by examination of the books or otherwise."

The sixth I will charge. "In determining whether the plaintiffs were induced by or relied upon the alleged false representation you should consider the business experience and intelligence of the plaintiffs and whatever there was in either of them of ability to determine for themselves the character and volume of the business or its past or prospective profits."

The seventh I will deny.

The eighth I will charge. "If plaintiffs have failed to satisfy you by a preponderance of testimony that they suffered a loss by reliance upon the alleged representation as to past profits, your verdict should be for the defendant, Rothstein."

The ninth I will charge. "If from the evidence you are unable to fix the amount of the loss plaintiffs suffered by reason of reliance upon the representations set up in the complaint, your verdict should be for the defendant."

The tenth, eleventh, twelfth and thirteenth requests I will deny.

The fourteenth and fifteenth requests I will deny except as charged.

The sixteenth I will charge. "The burden of proof on plaintiffs requires clear evidence to sustain it."

The seventeenth I will charge. "The law presumes that business transactions are honest. In other words, fraud is never presumed and the burden is on the plaintiffs to establish their charges of fraud, by a preponderance of testimony sufficient to overcome that presumption."

The eighteenth I will charge. "The law is that a charge of fraud must be clearly and distinctly proved by the party who asserts. Therefore, unless the preponderance of testimony amounts to clear proof your verdict should be for the defendant."

The nineteenth I will charge as I have amended it. "If the representation made to plaintiffs was as to the profits the plaintiffs might make and not the profits Rothstein had made, your verdict should be for the defendant, Rothstein, insofar as that representation is concerned." I do not think there are other representations, as I recall it.

Defendant's counsel prays an exception to the Court's refusal to charge the 9th, 16th, 17th, and 18th requests of the defendant to charge.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to the Court's refusal to charge as requested to the extent the Court refused to charge.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that portion of the Court's charge which says that the burden was upon the plaintiffs to establish the fraud charged by a fair preponderance of the evidence.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that portion of the Court's charge which says if the plaintiffs rely on their own investigation they cannot set up a claim of fraud, the point being that it is not within the plaintiffs' discretion as to whether they were relying on their own investigation, if they have actually investigated and found things one way they cannot set up anything different from what they had themselves found.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that portion of the Court's charge in which the Court stated that the jury might award a single sum to the plaintiffs.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to the Court's charge in which the Court stated that the plaintiffs took possession of the property in

stock of the corporation and that they did not lose their right to recover for fraud.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that portion of the Court's charge in which the Court referred to the testimony and charged that the jury might consider the testimony in the case that men buying department stores frequently or commonly gave one hundred per cent. of the value of the merchandise, and fixtures, if the business was profitable; and that the ascertainment of profits was a method, on the ground that there was testimony to the contrary.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that portion of the Court's charge in which the Court stated that this was not simply a purchase of stock and fixtures and that the jury, in determining the true value, might apply what the income was.

Exception noted as ground of appeal.

DEFENDANT'S REQUESTS TO CHARGE

1. The burden of proof is upon the plaintiffs to establish by a preponderance of the testimony every element of their charge of false and fradulent representation, that it is a false representation, known to be false, properly relied upon by the plaintiffs to their damage. 26 *C. J.* 1062; *Byard* v. *Holmes,* 34 *L.* 296.

2. If, having this burden of proof, the plaintiffs fail to show that there was a false representation, your judgment must be for the defendant.

3. If, having this burden of proof, the plaintiffs fail to show that the representation was known to be false, your judgment should be for the defendant.

4. If, having this burden of proof, the plaintiffs fail to show that they relied upon the alleged representation or representations, your judgment should be for the defendant.

5. In determining whether the plaintiffs were induced by or relied upon the alleged false representation, you should consider the testimony as to the opportunity that they had to determne the facts for themselves as to the volume of the business and the profits therefrom and the extent to which they availed themselves of that opportunity by examination of the books or otherwise.

6. In determining whether the plaintiffs were induced by or relied upon the alleged false representation you should consider the business experience and intelligence of the plaintiffs and whatever there was in either of them of ability to determine for themselves the character and volume of the business or its past or prospective profits.

7. If you find from the evidence that plaintiffs Weintraub and Rosenberg, or either of them were able, by reason of intelligence and experience, together with the opportunity for investigation, observation and inquiry, to judge for themselves, the probable profits from the business they proposed to carry on at the leased premises, your verdict should be for defendant.

8. If plaintiffs have failed to satisfy you by a preponderance of testimony that they suffered a loss by reliance upon the alleged representation

as to past profits, your verdict should be for the defendant, Rothstein.

9. If from the evidence you are unable to fix the amount of the loss plaintiffs suffered by reason of reliance upon the representations set up in the complaint, your verdict should be for the defendant.

10. If you find from the evidence that the plaintiffs after knowledge that any of the representations on which they had relied in making the purchase from the defendant was false, continued to make a payment or payments on account of the purchase price, your verdict should be for the defendant, Rothstein.

11. If you find from the evidence that plaintiffs, after taking title to the goods sold made a payment on account of the purchase price at a time when from observation or opportunity for ascertainment of the facts they should have known that the representation, if any, on which they had relied, was false, your verdict should be for defendant, Rothstein.

12. If the plaintiffs have failed to satisfy you by a preponderance of evidence that the value of the merchandise and fixtures purchased was less than represented by defendant, your verdict should be for defendant, Rothstein.

13. If the plaintiffs have failed to satisfy you by a preponderance of the testimony that a representation was made by defendant as to the value of the goods and fixtures they were buying on which they reasonably relied, and which was false, your verdict should be for defendant, Rothstein.

14. Unless the plaintiffs show you by a preponderance of the evidence that the defendant's representation to them as to the volume of business during the preceding year was substantially incorrect and known to him to be incorrect, and that plaintiffs justifiably relied on that representation, you should give that charge no further consideration.

15. Unless plaintiffs show you by preponderance of testimony that defendant represented to them "that the business had earned during the then past three years, above all expenses, a net return of 8 per cent. per year on the total gross business" and that such was false, and was a material inducement to plaintiffs to purchase the merchandise and fixtures in question, your verdict should be for defendant, Rothstein.

16. The burden of proof on plaintiffs requires clear evidence to sustain it. *Thompson on Trials, Sec.* 3780.

17. The law presumes that business transactions are honest. In other words fraud is never presumed and the burden is on the plaintiffs to establish their charges of fraud, by a preponderance of testimony sufficient to overcome that presumption. 27 *C. J.* 62; *Feickert* v. *Feickert,* 131 *Atl.* 576; *Gierber Engineering Co.* v. *Stafford,* 96 *L.* 280.

18. The law is that a charge of fraud must be clearly and distinctly proved by the party who asserts. Therefore unless the preponderance of testimony amounts to clear proof your verdict should be for the defendant. *Fivey* v. *P. R. N. Co.,* 67 L. 627 at p. 634; and *Feickert* v. *Feickert,* 131 Atl. 576.

Defendant's Requests to Charge.

19. If the representation made to plaintiffs was as to the profits the plaintiffs might make and not the profits Rothstein had made your verdict should be for the defendant, Rothstein.

Exhibit P. 2.

EXHIBIT P. 2.

THIS AGREEMENT, made this Twenty-first day of January, 1924, between ROTHSTEINS, INC., a corporation of the State of New Jersey, with its principal office in the City of Newark, County of Essex and State of New Jersey, party of the first part, and ELIAS ROSENBERG and MAX WEINTRAUB, of the Borough of Brooklyn, County of Kings and State of New York, parties of the second part; WITNESSETH:

WHEREAS the party of the first part is desirous of selling, and the parties of the second part are desirous of purchasing the business now conducted by party of the first part at 413-417 Springfield Avenue, Newark, N. J., it is hereby agreed between the parties:

1. That the price of the merchandise is fixed at $117,500, with the proviso that if the parties cannot agree on the price fixed for the various items of merchandise, that so far as said items are concerned each shall select an arbitrator who shall be a merchandise man, who in turn shall select a third arbitrator, also to be a merchandise man, and the decision of any two shall be binding on both parties hereto, and if the net price after agreement and arbitration, if necessary, shall be less than $117,500, party of the first part shall reduce the price by whatever the figure may be, or if the price shall be greater parties of the second part are to pay any such excess.

2. That the price of the fixtures is hereby agreed upon as $25000.

3. That all insurance, gas and electric bills, are to be adjusted as of January 1, 1924.

Exhibit P. 2.

4. That the sale shall take effect as of January 1, 1924, and all moneys collected by party of the first part since that date are to be turned over to the parties of the second part, less running expenses, and all bills for merchandise purchased since January 1, 1924, are to be assumed and paid by the parties of the second part.

5. That party of the first part, as a part of the consideration of the sale, agrees to procure a lease from Louis Rothstein and Dora Rothstein, his wife, owners of the premises at 413-417 Springfield Avenue, Newark, N. J., leasing to the parties of the second part the building for a term of twenty-one years from January 1, 1924, for the annual rent of $12,000 net, which means that parties of the second part are to pay all taxes and assessments assessed against said premises, all insurance premiums, all water rates, make and pay for all repairs to the building, it being the intention of this agreement that the owners of the premises are to receive $12000 per year net as rental.

6. Parties of the second part agree to insure the building and pay the premiums therefor to the extent of $80,000, and that the plate glass in said building is to be insured to its true value, by and at the expense of the parties of the second part.

7. Parties of the second part also agree to insure the stock and fixtures in said store for the term of three years for eighty per cent. of the value.

8. It is understood and agreed that the bill of sale for the merchandise and fixtures will be delivered by the party of the first part to a corporation about to be formed by the parties

Exhibit P. 2.

of the second part, and that the payment for the said merchandise and fixtures will be made by the said corporation to the said party of the first part as follows:

$5000 in cash upon the signing of this agreement, the receipt whereof is hereby acknowledged.

$70,000 on the Twenty-fifth day of January, 1924, at the office of Charles B. Clancy, 810 Broad St., Newark, N. J., between the hours of 10 and 12 in the forenoon.

The balance of said purchase price by the said corporation executing and delivering to the party of the first part its promissory notes each in the sum of $2000, the first note payable on April 1, 1924 and subsequent notes payable monthly thereafter until the Thirty-first day of December, 1926, when the entire balance remaining due shall be paid. Said notes are to be made by the said corporation so to be formed and to be endorsed personally by the parties of the second part hereto and their wives, and to bear interest at the rate of 6% per annum.

9. That the lease to be executed, as herein provided, shall contain a clause that the owner of the building shall not be responsible for any accidents occurred on or about the premises, and that they shall comply with all municipal requirements.

10. That the lease to be executed, as herein provided, shall contain the foregoing clauses in addition to the clauses contained in the Chisholm Revised Gilsey Lease #99.

11. That parties of the second part shall have the right to use the name "ROTHSTEINS, INC." and that Louis Rothstein and Dora Rothstein, his wife, who are the majority stockholders of Rothsteins, Inc., agree that they will not engage in the same line of business for a period of twenty-

Exhibit P. 2.

one years within a radius of one-half mile from the present location.

12. It is understood and agreed between the parties hereto that parties of the second part are about to form a corporation and that this agreement may be assigned to said corporation, and all of the terms herein mentioned are to be carried out by said corporation.

13. That in the event of an arbitration being necessary each of the parties hereto are to bear one-half of the expense.

14. That the notes to be given as herein provided are to be held in escrow by Charles B. Clancy, 810 Broad St., Newark, N. J., in the event of an arbitration being necessary, until the arbitration is completed, which shall be not later than February 1, 1924.

15. That Elias Rosenberg and Max Weintraub are to become sureties on the lease herein mentioned to be given to the corporation.

16. In the event that the said parties of the second part hereto shall fail to carry out the terms of this agreement on January 25, 1924, the deposit of $5000 herein mentioned is to be retained by the party of the first part and this contract cancelled.

17. That the lease shall contain an exception to the clause which prohibits the subletting or assigning of the lease without the written consent of the landlord to this effect, namely, that the parties of the second part hereto shall have the right to sublet or assign the lease without relieving themselves of liability, after January 1, 1927, without the written consent of the owner, provided that the sublessee or assignee shall be engaged in a similar business and deal in

Exhibit P. 2.

the same class of merchandise to be purchased from reputable jobbers and manufacturers.

In Witness Whereof, the said party of the first part has caused these presents to be signed by its President, and the said parties of the second part have hereunto set their hands and seals the day and year first above written.

ROTHSTEINS, INC., (L. S.)

By Louis Rothstein,
President.

ELIAS ROSENBERG, (L. S.)
MAX WEINTRAUB. (L. S.)

Signed, sealed and delivered
in the presence of

Chas. B. Clancy.

AGREEMENT

Between

ROTHSTEINS, INC.

and

ELIAS ROSENBERG and MAX WEINTRAUB

Dated January 21, 1924

Exhibit P. 3.

EXHIBIT P. 3.

KNOW ALL MEN BY THESE PRESENTS: *That* it, Rothsteins, Inc., a corporation of the State of New Jersey, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, party of the First Part, for and in consideration of the sum of One Dollar and other valuable consideration, lawful money of the United States, to it in hand paid, at or before the ensealing and delivery of these presents, by "Rothstein's," a corporation of the State of New Jersey, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, party of the Second Part, the receipt whereof is hereby acknowledged has bargained and sold, and by these presents do grant and convey, unto the said party of the Second Part, its successors and assigns, the goods and chattels particularly decribed and mentioned in the schedule hereto attached and made a part hereof, subject to the party of the second part assuming the payment of all obligations incurred since January 1st, 1924.

TO HAVE AND TO HOLD the same, unto the said party of the Second Part, its successors and assigns forever. AND it does for itself, its cessors or assigns, covenant and agree, to and with the said party of the Second Part, to warrant and defend the sale of said stock, merchandise and fixtures hereby sold unto the said party of the Second Part, its successors or assigns, against all and every person and persons whatsoever.

IN WITNESS WHEREOF, the said party of the first part has caused these presents to be signed

Exhibit P. 3.

by its President and attested by its Secretary, and its corporate seal to be hereto affixed, this Twenty-fifth day of January, 1925.

ROTHSTEINS, INC.,

By LOUIS ROTHSTEIN,
President.

Attest:

DORA ROTHSTEIN,
Secretary.

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

LOUIS ROTHSTEIN, President of ROTHSTEINS, INC., of full age, being duly sworn, says that it is the owner of, and in the possession of the chattel property mentioned in the within instrument, and has the sole right and lawful authority to sell same, that said property and each and every part and article thereof is now free and clear of and from all liens of whatever nature and description, including judgments, liens, levies, mortgage, or mortgages, except none, up to January 1st, 1924, that there are no judgments against deponent and no attachments or executions now outstanding against deponent and deponent further says that this affidavit is made to induce "Rothstein's" to purchase said goods and chattels, as well as the business and the good will thereof; knowing that the said "Rothstein's" is relying upon the truth of the statement herein contained; and also in compliance with "An Act to prohibit the sales of merchandise, goods and chattels in bulk in fraud of

Exhibit P. 3.

creditors,'' Chapter 208, Laws of New Jersey, pages 377 and 378, approved April 8th, 1915.

LOUIS ROTHSTEIN.

Subscribed and sworn to before
me this Twenty-fifth day of
January, 1924.

CHAS. B. CLANCY,
Master in Chancery of New Jersey.

SCHEDULE.

The following is a Schedule of the goods and chattels referred to in the foregoing Bill of Sale and is hereby made a part thereof, to wit:

The entire stock of merchandise and fixtures, together with the good will of the business located at 413-415-417-419 Springfield Avenue, Newark, N. J., except the personal belongings of Louis Rothstein.

ROTHSTEIN, INC.,
LOUIS ROTHSTEIN, Pres.

RALSTER
ROTHSTEINS,
By E. ROSENBERG, Pres.
MAX WEINTRAUB, Treas.

BILL OF SALE
ROTHSTEINS, INC.
to
"ROTHSTEIN'S"
Dated January 25, 1924

Exhibit P. 4.

EXHIBIT P. 4.

ROTHSTEIN, INC.

AUDIT REPORT

FOR PERIOD JANUARY 1st, 1923, to DECEMBER 31st, 1923.

PUDER & PUDER

CERTIFIED PUBLIC ACCOUNTANTS (N. J.)

ST. JAMES BUILDING
1133 BROADWAY
NEW YORK, N. Y.

Telephone Chelsea 1381

ESSEX BUILDING
31 CLINTON STREET
NEWARK, N. J.

Telephone Mitchell 3520

Newark, N. J.
February 21st
1 9 2 4

Rothstein, Inc.,
415 Springfield Avenue
Newark, New Jersey.

Gentlemen:—

In accordance with your instructions, we have audited your books for period January 1st, 1923 to December 31st, 1923, and, as a result thereof, submit herewith:

EXHIBIT A: Balance Sheet as of December 31st, 1923—Before Sale of Assets.

EXHIBIT B: Statement of Income and Profit and Loss for period January 1st, 1923 to December 31st, 1923.

Exhibit P. 4.

SCHEDULE #1: Selling Expenses for period January 1st, 1923 to December 31st, 1923.

SCHEDULE #2: General and Administrative Expenses for period January 1st, 1923 to December 31st, 1923.

SCHEDULE #3: Other Income and Other Charges for period January 1st, 1923 to December 31st, 1923.

EXHIBIT C: Balance Sheet as of December 31st, 1923, After the Sale of Assets.

Respectfully submitted,

Puder & Puder,
Certified Public Accountants (N. J.)

Exhibit P. 4.

ROTHSTEIN, INC.

EXHIBIT A.

BALANCE SHEET AS OF DECEMBER 31st, 1923.

(BEFORE SALE OF ASSETS)

ASSETS			LIABILITIES AND CAPITAL		
CURRENT ASSETS:			CURRENT LIABILITIES:		
Cash In Banks	$34,979.16		Accounts Payable, Merchandise	$ 31,254.00	
Change Fund	670.00		Accounts Payable, Expenses	808.43	
Total Cash		$ 35,649.16			
Accounts Receivable:					
Customers	$ 1,153.23				
Employees	157.47				
Total Accounts Receivable		1,310.70			
Inventory		117,500.00			
Bonds		500.00			
Loans		1,970.00			
Due from L. Rothstein		4,000.00			
TOTAL CURRENT ASSETS		$160,929.86	TOTAL CURRENT LIABILITIES		$ 32,062.43
FIXED ASSETS:			CAPITAL STOCK:		
Office Furniture	$ 1,846.83		Preferred Capital Stock	$ 50,000.00	
Less: Reserve for Depreciation	366.68	$ 1,480.15	Common Capital Stock	100,000.00	
Tube Cash System	$ 3,000.00		TOTAL CAPITAL STOCK ISSUED AND OUTSTANDING		150,000.00
Less: Reserve for Depreciation	870.00	2,130.00	SURPLUS:		
Cash Registers	$11,406.25		Balance, January 1st, 1923	$ 3,035.62	
Less: Reserve for Depreciation	2,862.31	8,543.94	Add: Proft for year ended December 31st, 1923, as shown on Exhibit B.	9,172.98	
Store Fixtures	$18,265.54		Total	$ 12,208.60	
Less: Reserve for Depreciation	5,166.45	13,099.09	Less: Dividends Paid	3.500.00	
Electric Fixtures	$ 1,350.00		SURPLUS—DECEMBER 31st, 1923		8,708.60
Less: Reserve for Depreciation	391.50	958.50			
Addressograph	$ 2,932.75				
Less: Reserve for Depreciation	748.41	2,184.34			
Autos	$ 826.90				
Less: Reserve for Depreciation	187.20	639.70			
TOTAL FIXED ASSETS		29,035.72			
DEFERRED ASSETS:					
Unexpired Insurance		805.45			
TOTAL ASSETS		$190,771.03	TOTAL LIABILITIES AND CAPITAL		$190,771.03

NOTE: Letter attached hereto is herewith made a part of this Exhibit.

Exhibit P. 4.

ROTHSTEIN, INC.

EXHIBIT B.

STATEMENT OF INCOME AND PROFIT AND LOSS FOR PERIOD JANUARY 1st, 1923 TO DECEMBER 31st, 1923.

INCOME:			
Sales:			
Cash Sales		$324,284.00	
C. O. D. Sales		4,059.19	
Trading Stamps		8,898.35	
Charge Sales		7,812.20	
Total Sales		$345,053.74	
Less: Returns	$ 382.67		
Refunds	1,494.46	1,877.13	
NET SALES			$343,176.61
COST OF GOODS SOLD:			
Inventory, January 1st, 1923		$113,890.98	
Purchases		247,412.60	
Freight—Inward		1,008.95	
Repairs to Merchandise		125.09	
Total Inventory and Purchases		$362,437.62	
Less: Inventory, December 31st, 1923		117,500.00	
TOTAL COST OF GOODS SOLD			244,937.62
GROSS PROFIT ON SALES			$ 98,238.99
SELLING EXPENSES:			
As Shown on Exhibit B—Schedule #1			73,903.27
NET PROFIT ON SALES			$ 24,335.72
GENERAL AND ADMINISTRATIVE EXPENSES:			
As Shown On Exhibit B—Schedule #2			22,823.51
NET PROFIT ON OPERATIONS			$ 1,512.21
NET FINANCIAL INCOME:			
As Shown On Exhibit B—Schedule #3			7,660.77

Exhibit P. 4.

NET PROFIT FOR PERIOD JANUARY 1st, 1923 to DECEMBER 31st, 1923, As Shown On Exhibit A	$ 9,172.98

ROTHSTEIN, INC.

EXHIBIT B—SCHEDULE #1.

SELLING EXPENSES FOR PERIOD JANUARY 1st, 1923 TO DECEMBER 31st, 1923.

WAGES:			
Cashiers	$ 1,076.52		
Window Trimmers	2,809.15		
Sales Wages	28,857.17		
Commissions	2,859.01		
TOTAL WAGES			$ 35,601.85
REPAIRS:			
Electric Fixtures	$ 268.10		
Typewriter	15.27		
Addressograph	2.37		
Measureograph	55.70		
TOTAL REPAIRS			341.44
Advertising	$ 4,063.38		
Trading Stamps Redeemed	8,898.35		
Packing Expenses	192.44		
Supplies	525.43		
Auto Expenses	561.62		
Window Cleaning	172.00		
Store Expenses	320.00		
Window Trimming Expense	2.50		
Postage	331.57		
Rent	12,000.00		
Light, Heat and Power	3,737.18		
Advertising for Help	55.06		
Painting	1,597.80		
Depreciation: Electric Fixtures	135.00		
Furniture	184.68		
Tube Cash System	300.00		
Cash Registers	1,072.43		
Store Fixtures	1,826.55		
Addressographs	293.27		
Autos	117.20		
Insurance	1,573.52	37,959.98	

ROTHSTEIN, INC.

EXHIBIT C.

BALANCE SHEET AS OF DECEMBER 31st, 1923.

(AFTER SALE OF ASSETS)

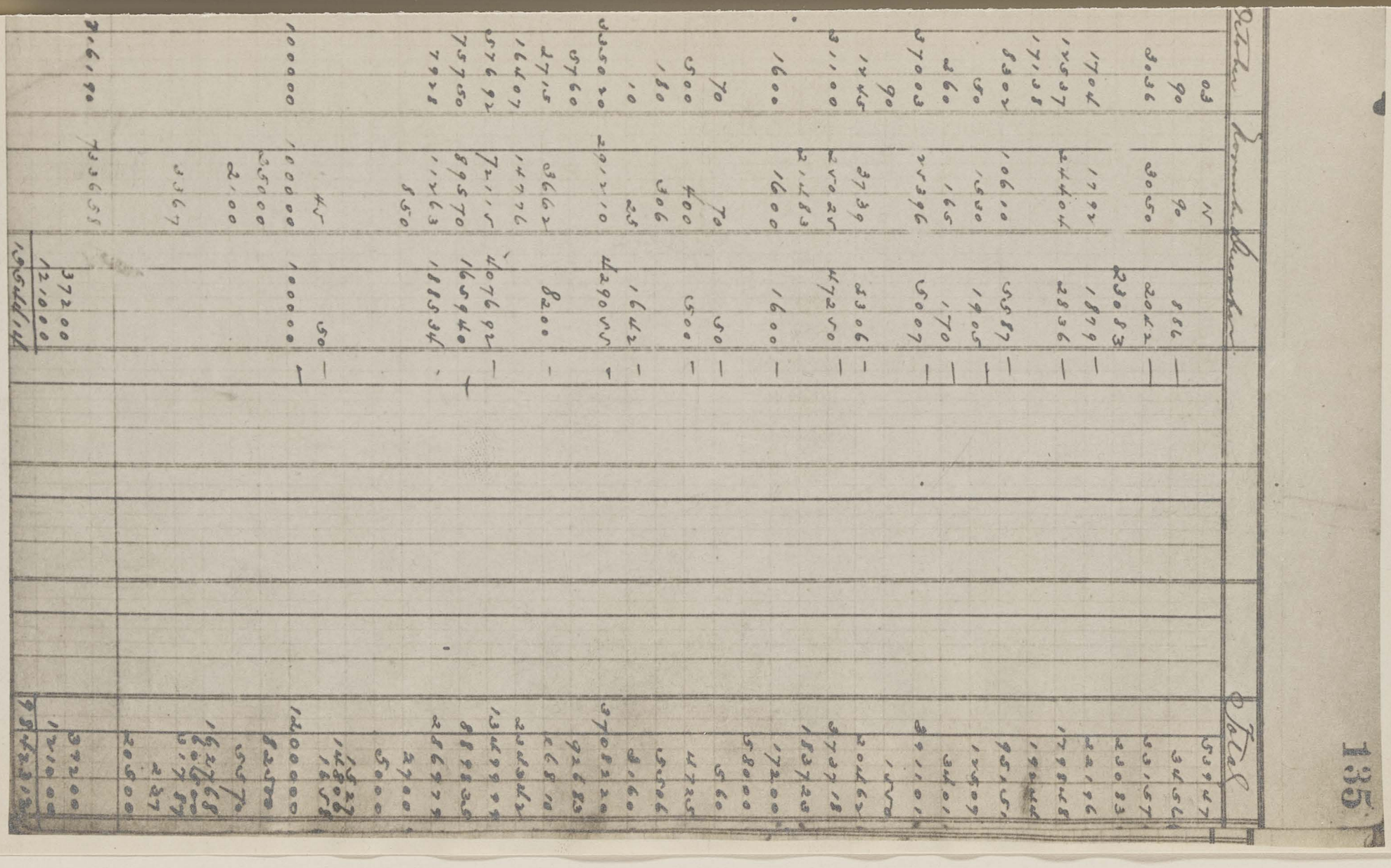
ASSETS

ASSETS:		
Cash In Bank	$ 34,979.16	
Change Funds	670.00	
Total Cash		$ 35,649.16
Accounts Receivable:		
Customers	$ 1,153.23	
Employees	157.47	
Total Accounts Receivable		1,310.70
Bonds		500.00
Loans		1,970.00
Due from L. Rothstein		4,000.00
Due from Rosenberg & Weintraub		142,500.00
Unexpired Insurance		805.45
TOTAL ASSETS		$186,735.31

LIABILITIES AND CAPITAL

LIABILITIES:		
Accounts Payable—Merchandise	$ 31,254.00	
Accounts Payable—Expense	808.43	
TOTAL LIABILITIES		$ 32,062.43
CAPITAL STOCK:		
Preferred	$ 50,000.00	
Common	100,000.00	
TOTAL CAPITAL STOCK		150,000.00
SURPLUS:		
Balance, January 1st, 1923	$ 3,035.62	
Add: Profit from Trading, as shown on Exhibit B	9,172.98	
Total	$ 12,208.60	
Less: Dividends Paid	3,500.00	
Loss on Sale of Assets	4,035.72	
SURPLUS—DECEMBER 31st, 1923		4,672.88
TOTAL LIABILITIES AND CAPITAL		$186,735.31

Note: Letter attached hereto is herewith made a part of this Exhibit.



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Expense 1923

	January	Febru	March	April	May	June	July	August	Septem	October	Novemb	December		Total
Stor Supplies	14713	38	10857	521	26	26320	870	290	05	03	15			53947
Office Supplies	77	90	04	488	80	10	09	468	1166	90	90	856	—	34561
Postage	3035	3014	3041	3207	3025	3002	3020	1075	2600	3036	3050	2042	—	33167
Indiana Revenue Sales												23083		23083
Telephone	1487	1906	1615	2206	1857	1774	1755	1650	1601	1704	1792	1879	—	22196
Advertising	28314	7691	36563	3078	14101	22380	7570 3400	9273	8701	17537	24404	2836	—	179845
Postage Expense			2106							17138				19244
Exchange	6427	17423	11023	5551	7992	5955	4793	5129	11339	8302	10610	5587	—	95151
Office Supplies	860	965	2710	1695	384	765	75	65	1505	50	1830	1905	—	12809
Janitor	377	553	666	330	195	210	110	155	310	260	165	170	—	3401
Incidental Expense	46697	19619	6875	14016	22401	9217	6119	9647	17468	37003	25396	5007	—	99101
Office Supplies						270	485	375	330	90				1550
Office Expense	2179	1092	503	4911	510	2803	95	429		1745	3739	5306	—	20462
Light and Power	50788	35175	38925	32550	25475	21875	21250	26525	17110	31100	25025	47250	—	377218
Insurance	16670			5150	130000	1140	9830		15750		21483			183720
Trustee Chenny	1600		1400	1400	1600	1608	1600	1600	1600	1600	1600	1600	—	17200
Salary for Carpenter	38000	13350	6650											58000
Janit Laundry		40	40	40	40	80	40	40	50	70	70	50	—	560
Watchman	300	300	375	350	400	506	400	400	300	500	400	500	—	4725
Assistant Janitor	735	340	1337	144	916	72	108	702	648	180	306			5506
Window Cleaning	543		21	360	-	36	03	111	409	10	25	1642	—	3160
Payroll	337498	439370	317581	290865	371751	337829	292180	477906	342655	335020	291210	429055	—	3708220
Furniture Fixtures	437	79986	2200		1600					5760				92683
Electrical Supplies		2176	3018	1239	1600	500	662	433	2760	2715	3662	8200	—	26815
Postmaster	38987	19850	19053	36655	17990	16710	18146	17796	18477	16407	14776			2084342
Janitor Salary	13416	14038	15384	5769	5769	7215	5769	5769	7215	5769	7215	4076	—	134999
Janitor Supplies	8050	5750	8000	5206	7250	7283	4868	4650	4500	7575	8957	16594	—	88935
Commission Sales		1151	563	1149	925	1167	1340	869	809	792	1126	1885	—	25697
Water	900				500			450			850			2700
Newspaper Subscription	2500	2500												5000
Repairs Building	331		446		750									1527
Electrical Supplies							1480							1480
Electricity	50		50		200		1000	63	200		45	50	—	1658
Rent	100000	200000		100000	100000	100000	200000		100000	100000	100000	100000	—	1200000
Professional Service		6000	50000	1500							3500			8250
Repairs and Repairs		500		*	2100			870			2100			5570
Janitor				7484	7796				1500					16276
Cleaning					6050									6050
Automobiles					1533			938	350		336			3178
Office Supplies								23						227
Advertising														2050
Auditing	10500			10000										
	83918	95451	47155	66096	80833	70876	70703	47741	68349	70619	73365	37200		37200
Trustee Bonds Refund	8850	5875	8000	5406	7250							12100		12100
Trustee Car	91949	104356	75155	71502	88106							195444		9846303

ROTHSTEIN, INC.

EXHIBIT C.

Exhi

EXHIBIT P. 15.

This agreement made the 18th day of November, 1925, between MAX WEINTRAUB, of 978 East 24th Street, in the City of Brooklyn and State of New York, party of the first part; JOSEPH KLAUSNER and MAURICE EPSTEIN, parties of the second part, and ELIAS ROSENBERG, party of the third part.

Witnesseth, that the said Max Weintraub, party of the first part, agrees to sell and convey to the said Joseph Klausner and Maurice Epstein, parties of the second part, on November 19, 1925, three hundred seventy-five (375) shares of the capital stock of Rothstein's Corporation, a corporation of New Jersey, of which three hundred and seventy-four (374) shares are now owned and held by Max Weintraub and standing in his name on the books of the said corporation and one share is now owned and held by Sarah Weintraub, wife of the said Max Weintraub, and standing in her name on the books of the said corporation, and to make and execute unto the said Joseph Klausner and Maurice Epstein all assignments, transfers and conveyances necessary to assure the same to them, their executors, administrators and assigns. In consideration whereof, the said Joseph Klausner and Maurice Epstein agree to pay unto the said Max Weintraub for such stock the sum of Thirty-seven Thousand Five Hundred ($37,500) Dollars in the following manner: Ten Thousand ($10,000) Dollars upon the execution and delivery of this agreement and the balance of Twenty-seven Thousand Five Hundred ($27,500) Dollars upon the said assignment and delivery of the said shares of stock to the said Joseph Klausner and

Maurice Epstein, and the shares of stock so assigned shall be properly executed and delivered to the said Joseph Klausner and Maurice Epstein.

The said Max Weintraub hereby makes the following representations and warranties to induce the said Joseph Klausner and Maurice Epstein to purchase the above mentioned stock, and hereby guarantees that the following statements are true:

1. The total stock outstanding and issued of the said Rothstein's Corporation is seven hundred fifty (750) shares of stock.

2. Neither the said Max Weintraub nor Sarah Weintraub, his wife, have transferred, assigned, set over, pledged, mortgaged or encumbered in any manner whatsoever the above mentioned three hundred seventy-five (375) shares of stock, or any part thereof, and the said shares of stock are free and clear of all encumbrances and liens whatsoever.

3. The following liabilities of the said corporation as of November 16, 1925 have not been changed and are as follows:

(a) Accounts payable for merchandise	$26,836.15
(b) Loans and notes due banks....	18,333.34
(c) Other loans and notes due....	27,500.00

It is understood that these liabilities have been ascertained and taken from the books of the corporation by H. C. Robbins and Mr. Armstrong, Accountants.

4. It is understood and agreed that the sum of Seven Thousand ($7,000) Dollars, advanced by the said Max Weintraub to the said corporation shall remain as assets of the said corpora-

Exhibit P. 15.

tion and that the said Max Weintraub has no claim, whatsoever, against the said corporation for the said sum of Seven Thousand ($7,000) Dollars or any part thereof.

5. The said Joseph Klausner, Maurice Epstein and Elias Rosenberg hereby agree to assign, transfer and set over unto the said Max Weintraub all their right, title and interest in and to a certain cause of action and claim, now pending in the Essex County Circuit Court, against Louis Rothstein and Rothstein, Inc., a corporation different and separate from the above mentioned Rothstein's Corporation.

6. The said Max Weintraub hereby agrees to execute a general release to the said Rothstein's Corporation of all claims whatsoever, and represents that there is nothing due and owing, whatsoever, from the said Rothstein's Corporation to him, and the said general release shall be executed and delivered upon the payment of the balance of the purchase price.

7. The said Max Weintraub further agrees to execute and deliver to the said Joseph Klausner and Maurice Epstein an affidavit as to the truth of the above representations and warranties upon the payment of the balance of the purchase price.

8. The said Elias Rosenberg hereby consents to the sale and assignment of the said shares of stock by the said Max Weintraub to the said Joseph Klausner and Maurice Epstein.

9. The said Max Weintraub further represents and warrants that he has done nothing whatsoever to incur any liabilities on account of the said Rothstein's Corporation, which are not set forth upon the books of the said corporation.

Exhibit P. 15.

In Witness Whereof, the said parties have hereunto set their hands and seals the day and year first above written.

MAX WEINTRAUB (L.S.)
JOSEPH KLAUSNER (L.S.)
MAURICE EPSTEIN (L.S.)
ELIAS ROSENBERG (L.S.)

Signed, sealed and delivered
in the presence of

David M. Klausner.

This agreement made the 19th day of November, 1925, between Max Weintraub and Sarah Weintraub, his wife, of 978 East 24th Street, Brooklyn, N. Y., parties of the first part; Joseph Klausner and Maurice Epstein, parties of the second part; Elias Rosenberg, party of the third part, and Rothstein's, a corporation of New Jersey, party of the fourth part.

Whereas, the said parties of the first part are now the owners and holders of 375 shares of stock of Rothstein's, a corporation of New Jersey, and are about to assign, transfer and set over to the said parties of the second part the said 375 shares of stock for the sum of Thirty-seven Thousand Five Hundred ($37,500) Dollars:

Now therefore, in consideration of the above premises and for the further consideration of One ($1.00) Dollar to each in the other hand paid, the said parties to this agreement hereby covenant and agree that the agreement dated November 18, 1925, between the said Max Weintraub, Joseph Klausner, Maurice Epstein and

Exhibit P. 15.

Elias Rosenberg shall be annexed hereto and made a part hereof.

The parties of the second part, third part and fourth part do hereby agree that they will execute any and all papers necessary to effect the assignment of the cause of action mentioned in the annexed agreement; it being understood that this cause of action is for the recovery of damages for fraudulent representations or misrepresentations to the said Max Weintraub or Rothstein's, a corporation of New Jersey.

The said parties of the second part, third part and fourth part also agree that they will execute all papers necessary, under the laws of the State of New Jersey, to enable the said parties of the first part to carry on this action in their name.

The said parties of the first part do hereby agree to indemnify the parties of the second part, third part and fourth part against any loss to them or either of them, that may result from the above mentioned cause of action.

The said parties of the second part, third part and fourth part do hereby agree to indemnify the parties of the first part against any loss which they may suffer by reason of the notes of the party of the fourth part, as shown upon the books of the said corporation as of November 16, 1925, which notes were personally endorsed by the said Max Weintraub.

In Witness Whereof, the said parties of the first, second and third parts have hereunto set their hand and seal the day and year first above written, and the said party of the fourth part has caused its corporate seal to be hereto affixed and attested by its Secretary and these presents

Exhibit P. 15.

to be signed by its President, the day and year first above written.

MAX WEINTRAUB (L.S.)
SARAH WEINTRAUB (L.S.)
JOSEPH KLAUSNER (L.S.)
MAURICE EPSTEIN (L.S.)
ELIAS ROSENBERG (L.S.)
(L.S.)

.....

Signed, Sealed and Delivered
in the presence of

David M. Klausner.

ROTHSTEIN'S,
a corporation of New Jersey,

by Elias Rosenberg,
President.

Attest:

Joseph Klausner,
Secretary.

Rule to Show Cause.

RULE TO SHOW CAUSE.

Filed November 20, 1926.

ESSEX COUNTY CIRCUIT COURT.

ROTHSTEIN'S, a corporation, MAX WEINTRAUB and ELIAS ROSENBERG, *Plaintiffs,* *vs.* LOUIS ROTHSTEIN and ROTHSTEINS INC., a corporation, *Defendants.*	*Action at Law.* *Rule to Show Cause.*

On application, made within six days after the rendering of the verdict herein;

It is on this 18th day of November, A. D. Nineteen Hundred and Twenty-six, on motion of Charles M. Clancy, attorney of the defendants, Louis Rothstein and Rothstein's, Inc., a corporation, ORDERED that the plaintiffs show cause before this Court on the 4th day of December next, at 10 A. M., why the verdict in this case should not be set aside and a new trial granted to the said defendants.

And it is further ORDERED, that the defendants be permitted to reserve the exceptions taken at the trial and that this rule shall not preclude the taking of an appeal by the said defendants.

WM. A. SMITH,
Judge.

Rule Discharging Rule to Show Cause.

This order is dated November 18, 1926.

Acknowledgment of service of copy made on original by Abraham Henig, Attorney for Plaintiffs, Nov. 18, 1926.

Original filed with County Clerk.

RULE.

Filed March 9, 1927.

ESSEX COUNTY CIRCUIT COURT.

ROTHSTEIN'S, a corporation, MAX WEINTRAUB and ELIAS ROSENBERG, *Plaintiffs,* *vs.* LOUIS ROTHSTEIN and ROTHSTEINS INC., a corporation, *Defendants.*	*Action at Law.* *Rule.*

The rule to show cause why the verdict in the above entitled cause should not be set aside having been argued by Alfred F. Skinner, of counsel with the defendant for the rule, and Merritt Lane, of counsel with the plaintiff contra, and the matter having been considered by the court;

It is, on this 8th day of March, 1927, ORDERED that the application for a new trial be denied and the rule to show cause be discharged with costs.

WILLIAM A. SMITH,
C. J.

NOTICE OF APPEAL AND GROUNDS OF APPEAL.

Filed April 19, 1927.

ESSEX COUNTY CIRCUIT COURT.

ROTHSTEIN'S, a corporation, MAX WEINTRAUB and ELIAS ROSENBERG, *Plaintiffs,* *vs.* LOUIS ROTHSTEIN and ROTHSTEINS INC., a corporation, *Defendants.*	*Action at Law.* *Notice of Appeal and Grounds for Appeal.*

To Abraham Henig, attorney for plaintiffs:

Take notice that the defendants appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. The Court allowed Harry B. Kossove to testify as an expert upon matters as to which he was not shown to be qualified to testify.

2. Motion made by counsel for the defendants for the direction of a verdict for six cents ($.06) damages in favor of plaintiff Weintraub on the ground that said plaintiff had shown no proof of any loss whatever as a result of the alleged fraud, was erroneously denied.

3. Motion made by counsel for the defendants for the direction of a verdict for nominal damages in favor of plaintiff Rosenberg on the ground that said plaintiff was shown to have

parted with all his beneficial interest in the case, and had shown no loss, was erroneously denied.

4. The Court refused to charge the seventh request of the defendants to charge, which request was as follows:

> (7) If you find from the evidence that plaintiffs Weintraub and Rosenberg, or either of them were able, by reason of intelligence and experience, together with the opportunity for investigation, observation and inquiry, to judge for themselves, the probable profits from the business they proposed to carry on at the leased premises, your verdict should be for the defendant.

5. The Court refused to charge the tenth request of the defendants to charge, which request was as follows:

> (10) If you find from the evidence that the plaintiffs after knowledge that any of the representations on which they had relied in making the purchase from defendant was false, continued to make a payment or payments on account of the purchase price, your verdict should be for the defendant, Rothstein.

6. The Court refused to charge the eleventh request of the defendants to charge, which request was as follows:

> (11) If you find from the evidence that plaintiffs, after taking title to the goods sold made a payment on account of the purchase price at a time when from observation or opportunity for ascertainment of the facts they should have known that the representation, if any, on which they had relied, was false, your verdict should be for defendant, Rothstein.

7. The Court refused to charge the twelfth request of the defendants to charge, which request was as follows:

(12) If the plaintiffs have failed to satisfy you by a preponderance of evidence that the value of the merchandise and fixtures purchased was less than represented by defendant, your verdict should be for defendant, Rothstein.

8. The Court refused to charge the thirteenth request of the defendants to charge, which request was as follows:

(13) If the plaintiffs have failed to satisfy you by a preponderance of the testimony that a representation was made by defendant as to the value of the goods and fixtures they were buying on which they reasonably relied, and which was false, your verdict should be for defendant, Rothstein.

9. The Court refused to charge the fourteenth request of the defendants to charge, which request was as follows:

(14) Unless the plaintiffs show you by a preponderance of the evidence that the defendants' representation to them as to the volume of business during the preceding year was substantially incorrect and known to him to be incorrect, and that plaintiffs justifiably relied on that representation, you should give that charge no further consideration.

10. The Court refused to charge the fifteenth request of the defendants to charge, which request was as follows:

(15) Unless plaintiffs show you by preponderance of testimony that defendant represented to them "that the business had earned during the then past three years, above all expenses, a net return of 8 per cent. per year on the total gross business" and that such was false, and was a material inducement to plaintiffs to purchase the merchandise and fixtures in question, your verdict should be for defendant, Rothstein.

11. The Court refused to charge the nineteenth request of the defendants to charge, which request was as follows:

(19) If the representation made to plaintiffs was as to the profits the plaintiffs might make and not the profits Rothstein had made your verdict should be for defendant, Rothstein.

12. The Court erred in charging that the burden was upon the plaintiffs to establish their case by a fair preponderance of the evidence.

13. The Court erred in charging that if the plaintiffs relied on their own or their agent's investigation, they could not offer the false representation of the defendant as ground for deceit.

14. The Court erred in charging that if the jury brought a verdict for the plaintiffs it should be in one sum in favor of both plaintiffs.

15. The Court erred in charging that this property was purchased by the plaintiffs, but that they took title in the name of a corporation and took the stock in that corporation; that this was their method of taking possession of the property and that they did not lose their right to recover their loss in the case if it were caused by the fraudulent representation of the defendant.

16. The Court erred in that portion of its charge in which it referred to the testimony as to the way in which the people of the dry goods business or department store business figure value; that where a concern earns a certain per cent. of profit on its gross sales, they are usually apt to take one hundred per cent. of the value of stock and fixtures; and that the jury had evidence concerning profit before it in determining what the true value of the property was.

17. The Court erred in charging that the purchase was not simply a purchase of so much stock and fixtures and that the jury could judge the true value from what it found the income of the property was, if it applied that method in determining the value.

PITNEY, HARDIN & SKINNER,
Of Counsel with
Defendants-Appellants.

Service acknowledged April 12, 1927, by Abraham Henig, Attorney for Plaintiffs.

New Jersey Court of Errors and Appeals

ROTHSTEIN'S, a corporation; MAX WEINTRAUB and ELIAS ROSENBERG, *Plaintiffs-Appellees,* *vs.* LOUIS ROTHSTEIN and ROTHSTEIN, INC., a corporation, *Defendants-Appellants.*	*Action at Law.* *On Appeal from Essex County Circuit Court.*

BRIEF FOR APPELLANTS.

The appeal is from a judgment of the Essex County Circuit Court in favor of the appellees, Max Weintraub and Elias Rosenberg, and against the appellants for $25,000.00 damages and $114.40 costs. The action was for deceit, to recover damages claimed by the appellees from alleged false representations by the appellants in connection with the sale of a department store business of the appellants to the appellees. (Complaint, record, p. 2.) The complaint presented a second cause of action, but as to this the appellees were non-suited in the course of the trial and we are concerned only with the action for deceit. (Record, pp. 189, 190.) Plaintiff, Rothstein's, was non-suited on the first count, leaving Weintraub and Rosenberg as plaintiffs.

FACTS.

The appellees, Weintraub and Rosenberg, at the time of the purchase of the business of the appellants, were conducting a department store business in Brooklyn, New York, and had been

in this business for many years. (Record, pp. 17, 39, 130, 139.)

In January of 1924, they met the appellant, Rothstein, who was conducting a department store in Newark and negotiations for the purchase of the department store business of Rothsteins, Inc., of which company Rothstein was president, followed, resulting in the purchase by the appellees, Weintraub and Rosenberg, of this department store business. (Record, pp. 16 to 21, 24-29, 43, 131-137.) An agreement was executed between the appellant Rothsteins, Inc., and the appellees, Weintraub and Rosenberg, on January 21, 1924, setting forth the terms of the sale. (Exhibit P. 2, record, p. 341.) This agreement fixes the price for the merchandise at $117,500.00 and for the fixtures at $25,000.00. It further provided that the bill of sale for the merchandise and fixtures was to be delivered to a corporation to be formed by Weintraub and Rosenberg and the payments were to be made by this corporation. The purchase price was to be paid $75,000.00 in cash and the balance in monthly installments of $2,000.00, as evidenced by notes covering the period from April 1, 1924, to December 31, 1926. In pursuance of this a bill of sale was executed by the appellant, Rothsteins, Inc., to Rothstein's, a corporation formed by the appellees, Weintraub and Rosenberg. The bill of sale covered the merchandise and fixtures, as called for by the agreement of sale and the schedule attached covered also the good-will of the business. (Exhibit P. 3, record, pp. 346 to 348.)

It is contended by Weintraub and Rosenberg that in the course of the negotiations for the purchase of this business the appellant, Rothstein, made certain representations which were false

and which induced them to purchase; that these representations were that the expenses of running the business were $76,000.00 annually and that the business had shown a profit of from 8% to 10% on a gross business of $350,000 a year. (Record, pp. 17, 19, 20, 24, 25, 131 to 136.) This was denied by the appellant, Rothstein. He testified that the appellees, Weintraub and Rosenberg, made their own examination of the business (record, pp. 277, 280 to 285); that he did not make any representation as to the profits, except that he told Rosenberg that the expenses were 25% to 27% of the gross sales. (Record, pp. 287, 314.) This would make the expenses from $94,000.00 to $97,500.00. He further testified that one Apfelbaum, a real estate agent who negotiated the sale, stated that there would be left at least $24,000 or $28,000 a year. (Record, pp. 287, 288.)

Following the closing of the transaction, the appellees took possession of the business and conducted it. A few days after the closing, the appellee, Weintraub, discovered that a book of the appellants showed that the expenses were $98,000 (record, p. 21), and that he then charged the appellant, Rothstein, with having cheated him (record, pp. 29, 30). So that according to the testimony of the appellees they discovered the alleged fraud a few days after the deal had been closed. (Record, pp. 21, 143.) He and Rosenberg, through their corporation, Rothstein's, continued to conduct the business until November, 1925, when Weintraub sold out his one-half of the stock of Rothstein's to third parties for the sum of $37,500.00. He had contributed $37,500.00 toward the original purchase of the business from Rothsteins, Inc., and he had put in an additional $7,000.00, so that he got back the amount he had

paid in except the $7,000.00 which he had advanced to the company to conduct the business over a period of almost two years after the discovery of the alleged fraud. (Record, pp. 51, 52, 145.) Rosenberg continued in the business until March, 1926, when he sold out for $19,000.00. His original contribution toward the purchase was $37,500.00, so he claims a net loss of $18,500.00. (Record, pp. 137, 143.)

Weintraub, in connection with the sale of his stock, retained his claim against the appellants (Exhibit P. 15, record, pp. 358 to 363), and at the same time Rosenberg assigned to Weintraub all his claim against the appellants. (Record, p. 145, Exhibit P. 15, record, pp. 358 to 363.) The appellees' testimony is that for a period of some two years after the sale of the business by the appellant and after the discovery of the fraud, they operated the business at some profit. (Record, p. 56.)

During this period they suffered from a fire. (Record, p. 143.)

The notes which were given by Weintraub and Rosenberg to Rothsteins, Inc., for the balance of the purchase price were paid as they became due. (Record, p. 65.)

The merchandise purchased from Rothsteins, Inc., at $117,500.00 was sold by Weintraub and Rosenberg for more than that amount. (Record, pp. 62, 141.)

LAW.

Appellants will not press the first, fifth, sixth, tenth and twelfth grounds of appeal.

POINT I.

The Court erroneously denied appellants' motion for the direction of a verdict for six cents damages in favor of appellee, Weintraub. (Ground 2.)

The established measure of damages for false representations is the difference between the amount paid and the real value of the property at the time when the fraud was discovered.

Crater v. *Binninger,* 33 N. J. L. 513;
Duffy v. *McKenna,* 82 N. J. L. 62;
Mitchell v. *Bassett,* 99 N. J. L. 110;
Richardson v. *Lowe,* 149 Fed. 625.

Under this rule the plaintiff must offer evidence as to the actual value of the goods at the time of the sale or at the time that the fraud ceased to be operative and in the absence of such proof, only nominal damages can be recovered.

Duffy v. *McKenna,* 82 N. J. L. 62.

In the case of *Batura* v. *McBride,* 75 N. J. L. 480, there is a seeming departure from this rule where the Court states that the measure of damages is the difference between the real value of the property purchased and the value which that property would have had if the representation had been true. It is submitted that the rule first stated above is the proper rule of damages in the instant case. Even if the rule adopted in the Batura case be a proper one, it would be inapplicable to the facts in the instant case. The alleged misrepresentations relate to the profits that had been made. In the Batura case the evidence was as to definite rentals for a fixed period and the total amounts were capable of exact computation. Profits are speculative. To permit of recovery they must be definitely proved.

Under neither of these rules above-stated have the appellees proved their damage.

There is no proof as to what the property was worth at the time of the sale or at the time of the discovery of the alleged fraud a few days later. There is no proof as to what the appellees' profits would have been if the business had been as represented. What the appellees could have made under other conditions is entirely speculative. There are too many elements entering into this to permit it to be ascertained with sufficient certainty so as to permit of recovery. And there is no proof in the case from which the jury could determine what the property was actually worth, or, under the second rule of damage, what the property would have been worth had it been as represented.

The evidence establishes the fact that Weintraub sold out his interest for exactly the same amount that he had paid in. He got back as much as he put in, with the exception of $7,000.00 invested by him or loaned to the corporation after the purchase of the property and during the course of a year and a half that he was engaged in the management of it subsequent to the discovery of the alleged fraud. The investment or loan of this $7,000.00 had nothing whatsoever to do with the alleged misrepresentation and cannot be considered an item of damage. The alleged misrepresentations were not an inducement to Weintraub to invest or loan the additional sum of $7,000.00 and had no connection with it. After he learned of the alleged fraud, he, of his own free will and in the exercise of his judgment, saw fit to advance this money to his corporation and he apparently considered it advisable to invest this additional sum in the business. What return he got on his investment does not appear.

The appellees under their agreement purchased the merchandise and fixtures, the right to use the name "Rothstein" and a lease. The agreement to secure this lease by the appellants was a part of the consideration for the transaction. (Exhibit P. 2, record, p. 342.) There is no proof in the case as to what the use of the name "Rothstein" was worth or what the lease was worth. The latter certainly had a definite value. There is no contention that the appellees did not receive the full value of this lease. Even if there were proof as to the fact that the merchandise and fixtures were worth less than the amount paid, this would not be sufficient in determining the loss. There would have to be taken into consideration the value of everything that the appellees received in return for the amount they paid and this includes the lease and the use of the name "Rothstein."

Just what the appellees received is not shown by the proofs. All that appears is that they received more from the sale of the merchandise than they paid. There is no contention that the fixtures were worth less than they paid. It appears that they received rent which they did not put through their books and the amount of which is not disclosed by the testimony. (Record, p. 57.)

While the profits that the appellees lost, we submit, are not an element of damage in this case and therefore cannot be recovered, aside from this they are entirely too speculative and uncertain to permit of recovery. There are too many elements entering into this question to permit of definite ascertainment. What an efficient

management might accomplish would be entirely different from what another management might accomplish. It would be going into the realm of speculation and would not lay the basis for ascertainment in the form of a money judgment. Furthermore, there is no attempt to prove what the profits were that the appellees actually did make or what they could have made. Their testimony shows that they received moneys that did not go through the books and the amount of which they do not disclose. (Record, pp. 57 to 59.) If it is contended that there is proof as to the earning capacity, it is submitted that this is not an element of damage and it is not proof that the true value of the goods was less than the price paid.

The law is too well settled that speculative profits cannot be recovered, and that in order to permit recovery they must be capable of being determined with reasonable certainty under the proofs, to require the citation of many authorities.

Bartow v. *Erie R. R. Co.,* 73 N. J. L. 12;

East Jersey Water Co. v. *Bigelow,* 60 N. J. L. 201;

McCornick v. *U. S. Mining Co.,* 185 Fed. 748.

It is submitted that what the appellees under the new management might have made in the business and the proofs of what they actually did receive from the business are too uncertain and speculative to permit of recovery in the nature of damages or to form a test of the value of the property purchased.

A case peculiarly in point is *Loewer* v. *Paris,* 57 Fed. 368 (Cir. Court of Appeals, 2nd Cir). This was an action to recover damages for alleged deceit in connection with the sale of a business. The purchaser contemplated transferring it to a corporation to be formed for that purpose. The Court held that the profits which the purchaser would have made were too uncertain and speculative to be recoverable.

M. Shultz Co. v. *Gether,* 198 N. W. 433 (Wis.) is also in point. In this action defendant on counter-claim sought to recover loss of profits for the purchase of goods for a corporation which defendant contemplated forming and the value of which he claimed the plaintiff had misrepresented. The Court held that damages for loss of profits which the corporation would have made if successful were speculative and could not be recovered.

At p. 436:

> "We have, therefore, to all intents and purposes a new business with a distinct capitalization, a new owner and a new manager. What such corporation will be able to show during the alleged period of the contract by way of profits is merely speculative and the law is well established that under such circumstances damages for loss of profits for breach of contract cannot be recovered."

17 C. J., p. 797 (Damages).

> "Where a new business or enterprise is floated and damages by way of a profit are claimed for its interruption or prevention they will be denied for the reason that such business is an adventure and speculative and remote, existing only in anticipation."

The same argument applies as to the claim of the appellee, Rosenberg, which was assigned to Weintraub. In his case, the evidence is that he disposed of his interest for the sum of $19,000.00, whereas he had contributed for his share of the purchase price the sum of $37,500.00. This he

claims resulted in a loss of $18,500.00. It is entirely speculative, and neither under the rule of the Crater case or of the Batura case could it be recovered as damages. The sale which resulted in this loss was over two years after the purchase of the property from the appellants and the discovery of the alleged fraud. During that time many causes intervened which affected the selling price. Among others a serious fire occurred. It does not appear how much insurance money was paid. (Record, pp. 143, 249, 250.)

It is submitted that the appellees should not be permitted to speculate with the business for a period of two years, conducting it according to their own ideas and then recover their loss from the appellants. It is undisputed that the merchandise which they got sold for more than they paid for it and it is unquestionably the fact that the merchandise that each of them sold when they got out of the business in November, 1925, and March, 1926, was not the merchandise that they had bought from the appellants. It is not the value of the merchandise which they purchased to replenish their stock that fixes the measure of damages, but the value of the merchandise sold by the appellants. If the contrary were the case the appellees would be permitted to dispose of the merchandise purchased from the appellants at a large profit and then purchase merchandise of an inferior grade, selling this and recovering the difference from the appellants. It would change the measure of damages in a case of this kind from the difference between the price paid and the real value of the goods bought to the difference between the price paid and the real value of other goods substituted by the purchaser.

Apparently the jury arrived at the amount of their verdict, $25,000.00, by taking the $7,000.00 which Weintraub claims he invested in the business or loaned to the company during the period that he was conducting the business and the sum of approximately $18,000.00 which Rosenberg claims was the difference between what he received on the sale of his stock in the corporation some two years after the sale and the discovery of the alleged fraud and the amount that he contributed in the initial instance. This fails to take into consideration the fact that profits were received by the appellees; that what they sold was not what they had bought; the value of the use of the name "Rothstein" and the value of the lease and the rentals received by the appellees.

Under the state of the evidence any verdict of the jury for substantial damages would be pure speculation and the appellants were entitled to a direction of verdict for nominal damages.

POINT II.

The Court erred in denying appellants' motion for the direction of a verdict for nominal damages in favor of the appellee, Rosenberg. (Ground 3.)

The same argument applies in support of this point as in support of Point I. Furthermore, it is admitted that the appellee, Rosenberg, had parted with all his beneficial interest in the case. (Record, p. 145, Exhibit P. 15, p. 358.) Under this state of the proofs, it was error to permit Rosenberg's claim in his own right to go to the jury for their determination of substantial damages.

POINT III.

The Court erred in its refusal to charge the seventh request to charge of the appellants.

This request was as follows:

> "If you find from the evidence that plaintiffs, Weintraub and Rosenberg, or either of them, were able by reason of intelligence and experience, together with the opportunity for investigation, observation and inquiry, to judge for themselves the probable profits from the business they proposed to carry on at the leased premises, your verdict should be for the defendant." (Ground 4.)

It is submitted that the rule is settled that a purchaser cannot blindly rely on representations made to him by the seller and that it is his duty to exercise reasonable care and prudence to investigate for himself. If he fails to avail himself of the opportunity to make such an investigation, he cannot be heard to complain. In determining the duty of the purchaser to make his own investigation and whether or not he has made reasonable efforts to verify the representations, there must be considered his experience and familiarity with the subject matter. A person who has the means of securing the desired information and is experienced and familiar with the subject matter is not justified in relying blindly upon representations made to him.

It is the province of the jury to determine whether under all the facts in the case, having in mind the experience and knowledge of the person complaining, such person, in the light of his knowledge, has made a reasonable effort to investigate and satisfy his own conclusions and whether he had the right to rely on the representation.

Bowring v. *Stevens,* 2 Carrington & Payne, 337;

Slaughter's Admr. v. *Gerson,* 13 Wall. 379;
Poland v. *Brownell,* 131 Mass. 138;
Long v. *Warren,* 68 N. Y. 426;
Mahardy v. *McHugh,* 202 Mass. 148;
Farrar v. *Churchill,* 135 U. S. 609;
Ellis v. *Andrews,* 56 N. Y. 83;
Industrial Savings & Loan Co. v. *Plummer,* 84 N. J. E. 185.
Smith v. *Richard,* 13 Pet. 26; 75;
Smith v. *Richards,* 13 Pet. 26;
Collins v. *Jackson,* 19 N. W. 947 (Mich.);
26 C. J. p. 1142.

In the instant case the appellees had been in the department store business for many years and were familiar with the value of the merchandise and business and had expert knowledge of the various elements. The evidence is that they made their own investigation; they examined the books; they spent about fifteen days in their investigation of the business before deciding to buy; they thoroughly examined the store and the place around it as a site for the business; they made an examination of the contents of the store and an agreement was reached after a minute examination as to the value of the merchandise. That the appellees' judgment was sound is shown in the fact that they got more than the value fixed. (Record, pp. 25, 41, 43, 44, 55, 56, 62, 135, 142.)

That they were experienced and fully capable of forming their own conclusions is undisputed. (Record, pp. 39, 40, 55, 130, 139.)

It is conceded that the main element entering into the business and merchandise was the location of the business and the value of the merchandise. As to these two elements they made

their own investigation and were fully capable of forming their independent judgment. They knew that the store was in a 60% neighborhood, being careful to thoroughly investigate its location. A 60% neighborhood, as explained by Weintraub, is a neighborhood where a man could not open up a store and immediately do business; that the business would have to get established. There is no claim that there was any alleged misrepresentation in connection with the gross business done by Rothstein, nor that his business was established for many years. (Record, pp. 44, 272.) The matter of expenses was one entirely in the control of the appellee. There is a definite relation between location and expenses recognized in the trade, so that on the basis of the location, appellees were in a position to determine for themselves what the expenses should be and the matter of these expenses, adopting the policies recognized in the trade, was within the control of the appellees. The fact that Rothstein spent more or less had nothing to do with the expenses resulting from the conduct of the business by appellees.

Under the evidence, the jury should have been instructed that if they found that appellees, or either of them, were able by reason of intelligence and experience, together with the opportunity for investigation, observation and inquiry, to judge for themselves the probable profits from the business they proposed to carry on, their verdict must be for the defendant. The Court's charge in no respect left this question to the jury. It instructed the jury that it was important for them to consider the opportunities appellees had for investigation because it was necessary that the appellees believed the representations were true. They were told that it

was for them to consider whether appellees made an investigation and whether they were led to believe otherwise. This is only a partial statement of the rule. Under the language of the charge the jury was told that the appellees were entitled to recover even though they made an examination which under the facts should have disclosed the truth or falsity of the alleged misrepresentation; that there could be a recovery if appellees, notwithstanding, relied upon the representations, whether or not such reliance was justified. They were not charged either that it was the duty of the appellees to make a reasonable examination and that appellees were chargeable with the knowledge which such an examination would have revealed under the facts in the case, and that if such an examination would have disclosed the falsity of the representations, there could be no recovery, whether or not an examination was made. Nor were they charged that it was for them to determine whether appellees had the right, under the circumstances, to rely on the representation. (Record, charge, p. 330.)

In *Collins* v. *Jackson, supra,* the Court charged the jury that if they believed from the evidence that the defendant was guilty of making the false representations; that the plaintiff relied on them; that he made the purchase in consequence of those representations and suffered damage, they should find for the plaintiff. The Appellate Court held that this charge was error, as

> "It fails to inform the jury that they should find the representations were such that the plaintiff, under the circumstances, had the right to rely upon them."

POINT IV.

The Court erred in its refusal to charge the twelfth request to charge of the appellants.

This request was as follows:

> "If the plaintiffs have failed to satisfy you by a preponderance of evidence that the value of the merchandise and fixtures purchased was less than represented by defendant, your verdict should be for defendant, Rothstein." (Ground 7.)

What the plaintiffs purchased were the merchandise and fixtures of the appellants, together with the use of the name and a lease to be secured by appellants. (Agreement, Exhibit P. 2, record, p. 341, bill of sale, Exhibit P. 3, record, p. 346.) Both the agreement and the bill of sale covered the purchase of the merchandise and fixtures, which the parties treated as constituting the business of the appellants. The schedule attached to the bill of sale includes the good will of the business, but this was not covered by the agreement. The bill of sale was for the goods and chattels (record, p. 346), and the reference to good will in the schedule attached to the bill of sale cannot broaden the description of the property conveyed contained in the bill of sale. The agreement between the parties is conclusive as to this. Any representations that were made to be material must refer to the subject matter of the transaction; that is, the merchandise and fixtures, use of name and lease. Any representation as to the expenses or the gross profit had no relation to the property which was purchased. What the appellees paid was the price agreed upon for the merchandise and the fixtures. If these were worth what was claimed by the appellants, there has been no misrepresentation of any fact material to the

transaction and the appellees have suffered no injury for which there can be a recovery. The jury should have been instructed as requested. As stated above, the measure of damages which applies to the instant case is the difference between the amount paid and the real value of the property. *Duffy* v. *McKenna,* 82 N. J. L. 62.

POINT V.

The Court erred in its refusal to charge the thirteenth request to charge of the appellants. (Ground 8.)

This request was as follows:

> "If the plaintiffs have failed to satisfy you by a preponderance of the testimony that a representation was made by defendant as to the value of the goods and fixtures they were buying on which they *reasonably* relied and which was false, your verdict should be for defendant, Rothstein."

For the reasons pointed out under Point IV, the representations which will lay the basis for any claim on the part of the appellees must have related to the merchandise and fixtures. In order to permit the appellees to recover for any such representations, it is, of course, settled that they must *reasonably* have relied on them and that they were false and the burden of proving these facts by a preponderance of the testimony was upon the appellees. It was for the jury to determine whether appellees had a right to rely on the representations. See cases under Point III.

POINT VI.

The Court erred in its refusal to charge the fourteenth request to charge of the appellants. (Ground 9.)

This request was as follows:

> "Unless the plaintiffs show you by a preponderance of the evidence that the defendants' representation to them as to the volume of business during the preceding year was substantially incorrect and known to him to be incorrect and that plaintiffs justifiably relied on that representation, you should give that charge no further consideration."

It is submitted that this request correctly states the facts which the jury must find in order to find for the appellees because of any misrepresentation as to the volume of business. The representation must be substantially incorrect to permit recovery. It must have been known to the plaintiffs to be incorrect and plaintiffs must have been justified under the facts in relying on this representation. If all of these elements were not present, the jury should not have considered any representation as to the volume of business in determining defendants' right to recover.

POINT VII.

The Court erred in its refusal to charge the nineteenth request to charge of the appellants. (Ground 11.)

This request was as follows:

> "If the representation made to plaintiffs was as to the profits the plaintiffs might make and not to the profits Rothstein had made, your verdict should be for the defendant, Rothstein."

If the appellants had made any representations as to the profits that the appellees might make, such representations would have been, in law and in fact, merely an opinion and not a representation of a fact known to the appellants. Appellees were equally capable of forming an opinion and they would not have been entitled to rely upon appellants' representations in this respect so as to lay the basis for a recovery of damages in the event that subsequent events should prove the representation wrong.

Halpern v. *Cafarelli,* 98 N. J. L. 77;
Truman v. *J. I. Case Threshing Mach. Co.* (*Mich.*), 135 N. W. 89;
Gamet v. *Haas* (*Iowa*), 146 N. W. 465;
Keithley v. *Mutual Life Ins. Co.* (*Ill.*), 111 N. E. 503;
Collins v. *Jackson,* 19 N. W. 947;
26 *C. J.,* Sec. 105, p. 1204.

The appellant, Rothstein, denies that he made any representation about the profits which he had made, but that a real estate agent who was negotiating the sale made a statement as to the profits which appellees might make. (Record, p. 287.) This real estate agent, Apfelbaum, who was present at the time the negotiations between Rothstein and Weintraub and Rosenberg, says that there was no representation as to the profit which Rothstein had made and that he had figured the profit the appellees would make at about 8%. (Record, pp. 262, 265.) The charge of the Court in no way instructed the jury in this respect. What the Court told the jury was that the plaintiffs must prove first that the defendant made some representation; that this was made with the intent that it be acted upon; that it was false when he made it and knew it to be false and that the appellees believing the representa-

tion to be true had acted upon it with resulting injury. It does not instruct the jury that if the representation was a matter of opinion there should be no recovery and the language of the charge permitted the jury to find for the appellees even if the representation had been as to the profits which the appellees might make.

POINT VIII.

The Court erred in charging that if the plaintiffs relied on their own or their agents' investigation they could not offer the false representation of the defendant as ground for deceit. (Ground 13.)

This was an incorrect and incomplete statement of the law discussed in this brief under Point III. The jury was entitled to infer that a false representation of the appellant could not be offered as ground for deceit only if the appellees, either themselves or through their agents, made an investigation and relied on the result of this investigation. It led the jury to the belief by inference that if no such investigation was made, even though the opportunity was given, or, if such an investigation was made but was not in fact relied upon by the appellees, there could still be recovery. It failed to state the rule correctly, that if there was an opportunity for examination and if such an examination would have disclosed the falsity of the representation, there could be no recovery, whether or not an investigation was made.

POINT IX.

The Court erred in charging that if the jury brought a verdict for the plaintiffs it should be in one sum in favor of both plaintiffs. (Ground 14.)

In this respect the Court told the jury that "if you bring in a verdict for the plaintiffs, it will be in one sum in favor of both plaintiffs; you will not divide it between the plaintiffs." (Record, p. 331.)

There are two separate and distinct claims under the theory on which the case was tried, that of Weintraub and that of Rosenberg. The elements of damage in each case are distinct. The appellants were entitled to have the jury consider each claim separately. The only intelligent and correct way, if the jury found in favor of the appellees, to determine the amount of damages, was to take each claim and consider the evidence of damage in relation to that claim without combining them. Under the Court's charge, the jury was permitted to consider both claims together without differentiating between them as to the amount of damage to which each of the appellees was entitled.

In following this method the jury was permitted to consider the evidence relating only to the damage suffered by one appellee as applying to the damage suffered by the other appellee, and the jury, following this method, could not possibly arrive at an intelligent and correct verdict, in the absence of further instructions that the amount of damage claimed by each of the appellees must be separately determined on the evidence relating to the separate claims.

Furthermore, a verdict lumping the claims in this way prevents the appellants from determin-

ing the amount of damages found by the jury for each of the appellees in considering whether the damages assessed were excessive in either case.

A verdict of this kind permits a jury to cover up damages which are clearly excessive for one plaintiff.

A verdict of this kind is unintelligent and unintelligible.

The language of the Court, in effect, would lead the jury to believe that both claims, though in fact distinct, stood on the same footing and that if they found in favor of one plaintiff, they must necessarily find in favor of the other.

POINT X.

The Court erred in charging that this property was purchased by the plaintiffs but that they took title in the name of a corporation and took the stock in that corporation; that this was their method of taking possession of the property and that they did not lose their right to recover their loss if it were caused by the fraudulent representation of the defendant. (Ground 15.)

The language of the Court in this respect is found at page 331 of the record.

It is submitted that the evidence is that the plaintiffs purchased the property for a corporation to be formed for that purpose. (Record, Exhibit P. 2, p. 344, complaint, record, p. 3.)

The agreement was made by the appellees for this corporation and they were acting as agents for the corporation. Any claim of damages for misrepresentation made to the corporate agent would vest in the corporation and not in the

agent. The corporation which was subsequently formed and to which the property was conveyed by the appellants was a separate and distinct legal entity and its rights in the premises are distinct from those of the appellants. The rule of damages as to the corporation would be different than would be the rule of damages for the appellees, as stated by the Court on the motion for a non-suit. (Record, p. 191.) Yet under this language of the charge, the jury was confused as to the rules of law which apply and were, in fact, told that the claims of the appellees and the corporation were the same. It furthermore appears that insofar as any claim of the corporation is concerned, the corporation had no intention of asserting it. (Record, pp. 227, 248.) Any claim of the corporation was not assigned to Weintraub. (Exhibit P. 15, p. 360, ll. 8 to 17.) While Weintraub testified that Rosenberg had assigned the corporation's interest, no such assignment is produced and, of course, any such assignment by Rosenberg would have been inoperative. The assignments which are produced speak for themselves and do not cover the interest of the corporation. In the course of the trial the corporation was non-suited and the claims that went to the jury were the claims of Weintraub and Rosenberg individually. Under the charge the jury were not told that they must not consider any claim of the corporation and on the contrary were led to believe that the claim of the corporation and the two individuals stood on the same footing.

POINT XI.

The Court erred in that portion of its charge to the jury in which it referred to the testimony as to the way in which the people of the dry goods business or department store business figured value; that where a concern earns a certain per cent. of profit on its gross sales, they are usually apt to take one hundred per cent. of the value of stock and fixtures and that the jury had evidence concerning profit before it in determining what the true value of the property was. (Ground 16.)

The language of the Court in this respect is found at p. 332 of the record.

It is submitted that there is no connection between profit and true value of the property. As stated by the Court, the measure of damages to be applied to the case is the difference between the price paid and the real value of the property acquired. The proofs are uncontradicted that the property sold for more than the appellees paid. There was no proof as to the profits realized by the appellees. It is amply shown that they received income and rent which did not go through their books and the amount of which is not disclosed. What the profit of this business was as compared with any other business depended on too many elements and vicissitudes of the business to permit of a proper comparison for the purpose of determining the real value of the property. By inefficient and uneconomical management for the period that the appellees owned and operated the business, they could under this method of determining the value substantially decrease the value of the property below its real worth at the time of the purchase.

The appellees purchased the fixtures, merchandise, a lease and the right to use appellants' name. As we have argued above, in determining the real value of what the appellees got, the value of all of these items must be considered and not merely the value of the store and fixtures. To instruct the jury that where a concern earns a certain per cent. of profit on its gross sales, they are apt to take one hundred per cent. of the value of the stock and fixtures and that the jury had evidence concerning profit before it in determining what the true value of the property was, entirely leaves out of consideration the lease and limited the jury, in effect, to a consideration only of the value of the merchandise and fixtures in determining the difference between the price paid and the real value of the property received.

POINT XII.

The Court erred in charging the jury that the purchase was not simply a purchase of so much stock and fixtures and that the jury should judge the true value from what they found the income of the property was if it applied that method in determining the value. (Ground 17.)

The language of the charge in this respect is found in the record at p. 332.

Under this charge the Court again left to the jury the question of determining the income of the property. As we have argued, in the first place what the income from the property was is, under the proofs submitted, entirely speculative and not susceptible of a reasonable ascertainment. There is no definite proof as to what the appellees received. They certainly received some

income but the amount is not shown. They admittedly received income which did not go through their books.

Then again, this was an improper method to adopt in determining the value. The income of the property under the management of the appellees had no relation to the value of the property at the time of the purchase or the discovery of the alleged misrepresentation. Too many elements enter into this to make it a fair test of value and it cannot be the basis for determining the true value of what the appellees received.

It is submitted that the damages of the appellees in the instant case under the evidence and in view of the very nature of the case are not susceptible of reasonable ascertainment and appellees' proofs fail to show their real loss.

The judgment should be reversed.

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New Jersey Court of Errors and Appeals

ROTHSTEIN'S, a corporation; MAX WEINTRAUB and ELIAS ROSENBERG, *Plaintiffs-Respondents,* *vs.* LOUIS ROTHSTEIN and ROTHSTEINS, INC., a corporation, *Defendants-Appellants.*	*Action at Law.* *On Appeal from Essex County Circuit Court.* *Judgment for Plaintiff.* *Defendants' Appeal.* *Rule to Show Cause Why Verdict Should Not Be Set Aside.* *Heard Below Before* SMITH, *J.,* *and a Jury.*

(Italics, etc., ours except where otherwise noted.)

BRIEF FOR RESPONDENTS.

Statement of the Case.
Preliminary.

In arguing the exceptions defendants have indicated that the case was submitted to the jury upon a theory of damages upon which, in fact, it was *not* submitted. This error runs throughout the statement under the title "Facts" and throughout the argument under practically each one of the points.

There were two plaintiffs who jointly purchased. From the argument of appellants one would suppose that each plaintiff made a separate claim for damages and that the case went to the jury upon the theory that each plaintiff was entitled to the difference between the money he invested in the enterprise and the money he ultimately got out. And appellants argue that under such circumstances (Point 9, p. 21) each claim should be considered separately.

The case did *not* go to the jury upon any such theory of damages. The court charged the jury as to the damages (p. 331)—

> "The damages which are recoverable are compensation in money damages for the natural and proximate consequences of the defendant's act; namely, compensation for the loss actually sustained. *In this case it will be the difference between the price paid and the real value of the property acquired.*"

This was a correct statement of the rule as to damages in this case and there was no exception.

The court further charged the jury (p. 332)—

> "The fact that the plaintiffs sold out their interest in this property for less than the $75,000, their initial cash payment, should not have any consideration in your mind to fix the damages they are entitled to. This transaction took place in January, 1924. It was not immediately resold on discovery of the fraud. They went on and managed the business. What happened afterward was not under the control of the defendant. It may be that a loss occurred because of poor management; or a profit may have been made because of good management. That does not concern us. The method of assessing the damages is the difference between the price paid and the value of the goods at the time of the sale."

To this there was no exception.

What occurred after plaintiffs took possession of the property purchased and their disposition of their interests in the property was not proven by plaintiffs, but was injected into the case by defendants.

(Cross examination of plaintiff Weintraub, pp. 50, 51, 52.)

The subject having been opened by defendants plaintiff Rosenberg (p. 137) was asked on direct as to when he had sold and what price he had received. There was no objection, but, on the contrary, considerable cross examination (pp. 143, 144, 145, 146).

Now, defendants argue as if the case went to the jury upon this theory of damages. It did not.

Plaintiffs prove the damage by the production of expert witnesses, Kossove, p. 157; Federman, p. 198, who testified, without objection, as to what the real value of the property was, assuming the *true* condition of the business which it was said had been falsely represented by the seller.

And this proof was met by proof of a similar nature offered by defendant; Cronkeim (p. 207).

Plaintiffs bought a going department store business. The purchase price was arrived at by taking merchandise at 100 per cent. of inventory and fixtures at cost. This was a *method* of arriving at the *sale value of the business.* Plaintiffs' expert Kossove testified that this would be a fair price *if the representations exhibited the true situation.* But, assuming that they did not represent the true situation and that the true situa-

tion was as claimed by plaintiffs, the witness said that the real value of the merchandise would be sixty-five per cent. of inventory and the real value of the fixtures would only be fifty per cent. of cost and plaintiffs' witness, Federman, testified that, if the true situation was as claimed by plaintiffs the real value of the merchandise would be between sixty and seventy per cent. of inventory and the real value of the fixtures forty or fifty per cent. of cost (pp. 199, 200).

Defendants' expert Cronheim contents himself with saying that the theory of the plaintiffs witness "is entirely wrong" (p. 210), but he says (p. 210)—

> "Q If you were buying the stock of goods of another store and were also intending to continue the business, would you, among other things, inquire what the man from whom you were buying, what profit he made? A *I certainly would.*
> * * * * * * * * * * *
> Q To what extent would that influence you? A *Past history is always interesting to the purchaser of a store.*"

And p. 215—

> "Q Assume now that a store is making no profit at all and has not been making a profit, or a very small amount of money, for three years. Can you conceive yourself being interested in the purchase of that store at one hundred per cent. of the cost of stock and fixtures unless you wanted that store for competitive reasons? A I wouldn't buy any store at one hundred per cent. on the dollar unless I wanted to operate the business."

And p. 215—

> "Q The past performance of a store to a purchaser is of importance, isn't it? A *Of great importance and great interest.*
> Q And it would make considerable difference. Assuming now that a man has no motive such as removing a place from competition, or buying for the purpose of throwing it into a big concern, but merely for his own little business, it would make a considerable difference to him if the profit was eight per cent. or the profit was three per cent.? A It would, unless he had unusual ability and had a good idea of what his ability was.
> Q He would have to have a great ego to say he could make eight per cent. where the former owner had made three per cent.; he would have to have great faith in his own ability? A He would have to have great faith in his own ability.
> Q *It would have some influence upon the amount that would finally be agreed upon as the sales price of the store?* A *Quite naturally it would.*"

This is the defendants' witness.

All of this testimony went in without objection. *The method of proof of damages was without objection.*

Yet defendants say that there was *no* proof of the actual value of the goods at the time of the sale (Point 1, p. 5).

The proof was that, if the representations exhibited the true situation, the property purchased was worth the price paid, *i. e.,* 100 per cent. of the inventory value of merchandise and 100 per cent. of the cost of fixtures, whereas in the light of the true situation, as disclosed by the proofs, the real value of the property purchased would be between 60 and 70 per cent. of the inventory value of merchandise and 50 per cent. of the cost of the fixtures.

In essence, the attempt of defendants is to reverse a judgment upon the theory that there was evidence in the case which permitted the jury to

consider elements which should not be considered in determining damages, *i. e.*, what the respective plaintiffs received for their interests in the property purchased months after purchase, but it would be a novel procedure, we submit, to permit defendants to secure a reversal of a judgment because there got into the case, *on defendants' own motion,* evidence, with respect to elements which should not be considered by the jury on the matter of damages, when the court expressly charged the jury that these elements, *so injected by defendants,* should *not* be taken into consideration, and charged the jury that the damages were to be determined by the rule now contended for by defendants, *i. e.*, the difference between the amount paid and the real value of the property.

Defendants state the rule (Point I, p. 5) that it is the difference between the price paid and the real value of the property at the time *when the fraud was discovered.* The rule is the difference between the price paid and the real value of the property *at the time of the sale.* It is, of course, immaterial what the real value of the property was at the time of the discovery of the fraud. We do not mean to indicate here that we believe that this is really the true rule. We feel the better rule to be the difference between the real value of the property purchased and the value that the property would have had had the representations been true. But the case was submitted *without objection* to the jury upon the rule as first stated and, as matter of fact, in this case the result would be the same applying either rule, because the plaintiffs' testimony is to the effect that, if the representations had been true, the value of the property would have been the price paid and the difference between the real value of

the property and the value which the property would have had if the representations been true would be the same as the difference between the price paid and the real value of the property.

With this preliminary statement we will consider

THE FACTS.

Louis Rothstein conducted a department store at 413 Springfield avenue, Newark, New Jersey. He had been conducting the store for upwards of forty years (pp. 272, 273, 274). He was the owner of the business although it was conducted in the name of defendant Rothsteins, Inc. He desired to sell and for that purpose placed the matter in the hands of Murray Apfelbaum, a real estate agent (p. 275). It was the *business as such* that he desired to sell (p. 275). Plaintiff, Max Weintraub, had been in the clothing and haberdashery business in Brooklyn, New York, for ten years preceding January, 1924 (p. 39). Plaintiff Elias Rosenberg had been in the department store business in Brooklyn, New York, for twenty years (p. 139). There is no evidence, as indicated by defendants in their brief (pp. 1, 2) that they had been in business together and no evidence that Weintraub had ever been in the department store business. In January of 1924 they came in contact with Rothstein through Apfelbaum, and negotiations were taken up for the purchase of the business of Rothstein.

There is no evidence, or suggestion of evidence, that Weintraub and Rosenberg desired to purchase *merchandise and fixtures as such.* On the contrary, the evidence of Weintraub is that it was the *business* which was being purchased (p. 39), and the evidence of Rothstein is that it was the *business* that was to be sold (p. 275).

And to the same effect is the evidence of Apfelbaum produced by defendants (p. 260).

Weintraub says that a representation was made by Rothstein that the gross business of Rothstein, Inc., was $350,000 for the year 1923, and that the expenses were $76,000, and that the business "had shown a net profit of eight to ten per cent." on the gross business, or $28,000; that in 1921 he did a business of $393,000, but in that year he did not make more money because he had some man managing and he had to pay out a larger expense. And Rothstein showed them a long green book (p. 19) which showed the gross business as $343,000, to which Rothstein stated that there should be added $7,000, which he received by renting out the basement for the holidays for the sale of toys; which made the $350,000 represented. The books showed the expenses on one page at a total for the year 1923 of *$76,000* (p. 20).

Plaintiff Rosenberg had seen Rothstein in October, 1923, with respect to the purchase, and practically the same representations had been made to him at that time (p. 131). He testifies as to the occasion referred to by Weintraub in January, 1924, to the same effect as Weintraub (pp. 132, 133). Upon that occasion the price was discussed and Rothstein stated that he wanted *for the store* "One hundred cents on the dollar for inventory and $25,000 for the fixtures"; he said "$75,000 cash and the rest on terms, *to buy the store*" (p. 18).

A smaller offer was made to him (p. 24). Rothstein argued that he should not be obliged to take any less because of the net profit which he had made in the business (p. 24). He stated that his own salary of $150 a week was included in the *$76,000* on the expense sheet (p. 24).

No agreement was made at that time. They met a few days later and reached an agreement, under the terms of which the business was to be purchased at a price to be fixed at one hundred cents on inventory value of the merchandise (pp. 24, 25), that is the price at which he carried the merchandise, and the cost price to him of the fixtures which was fixed at $25,000 (pp. 25, 26). At this time the representations were repeated. Plaintiffs desired to pay less, and in indicating to them why they should pay his price Rothstein repeated the representations.

The testimony of Rosenberg is to the same effect (pp. 133, 134, 135, 136). The plaintiffs went through the inventory. The merchandise showed a value of $117,500 at 100 per cent. of inventory.

On January 21, 1924, a contract was made between Rothstein, Inc., and Rosenberg and Weintraub (Exhibit P. 2, p. 341) which recites that Weintraub and Rosenberg are desirous of purchasing *the business now conducted by Rothstein, Inc.* The price of the merchandise was fixed at $117,500 with a provision that there might be an investigation of the inventory and an appropriate reduction or increase, as the case might be, based on one hundred per cent. however of inventory, and the price of the fixtures was fixed at $25,000.

The sale was to take effect as of January 1, 1924. Rothstein, Inc., agreed to procure a lease from Louis Rothstein and Dora Rothstein, who owned the property in which the business was conducted.

The agreement provided that the bill of sale should be made "to a corporation about to be formed" by Weintraub and Rosenberg and that payment of the consideration should be made $5,000 in cash, which was paid at the time of the signing of the agreement, and $70,000 on the 25th of January, and the balance in notes of $2,000 each, the first note payable on April 1, 1924, and subsequent notes monthly thereafter until the 21st day of December, 1926, when the entire balance should be paid. The notes were to be the notes of the corporation *but endorsed personally by Weintraub and Rosenberg and their wives.* Weintraub and Rosenberg were given the right to the use of the name Rothstein, Inc. Weintraub and Rosenberg were also to become sureties on the lease.

The transaction was closed as provided in the agreement and the $70,000 paid, making a total cash payment of $75,000 of which each plaintiff contributed $37,500 or one-half (p. 137).

A bill of sale was delivered (Exhibit P. 3, p. 346) by Rothstein's, Inc., which was Rothstein's corporation, to Rothstein's, which was the corporation formed by Weintraub and Rosenberg for the purpose of taking over the business, which bill of sale transferred "the entire stock of merchandise and fixtures, *together with the good will* of the business located at 413-415-417-419 Springfield avenue, Newark, N. J., except the personal belongings of Louis Rothstein" (pp. 346, 348).

For the money which Weintraub and Rosenberg invested they took stock in the corporation, which they created, and which was wholly owned by them.

In various portions of their brief defendants intimate that the transfer of the good will by the bill of sale was wholly gratuitous, and that all Weintraub and Rosenberg purchased was merchandise, fixtures, the right to a lease and the right to the use of a name.

All of the testimony is to the effect, both from plaintiffs and defendants, that the negotiations were for the purchase of the *business,* and the agreement so recites (p. 341). And the case was tried upon the theory, *on both sides,* that Weintraub and Rosenberg were purchasing *a business.*

That *certain* representations *were* made is conceded by defendants. Their witness and agent Murray Apfelbaum testified that he showed Weintraub and Rosenberg "a sheet of paper there with about the approximate business he did" (Rothstein), which paper he had received from Rothstein.

This witness agrees with Weintraub and Rosenberg that the price fixed by Rothstein *for the business* was one hundred cents on the dollar for stock and $30,000 for fixtures. Subsequently this latter was reduced to $25,000 *so far as Weintraub and Rosenberg were concerned,* although Rothstein got his $30,000, Apfelbaum rebating $5,000 of his commission to make up the $30,000 (p. 264).

Apfelbaum states that he said that an eight per cent. profit *could* be made but that Rothstein made no representation as to the profit which he *had* made (pp. 262, 263).

Apfelbaum says that, during the negotiations (p. 263), Weintraub and Rosenberg went upstairs to look at the books. He concedes that Weintraub and Rosenberg were interested in the

amount of business Rothstein had been doing, and also interested in the profit and the expenses (p. 266). He concedes that "volume of business they spoke about; and they spoke about expenses" (p. 267). If Weintraub and Rosenberg had been shown the correct books, when they went upstairs, they would have immediately seen that, instead of the expenses being *$76,000* for the year 1923 they were *$98,000* and, instead of the profit being approximately eight per cent., it was negligible, not exceeding from 1½ to 3 per cent. A casual inspection of the books would have disclosed this fact. Having been told that a profit of eight per cent. might be anticipated, according to *defendants'* witness and having discovered that for the past year a profit of but from 1½ to 3 per cent. had been made there would have been an immediate explosion when they came downstairs. Apfelbaum testified (p. 267)—

> "Q After Mr. Weintraub and Mr. Rosenberg left the room and came downstairs, didn't they say, 'It's all wrong. There isn't any profit like that. Expenses are up to $98,000 and it only shows a very small profit.' Do you remember their saying that? A I don't remember.
>
> Q Did any such talk take place; any explosion of that kind take place? A No, sir.
>
> Q Still, you had been figuring on a profit of seven or eight per cent. and they were upstairs to see the books and came down again. A They were up some time.
>
> Q And then they came down again and never said anything like what I have said? A No, sir."

Weintraub and Rosenberg went into possession. They had only been in possession a few days when Weintraub asked Miss Feldman, now Rhoda Hersh, Rothstein's bookkeeper, who had

been continued, to see the book showing expenses for 1923. She went to get the book, which is Exhibit P. 1, and she found that *the page which exhibited the expenses had been cut out* (p. 79). That green book was a book which she kept for Rothstein's private use, and she had another book, a black book, which formed no part of the bookkeeping system, but which she also kept for Rothstein's private use, in which these expenses had been entered. Rothstein had instructed her to take *all* the books and deliver them to Puder & Puder (pp. 78, 79)—both this green book with the page cut out and the black book had been *overlooked* by her (p. 79). When she discovered that the page showing the expenses had been cut out of the green book she told Weintraub that she had another book which showed them. She produced the black book, which showed that the expenses for the year 1923 were *$98,423.12* (p. 81). At the time Mrs. Hersh testified, the black book had not been produced. The book was finally produced (p. 118). The page is printed (p. 357). The record shows that it was almost impossible to get books under the control of defendants. See the attempts (pp. 99, 124, 127, 129).

Upon discovering this difference in the expenses Weintraub saw Rothstein, who said that there was $350,000 worth of business done during 1913 and $28,000 profit as represented and "to forget about the books and come down to business" (p. 30). Rothstein said that the book was kept showing a large expense *for government purposes* (p. 30). Some time later, by mistake, Puder & Puder, accountants for Rothstein, mailed the audit for the year 1923 to the place of business and Weintraub and Rosenberg got that audit. It is printed (Exhibit P. 4, p. 351), and was proven by Armstrong of Puder & Puder, who

made it (p. 99). It shows a profit for the year 1923 of *$9,172.98 instead of $28,000* as represented by Rothstein, and, in order to make up that profit, there is included an item of $7,660.77 (Exhibit P. 4, Exhibit B, p. 352), which has no connection with operation, the net profit on operation being *$1,512.21,* on net sales $343,176.61.

See the testimony of Armstrong (pp. 105, 106).

The difference between the actual profit made for the year 1923 and the profit as represented to Weintraub and Rosenberg is made up of the difference in the expenses between $76,000, as represented, and $98,000, as the fact was.

When Weintraub and Rosenberg received this audit they knew that they had been defrauded (p. 35).

This suit was brought November 10, 1924 (p. 1). They might have delayed bringing the suit, if they so desired, until just before the statute of limitations run.

At the trial no attempt was made by defendants to prove the truth of the representations. It was conceded that the report of Puder & Puder actually represented the financial condition for the year 1923. The defense consisted of a denial that the representations had been made and a claim that, if they were made, Weintraub and Rosenberg should have discovered their falseness before making the agreement. No explanation is made for the cutting out of the page of the green book showing the expenses.

Upon plaintiffs' theory of the case Rothstein made the representation that he had made during 1923, $28,000 to $30,000 and that the expenses were $76,000; *he showed them a book, which had been prepared for the purpose, which showed*

the expenses at $76,000; he mutilated the green book, but forgot to take out the page of the black book, which showed the correct expenses, believing that that book had been sent to Puder & Puder and that Weintraub and Rosenberg would not secure access to it.

We have already indicated how plaintiffs proved their damage.

The case would have supported a verdict for $60,000 for, assuming that plaintiffs' experts were correct, under the true situation, the value of the business should have been fixed at not more than fifty per cent. of the cost of the fixtures, which would be $12,500, and not more than sixty per cent. of the inventory of the merchandise, which would be approximately $70,000, which would make a total real value of approximately $82,000 as against the amount paid of $142,000, or a difference of $60,000. The verdict was for $25,000.

Judgment was entered November 12, 1926 (p. 14).

Defendants took a rule to show cause general in form (p. 364), but reserving exceptions generally.

Defendants argued that the verdict should be set aside and a new trial granted upon the ground that the verdict was against the weight of the evidence and that the damages were excessive. The court discharged the rule to show cause (p. 365).

ARGUMENT.

POINT I.

The Court did not err in denying appellants' motion for the direction of a verdict for six cents damages in favor of appellee, Weintraub (Ground 2).

POINT II.

The Court did not err in denying appellants' motion for the direction of a verdict for nominal damages in favor of the appellee, Rosenberg (Ground 3).

We know of no authority for defendants to move for a verdict for plaintiffs in any amount. The motion was made on page 325. The proper method by which such a matter should be raised is, we submit, a request to the court to charge the jury that, if they find in favor of the plaintiffs, the damages must be limited to a nominal sum. This course was not pursued.

The theory of the motion for a direction of a verdict for six cents as to the plaintiff Weintraub and as to the plaintiff Rosenberg was that there was *no proof of actual damage.* But defendants have had a rule to show cause why the verdict should not be set aside which was argued upon the ground that it was against the weight of the evidence and that the damages were excessive.

Under such circumstances, it is submitted, defendants are precluded here from arguing that there should have been a direction of a verdict in favor of plaintiffs for nominal damages, for that is but another way of saying that the damages are excessive and against the weight of the evidence.

The matter is controlled we submit by the principle of *Catterall* v. *Otis Elevator Co.,* 6 N. J. Advance Reports, p. 158, in this court and the cases there cited. This court held that a reason assigned for a new trial that the verdict is contrary to the weight of the evidence, is necessarily embraced within exceptions to the refusal to non-suit and to direct a verdict on the ground that there was no evidence of defendant's negligence and that contributory negligence of the plaintiff conclusively appeared, and that where all the evidence in a cause is involved in a motion to take the case from the jury it would be impossible to determine that the verdict was contrary to the weight of the evidence, without necessarily determining that the refusal of the motion was right.

So, here, in determining that the verdict of this jury was not against the weight of the evidence, as the trial court did upon the rule to show cause, there was necessarily involved the refusal of the trial court to non-suit the plaintiffs and to direct a verdict for defendants, and, realizing this, defendants do not seek to argue here the objections based upon the refusal of the court to grant these motions.

But there was also necessarily involved in the determination that the verdict was not against the weight of the evidence, a determination that there was evidence sufficient to go to the jury upon which the jury might fix substantial damages for the plaintiffs and, in the determination that the verdict was not excessive, there surely is involved a determination that there *was* evidence which would warrant the jury in fixing more than nominal damages.

But there is no merit in the contention of defendants in any event.

Defendants' argument presupposes that the case went to the jury upon the theory that each plaintiff was entitled to recover the amount of his loss to be fixed by the difference between what he put in and the amount which he ultimately got out and that, in some way or another, *prospective* profits were involved in the case. *No one suggested any such theory except defendants.*

Plaintiffs' theory and the theory upon which the case went to the jury was, as stated in the preliminary portion of this brief, that plaintiffs were entitled to recover the difference between the amount paid and the real value of the property, and the court in its charge to the jury in two places so instructed the jury. It said (p. 331):

> "In this case it (the damages) will be the difference between the price paid and the real value of the property acquired."

And page 332:

> "The fact that the plaintiffs sold out their interest in this property for less than the $75,000, their initial cash payment, should not have any consideration in your mind to fix the damages they are entitled to. This transaction took place in January, 1924. It was not immediately resold on discovery of the fraud. They went on and managed the business. What happened afterward was not under the control of the defendant. It may be that a loss occurred because of poor management; or a profit may have been made because of good management. That does not concern us. The method of assessing the damages is the difference between the price paid and the value of the goods at the time of the sale."

And to this no exception was taken.

The evidence as to what happened afterwards was injected into the case, as we have previously stated, by defendants who, on cross examination, asked Weintraub for what amount he had sold out his interest in the business (p. 52), and it appeared that he had sold out for $7,000 less than he had put in.

Defendants devoted a great deal of time to bringing out this information. Weintraub got out in the latter part of 1924. It then appeared that Rosenberg sold out for $18,500 less than he had put in (p. 137) and defendants devoted a great deal of time in cross examining upon that subject (pp. 142, 143). He sold out in the early part of 1926, but before he sold out there had been a fire in January, 1926. *Defendants* produced this testimony (pp. 248, 249).

The court very properly instructed the jury that they were to leave all of this out of consideration. The business had been operated and old stock sold; new stock had been purchased; there had been a fire and it would have been quite immaterial, under the circumstances, if Weintraub and Rosenberg had, in fact, made a profit; they still would have been entitled to the difference between the price paid and the real value of the property purchased.

If there was any error it was invited by defendants and a party cannot complain of any error invited by himself. *Newcomb* v. *Downam,* 13 N. J. L. 135; *Turrell* v. *Elizabeth,* 43 N. J. L. 272.

The purpose of defendants in injecting this testimony, which, upon their own theory of the case, was immaterial, was to convince the jury that, whatever the rule of law might be, Weintraub and Rosenberg had not, in fact, been injured, *i. e.,* they had gotten out what they put in, and therefore, even if technically they were entitled to the difference between the price paid and the real value, the jury should not award it to them because they had taken out what they put in.

This leaves out of consideration, of course, the labor that they put in and *their right* to a profit, if there were one.

They failed in convincing the jury, by this immaterial evidence, that Weintraub and Rosenberg had not been injured and now they complain because they say (p. 11)— "Apparently the jury arrived at the amount of this verdict, $25,000 by taking the $7,000 which Weintraub claims he invested in the business or loaned to the company during the period that he was conducting the business and the sum of approximately $18,000 which Rosenberg claims was the difference between what he received on the sale of his stock in the corporation some two years after the sale and the discovery of the alleged fraud and the amount that he contributed in the initial instance."

If the jury's verdict had been based upon these figures, the verdict would have been $7,000 plus $18,500 or $25,500. These figures are definite and, if the jury had adopted this theory of the case, there was no reason why it should not bring in the precise sum. It did not.

But defendants insist that the court should infer that it did because of the nearness of the figure $25,000 to $7,000 plus $18,500. By reason of this coincidence of figures defendants argue that the court must assume that the jury paid no attention to the instructions of the court to disregard these matters injected by defendants and to fix the damages at the difference between the amount paid and the real value.

This argument is such as might well be directed to the court on an argument of the rule to show cause why the verdict should not be set aside as against the weight of the evidence upon the ground that the damages were excessive but has no place, we submit, on appeal.

Defendants are mistaken when they say "all that appears is that they received more from the sale of merchandise than they paid. There is no contention that the fixtures were worth less than what they paid." We reiterate that *all* of the testimony showed, both from plaintiffs and defendants, that the subject matter of this sale was the *business,* a going concern, with the price to be paid fixed by a certain method and the testimony also indicates that this is the usual method for the fixing of purchase prices of going concerns of this character.

Plaintiffs proved their damage by the testimony of the witness Kossove, an expert (p. 167); and Federman (p. 198), and by the testimony of plaintiff Rosenberg (pp. 139, 140), and defendants countered by the testimony of the expert Cronheim (p. 207); Rosenblum (p. 227); Spitz (p. 254). The testimony of plaintiffs was to the effect that the value of department stores is usually arrived at by the method in which the purchase price of this one was fixed,

and that the real value of the property purchased was but from sixty to seventy per cent. of the inventory value of the merchandise, whereas the plaintiffs had paid 100 per cent., and fifty per cent. of the cost price of the fixtures, whereas the plaintiffs had paid one hundred per cent. The experts differed somewhat among themselves of course as experts will. The experts of the defendants attempted to show that the theory of plaintiffs was wrong, and that the profit which had been made should be given little consideration in determining the price to be paid, but the jury was quite justified in giving but little weight to this testimony in view of what defendants' witness Cronheim said on page 210:

> "Q If you were buying the stock of goods of another store and were also intending to continue the business, would you, among other things, inquire what the man from whom you were buying, what profit he made? A *I certainly would.*
>
> * * * * *
>
> Q To what extent would that influence you? A Past history is *always* interesting to the purchaser of a store."

And also in view of the fact that it is conceded by defendant Rothstein and defendant's agent Apfelbaum that the business that Rothstein had done *was* discussed and that the purchasers *were* interested in the volume of business *and in the profit* and that the agent Apfelbaum, showed plaintiffs a statement which he had obtained from Rothstein indicating the business done in 1923, and that the *expenses were* discussed and that Weintraub and Rosenberg went "upstairs" to look at the books.

All of this expert testimony went in without objection and there is no place in the record where any question is raised as to the propriety

of so proving the damages. The proof went to the value of the whole property purchased, which was the business.

In two places in their brief, defendants state that the merchandise purchased from Rothstein, Inc., at $117,500 was sold by Weintraub and Rosenberg for more than that amount (pp. 4, 7). That we submit is not a proper construction of the testimony. Weintraub says on cross examination on p. 61:

> "Q Did you not get stock that was worth, in your judgment, what you paid for it? A As a going business. Without any representation of profits I don't want it. I wasn't in the stock business.
>
> Q I ask you if you didn't know and understand that stock was worth what you paid to anybody who took it and was going in that place what you were charged for it? A It wouldn't be worth anything to me if he wasn't making money."

He is then asked (p. 62) whether he did not sell the merchandise for more than it was inventoried at and

> "Q Didn't you? A We must have."

And page 62:

> "Q Then you must have gotten for them as a going business more than you paid for them? A We made expenses in order to sell them.
>
> Q I think you said you sold them for more than you paid for them? A The usual retail methods.
>
> Q And the usual retail price? A And some less; when we ran a sale.
>
> Q But you got as much as you expected to get? A We didn't expect anything; we bought a going business."

Page 72:

"Q Then the value of merchandise and the value of fixtures, depends upon whether the business is profitable or not? A Absolutely.

Q If there is nothing there— A They are worth only that for an auctioneer to buy."

Rosenberg says (p. 140):

"Q As a matter of fact you paid for these goods? A Yes.

Q And you sold them again? A We did.

Q You got the retail price for them? A Oh, no.

Q You differ from Mr. Weintraub? A I don't agree what he said. We sold some of it ten cents on the dollar; we gave some of it away; some went to an auctioneer.

Q For the stock you gave away you paid 100 cents on the dollar? A Yes. We sold to an auctioneer shoes on ten cents on the dollar.

Q You sold that merchandise as you carried that business on for less than $117,500? A I am not speaking of the whole thing.

Q I am. I am asking you now? A No, we didn't.

Q Then you got the $117,500 and more, too? A I couldn't tell you.

Q Why did you say you didn't sell it for less than that, but you sold— A Goods kept coming in; first-class merchandise kept coming in. Mr. Rothstein was twenty years in business, he had stock that had horns on it. We had to dispose of the junk; we had to sell it at any price or throw it out.

Q But you wouldn't say you didn't get $117,500 for the stock of merchandise as a whole? A We had expenses on it.

Q Did you sell it for $117,500 or more? A I couldn't really tell you, sir.

Q You haven't much recollection of how much you did get, have you? A We bought the goods at wholesale and sold at retail.

Q That retail price was considerably more than the wholesale price? A That's right.

Q And the wholesale price was the price that figured $117,500? A That's right."

Defendants complain saying—"that the appellees should not be permitted to speculate with the business for a period of two years, conducting it according to their own ideas and then recover their loss from the appellants."

Upon discovery of the frand, the person defrauded has an election. He may rescind the transaction and sue to recover the price paid, or he may affirm the transaction and sue for damages and if he does the latter he may wait and sue at any time within the period of the statute of limitations.

Hanrahan v. *Nat'l B. L. and Prov. Asso.,* 66 N. J. L. 80; 48 Atl. 517;

Kvedar v. *Shapiro,* 98 N. J. L. 225; 119 Atl. 104.

The court charged the jury the 9th request of the defendant to charge (p. 334):

"If from the evidence you are unable to fix the amount of the loss plaintiffs suffered by reason of reliance upon the representations set up in the complaint, your verdict should be for the defendant."

This charge covered all that defendants were entitled to have charged on the question of any indefiniteness of the proof of damages.

POINT III.

The Court did not err in refusing to charge the seventh request of appellants.

That request read:

> "If you find from the evidence that plaintiffs Weintraub and Rosenberg, or either of them were able, by reason of intelligence and experience, together with the opportunity for investigation, observation and inquiry, to judge for themselves, the *probable profits* from the business they proposed to carry on at the leased premises, your verdict should be for defendant."

The court charged the 5th request of the defendants (p. 337):

> "In determining whether the plaintiffs were induced by or relied upon the alleged false representation, you should consider the testimony as to the opportunity that they had to determine the facts for themselves as to the volume of the business and the profits therefrom and the extent to which they availed themselves of that opportunity by examination of the books or otherwise."

The court also charged the 6th request of the defendants to charge:

> "In determining whether the plaintiffs were induced by or relied upon the alleged false representation you should consider the business experience and intelligence of the plaintiffs and whatever there was in either of them of ability to determine for themselves the character and volume of the business or its past or prospective profits."

The court also charged the jury in speaking of the elements necessary to be shown before there could be a recovery in deceit for false representations:

> "* * * The third is that the plaintiffs believed such representation to be true and acted upon it and were injured thereby."

> "In connection with the proof under that item it is important for you to consider the opportunity they had for investigation, because you see that that requires that the plaintiffs believed the representations were true. If they made an investigation themselves and were led to leave otherwise, it is a matter for you to consider. There must be a fraudulent design. If false representation was made, it was made to commit a fraud to gain the benefit of it or to put through the transaction. If the plaintiffs relied on their own or their agent's investigation, they cannot offer the false representation of the defendant as ground for deceit. The representation must be one of fact, not of opinion, and must be in reference to a subject matter susceptible of knowledge."

The 7th request to charge *requires* those about to be defrauded to make an investigation. If it were charged the jury would have been told, in effect, that, if plaintiffs had intelligence and experience sufficient to judge for themselves and if they had opportunity for investigation, observation and inquiry, to judge for themselves the *probable profits from the business they proposed to carry on at the leased premises,* the verdict would have to be for defendants.

The request is defective in two respects. In the first place, it puts a burden upon those about to be defrauded to make an investigation if they have an opportunity, and in the second place it makes the determining factor the intelligence and experience and opportunity to determine *"probable profits from the business"* which plaintiffs would make and not the intelligence, experience and opportunity to determine the truth or falseness of the alleged false representation.

The cases which are cited by defendants at page 13, include the *Industrial Savings and Loan Company* v. *Plummer,* 84 N. J. Equity, p. 184; 92 Atl. 583, but that was a case where the representation was merely as to value without actual fraud, and the court said:

> "Every person reposes at his peril in the *opinion of others,* when he has equal opportunity to form and exercise his own judgment."

Vice-Chancellor Bentley in *Condon* v. *Sandhow,* 97 N. J. Eq. 204; 127 Atl. 101, had to deal with a charge of fraud based on a representation that a building was constructed of hollow tile, whereas in fact, it was not so constructed and said (p. 206):

> "I think there can be no question that the defendants would have been entitled to rely upon any such statement as that with which they charged complainants. The trouble is, however, as I have said, *that they did not do so,* but preferred to investigate the matter for themselves and, having done so, must be charged with what it is reasonable to assume they found or could have found if their investigation was made with the care and completeness to be expected of one who deals at arms length with another."

He further said (p. 207):

> "Had there been any fraud to frustrate the attempt of the defendants in their examination of the building, a different situation would have been present."

The general rule is stated in 26 C. J. Title-Fraud, Sec. 68, p. 1149:

> "Where the parties deal upon *equal terms,* one who has failed to avail himself of *means of knowledge readily within his reach* cannot *as a rule complain of the other parties' representations.* * * * *But the mere presence of opportunities for investigation will not, of itself, preclude the right of reliance;* and this is especially true where * * * there was *intentional fraud.* * * * The right to rely upon representations is generally conceded where the hearer lacks *equal facilities for ascertaining the truth.*"

And in Sec. 66, p. 1147, the author of the article in Corpus Juris, says:

> "Since the very purpose of fraud is to cheat its victim by making him neglect the precautions essential to prevent injury and to deny relief because the victim was negligent would encourage dishonesty, it is generally held in cases of the character described above that the fraud feasor will not be heard to say that he is a person unworthy of belief and that plaintiff was negligent in trusting him and was cheated through his own credulity."

As the court said in *Jacobson* v. *Whitley,* 138 Wis. 434, 120 N. W. 285-286:

> "It is an unsavory defense for a man who, by false statements, induces another to act, to assert that, if the latter had disbelieved him, he would not have been injured."

In the case at bar the false representations relied upon were not matters of opinion, but matters of past events, *i. e.,* the expenses of the business for 1923, and the amount of profit which *had been made.*

Upon the theory of plaintiffs there was *actual fraud.* Even assuming that there was a duty upon Weintraub and Rosenberg to investigate, if they had had an opportunity to investigate, and that they had that opportunity, *still the charge requested would have been erroneous.* Had that duty rested upon plaintiffs, the matter would still have been one for the jury as to whether or not plaintiffs would be barred of their action. This would be so even if an investigation were in fact made by plaintiffs.

In *Townsend* v. *Niles,* 210 Massachusetts 524; 96 Northeastern 1035, the Massachusetts Supreme Court said:

> "The defendant contends also that the case here presented is like that of one purchasing goods which he is given full opportunity to examine and of which the condition is obvious upon examination. Salem India Rubber Co. *v.* Adams, 23 Pick. 256; Manning *v.* Albee, 11 Allen, 520, 522; Brown *v.* Leach, 107 Mass. 364; Burns *v.* Lane, 138 Mass. 350; Deming *v.* Darling, 148 Mass. 504, 505; 20 N. E. 107; 2 L. R. A. 743. But here again the question was for the jury. We cannot say as matter of law that the fullest examination of a stall in a market or of other premises in which the business of dealing in provisions at wholesale or retail is carried on would make manifest the truth of falsity of a representation as to the amount of business which is being done there. And under the circumstances of this case the same principle applies to the advice of third persons *or to the examination of books* so far as this was or might have been made. See Lewis *v.* Jewell, 151 Mass. 345, 347; 24 N. E. 52; 21 Am. St. Rep. 454; Holst *v.* Stewart, 161 Mass. 516; 37 N. E. 755; 42 Am. St. Rep. 442; Whiting *v.* Price, 172 Mass. 240; 51 N. E. 1084; 70 Am. St. Rep. 262; Arnold *v.* Teel, 182 Mass. 1; 64 N. E. 413; Long *v.* Athol, 196 Mass. 497, 504; 82 N. E. 665; 17 L. R. A. (N. S.) 96; Rollins *v.* Quimby, 200 Mass. 162; 86 N. E. 350; Thomson *v.* Pentecost, 206 Mass. 505; 92 N. E. 1021.

3. It cannot be said that the evidence taken together discloses such a failure on the part of the plaintiff to use reasonable care for his own protection as to preclude his recovery under the rule of Poland *v.* Brownell, 131 Mass. 138; 41 Am. Rep. 215. The doctrine of that case is not to be extended. *'It relates merely to seller's talk.'* Light *v.* Jacobs, 183 Mass. 206, 210; 66 N. E. 799, 800."

Note here that the Massachusetts court in speaking of the rule which requires that a purchaser "use reasonable care for his own protection," states that it "relates merely to seller's talk." Such was the type of representation dealt with *Industrial Savings and Loan Company* v. *Plummer,* 84 N. J. Equity, p. 184. The rule has no application to express representations of past events which are knowingly false.

The jury would have been instructed if defendants' request had been granted, that if there was a combination of intelligence, experience, opportunity for investigation, observation and inquiry, a verdict *was required* for defendants. This leaves out of consideration altogether the fact that the proof from plaintiffs showed that, when plaintiffs were offered an examination of the books, the books had been *doctored* to show that the expenses had been $76,000, whereas in fact they had been $98,000.

Defendants say, at page 13 of the brief, that the evidence is that plaintiffs made their own investigation and that they examined the books. The *only* examination of the books which was made was an examination of the books which Rothstein had changed to show the expenses as $76,000 instead of $98,000, and the profits $28,000 or $30,000 instead of $9,000 or less.

Nor was it determinative if plaintiffs had the ability and opportunity to *"judge for themselves the probable profits from the business they proposed to carry on."* One of the elements which went into the probable profits that could be made, was the profits which *had* been made. Defendants' expert agreed to this when he said that if he were buying *any* stock of goods and were also intending to continue the business, he would *certainly* inquire from the man from whom he was buying, what profit he had made.

Even if plaintiffs believed that they could make a reasonable profit and had the ability and opportunity so to determine without the aid of the information given by Rothstein, still they might recover, if because of the false representation of Rothstein as to *his* profit they were induced to pay more than the market value of the property.

The Supreme Court of Massachusetts in *Light* v. *Jacobs, et al.,* 183 Mass. 206; 66 N. E., p. 799 at 800, said:

> "The defendants contend that the fact that the plaintiff made a separate and distinct investigation into the value of the property covered by the second mortgage prevents him from recovering. The case of Poland *v.* Brownell, 131 Mass. 138; 41 Am. Rep. 215, cited by the defendants, does not cover this point. *It relates merely to seller's talk. The rule is that it is not necessary that the false representations should have been the sole, or even the predominant, motive; it is enough if they had material influence upon the person deceived, although combined with other motives.* Matthews *v.* Bliss, 22 Pick. 48; Safford *v.* Grout, 120 Mass. 20, 25; Windram *v.* French, 151 Mass. 547; 24 N. E. 914; 8 L. R. A. 750; Burns *v.* Dockray, 156 Mass. 135, 138; 30 N. E. 551."

Defendants attempt to argue that the profit which *had been made* had *no* relation whatever to the profit that *could* be made, and that the expenses which had been incurred could have no relation to the expenses which would be incurred (p. 14). The difficulty is that no one states this except counsel for defendants, the testimony, including that of witnesses for defendants, is the other way. The matters above mentioned *had* a relation to what a willing purchaser would pay for the business and that after all is the test of *real value* as used in the cases. When

a seller makes a false representation as to a matter which would affect what a willing purchaser would pay it is a material representation whatever a prospective purchaser may think he can make out of the thing when purchased.

Defendants contend that under the charge

> "the jury was told that the appellees were entitled to recover even though they made an examination which under the facts should have disclosed the truth or falsity of the alleged misrepresentation; that there could be a recovery if appellees, notwithstanding, relied upon the representations, whether or not such reliance was justified."

An examination of the charge of the court indicates that it did *not* so instruct the jury. We have already referred to certain sections of the charge dealing with this subject matter. The court further charged the first request of the defendants to charge as follows (p. 333):

> "The burden of proof is upon the plaintiffs to establish by a preponderance of the testimony every element of their charge of false and fraudulent representation, that it is a false representation, known to be false, *properly relied upon by the plaintiffs to their damage.*"

This court stated the elements in an action for deceit in *Kosobucki* v. *McGarry,* 5 N. J. Advance Rep., p. 1409, as follows:

> "(1) that the defendant made some representation to the plaintiff, meaning that he should act upon it; (2) that such representation was false, and that the defendant, when he made it, knew it to be false, and (3) that the plaintiff, believing such representation to be true, acted upon it and was thereby injured."

Upon consideration as to whether the court should have charged the seventh request, it is unimportant as to whether the court should have charged something else.

DeFeo v. *People's Gas Co. of N. J.*, 5 N. J. Advance Rep., p. 1405.

It is not error to refuse a request to charge which contains *any* erroneous statements. *Consolidated Traction Co.* v. *Chenowitz,* 58 N. J. L. 416; 34 Atl. 817.

The question is whether the charge *as requested* accurately stated the law. It did not, and there was no error.

POINT IV.

The Court did not err in refusing to charge the twelfth request of defendants which reads as follows:

> "If the plaintiffs have failed to satisfy you by a preponderance of evidence that the value of the merchandise and fixtures purchased *was less than represented by defendant,* your verdict should be for defendant, Rothstein."

The court *had* charged the jury (p. 331):

> "In this case it (the damages) will be the difference between the price paid the real value of the property acquired."

and had further charged the jury the

> "method of assessing the damages is the difference between the price paid and the value of the goods at the time of the sale."

The requested charge presupposes that the complaint of plaintiffs was that defendants had represented the *value* of the property purchased *at a certain figure,* which representation was false.

There is no charge, either in the complaint or in the testimony, of any false representation by defendants as to the *"value of the merchandise and fixtures."* The gravamen of plaintiffs' complaint is that the representation made was as to *the amount of the expenses of the business for the year 1923, and the amount of the profit.*

The charge containing within it a false assumption of fact could not have properly been charged by the court.

Defendants say (p. 16):

> "Any representations that were made to be material must refer to the subject matter of the transaction; that is, the merchandise and fixtures, use of name and lease. Any representation as to the expenses or the gross profit had no relation to the property which was purchased."

One difficulty with this argument is that it amounts to this—that there should have been a non-suit or a direction of a verdict for defendants upon the ground that no material false representation had been shown.

But the motions to non-suit and to direct a verdict are not argued, and cannot be argued, because there was a rule to show cause why the verdict should not be set aside argued upon the ground that the verdict was against the weight of the evidence and that the damages were excessive.

Here again, we repeat that no one asserts that the representations as to the past business done, the expenses and the profit were not material in the fixation of the price except counsel for defendants.

Defendants are mistaken, we submit, when they say that all the plaintiffs purchased was "the merchandise and fixtures," as what was purchased *was the business,* the price of the business being fixed at a certain percentage of the inventory value of the merchandise and the cost of the fixtures.

POINT V.

The Court did not err in refusing to charge the thirteenth request of defendants.

That request was:

> "If the plaintiffs have failed to satisfy you by a preponderance of the testimony that a representation was made by defendant as to the value of the *goods and fixtures they were buying on which they reasonably relied, and which was false,* your verdict should be for defendant, Rothstein."

Here again, the charge presupposes that the representation complained of was "as to the value of the goods and fixtures" plaintiffs were buying. This is not so. There was no representation complained of "as to the value of the goods and fixtures" plaintiffs were buying. The representation was as to the past business done, which was a material element to be considered by plaintiffs as to whether they would purchase or no, and as to the value of the thing they were purchasing, which was not "the goods and fixtures," but as well the *business.*

Moreover, the word "reasonably" is no more definite than the word "properly," and the court had, in response to the request of defendants, charged the jury that

> "The burden of proof is upon the plaintiffs to establish by a preponderance of the testimony every element of their charge of

> false and fraudulent representation, that it is a false representation, *known to be false, properly relied upon by the plaintiffs to their damage"* (p. 333).

POINT VI.

The Court did not err in refusing to charge the fourteenth request of defendants, which was:

> "Unless the plaintiffs show you by a preponderance of the evidence that the defendant's representation to them as to the volume of business during the preceding year was substantially incorrect and known to him to be incorrect, and that plaintiffs justifiably relied on that representation, you should give that charge no further consideration."

This request to charge had no application to the case at bar.

The complaint was *not* that defendants had falsely represented the volume of business done. The complaint was, paragraph seven of the complaint, page 4, that the representation was false in that the

> "said business had not earned during the past three years, over and above all expenses, a net return of eight per cent. per year on the total gross business, and that the said business had not earned over and above all expenses, a net return of eight per cent. on the total gross business of $350,000, during the past year."

The court charged the jury (p. 328):

> "The defendant's answer to this claim is that he did say there were $350,000 gross sales and I do not think it is disputed that there was that amount of sales, if the sales in the toy department were added; *so it was not a misrepresentation."*

The court also charged the jury the first request of defendants to charge (p. 333):

"The burden of proof is upon the plaintiffs to establish by a preponderance of the testimony every element of their charge of false and fraudulent representation, that it is a false representation, known to be false, properly relied upon by the plaintiffs to their damage."

The court therefore charged the jury that the representation as to the volume of business was *not* a false representation, and it had likewise charged the jury that it could not find a verdict in favor of plaintiffs unless plaintiffs proved a false representation, known to be false, upon which they properly relied, and it was nowhere in the case claimed that the representation as to the volume of business was false.

The court had in effect charged as requested in the fourteenth request of defendants to charge, and was not obliged to recharge in the language of counsel. Nor was it obliged to charge the request upon a matter which was entirely outside the pleadings.

New Brunswick Steamboat Co. v. *Tiers,* 24 N. J. L. 697;

Smith v. *Irwin,* 51 N. J. L. 507; 18 Atl. 852.

POINT VII.

The Court did not err in refusing to charge the nineteenth request of defendants.

That request was:

"If the representation made to plaintiffs was as to the profits the plaintiffs might make and not the profits Rothstein had made, your verdict should be for the defendant, Rothstein."

The court charged this request in the following language (p. 334):

" 'If the representation made to plaintiffs was as to the profits the plaintiffs might make and not the profits Rothstein had made, your verdict should be for the defendant, Rothstein, insofar as that representation is concerned.' I do not think there are other representations, as I recall it."

The court had likewise charged the jury (p. 330):

"The representation must be one of fact, not of opinion, and must be in reference to a subject matter susceptible of knowledge."

Nowhere, we submit, is there, in the language of the court, justification for the remarks of defendant on page 20 of their brief:

"It does not instruct the jury that if the representation was a matter of opinion there should be no recovery and the language of the charge permitted the jury to find for the appellees even if the representation had been as to the profits which the appellees might make."

POINT VIII.

The Court did not err in charging that if plaintiffs relied on their own or their agent's investigation, they could not offer the false representation of the defendant as ground for deceit.

The language of the court to which exception was taken is found on page 330:

"If they (plaintiffs) made an investigation themselves and were led to believe otherwise, it is a matter for you to consider. * * * If the plaintiffs relied on their own or their agent's investigation, they cannot offer the false representation of the defendant as ground for deceit."

The court further charged in connection with the same subject matter the fifth request of the defendants to charge:

"In determining whether the plaintiffs were induced by or relied upon the alleged false representation, you should consider the testimony as to the opportunity that they had to determine the facts for themselves as to the volume of the business and the profits therefrom and the extent to which they availed themselves of that opportunity by examination of the books or otherwise."

The court likewise charged the sixth request of the defendants to charge.

"In determining whether the plaintiffs were induced by or relied upon the alleged false representation you should consider the business experience and intelligence of the plaintiffs and whatever there was in either of them of ability to determine for themselves the character and volume of the business or its past or prospective profits."

The court also charged the eighth request of the defendants to charge (p. 334):

"If plaintiffs have failed to satisfy you by a preponderance of testimony that they suffered a loss of reliance upon the alleged representation as to past profits, your verdict should be for the defendant, Rothstein."

There can be no question but that the portion of the charge to which defendants excepted (p. 330), accurately stated the law, but defendants complain that:

"It led the jury to believe *by inference* that if no such investigation was made, even though the opportunity was given, or, if such an investigation was made but was not in fact relied upon by the appellees, there could still be recovery."

Assuming that this portion of the charge did not state *all* the law upon the subject, if it was correct as far as it went, and it was, defendants cannot complain in the absence of a request, for that would be in effect permitting an exception

to a failure to charge when no request was made. *Malinowski* v. *Phillips,* 5 N. J. Advance Rep. 1407.

As the court said in *Benz* v. *The Central Railroad,* 82 N. J. L. 197 at p. 199; 82 Atl. 431, affirmed by this court on the opinion of the Supreme Court, 83 N. J. L. 780; 85 Atl. 1134:

"The argument based on this assignment as stated by the brief of counsel (and the case is submitted on brief) is: this instruction too narrow, for it left out of view the question as to how long the next of kin would have received any pecuniary benefit from the continuance of Benz' life. In other words, an assignment of error directed solely at what the court had said is sought to be supported solely by what the court had not said, *i. e.,* had failed to say."

See also *Petrie* v. *Rosenvinge,* 94 N. J. L. 521; 110 Atl. 809.

Again defendants insist that the true rule is:

"that if there was an opportunity for examination and if such an examination would have disclosed the falsity of the representation, there could be no recovery, whether or not an investigation was made."

We submit there is no such rule.

POINT IX.

The Court did not err in charging that if the jury brought in a verdict for the plaintiffs it should be in one sum in favor of both plaintiffs.

Defendants insist under this point that there were two separate and distinct claims under the theory of which the case was tried, that of Weintraub and that of Rosenberg, and that the elements of damage in each case were different.

And defendants then argue as if the case were tried upon the theory that the damages to which plaintiffs were entitled was the difference between the amount paid by them and the amount ultimately received by them.

We have already shown that the case was neither tried nor submitted to the jury upon any such theory.

The case was tried and submitted upon the theory that the damages was the difference between the price paid and the real value of the property acquired.

Plaintiffs were joint purchasers and there was but a single purchase price. And there was but a single real value of the property purchased. The difference represented one sum to which the plaintiffs were jointly entitled. There is no theory of damages under which the jury *could* have considered the matter of the amount which each plaintiff had received in the course of the continued carrying on of the business and defendants cite no authority for any such theory, nor did they ask the court in their nineteen requests to charge to submit the matter to the jury upon any such theory.

The general rule is stated in 27 C. J., Title-Fraud, Sec. 142, p. 27:

> "And where the contract is entered into jointly by the persons on whom the fraud has been practiced, the right of action in deceit is joint and the defrauded parties must join as plaintiffs, where they have not assigned their interest to plaintiffs. A joint right of action for fraud cannot be divided because of the subsequent separation of the interests of the aggrieved parties."

And the general rule is also stated in 27 C. J., Title-Fraud, Sec. 247, p. 99:

> "The rule established by the weight of authority appears to be that if a purchaser, through fraud practiced upon him, has paid a higher price than the property was worth, and the fraud is actionable in its character, then he is entitled to recover for the injury occasioned by such fraud, notwithstanding any subsequent disposition he may make of the property, and hence recovery cannot be defeated or the amount of damages reduced, by showing that plaintiff has sold the property for the same amount that he paid for it, or for a larger amount than he claims its real value to have been."

And in this statement of the rule, defendants acquiesced for they did not, in any one of their nineteen requests to charge, ask the court to instruct the jury to consider, in diminution of damages, what plaintiffs had subsequently received for the property. Nor did they except to that portion of the court's charge in which it instructed the jury to disregard what subsequently happened to the property. Having acquiesced, they cannot now complain. *Hays* v. *Kluge,* 86 N. J. L. 657; 92 Atl. 358.

POINT X.

The Court did not err in charging that the property was purchased by the plaintiffs but that they took title in the name of the corporation and took the stock in that corporation, and that that was their method of taking possession of the property and that they did not lose their right to recover their loss if it were caused by the fraudulent representation of the defendant.

The corporation originally was a party plaintiff with the individual plaintiffs. At the conclusion of plaintiffs' case, defendants raised the question as to the right of the corporate plaintiff to recover and counsel for defendants at p. 193 of the record on that motion, said:

> "Who had that cause of action? The agreement undoubtedly—the negotiations were made with Weintraub and with Rosenberg. The representations were made to them. What Weintraub and Rosenberg did was to plan in advance that they would turn over to a corporation bargains that they made and would take their profits of the bargains in corporate form. *Weintraub and Rosenberg may be regarded, then, as being the ones entitled to whatever there was of cause of action.* Weintraub and Rosenberg chose to convert their interest in the goods, by virtue of their agreement, into stock of the corporation. *That was their own choice and their own method.* What they got at the end of this—counting from the beginning of the negotiations to the consummation of the deal, was stock in the corporation. Weintraub put up $37,500 and received $37,500 shares of the stock of the par value of $100."

Counsel for defendants then made a motion to non-suit as to Weintraub and Rosenberg (p. 195), not upon the ground, however, that they were not the ones entitled to recover, but upon the

ground that it appeared that they had received back as much as or more than they had put in. Counsel for defendants, at this stage of the case, insisted, apparently, that the damages was the difference between the amount invested and the amount taken out, which is not the rule of damages for which defendants now contend under their Point I (p. 5 of their brief), nor is it the rule of damages on which the case was submitted to the jury without exception from defendants.

At the conclusion of the whole case, the suggestion of *counsel for defendants,* made upon the motion for non-suit that Weintraub and Rosenberg were the proper parties plaintiff and the only ones entitled to recover, was adopted, and a voluntary non-suit was granted as to the corporation. Thereupon a motion was made to direct a verdict against the individual plaintiffs and also a motion for direction of a verdict for plaintiffs for six cents damages as to each individual plaintiff, not because the individual plaintiffs had no right to recover any loss if there were a loss, but *upon the ground that there was no proof of loss* (p. 325).

The fact that the individual plaintiffs were the persons entitled to recover became the law of the case suggested by counsel for defendants, and the trial court in charging on page 331:

> "This property was purchased by the plaintiffs, but they took title in the name of a corporation and they took the stock in that corporation. That was their method of taking possession of the property, and they did not thereby lose their right to recover their loss in the case if it was caused by the fraudulent representation of the defendant."

in effect, adopted the language of counsel for defendants on the motion to non-suit (p. 194).

Defendants *now* complain that *their* theory as to who was entitled to recover was adopted by the court. They cannot so change their position and avoid the effect of the law of the case injected into the case by themselves.

Moreover, the argument under Point X is, in effect, that there should have been a non-suit against plaintiffs or a direction of a verdict in favor of defendants. Both of these motions were made, but they are not argued here because they were involved in the argument of the rule to show cause why the verdict should not be set aside as against the weight of the evidence. Defendants cannot, we submit, avoid the effect of that rule by arguing an exception to the charge instead of the motion to non-suit or to direct a verdict, where the effect, if the portion of the charge excepted to be erroneous, would be that a non-suit or a direction of a verdict for defendants should have been granted.

But the position taken by defendants on the trial that the individual plaintiffs were the persons entitled to recover notwithstanding the fact that a corporation had been formed and the property transferred to it, which position was acquiesced in by the court, was correct.

The agreement to purchase, which was the result of the fraudulent representation, was made between the individual plaintiffs and Rothstein, Inc. (Exhibit P. 2, p. 341). It is recited in the agreement that a corporation was about to be formed by the individual plaintiffs for the purpose of taking over the property but the obligation to pay the purchase price rested upon the individual plaintiffs; they bound themselves to make the cash payment and to personally endorse the notes representing the deferred payments,

as well as to secure their wives' endorsements, and to guarantee performance of the lease which was to be made. And when the transaction was closed, although the bill of sale was made to the corporation, the individual plaintiffs made the payments. No one was interested in the corporation except the individual plaintiffs and the court was quite right, upon the evidence, when it acquiesced in the position taken *at that time* by counsel for defendants that, while the title was taken in the name of the corporation, that was only the method of plaintiffs in taking possession.

POINT XI.

The Court did not err in that portion of its charge to the jury in which it referred to the testimony as to the way in which the people of the dry goods business or department store business figured value; that where a concern earns a certain per cent. of profit on its gross sales, they are usually apt to take one hundred per cent. of the value of stock and fixtures and that the jury had evidence concerning profit before it in determining what the true value of the property was.

The matter above referred to is stated in the 16th ground of appeal (p. 370). We submit that this ground of appeal is not sufficient. It does not point out the language of the court objected to but is general in form. Such an assignment is not sufficient.

In *Valenti* v. *Blessington,* 96 N. J. L. 498; 115 Atl. 377, where one grounds of appeal was "the court erred in refusing to charge the jury as requested by defendant," and another ground was "that the court erred in charging the jury as specified by the exceptions to said charge taken by the defendant's attorney," the court said:

"These 'blanket' grounds of appeal, as they may be called, are inadequate to raise any ruling for review. Assignments of error must be specific and definitely point out a ground of error, or they will not be considered."

When we turn to the exception upon which the ground of appeal is based (p. 336) we find it is as indefinite as the ground of appeal, the exception being "to that portion of the court's charge in which the court referred to the testimony and charged that the jury might consider the testimony in the case that men buying department stores frequently or commonly gave one hundred per cent. of the value of the merchandise, and fixtures, if the business was profitable, and that the ascertainment of profits was a method, *on the ground that there was testimony to the contrary.*" But this was the *only* objection raised to the portion of the charge referred to. Apparently defendants thought that the court should not have referred to the testimony as to the method by which prices are fixed upon merchandise and fixtures of a going concern without referring to whatever testimony there was to the contrary.

But if this was the objection of defendants it should have been met by requesting the court to charge, not by an objection to the charge, which so far as it went, was proper.

Malinowski v. *Phillips,* 5 N. J. Advance Rep. 1407;

Benz v. *C. R. R.,* 82 N. J. L. 197; af. 83 N. J. L. 780.

The language of the court with reference to the matter sought to be argued under this ground of appeal commences on p. 331:

"The price paid was $117,500 for the stock and $25,000 for the fixtures, as I have told you. That is a total of $142,500. It is quite probable that you will find that this represents the true value of the stock and fixtures of a going concern netting eight per cent. profit on the gross sales of $350,000; that is, that the value of the stock and fixtures is one hundred per cent. of their true value. Of course, you have to take into consideration that you cannot apply the same rule to a big stock of merchandise as you would to a pair of socks which cost twenty-five cents and sold at a dollar, because the big stock of merchandise cannot turn over quickly. If it is big you have to work it out. You have heard the testimony of the way in which the people of the dry goods business or department store business figure value. Where a concern earns a certain per cent. of profit on its gross sales, they are usually apt to take one hundred per cent. of the value of the stock and fixtures. *That, of course, I do not mean to define as a rule.* I mean to say that that is the testimony as to what is done. A person might be taking eight per cent. One might want to sell more than the other wants to buy, but there is testimony to show that that is the true value of a going concern."

The court also charged the jury (p. 328):

"My duty is to instruct you as to what is the law in the case. You will rely upon your own recollection of the testimony and not as I may have stated it to you, because the responsibility is yours and not mine. You must, as I say, rely on your own recollection as to that."

There *was* evidence before the court and jury, without objection, that the value of a going business, which was what was purchased by plaintiffs, is fixed by the method suggested by the court. Plaintiff Rosenberg testified (p. 139), after qualifying:

"Q Does the sale value of the merchandise and the sale value of the fixtures vary with the amount of profits that a store is making? A Yes, sir.

Q If the store is making, we will say, four per cent. instead of eight per cent., what effect would that have on the value of the fixtures? A Between fifty and sixty cents on the dollar.

Q I am talking of your experience in business. What would it be worth? A Fifty cents on the dollar.

Q What about the fixtures? A Ten cents on the dollar; probably less.

Q If the store were making two per cent., what would it be worth? A Scrap purposes.

Q And for scrap purposes, what would it be worth? A You would have to pay to take them away."

Plaintiffs' expert Kossove, after qualifying, testified (p. 173):

"Q Does the amount of profit that a store is making have any effect upon the sale value of the merchandise and fixtures in that store for going business purposes? A Naturally, as a part of its good will.

Q If a store is operated at a profit of eight per cent. net is the merchandise and fixtures in that store worth approximately 100 per cent. cost?

Objected to.

Objection sustained.

Q What would it be worth in percentage of cost? A Cost of merchandise less cash discount.

Q What do you mean by that? A Invoice price less cash discount—the actual cash paid.

Q If a store is making four per cent. net instead of eight per cent. the value of its fixtures and good will would be 100 per cent. of cost less discount; what would the fixtures and the merchandise be worth? A About sixty-five per cent.

Q Of costs? A Of costs.

Q What would the fixtures be worth? A About one-half of their cost value provided they haven't been depreciated that much. If a store is in business ten years and depreciated the fixtures they would be junked in that ten years. That is permitted by the Federal Government.

Q Suppose the store is making three per cent. instead of four per cent.? A It would bring it down to an unprofitable store and make him sell out the merchandise at retail instead of under the hammer.

Q What effect would that have? A Between fifty and sixty per cent.

Q How about the fixtures? A Fixtures are worthless except for scrap.

Q Is there a recognized scrap value? A Usually ten per cent. if everything is less than six years old."

And (p. 175):

"Q In this case it appears that accordind to the auditor's report that the net profit on operation was $1,512.21 from the general business; net sales of $343,176.61. Assuming that to be the net profit on that amount of sales, what percentage would you say of cost were those fixtures and merchandise worth? A They would be fit to go into the hands of auctioneers.

Q At what percentage? A Usually thirty-three and one-third to fifty per cent."

And (p. 176):

"Q Let us assume that this company has a net profit on operation on an annual turnover of $343,176.61, a net profit on operation of $1,512.21 and a net financial income of $7,660.77, or a total of $9,172.98, in what class of business would that fall as to percentage of costs that the fixtures and the merchandise would be worth upon a sale? A This would really amount to about two and a half per cent. on the net profit. It would come into the class of the sell-out

and necessarily an auctioneer's business. But a person who is disposing of his stock at retail, taking such reduction from the price as is warranted by the business; men buying goods before Christmas may hold them at the higher price; afterwards they would naturally reduce it twenty or thirty per cent. as the stock became depleted.

Q What would you then consider the cost of the goods? A Sixty-five per cent. on goods and twenty per cent. on fixtures."

On cross examination (p. 183):

"Q A store that you said was making four per cent. profit on the sales for the year, the merchandise on the shelves would only be worth, I think you said, sixty-five cents on the dollar? A Yes.

Q While if the store was making eight per cent. the stock would be worth 100 cents on the dollar? A Cash, less discount."

Plaintiffs' expert Federman testified, after qualifying (p. 199):

"Q Assuming that a store and fixtures and merchandise of a store is worth one hundred per cent. of cost, if the store is making a profit of eight per cent., what in your opinion, would be the percentage of cost of those fixtures and merchandise, if, in fact, the store was not making more than three per cent.? A If a store were making eight per cent., which is a very good profit, the store would be worth, if I understand your question correctly, 100 cents on the dollar of what it costs the party that is selling to you. In the event that the store would be making only three per cent. that store would not be worth nearly as much.

Q Can you give me a percentage that the store would be worth making only three per cent.? A It would be in proportion. If you were paying a hundred cents on the dollar for merchandise, figuring that for every $100 that has been sold, that your net profit (you

are talking about net profit, I presume) it would be worth 100 cents on the dollar; if the three per cent.; the proportion would be on a lower basis."

Defendants' expert Cronheim testified (p. 209):

"Q *In the purchase of stock of goods of a store, which you say you have been engaged in or seen handled, does it make any difference in the value of the buyer of the goods that are being purchased what profit has been reaped by the man that has had the business?* A *That would have something to do with it,* but the all-important part is the management. If you have men of high caliber—we took over the W. V. Snyder Company after it was operated by Oscar Michael. He ran it for two months and failed. Twenty years before that W. V. Snyder Company operated this properly. We took it after Michael's failure and made plenty of money.

Q It has been testified here that if a man is running his business and making a profit of eight per cent. on the gross amount of sales that the stock of goods on the shelves, if he tries to sell it, might be worth one hundred cents on the dollar of inventory. Assuming that inventory value to be reasonably based, where is he if the profit he has been making is only four per cent. and the value of the same goods would be only sixty-five cents on the dollar. What would you say? A I say the theory is entirely wrong.

Q Why? A If a department makes eight per cent. on their turnover the stock would have to be only a hundred per cent. to make that while they may still make four per cent. if the goods is one hundred per cent. It depends on how the store is operated.

Q If you were buying the stock of goods of another store and were also intending to continue the business, would you, among other things, inquire what the man from whom you were buying, what profit he made? A *I certainly would.*

Q Would you depend upon that or would you depend upon your own?

Objected to as leading.

Objection sustained.

Q To what extent would that influence you? A Past history is always interesting to the purchaser of a store."

And, again (p. 210):

"Q Does it give you any idea at all as to the value of the good will? A Of course, there is a theory that good will is based on operating revenue. There are other things that may be good will. That is a particularly long drawn-out subject."

And again (p. 215), on cross examination:

"Q Assume now that a store is making no profit at all and has not been making a profit, or a very small amount of money, for three years. Can you conceive yourself being interested in the purchase of that store at one hundred per cent. of the cost of stock and fixtures unless you wanted that store for competitive reasons? A *I wouldn't buy any store at one hundred per cent. on the dollar unless I wanted to operate the business.*

Q I asked whether you want to operate it? A I can't answer that. There may be a thousand things enter into that.

Q The past performance of a store to a purchaser is of importance, isn't it? A *Of great importance and great interest.*

Q And it would make considerable difference. Assuming now that a man has no motive such as removing a place from competition, or buying for the purpose of throwing it into a big concern, but merely for his own little business, it would make a considerable difference to him if the profit was eight per cent. or the profit was three per cent.? A It would, unless he had unusual ability and had a good idea of what his ability was.

Q He would have to have a great ego to say he could make eight per cent. where the former owner had made three per cent.; he would have to have great faith in his own ability? A He would have to have great faith in his own ability.

Q It would have some influence upon the amount that would finally be agreed upon as the sales price of that store? A Quite naturally it would."

And Rothstein admits that a statement *was* made as to the prospective profits which plaintiffs might expect in the course of the negotiations, although he denies that he represented the amount of profits which he had himself made, upon which issue the jury found against him (p. 287):

"Q At that meeting was any statement made by Mr. Apfelbaum or you as to the amount of profits you had made in previous years? A The statement was made by Mr. Apfelbaum, but not about the profit of that year.

Q What was the statement? A *Mr. Apfelbaum made a statement that the general department store profits are between six, seven and eight per cent.* He said at the present year I have done $350,000 business. He said, 'You have stated that you are going to put on some new departments and the profits will increase.' And he figured they would make six or seven or eight per cent."

All of this testimony went in without objection and the court properly summarized it in its charge, and there was no evidence to the contrary, nor did defendants attempt to direct the attention of the court to any evidence to the contrary.

The difficulty with defendants' argument (p. 24 of the brief) is that they ignore the testimony and make the bald assertion that "there is no connection between profit and true value of the

property," whereas *all* of the testimony is to the contrary. They assert the statements made many times in their brief that it was uncontradicted that the property sold for more than the appellees paid. This is not the fact. They treat the case as if it were a purchase of so much merchandise and so much fixtures, etc. It was not. It was the case of the purchase of a *business,* the value being fixed in a certain way. They refer to the fact that there is no proof as to the profits realized *by the appellees* and what the profit of the business was and the difficulty of determining the value of the property by the profits which had been made *by the appellees* and they say—"By inefficient and uneconomical management for the period that the appellees owned and operated the business, they could under this method of determining the value substantially decrease the value of the property below its real worth at the time of the purchase." *No attempt was made to fix the value of the property upon the profit that appellees made while they conducted the business.* Proof of what happened to the business after the plaintiffs purchased was immaterial under the circumstances of this case. Plaintiffs fix their damage by showing what the real value of the property purchased would be upon the hypothesis that the profit made by Rothstein was the actual profit made and not the profit which he represented.

And this method of fixing damages was without objection.

Here, again, if defendants are correct with respect to their objection to this portion of the charge of the court, there should have been a non-suit or the motion to direct a verdict for the defendants should have been granted upon the ground that there was no proof of damage, and

the determination of the legality of this section of the charge was necessarily involved on the rule to show cause why the verdict should not be set aside as against the weight of the evidence and upon the ground that the damages were excessive, and defendants are attempting to argue those points which they are precluded under the decisions of this court from arguing.

POINT XII.

The Court did not err in charging the jury that the purchase was not simply a purchase of so much stock and fixtures and that the jury should judge the true value from what they found the income of the property was if it applied that method in determining the value (Ground 17).

Here, again the ground of appeal (17) does not direct the attention of this court to the precise language of the court below complained of, nor did the exception taken direct the attention of the trial court to the language objected to (p. 336).

The brief of defendants does not direct the attention of the court to the precise language and it is impossible to determine how much of the court's charge is intended to be included in the objection. The court said (p. 332):

> "It was not the purchasing of so much stock and fixtures. It had the conveyance of good will and a lease for a long term. The business was going on; it was not being sold to be resold in bulk. So, therefore, you have that evidence before you in determining what the true value of this property was and that you can judge yourself from what you find the income of this property was if you apply that."

> "*You are not obliged to apply that method,* but if you apply that method you can find what the income of that property was. If the claim is made that the profit was less than one-half of one per cent. you will see, by applying the testimony of the witnesses, as to what that business was worth; it would be what you could get for a business that is going to close up and auction off."

We do not know just what parts of these excerpts from the court's charge is objected to. Defendants persist in arguing under this point (p. 25) that it was the income from the property which was received by appellees which is referred to in the court's charge. The court did *not* refer to the income of the property received by plaintiffs-appellees nor did the court refer to what income they may have made. What the court referred to was the true income which *had been received* from the property during the year 1923 by Rothstein. He represented that he was making about $28,000 or approximately eight per cent. These representations were false. The proofs show that he was making not in excess of three per cent. or about $9,000 and that he arrived at the difference in percentage by falsely representing his expenses to be $76,000 approximately whereas, in fact, they were $98,000.

No proof was offered by plaintiffs as to the amount of moneys which they had made or lost in the conduct of the business. All that was said on that subject was injected into the case by defendants.

Defendants' counsel asked Weintraub on cross examination (p. 56)— "What profits did you make? A What profits did we make? Q Yes. A I don't rmember now. I think it was $3,000 or $2,000," etc. Plaintiff Weintraub, on direct

examination, had not been asked a word about his profits. It was immaterial. Defendants seemed to have some reason in their own minds why they desired to inject it into the case. Having injected it into the case, they cannot well now complain that it should not have been injected and that it was indefinite.

But all of this has nothing to do with the argument under Point XII because, at no point in the charge, did the court permit the jury to take the profits which had been made by plaintiffs into consideration in determining the true value of the property. The court *did* permit the jury to take into consideration the actual profit which defendants had made during the year 1923, the amount of which Rothstein had misrepresented to plaintiffs and the court did that upon the assumption that it was an element to be taken into consideration in determining the true value of the property which testimony went in without objection. The court was quite right in charging the jury that the purchase was not that of so much stock and fixtures for resale but that it was the purchase of a going business. There is no dispute whatever in the testimony upon that subject. Rothstein himself testifies that it was his *business* which he was selling and plaintiffs testify that it was *the department store business* which they were buying and there was no dispute.

Again, this point, as argued by defendants, was necessarily involved in the determination of the rule to show cause for, if defendants be correct in their criticism of the charge, a motion to non-suit or direct a verdict for defendants should have been granted.

CONCLUSION.

In conclusion we quote the language of this court in *Kragman* v. *Carlo,* 85 N. J. L. 632; 90 Atl. 292, which has an application to all of the objections of defendants:

> "So long as the law is stated correctly and intelligently, the ultimate test of the soundness of instructions is not what the ingenuity of counsel can, at leisure, work out the instructions to mean, but how and in what sense, under the evidence before them and the circumstances of the trial, would ordinary men and jurors understand the instructions as a whole."
>
> "What we have said disposes of, in effect, most of the grounds of appeal. With respect to the others it is enough to say, that: 'No judgment will be reversed on the ground of misdirection, or the improper admission or exclusion of evidence, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party.'"

There is not pointed out any error in the admission of evidence or in the directions of the court which went to the substantial questions in this case, *i. e.,* were the representations made, were they false, were they made with intent that plaintiff should rely upon them, were they knowingly false; and, as subsidiary to this, did Rothstein deliberately show plaintiffs a book which contained a false statement of the expenses and of the profit. Upon these points the jury found against defendants and upon this appeal the verdict must be considered as conclusive upon these points for, with respect to anything which went into their determination there is no error alleged.

Defendants having been so convicted of deliberately making a false representation, the matter then is one only of damages and with respect to that the trial court has said, upon a rule to show cause, that the damages are not excessive and, upon a careful review of the testimony, has said that the verdict is not against the weight of the evidence.

It is respectfully submitted that the judgment should be affirmed.

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