INDEX

TESTIMONY.

For Plaintiff.

For Defendant.

EXHIBITS.

NOTICE OF APPEAL.

Filed December 5, 1931.

New Jersey Supreme Court

ESSEX COUNTY.

SILVER ROD STORES, INC., a corporation of New Jersey, *Plaintiff,* *vs.* KALMAN BERNSTEIN, trading as K. Burns & Son, *Defendant.*	*Action at Law.* *Notice of Appeal.*

To Osborne, Cornish and Scheck, attorneys of the defendant, Kalman Bernstein, trading as K. Burns & Son, or To Whom It May Concern:

SIRS:

Please Take Notice that the plaintiff in the above-entitled cause appeals to the New Jersey Court of Errors and Appeals in the Last Resort in all causes in New Jersey from the whole of the judgment entered in this cause.

Respectfully yours,

KLEIN & KLEIN,
Attorneys of Plaintiff.

Service on us of a copy of the within Notice of Appeal acknowledged this 30th day of November, 1931.

OSBORNE, CORNISH & SCHECK,
Attorneys of Defendant.

Notice of Appeal.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true copy of notice of appeal in the above-stated cause as the same remains on file in my office.

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

(SEAL)

FRED L. BLOODGOOD,
Clerk.

GROUNDS OF APPEAL.

New Jersey Court of Errors and Appeals

SILVER ROD STORES, INC., a corporation of New Jersey, *Plaintiff-Appellant,* *vs.* KALMAN BERNSTEIN, trading as K. Burns & Son, *Defendant-Respondent.*	*Action at Law.* *Grounds of Appeal.*

The following are the grounds of appeal of the plaintiff on the judgment entered by the New Jersey Supreme Court in the within entitled cause:

1. That the Court, over the objection of the plaintiff, as incompetent and immaterial, permitted the following questions:

To the Witness, Kalman Bernstein:

"After you had been in the premises for some time did the Silver Rod Stores demonstrate or sell any articles in their store which are usually sold in jewelry stores?"

"What articles that are on display there are usually sold in jewelry stores?"

2. That the Court, over the objection of the plaintiff, as incompetent and immaterial, permitted the following question:

To the Witness, Lester Finger:

"What was the value of these premises, on a monthly rental basis, for a five year lease, at the time this lease was made in

1927, without any restrictions as to competition?''

3. That the Court, over the objection of the plaintiff, permitted the witness, Herman Weissman, to qualify and testify as an expert, although incompetent.

4. That the Court, over the objection of the plaintiff, as incompetent, permitted the following question:

To the witness, Mitchell Stern:

''Did the selling of these articles, in the neighboring store injure your business?''

5. That the Court, on motion of the plaintiff, refused to direct a verdict for the plaintiff on the first count of the plaintiff's case.

6. That the Court, on motion of the plaintiff, refused to direct a verdict for the plaintiff upon the second count of the plaintiff's case.

7. That the Court, on the motion of the plaintiff, refused to direct a verdict for the plaintiff on the counter-claim of the defendant.

8. That the Court improperly and illegally molded the verdict.

KLEIN AND KLEIN,
Attorneys for the Plaintiff-Appellant.

JUDGMENT RECORD.

NEW JERSEY SUPREME COURT.

SILVER ROD STORES, INC., a corporation of New Jersey, *Plaintiff,* *vs.* KALMAN BERNSTEIN, trading as K. Burns & Son, *Defendant.*	*Judgment Record.* *Action at Law.* *On Postea. Judgment for Defendant on Counterclaim.*

Osborne, Cornish & Scheck, attorneys for defendant:

Kalman Bernstein, trading as K. Burns & Son the defendants in this cause were summoned to answer unto Silver Rod Stores, Inc., a corporation of New Jersey, the plaintiff therein in an action at law upon the following complaint:

(Summons issued: February 13, 1931.)

Plaintiff, Silver Rod Stores, Inc., a corporation of New Jersey, having its principal office in the City of Jersey City, County of Hudson and State of New Jersey, shows that:

1. On or about March 23, 1927 the plaintiff became the lessee of premises known and designated as Nos. 203-205 Market street, Newark, New Jersey, by assignment to it from the Silver Rod Stores, Inc., a New York corporation, which held the lease to the aforesaid premises by virtue of a written lease made between Rachel Bierman,

the owner of said premises, to said Silver Rod Stores, Inc., a New York corporation, dated January 25, 1927.

2. On or about July 15, 1927 the plaintiff leased to the defendant, by written agreement of lease, store No. 1 in said premises Nos. 203-205 Market street, Newark, N. J., for a period of five years beginning with August 1, 1927 (or as soon thereafter as premises are made ready for occupancy) and terminating July 31, 1932, and which said lease provided, among other things, that the defendant pay as and for the rent of the said store the sum of $5,750.00 annually, during said term and payable at the rate of $479.17 on the first day of each and every month in advance during said term, and which said rental money the said defendant, by and under the said lease, agreed to pay.

3. After the execution of the aforesaid lease and pursuant to the terms thereof, the defendant went into possession of the aforesaid demised premises.

4. Defendant has failed to pay to the plaintiff the rent for the month commencing January 1, 1931 amounting to $479.17, and for the month commencing February 1, 1931, amounting to $479.17, and has refused and still refuses to pay the same, no part thereof having been paid to the plaintiff, although payment has been demanded of the defendant for the same.

5. There is due and owing to the plaintiff from the defendant the sum of $958.34.

Plaintiff demands as damages the sum of $958.34, together with interest on $479.17 from

January 1, 1931 and together with interest on $479.17 from February 1, 1931, together with cost of suit to be taxed.

KLEIN & KLEIN,
Attorneys of Plaintiff.

Filed March 6, 1931.

Defendant, of the City of East Orange, County of Essex and State of New Jersey says that:

1. Defendant has no knowledge or information sufficient to form a belief as to the allegations of the first paragraph of the complaint.

2. Defendant admits the execution of said lease but refers to the same for the terms thereof.

3. Defendant admits paragraph 4 of the complaint.

4. Defendant denies paragraph 5 of the complaint.

FIRST SEPARATE DEFENSE.

1. Defendant is engaged in the jewelry business and in selling and/or demonstrating jewelry, silverware and such other articles as are usually sold in jewelry stores and leased said premises from plaintiff for said business and purposes with the knowledge of plaintiff that said premises were to be so used.

2. By the terms of said lease and in consideration for defendant's covenant to pay rent, plaintiff did promise, covenant and agree to and with defendant that plaintiff would not permit

the sale and/or demonstration of jewelry, silverware and such other articles as are usually sold in jewelry stores by any other occupant, lessee or tenant of the building of which the premises leased to defendant are a part.

3. Said plaintiff did not keep, perform and fulfill said agreement, but did wilfully and wrongfully violate and breach the same in that plaintiff permitted other occupants, tenants and lessees of said building to sell and/or demonstrate jewelry, silverware and such other articles as are usually sold in jewelry stores.

4. Plaintiff and other occupants, tenants and lessees of said building did sell and/or demonstrate and are still selling and/or demonstrating in said building such articles as are usually sold in jewelry stores even though defendant requested that such sales and/or demonstrations be discontinued.

5. By reason of said wilful, wrongful and continued failure of plaintiff to keep, perform and fulfill said agreement on its part to be kept, fulfilled and performed said premises leased to defendant were thereby rendered unfit for his purposes and defendant was deprived of the enjoyment of said premises.

6. By reason of the aforesaid wilful, continued and wrongful acts on the part of the said plaintiff, said lease was terminated and discharged and defendant was forced to and did vacate said premises.

SECOND SEPARATE DEFENSE.

1. Defendant repeats paragraph 1 of the first separate defense.

2. By the terms of said lease and in consideration for defendant's covenant to pay rent, plaintiff did promise, covenant and agree to and with defendant that plaintiff would not rent, lease or demise any other store in the said building of which the premises leased to defendant are a part for the sale of jewelry, silverware and such other articles as are usually sold in jewelry stores.

3. Said plaintiff did not keep, perform and fulfill said promise, covenant and agreement, but did wilfully and wrongfully violate and breach the same in that plaintiff did lease, rent and demise other stores in said building for the sale and/or demonstration of jewelry, silverware, and such other articles as are usually sold in jewelry stores.

4. Said jewelry, silverware and such other articles as are usually sold in jewelry stores have been and are still being sold in said other stores by plaintiff and by the other lessees and occupants thereof even though defendant has requested that such sales and/or demonstrations be discontinued.

5. Defendant repeats the allegations of paragraphs 5 and 6 of the first separate defense.

THIRD SEPARATE DEFENSE.

1. Defendant entered into said lease in consideration of plaintiff's covenant, promise and agreement that plaintiff would not rent other stores in said building of which the premises rented to defendant are a part for the sale and/or demonstration of jewelry, silverware and such other articles as are usually sold in jew-

elry stores, and that plaintiff would not permit any occupant, tenant or lessees of said building to make the aforesaid sales and/or demonstrations.

2. Defendant alleges that there was a failure of consideration for defendant's agreement to pay rent, said failure of consideration consisting of plaintiff's failure to keep, perform and fulfill the aforesaid promise, agreement and covenant by reason whereof defendant was forced to and did vacate the said premises.

By way of counter-claim defendant says:

FIRST COUNT.

1. Defendant admits the execution of said lease but refers to the same for the terms thereof.

2. By the terms of said lease, and as an inducement to defendant to enter into the same, plaintiff did promise, covenant and agree to and with defendant that plaintiff would not permit the sale and/or demonstration of jewelry, silverware and such other articles as are usually sold in jewelry stores by any other occupant, lessee or tenant of the building of which the premises leased to defendant are a part.

3. Defendant repeats the allegations of paragraphs 3 and 4 of the first separate defense.

4. By reason of said wilful, wrongful and continued failure of plaintiff to keep, perform and fulfill said promise, covenant and agreement on its part to be kept, fulfilled and performed defendant was damaged to the extent of $5,000.00.

Defendant demands as damages under the first count of the counter-claim the sum of $5,000.00.

SECOND COUNT.

1. Defendant repeats the allegations of paragraph 1 of the first count of the counter-claim.

2. By the terms of said lease, and as an inducement to defendant to enter into the same, plaintiff did promise, covenant and agree to and with defendant that plaintiff would not rent, lease or demise any other store in the said building of which the premises leased to defendant are a part for the sale of jewelry, silverware and such other articles as are usually sold in jewelry stores.

3. Defendant repeats the allegations of paragraphs 3 and 4 of the second separate defense.

4. Defendant repeats the allegations of paragraph 4 of the first count of the counter-claim.

Defendant demands as damages under the second count of the counter-claim the sum of $5,000.00.

OSBORNE, CORNISH & SCHECK.

Filed March 3, 1931.

Plaintiff by way of Reply to the Answer filed by the defendant, says:

FIRST SEPARATE DEFENSE.

1. It admits Paragraph 1.

2. It denies Paragraphs 2, 3, 4, 5 and 6.

SECOND SEPARATE DEFENSE.

1. It admits Paragraph 1.

2. It denies Paragraphs 2, 3, 4 and 5.

THIRD SEPARATE DEFENSE.

1. It denies Paragraphs 1 and 2.

Plaintiff by way of Answer to the Counter-claim filed by the defendant, says:

FIRST COUNT OF COUNTER-CLAIM.

1. It admits Paragraph 1.

2. It denies Paragraphs 2, 3 and 4.

SECOND COUNT OF COUNTER-CLAIM.

1. It admits Paragraph 1.

2. It denies Paragraphs 2, 3 and 4.

KLEIN & KLEIN,
Attorneys for the Plaintiff.

Filed May 25, 1931.

THIRD COUNT.

1. Defendant admits the execution of the lease mentioned in the complaint, but refers to the same for the terms thereof.

2. On or about July 15, 1927, in accordance with the terms of said lease, defendant paid to the plaintiff the sum of $479.17 as a deposit to secure the performance of the terms of the said lease.

3. Under the terms of the said lease, plaintiff agreed to repay to the defendant the said sum of $479.17 at the termination of the said lease, provided the defendant has fully and faithfully carried out all of the terms, covenants and conditions on his part to be performed.

4. Under the terms of the said lease, plaintiff agreed to pay to the defendant, interest at the rate of 4% per annum upon the said sum of $479.17, annually.

5. Defendant has fully and faithfully carried out all the terms, covenants and conditions on his part to be performed under the terms of the said lease, except as prevented by the wrongful acts of the plaintiff.

6. Defendant repeats paragraphs 2, 3, 4, 5 and 6 of the First Separate Defense.

7. By reason of the aforesaid, there is justly due and owing to the defendant the said sum of $479.17, plus interest at 4% per annum from July 15, 1927, no part thereof having been paid.

OSBORNE, CORNISH & SCHECK,
Attorneys for Defendant.

Filed July 22, 1931.

This cause was tried before the Honorable Newton H. Porter, Circuit Judge, to whom the same had been referred, with a jury, at the Essex County Circuit on June 9, 1931. The jury rendered a verdict entered by the clerk as follows:

The evidence being closed the jury retired to consider of their verdict, an officer being sworn

to attend them, when having returned into court say they have agreed upon a verdict and by their foreman say they find in favor of the plaintiff, Silver Rod Stores, Inc., a corporation of New Jersey, and assess the damages against the defendant Kalman Bernstein trading as K. Burns & Son at the sum of Four Hundred Seventy-nine Dollars and Seventeen Cents ($479.17) retained and no further cause of action and in favor of the Defendant Kalman Bernstein, trading as K. Burns & Son and against the Plaintiff, Silver Rod Stores, Inc., 4% interest on Four Hundred Seventy-nine Dollars and Seventeen Cents ($479.17) from August 1, 1927 to December 31, 1930 inclusive and Seven Hundred Fifty Dollars ($750.00) and so say they all:

Thereafter, on motion of Osborne, Cornish & Scheck, attorneys for the defendant, after argument by counsel for plaintiff and for defendant, and the Court ordered the verdict molded as follows:

The plaintiff is entitled to be paid rent for the month of January 1931 amounting to $479.17, and to retain in payment of the said rent the deposit of $479.17 left with it by the defendant; and that there be a verdict on the counter-claim in favor of the defendant, Kalman Bernstein and against the plaintiff, Silver Rod Stores, Inc., in the sum of $750.00 damages and also in the sum of $65.46 as interest at the rate of four per cent. on the deposit of $479.17 from August 1, 1927 to December 31, 1930, making the total of the verdict in favor of the defendant the sum of $815.46.

Judgment Record—Judgment.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant Kalman Bernstein, trading as K. Burns & Son do recover of the said plaintiff Silver Rod Stores, Inc., a corporation of New Jersey, on the counter-claim, the sum of eight hundred fifteen dollars and forty-six cents damages together with his costs, which have been taxed at the sum of sixty-two dollars and fifty cents, making in the whole the sum of eight hundred seventy-seven dollars and ninety-six cents.

Damages	$815.46
Costs	62.50
	$877.96

Judgment entered and signed July 22, 1931.

WM. S. GUMMERE,
C. J.

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

In testimony whereof I have set my hand and the seal of said Court (seal) at Trenton, this twelfth day of April, A. D. nineteen hundred and thirty-two.

FRED L. BLOODGOOD,
Clerk.

TESTIMONY.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

Tuesday, June 9, 1931.

SILVER ROD STORES, INC., a corporation of New Jersey, *vs.* KALMAN BERNSTEIN, trading as K. Burns & Son.	*Action at Law.*

Before Newton H. Porter, *J.*, and a jury.

For plaintiff appear Klein & Klein (by Seymour Klein).

For defendant appear Osborne, Cornish & Scheck (by Ervin S. Fulop).

(A jury is called and sworn.)

Mr. Fulop: I would like to ask to amend the counter-claim, for the reason that we omitted to ask for the deposit. I think Mr. Klein will admit the deposit was made.

Mr. Klein: No objection. Then I would like to ask the Court to permit me to amend the reply and answer to the counter-claim, to this effect: The plaintiff says that the defendant waived his rights to the covenant in the lease mentioned in the answer and counter-claim by his course of conduct during a period of years in remaining silent and not objecting.

The Court: Let both amendments be made.

Mr. Klein opens for plaintiff.

Mr. Fulop opens for defendant.

SIMON RODNON sworn in behalf of plaintiff.

Direct examination by Mr. Klein.

Q Mr. Rodnon, you are connected with the Silver Rod Stores, Inc., the plaintiff in this action? A Yes, sir.

Q In what capacity? A President of the company.

Q You are the holders of the lease at 203-205 Market street, Newark? A The company is.

Q Your company entered into a lease with Kalman Bernstein, trading as K. Burns & Son, for a store in that building? A Yes, sir.

By the Court.

Q Where is the building? A On the corner of Beaver and Market streets.

Q Opposite the Ordway Building? A Yes, sir.

Mr. Klein: I offer the lease in evidence.

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

By Mr. Klein.

Q Under that lease, what was the rent payable by the tenant? A $479.17.

Q Is there any rent unpaid? A Well, we did not receive any rent since January.

Q Is the January rent paid? A No, sir.

Q Is the February rent paid? A No, sir.

Q Did the tenant move out? A Yes, sir.

Q When did the tenant move out? A The latter part of January.

Q Has any part of that two months rent been paid to you? A No, sir.

Q The full amount is due? A Yes, sir.

Mr. Klein: That is all.

By the Court.

Q How much is the rent a month? A $479.17.

Cross examination by Mr. Fulop.

Q Did you, at the beginning of this lease, receive $479.17 as a deposit? A Yes, sir.

Q You still have that? A Yes, sir.

Q Have you ever paid interest on it? A I can't tell you that.

Q You don't know that you did pay it? A I don't know that I did not either. The bookkeeping department will answer that.

Q You agreed to pay interest. Do you remember that? A I don't remember.

The Court: There is no dispute about that, is there?

Mr. Klein: If it is in the lease, I am satisfied.

Q At the time you rented this store to K. Burns & Son, did you know what business K. Burns & Son were in? A Yes, sir.

Q Did you undertake not to lease any other store, or not to permit the sale of any other articles sold in jewelry stores, usually sold in jewelry stores?

Mr. Klein: I object to that. In the first place, the lease speaks for itself. In the second place, it is improper cross examination.

The Court: I think it is proper cross examination, but I think it is objectionable because of the fact that the lease speaks for itself. There is no dispute about it, I take it. Look at the lease and see whether that is what it says.

Q May I call your attention to the 28th paragraph of the lease which you just testified to? What does that provide?

Mr. Klein: I object, your Honor. The lease speaks for itself.

The Court: Objection sustained. You may read it to the jury.

(The 28th clause of Exhibit P. 1 was read to the jury by Mr. Fulop.)

Q What kind of a store did you have on the corner of Market and Beaver streets at the time you entered into this lease? A We conducted a cigar store and a fountain—

Q And then— A Do you want me to answer your question?

By the Court.

Q What kind of a business did you do? A We sold clocks, watches, fountain pens, cigar lighters, shaving paraphernalia of all kinds like razors and blades.

By Mr. Fulop.

Q Did you thereafter install any other articles usually sold in a jewelry store?

Mr. Klein: I object to that, your Honor, as not proper cross examination.

The Court: Objection sustained.

Q Is this your signature (handing document to witness)? A No, sir.

Q It is not your signature? A No, sir.

Q Is that your signature (handing document to witness)? A No, sir.

Q Did anybody else sign it? A They probably did it under my direction. I admit the letters.

Mr. Fulop: I should like to have these letters marked for identification.

(The same are marked Exhibits D. 1 and D. 2 for identification.)

Q Is that a picture of your store in January, 1931? (Handing photograph to witness.) A I can't say so.

Q Does it look like your store? A It might look like any one of our stores. Are you talking about this particular store?

Q Yes. A I could not identify it.

Q Could you tell by noticing the store next to it? A Well, I would not say positively.

Q Does it look like your store? A This part (indicating) looks like any one of our stores. This thing (indicating) may be the store next door. I cannot say.

Mr. Fulop: That is all.

Mr. Klein: Plaintiff rests.

Mr. Fulop: I should like to have the photograph marked for identification.

(The same is marked Exhibit D. 3 for identification.)

KALMAN BERNSTEIN, the defendant, sworn in his own behalf.

Direct examination by Mr. Fulop.

Q What business are you in, Mr. Bernstein? A Jewelry business.

Q How many years have you been in the jewelry business? A About 25 years.

Q Did you on July 15, 1927, rent a store from the Silver Rod Stores, Inc.? A I did.

Q Is that the lease which you entered into (handing Exhibit P. 1 to witness)? A Yes, sir.

Q I call your attention to the 28th clause of that. Will you look at that? A Yes.

Q At the time that you entered the store, what sort of business was conducted by the Silver Rod Stores? A They conducted a cigar counter with an open front, no windows at all. It was completely open like a soda stand. They also had a luncheonette. They sold cigars, they sold watches, pocket watches, they did sell clocks, they did not have any show windows of any kind. In other words, if a person came in, they saw a clock or a pocket watch on the stand at the counter. And they had a luncheonette where they sold sandwiches and ice cream.

Q Did they sell fountain pens and pencils? A They did not.

Q Cameras? A No, sir.

Q Flasks? A No, sir.

Q Cigarette cases? A No, sir.

Q Lighters? A No, sir.

Q Atomizers? A No, sir.

Q Vanity cases? A No, sir.

Q Compacts? A No, sir.

Q Bath salts? A No, sir.

Q Perfumes? A No, they did not.

Q Smoking sets? A They did not.

Q Ash trays? A No, sir.

Q Humidors? A No, sir.

Q Cigar and cigarette holders? A No, sir.

Q Traveling clocks? A No, sir.

Q At that time, did you tell Mr. Rodnon what business you intended to establish at that place? A I told him—

Mr. Klein: I object to any testimony prior to the execution of this lease.

The Court: I shall allow it.

Mr. Klein: It all merged in the lease.

The Court: Probably so, but I cannot be sure whether it was a contemporaneous separate agreement or not.

(Question read.)

Witness: Yes.

Q Did you then provide for any protection from competition by your lease? A I did.

Q Is that the clause that I read before? A That is right.

Q Would you have signed that lease if you had not had that restriction? A No, sir.

Mr. Klein: I object to that question, your Honor.

Kalman Bernstein, for Defendant, Direct.

The Court: I do not think it is very important one way or the other. He did not sign it without it. That is the best evidence in the world.

Q You entered the premises when? A I believe the first of August.

By the Court.

Q 1927? A Yes.

Q When did you move? A I moved out the 28th of January, 1931.

Q The 28th of January? A The 28th of January.

Q When does the lease expire? A I believe it expires a year and a half later.

Q A year and a half after that? A Yes. It was a five year lease.

By Mr. Fulop.

Q After you had been in the premises for sometime, did the Silver Rod Stores demonstrate or sell any articles in their store which are usually sold in jewelry stores? A They did.

Mr. Klein: I object to the form of the question, in the first place. Then I want to enter a formal objection to a number of these questions that I anticipate.

The Court: Do not anticipate anything.

Mr. Klein: Well, I will confine myself to this one question. A breach of an independent covenant is not a defense to an action for the non-payment of rent under the covenant.

(Argument.)

The Court: The defendant here has put in a counter-claim. I think the testimony is competent with respect to the counter-claim. Whether Mr. Fulop puts his testimony in first with respect to the defense that he might have or whether he puts it in first with respect to his counter-claim I think makes no difference. I do not think he is contending that he paid the rent for January or February.

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

Exception noted as ground of appeal.

Q What were some of those articles? A. Cigarette lighters, atomizers, cigarette cases, fountain pens, nationally advertised, whiskey flasks, cameras, generally sold in jewelry stores.

Q Do you sell those in your store? A I do.

Q Did you thereafter protest? A I called the attention of Mr. Rodnon—I said I hired a store for jewelry. I said, "Now, you entered into the jewelry business." He said, "Well, we put this complete line in every one of our stores where we never carried it."

By the Court.

Q When was that? A Sometime during the year of 1929, before Christmas, I should judge it was around September, 1929. I also called his attention to the optical store that he sublet around the corner in the same building, an optician. I said, "This man sells ready made glasses he has a big display of them, and I carry glasses here, and I do repairing of glasses, and this man is taking the entire business away." He said,

"Well, I will see what we can do." I called him up several times after that.

Q When was that? A That was around November.

Q The same year, 1929? A The same year.

Q About when did the optician go in? A The optician went in the early part of 1929.

Q You did not complain about that until November? A I did complain immediately that they moved in.

Q When did you first object to the optician? A Around 1929, I should judge around June or July.

Q What did Mr. Rodnon tell you then? A He said, "This man has got a lease." He gave him a lease and he did not think about me, and he did not know I had the glasses. That was around June or July.

Q And then in November you again spoke to him? A In September when he started to make big displays with big show windows. There were no windows there originally, and he put in new windows in the store. My manager that took charge of that store while I was away in Europe called his attention to it in 1929.

Q Well, you were not there, so do not tell what your manager did. A At that time I was not there. I called his attention to the fact that he was making displays of this merchandise adjoining my store. He said, "We are carrying these goods in all our stores. We just entered into that business. I will see what I can do."

Q When you left on January 28th, was the optician's store still there? A The optician moved out.

Q When? A I should judge in December. He had some other business. He moved out of his own accord.

Q Was the plaintiff, Silver Rod Stores, Inc., still selling the same line of goods in its store at that time, the line of goods that you have described? A Yes, sir.

By Mr. Fulop.

Q Did you in November, 1930, receive that letter through the mails (handing Exhibit D. 2 for identification to witness)? A I did.

Mr. Fulop: I should like to offer that in evidence.

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

(Mr. Fulop then read Exhibit D. 2 to the jury.)

Q Did they thereafter correct the condition complained of? A They did not.

Q I show you a letter dated December 2, 1930, and ask you if you received that through the mails (handing Exhibit D. 1 for identification to witness). A I did.

Mr. Fulop: I offer that letter in evidence.

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

Q After you received that letter, did they remove those articles? A They did not.

Q Did they continue to handle them? A They did.

Q Do they now? A They do.

Q Did they handle them in January? A They did.

Q I show you a picture and ask you if you recognize that picture (handing photograph to witness)? A I do.

Q What is it? A It is a photograph showing my store next door to the Silver Rod stores.

Q Can you tell about when it was taken? A About the middle part of January, the 14th or the 15th.

Q Were you there when it was taken? A I called up the photographer—

By the Court.

Q Were you there when it was taken? A I was not.

By Mr. Fulop.

Q Does that represent the condition of the window?

Mr. Klein: I object to that.

The Court: I shall allow it.

A Yes.

By the Court.

Q That is a picture of the store as it looked about when? A During the month of January.

By Mr. Fulop.

Q Of this year? A That is right.

Q What articles that are on display there are usually sold in jewelry stores?

Mr. Klein: I object to the form of the question.

The Court: I shall allow it.

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

Exception noted as ground of appeal.

A In this particular picture it shows fountain pens, it shows pencils to match, it shows cigarette cases and lighters in this particular picture.

Mr. Fulop: I offer that photograph in evidence.

(The same is received in evidence and marked Exhibit D. 4.)

The Court: I do not understand that there is any dispute that the plaintiff sold those articles.

Mr. Fulop: Can we put into the record that the articles listed were sold in the store?

The Court: Yes, if counsel agrees that they were.

By Mr. Fulop.

Q What does that picture represent (handing Exhibit D. 3 for identification to witness)? A This is also the window of the Silver Rod Stores.

By the Court.

Q Taken about when? A The same date.

By Mr. Fulop.

Q Is that another window? A Yes.

Mr. Fulop: I offer that photograph in evidence.

(Exhibit D. 3 for identification is received in evidence and marked Exhibit D. 3.)

Mr. Klein: We admit that the articles that counsel has enumerated before were sold, but we do not want to be restricted as to them. We contend that they were sold all along during the lease.

Mr. Fulop: It is agreed that fountain pens, pencils, cameras, flasks, beverage shakers, cigarette cases, lighters, atomizers, vanity cases, compacts, bath salts, perfumes, smoking sets, ash trays, humidors, cigar and cigarette holders and traveling clocks were sold by the plaintiff.

Q Are there any other articles? A Not that I can think of right now. Optical goods.

Q That was in the other store? A Yes.

Q Mr. Bernstein, at the time of this lease did you pay a deposit of $479.17? A I did.

Mr. Klein: We admit that.

Q Did you ever get interest on it? A I did not.

Q Do you remember what the rate of interest was? A I believe the lease specifies 4%.

Q You never received that money back? A I did not.

Q What would you have been willing to pay for that store in rent if you had not had this restrictive covenant?

Mr. Klein: I object to that.

The Court: Objection sustained.

Mr. Fulop: That is all.

Cross examination by Mr. Klein.

Q Mr. Bernstein, are atomizers jewelry? A It is a gift item in a jewelry store.

Q Isn't that a drug store item? A Well, it is carried by drug stores and carried by jewelers, cosmetics.

Q Are bath salts an item of jewelry? A It is.

Q It is an item of jewelry? A It is, exactly.

Q Are ash trays an item of jewelry? A Yes, sir.

Q Humidors? A It is.

Q Cigar and cigarette holders? A Yes, sir.

Q Aren't they cigar store items? A It is carried by jewelers with gold trimmings on, a special gift item all year round in the jewelry store.

Q The cigar and cigarette holders that you carried had gold trimmings? A Gold and plain. Some come plain, some come decorated, others come engraved, others come with decorated painting.

Q Are they like the ones that the Silver Rod Stores carried? A They carried the same as I did.

Q Did they carry them with the gold trimmings? A They did.

Q And fancy? A Yes, and each one in a box, in a gift box.

Q Is a camera an article of jewelry? A Yes, sir.

Q And beverage shakers? A Absolutely.

Q Aren't fountain pens and pencils stationery items? A Carried by every jewelry store in the United States. Even Tiffany carries pen and pencil sets.

Kalman Bernstein, for Defendant, Cross.

Q They are carried by drug stores? A Yes.

Q And stationery stores? A Yes, sir, and jewelry stores carry them.

Q What kind of a jewelry store did you conduct there? A I conduct a popular price jewelry store, small items.

By the Court.

Q What is the nature of your stock? A Fountain pens, cigarette holders, cameras, razor blades, rings, chains, pocket knives, chain knives. As a matter of fact, they put in a big display of knives in the store that I carried and sold them at half the price that I sold them for in that particular store.

Q What kind of knives? A Pocket knives, pearl handled knives, cutlery.

Q The knives had chains? A No, pocket cutlery, knives that I carried.

Q Not with gold or silver handles? A No, sir.

Q What else, besides that, did you carry? A In my store?

Q Yes. A I carried pocket watches, of course, clocks.

Q Wrist watches? A Wrist watches.

Q Scarf pins? A Yes, sir.

Q Clocks and watches of all kinds? A Yes, lower priced goods.

Q Diamonds? A Not a great deal of diamonds.

Q What? A Not a great deal of diamonds.

Q Some diamonds? A A few.

Q Did you carry brooches and pins for women? A Yes, sir.

By Mr. Klein.

Q You had a sign in front of your store, "Diamonds"? A I have a sign in all my stores, "Diamonds."

Q And you had it in this store? A Yes, and they made me take it off.

Q You had a sign there, "Jewelry Store"? A K. Burns & Son, general merchandise store.

Q General merchandise? A Yes.

Q When was that? A All the time, general merchandise.

Q Then you were in the general merchandise business? A I was selling everything that I could buy and sell in that line of store.

Q Did you sell groceries? A I did not. When I say "general merchandise" I mean general goods that are carried in a store of that type.

Q You are well known in Newark, aren't you, Mr. Bernstein? A Yes.

Mr. Fulop: I object to that.

The Court: He has answered it. I shall let the answer stand.

Q You have been in the jewelry business for quite some time? A Not exactly in the jewelry business all the time.

By the Court.

Q He did not ask you that. The question was: You have been in the jewelry business for quite some time? A Yes, sir.

By Mr. Klein.

Q For how long a time? A Twelve years.

Q You have had a number of stores in the City of Newark? A Two stores.

Q You have had more than two, haven't you? I do not mean at one time. A Two stores. The most I ever had was two stores in Newark.

Q You had another store in Newark at the same time you conducted this store? A I did.

Q Where was that located? A On Broad street and New street.

Q You have another store today, have you not? A I have.

Q Where is that located? A 683 Broad street.

Q You opened that store since you moved from this store? A I have opened two other stores since then.

Q So the name of K. Burns is well known in the City of Newark as a jewelry store, is it not? A Yes.

Q Mr. Bernstein, isn't it a fact that the Silver Rod Stores sold fountain pens, pencils, and all these other articles that you mentioned, with the exception of the drug store items, at the time you moved into that place? A They did not.

Q You are certain about that? A Positive.

Q When did they begin? A They began during 1929 when they put in the drug business, and they entered into the jewelry business in every one of their stores. They made a complete change. They put in a new store, they took out their luncheonette, they took out the soda fountain, and they put in a regular display, the same as any jewelry store display.

Q The biggest part of your business was the sale of the more expensive items of jewelry? A No, sir.

Q I mean the things that are not novelties. A No, sir.

Q You sell plenty of watches? A We sell watches, yes.

Q Plenty of watches? A Not exactly plenty. I would not say watches more than anything else.

Q You have to sell a number of these cigar lighters to make money, don't you? A It is the biggest selling item today.

Q But you can make more money on one ring than on a number of lighters? A If you sell rings, you can make a profit, but every location has a different class of merchandise to handle. In that particular location we couldn't sell diamonds, we couldn't sell expensive watches.

Q When did you find that out? A I was in that particular building before the Silver Rod Stores ever moved in there. I was there for five years before they moved in.

Q Didn't you ask the Silver Rod Stores for a reduction in rent before you moved out?

Mr. Fulop: I object to that.

The Court: I shall allow it.

A When I kept complaining all the time—

Q Answer my question. Did you or did you not? A I did.

Q When you moved out in January, did you inform the Silver Rod Stores, or did you just move out? A I certainly did.

By the Court.

Q You certainly did what? A Informed them that I was going to move out.

Kalman Bernstein, for Defendant, Cross.

By Mr. Klein.

Q In what manner did you inform them? A Mr. Rodnon came to my store and he says to me, "Mr. Bernstein—"

Q I am asking you in what manner you informed them.

By the Court.

Q By letter, or by word of mouth? A By mouth.

By Mr. Klein.

Q How long before you moved out? A Three weeks.

Q Three weeks before? A Yes.

Q Did you tell Mr. Rodnon when you were to move? A I told Mr. Rodnon if he does not take out these things, if he does not start taking out these items and give me my store so I can do business, I will move out, that I could not pay the present rent that I am paying if he continued to sell those items.

Q That was the trouble, the rent? A It was not a question of rent at that time. I wanted him to take the items out. I was willing to pay my regular rent.

Q You did not pay your January rent, did you? A When I was asked for the rent, I said, "I will not pay the January rent until you take these items out."

Q You had been behind before in your rent? A I was never behind in my rent for three and one-half years, excepting during the last few months before Christmas when he kept on making larger displays, and I kept on saying, "I won't pay the rent unless you take these items out."

Q That is the reason you were behind in your rent? A I was never behind in my rent during the entire term of three and a half years.

Q From these letters here I note that you paid two months at a time on occasions. A Because he had an error. He thought that I paid him, and I called his attention to it, and told him that that rent was not paid. It was also because he promised to come down and take that stuff out. My rent was always paid on the first of the month.

Q How did you pay that? A By check.

Q You mailed it in? A I used to mail it right in.

Q When did the optician move in? A During the year of 1929.

Q Do you remember what part of the year? A I said either June or July.

Q Do you know when he moved out? A I believe he moved out in November—because I know they had some liquor place in there after he moved out.

Q Was it in 1929 that the optician moved out? A In 1929, before Christmas.

Q In 1929? A I think so.

Q Did you have a registered optician in your store? A I had a registered optician in my Broad street store, and when somebody came to have their eyes examined in the Market street store, we used to call him up, and he would go down there and have the work done.

Q The patient would go to the Broad street store? A No, the patient would wait there. We sold ready-made glasses. We did repairing on the premises. But if it was a case of eyes examined, we had our optician come down from our

Broad street store, the same as we do at the present time.

Q You sell ready-to-fit glasses, you mean? A We sell ready-to-fit glasses. So did this optician sell ready-to-fit glasses.

Q He put out the same kind? A He displayed glasses, $2 and $1 glasses. People come in and buy ready-fitted glasses in that particular location.

Q Are there any articles that you can name that jewelry stores do not sell? A Yes.

Q From September, 1929, Mr. Bernstein, you complained about these articles being sold? A I complained before that time, several times.

Q Did you write any letters about it? A I called him up, and every time he was down to the store I spoke to him about it.

Q In November again you spoke to him about it? A I spoke to him every time I had a chance to see him.

Q After November, 1929, had you spoken to him? A I did.

Q How often? A I used to find out the day that he would come down and make his day in Newark, I ran down to the store to see him.

Q Did you ever send him any formal notice that you demanded that he discontinue selling these articles, or otherwise you would move? A I told him—

Q I am asking you a question. A I never done much writing with him for three and a half years.

Q You did not send him any formal notice? A I don't think so.

Q In December, 1930, these articles were being sold by him? A Yes.

Q Before your Christmas rush? A Yes.

Q Why didn't you move out then? A I told him—

Q Please answer the question.

Mr. Fulop: I object to the question. I object to the whole line of examination.

The Court: I shall allow him to answer that.

By the Court.

Q You might answer it. A Why, that particular time was the busy time for us, and I did not think I could take the time even to move.

Q It was a good time for you? A Not a good time for business. It was a busy time and I was taken up with my stores.

Q When business slowed down after Christmas, you decided— A My business was slow there for a year before that.

Q I beg your pardon. Will you let me finish the question? When business slowed down after Christmas, you decided to move out, and blame it on your landlord selling these articles? A I came to Mr. Rodnon several times before September, and I told him I would move.

Mr. Klein: I think the answer is not responsive.

The Court: Reframe your question. I shall let the question and answer stand. I think the answer was partly responsive.

Q Is it not a fact, Mr. Bernstein, that you moved out in January, 1931, because business generally was bad and the spot was no longer

suited for the particular business that you were in? A No, sir.

Mr. Klein: That is all.

LESTER FINGER, sworn in behalf of defendant.

Direct examination by Mr. Fulop.

Q Mr. Finger, what business are you in? A I am in the real estate business. I am a real estate broker.

Q How long have you been in that business? A Ten years, approximately.

Q What experience have you had in that time? A Well, I was with Louis Kamm, Inc., for about eight and a half years, in their leasing department part of the time. Part of the time I was the head of their leasing department, the last three or four years of that time. For a year and a half I have been in business for myself, in the general practice of real estate, specializing in commercial leasing.

Q You were subpoenaed here today? A Yes, I was subpoenaed here today.

Q Did you act as agent for the Silver Rod Stores to lease the store to K. Burns & Son at 203-205 Market street, in 1927? A Yes.

Q Do you remember what the rent was? A I was not present at the final completion of the deal. I can recollect the rent.

Q Do you know what the value of those premises on a five-year lease was, with restrictions against competition in the same building?

Mr. Klein: I object, your Honor, first on the ground that this witness has not qualified to testify in answer to this particular question, and, second, on the ground that it is immaterial in this case, because there is no question here about the interruption of the physical premises.

The Court: I think he is qualified by reason of his having specialized for a number of years in the leasing of properties for commercial purposes. I am not sure that it is competent, though, as to what the lease was worth for this particular purpose, restricted, because the lease speaks for itself on that. The defendant cannot complain that he paid too much.

Mr. Fulop: I withdraw the question.

The Court: You might ask him the following question that is in your mind.

Q What was the value of these premises, on a monthly rental basis, for a five year lease, at the time this lease was made in 1927, without any restrictions as to competition.

Mr. Klein: I object. I do not think this witness is qualified to testify as to that.

The Court: I shall allow him to answer. I think he is qualified as an expert.

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

Exception noted as ground of appeal.

(Argument.)

The Court: It seems to the Court that the question as to the qualifications of an expert is almost entirely discretionary with the

Court. Here we have a man who testifies that for ten years he has been in business as a real estate broker, and most of the time he has been engaged in leasing this type of property. If that does not make an expert, I do not believe you can find one. He has been engaged for eight years of the ten with one of the big offices, and a part of the time in charge of its leasing department.

Mr. Klein: I do not dispute the witness' qualifications as an expert with respect to rental values, but I do say that he cannot say what is the difference between the rental value of a particular store with and without restrictions of this character, because he is not informed sufficiently to know how much harm may come to this tenant by virtue of the fact that his landlord is selling articles of a similar character.

The Court: On cross examination you can show that his opinion is not worth anything, if you want. It may be that no man could give the kind of testimony that is being sought from this witness. That is for the jury to say. But, if anybody can give it, it being opinion testimony, it can be given by a man who has knowledge of the subject; that is what makes an expert. I have no question in my mind that a man who has had the experience that this man has had is qualified to give his opinion with respect to values of leases, for whatever worth it may be. You may "upset the apple cart" on cross examination to the point where the witness' testimony will not be worth anything.

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

Exception noted as ground of appeal.

By the Court.

Q Do you know what the question is? A Yes.

Q What is the answer? A My opinion is that the store was worth approximately $6,000 a year at that time, with the restriction.

Q He did not ask you that. The question is: What was it worth without restrictions? A About $5,000 a year.

By Mr. Fulop.

Q Is it possible to calculate the difference in value between a store with restrictions and without? Do you do that in the real estate business? A It has been done in the real estate business.

Q Are you familiar with the value of such restrictions? A I am somewhat familiar.

Q Have you had any experience in leasing stores with restrictions? A Yes.

Q Have you had any experience in leasing stores without restrictions? A Yes.

Q And you know what they leased for? A Yes.

Q And the difference between the amount of this lease and the value without restrictions is how much?

The Court: He has testified that without restrictions it was worth $5,000 a year at the time the lease was made.

Lester Finger, for Defendant, Cross.

By the Court.

Q That is your testimony, is it not? A Yes.

Cross examination by Mr. Klein.

Q Mr. Finger, when you negotiated with Bernstein for this store, you gave him a price, didn't you? A Yes, sir.

Q What was the price you gave him? A Well, it is a matter of a few years ago. I don't know the exact price. I can approximate it.

Q You gave him the price that ultimately resulted in this lease, did you not? A I don't think so.

Q Probably a greater price? A Probably.

Q And then when you went to him with your price, did you say to him, "Now, Mr. Bernstein, this is your price without a restriction, and this is your price with a restriction," did you say that? A No.

Q You went to him, and then they got together with their lawyers and they negotiated? A That is about right.

Q Was there anything said at that time when you went to Mr. Bernstein about restrictions? A I can't recall.

Q At least you did not tell him about restrictions, did you? A I can't recall.

Q At that time, did you place any value on the store with restrictions and without restrictions? A No.

Q Have you any particular way of figuring values with a restriction or without a restriction? A Only generally, and by precedents.

Q What was that? A Only generally, and by precedents.

Q Have you ever had any occasion in your experience to quote or estimate a price for a lease with restrictions, and without, for the same store? A Yes, sir.

Q And when was that? A Within the last six months.

Q Where was that? A In the Metropolitan Building on Washington street. That is on Washington street right off of Market.

Q What kind of a store was that which you were leasing? A That was a clothing store.

Q What were the restrictions? A There was a clothing tenant in the building who had a clothing restriction in the entire building. My prospect was another clothing man. I endeavored to complete a lease for my clothing client, and in the negotiations I negotiated with the clothing occupant in the building and tried to upset or do away with his clothing exclusive. That was the last experience I had. That is within six months.

Q Did you ultimately close that deal? A No.

Q Then you fixed no price? A Well, a price was discussed, but we could not offer the clothing tenant that was already in the building enough money to do away with that exclusive.

Q Isn't it a fact that in downtown properties in a city like Newark competition next door to each other does not hurt? A You will have to qualify that.

Q You know that on Broad street you have three men's shoe stores next door to each other, and four men's shoe stores? A I can't recall that.

Q You know where Blyn's and Rambler's and John Ward are. They are all right next door to

each other, are they not? A I think there are one or two stores in between.

Q You know these downtown stores where they are right next door to each other, don't you? A The question is whether they do that deliberately, or whether it is just an accident.

Q Does it affect the rental value if you have three or four stores selling the same kind of merchandise, if they are next door to each other? A I personally think that the landlord could get a bigger rental in a case like that if he kept a 100 foot or 150 foot exclusive of that kind of merchandise.

Q Isn't it a fact that people like to create centers? Take Halsey street with your stocking and lingerie stores. Don't they all come together purposely so that they will create a center and have all the shoppers come there? Isn't that an advantage and an asset rather than a disadvantage? A Not next door to each other.

Q It is all over the City of Newark, is it not? A I don't know.

Q You don't know? A I don't know if it is all over the City of Newark.

Q How long have you been leasing downtown properties? A About ten years.

Q Are you familiar with Market street from Washington to Broad? A I think so.

Q Are you familiar with Broad street, on the west side of the street, from New to Academy? A Yes, somewhat familiar.

Q You have your Prudential stores between Academy and Bank. They are all dress shops, are they not? A Yes, but they are not particularly successful dress shops.

Q But they are all dress shops? A They are dress shops one month and something else the next.

Q Coming back to this lease, when you negotiated that lease, or when the parties got together, was there anything said with respect to restrictions when the price was fixed? A There was nothing said about restrictions, as far as I know, not in the beginning of the negotiations where I was connected.

Q Then the price was not dependent upon whether or not there would be restriction; is that what you mean? A There was nothing said about restrictions.

Re-direct examination by Mr. Fulop.

Q Before the closing of this lease, did Mr. Bernstein say anything about restrictions, to your knowledge? A I don't remember anything about restrictions. It might have been said, but I can't recall.

Q Were you familiar with the lease when it was drawn? A No, I was not there at the final arrangement.

Q Did you see the lease at that time? A I don't think I have ever seen the lease.

HERMAN WEISSMAN, sworn in behalf of defendant.

Direct examination by Mr. Fulop.

Q What business are you in, Mr. Weissman? A Jewelry business.

Q How long have you been in the jewelry business? A About 20 years.

Q In what capacity are you now connected with the jewelry business? A Selling jewelry.

Q For whom? A Myself.

Q Selling to whom? A Jewelry stores.

Q Are you familiar with the articles purchased by jewelers for sale in jewelry stores? A To a very great extent.

Q Can you tell us, as a result of that experience, whether fountain pens are usually sold in jewelry stores?

Mr. Klein: I would like to cross examine this witness on that first.

The Court: All right.

By Mr. Klein.

Q Are you a manufacturer or jobber? A I am a jobber.

Q What kind of articles of jewelry do you sell? A At present?

Q Yes. A At present I sell novelty jewelry.

Q Do you sell diamonds and watches? A Not watches, but diamonds.

Q You sell diamonds? A Yes, sir.

Q What is the greater portion of the articles you sell—these novelties? A Yes, sir.

Mr. Klein: I object to the testimony of this witness, on the ground that he is not qualified to testify as to what is usually sold in the jewelry stores.

The Court: He has been in the jewelry business for 20 years. If he does not know anything about the business after 20 years, he never will know. I shall allow him to testify.

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

Exception noted as ground of appeal.

Q (Question repeated by the stenographer as follows: "Can you tell us, as a result of that experience, whether fountain pens are usually sold in jewelry stores?") A Yes.

Q And pencils? A Yes.

Q Cameras? A Yes, sir.

Q Flasks? A Yes, sir.

Q Beverage shakers? A Yes, sir.

Q Cigarette cases? A Yes, sir.

Q Lighters? A Yes, sir.

Q Atomizers? A Yes, sir.

Q Vanity cases? A Yes, sir.

Q Compacts? A Yes, sir.

Q Smoking sets? A Yes, sir.

Q Ash trays? A Yes, sir.

Q Humidors? A Only silver humidors.

Q Traveling clocks? A Yes, sir.

Mr. Fulop: You may cross examine.

Cross examination by Mr. Klein.

Q Counsel forgot to ask you whether bath salts are sold in jewelry stores. Are they? A No, not unless they are sold in silver bottles.

Q Aren't these items stationery store items and drug store items? A To be candid, I have seen them in stationery stores, but a jeweler displays them as the fundamental things of the jewelry trade.

Q What makes them articles of jewelry? A Well, they are advertised to the jewelers, in the first place. The jewelry is solicited to buy them. The jeweler is shown where he can make a big profit on them if he sells them to the retail trade.

Q If you were looking for an ash tray or if you were looking for a fountain pen or a pencil,

you would go into a stationery store, wouldn't you? A If I were looking for a fountain pen, I would go to a jewelry store.

Q You would as a jeweler. A I would as a jeweler, and I think because they are vastly displayed by jewelers everybody almost unconsciously walks into a jewelry store to buy them.

Q Where would you go if you wanted to buy bath salts? A I would go to a drug store.

Q And if you wanted to buy a compact, where would you go? A I would go to a jewelry store.

Q Wouldn't you go to one of these perfumery stores that we have around? A There is quite a difference between the ones they carry in the perfumery stores and the ones they carry in the jewelry stores.

Q And there would be a difference between the ones they would carry in a store like K. Burns & Son and the ones they would carry in a cigar store? A There certainly would.

Q And that goes for the fountain pens also? A Well, at the present time, there would not be much of a difference in the fountain pens.

Q There would be a difference in these cigar cases and cigarette holders? A There would not be much of a difference.

Q The jewelry store would have something with silver or something more expensive? A Is that a cigarette case?

Q Yes. A A cigarette case generally is made out of metal, either silver, silverroid or gold.

Q But there are leather cigarette cases, are there not? A Yes.

Q Would that be a cigar store article? A Not necessarily.

Q Would a leather cigarette case be a jewelry store item? A Yes, they all carry an emblem, a shield on there.

Q Would an atomizer be a jewelry store item? A I understand an atomizer is sold exclusively by jewelers.

Q Aren't they sold in drug stores? A Yes.

Q Isn't that the place to go for them? A Well, if you have been a patron of a drug store, and saw it there, you would go in there.

Q Isn't that the test, Mr. Weissman?

Mr. Fulop: I object.

The Court: I shall allow it.

A What test?

Q Isn't that the test—where you would be accustomed to go? In other words, if a person was accustomed to going to a cigar store for a cigarette lighter, he would not go into a jewelry store for it, would he? A If he saw it there and he liked it there, and the price was right, he would be foolish to go into a jewelry store to buy it.

Q Doesn't every cigar store or almost every cigar store carry cigar lighters and cigarette holders and cigarette cases? A I will admit that they do carry them, but only of recent years.

Q They have carried them for the last five years, have they not? A I can't really approximate the amount of time.

Q Three years? A Well, I should say you are right.

MITCHELL STERN, sworn in behalf of defendant.

Direct examination by Mr. Fulop.

Q Mr. Stern, what business are you in? A Jewelry salesman.

Q With whom are you employed? A K. Burns & Son.

Q How long have you been employed by K. Burns & Son? A 10½ years.

Q Did you have any connection with the store at 203-205 Market street? A I was the manager of the store.

Q Are you familiar with the neighboring store, the Silver Rod Store, Inc.? A Yes.

Q Did you observe what articles were demonstrated or sold in the Silver Rod Store at the time you entered the premises? A Yes.

Q Will you tell us what they were? A They had a soda fountain, and cigar store.

Q During the time that you were occupying the store, did they install other articles? A They did.

Q Were any of those articles articles usually sold in a jewelry store? A Yes.

Q Could you name some of those articles? A Cameras, knives, fountain pens, compacts, atomizers, cigarette cases, lighters.

Q About when did they begin to install these items? A About 1929.

Q Did you personally ever protest to the Silver Rod people with respect to it? A I complained all the time to my main office.

Q You complained to your own office? A Yes.

Mitchell Stern, for Defendant, Direct.

Q Did the selling of these articles in the neighboring store injure your business? A It did.

Mr. Klein: I object to that.

The Court: I shall allow it.

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

Exception noted as ground of appeal.

Q Have you any idea to what extent it injured your business?

Mr. Klein: I object to that.

By the Court.

Q You might say "yes" or "no," if you know. A Yes.

Q You do have an idea? A Yes.

By Mr. Fulop.

Q Could you give us any idea of the extent? A To a great extent, because that is the main part of our business.

Q What is the main part of your business? A General merchandise.

Q These articles that you named? A That is right.

Q Those articles are sold in a jewelry store? A Correct.

Q Yours was what kind of a store? A General merchandise, popular priced goods.

By the Court.

Q Don't you think that a whole row of jewelry stores next to each other would stimu-

late trade for each other in a block—or do you think that it would be better for them to be scattered around? A On certain locations.

Q The location would make a difference? A Like in Times Square where all the people are together, it is a center, or in Maiden Lane.

Q Then it is all right? A Then it is all right. But for the neighborhood trade it is not.

Q Do you call Market and Beaver street a neighborhood trade? A It is not a neighborhood trade, but it is not a big center.

Q They go down to the market, and there is a whole row of chicken stands, one against the other. Everybody who wants to buy a chicken goes to the market and he picks out the best looking chicken. All the meat is together, and all the vegetable stands are together. That brings the people to one place, those who want to purchase provisions for the home. Is that not so? Is that not the theory? But it does not work in the jewelry business? A It works with jewelry to a great extent.

Q But not there; is that your point? A I will not say, "Not there." I will say, "In general."

Q In general it does not work; is that right? A Yes.

By Mr. Fulop.

Q Is this a jewelry center?

The Court: He says not.

By the Court.

Q Isn't that your testimony? A Not for expensive merchandise. For general merchandise it is a center.

Cross examination by Mr. Klein.

Q There are two other jewelry stores right near you on Market street? A Yes.

Q And they have been there even longer than you have? A No.

Q They have been there since you have been here? A No.

Q How long have they been there? A I have been in that location for the last 10½ years.

Q I mean since this lease started. They have been there 3½ years? A Yes, but in the same location we were there 10½ years.

Q And they have been there 10½ years? A Yes.

Q You say your business was hurt materially, or a great deal; is that right? A Right.

Q Have you any records to show how much you have been hurt? A Yes.

Q Have you got them with you? A I haven't got there with me.

Q Do you charge that falling off of business to this alone? Didn't it fall off because of the depression? A Well, I am not a judge of depressions.

Q There is a depression, is there not? A They claim there is a depression. It is not a depression with me. I get the same salary.

Q All the business men are complaining, are they not, about business? A That has nothing to do with me. I am a working man.

Q You are manager of a jewelry store? A That is right.

By the Court.

Q And business is not good for the boss, even though it is for you; isn't that so? A That is right.

Q You have more time now than you did have when you were busy? A I have got less time. I have got to work harder to produce the same thing.

Q Then you do know there is a depression, and that business is bad in your line; is that so? A That is right.

Q The question is whether that is not the reason that you had the slowing up of business when you were in that location, rather than because of the competition of the plaintiff, the landlord. A I know I used a certain amount of fountain pens, but the sales dropped off. Knives, cigarette cases, compacts, were a big item. I did not sell them, and I was complaining to the main office.

Q You say it was because of the competition? A To a great extent.

Q More than it was due to poor business conditions? A Yes.

By Mr. Klein.

Q Didn't your sale of diamonds fall off? A We sold very little diamonds there altogether.

Q Didn't it fall off this last year? A In percentage maybe it did fall off.

Q And didn't your sale of watches fall off? A Very little, because we did not sell a lot of watches.

Q Did your sales of rings fall off, and didn't your sales of general jewelry fall off? A Yes, but they started to sell fountain pens and compacts.

By the Court.

Q He is talking about the things you sold which the other side did not sell. For instance, they did not sell watches and diamonds. A I did not keep a separate record on them.

Q You cannot tell us whether those sales fell off? A I don't keep a separate record.

Q But you did keep a separate record of the fountain pens and the compacts? A I did not.

Q Yet you say the sales of those fell off? A The general business fell off, and I claim that because the general merchandise is not selling it was due to that competition next door.

Q But you cannot tell us whether or not business was bad with respect to the articles that they did not sell; is that what you mean? A Yes, sir.

By Mr. Klein.

Q You have charge of that store, have you not? A Yes, sir.

Q You said before that it is good for stores selling cheaper merchandise to be next door to each other? A I did not say that.

Re-direct examination by Mr. Fulop.

Q Did the Silver Rod Stores lease a store in the same building for any other business competing with yours? A Optician.

Q When did they lease to the optician, or when did the optician enter? A In the year of 1929, but I cannot recollect exactly the dates.

Q When did he leave? A In the same year. He was there a few months.

Simon Rodnon, in rebuttal, Direct.

Q Did that injure your business any? A It did.

Re-cross examination by Mr. Klein.

Q Did you have a sign on your store with the word "optician" on it? A Yes, sir.

Q How often did you get a customer for glasses? A We get very seldom a customer for examination, but we sell a lot of ready-made glasses, like $1, $1.50 or $2, the customer picks them out himself, whatever he likes.

DEFENDANT RESTS.

SIMON RODNON, recalled in behalf of plaintiff in rebuttal.

Direct examination by Mr. Klein.

Q Mr. Rodnon, when did the Silver Rod Stores start its business in this location? A The same year as this lease was made, in 1927.

Q Was it about the same time that the two stores started? A Yes, sir.

Q At that time did you sell fountain pens? A Yes, sir.

Q Pencils? A Yes, sir.
Q Cameras? A Yes, sir.
Q Flasks? A Not flasks.
Q Beverage shakers? A No.
Q Cigarette cases? A Yes, sir.
Q Lighters? A Yes, sir.
Q Smoking sets? A Yes, sir.
Q Ash trays? A Yes, sir.

Q Humidors? A Yes, sir.

Q Cigar and cigarette holders? A Yes, sir.

Q What kind of a store did you run at that time? A A cigar store, with all of these smoking accessories, fountain pens, and we advisedly included in our lease the sale of watches and clocks, which is a peculiar jewelry item, because we knew that Mr. Bernstein's store would carry watches and clocks, and we at that time also carried watches and clocks, so we stipulated in the lease that we have a right to carry watches and clocks of all kinds.

Q When did you start selling the bath salts, compacts, vanity cases and perfumes? A About nine or ten months ago.

Q When was that? A It was early in 1930, or perhaps late in 1929, I can't recall exactly the month.

Q That was when you inaugurated a drug counter and drug store? A We took out the luncheonette fountain and we put in a drug store instead, at least drugless drugs, cosmetics.

By the Court.

Q Drugless drugs? A Cosmetics and perfume.

Q No drugs? A No. Some proprietary medicines.

Q It was a drug store without drugs? A Without a registered druggist. Some proprietary medicines that we were allowed to handle.

Q For instance. A Like Listerine and some cough remedies which we are allowed to sell by law without a registered pharmacist.

Simon Rodnon, in rebuttal, Direct.

By Mr. Klein.

Q When you first commenced to operate your store and sold these articles, fountain pens and smoking accessories, did Bernstein know about it? A Yes, sir.

Q Did he say anything to you? A No, sir.

Q Did he know that you were selling these perfumes and bath sales after you started your drug department? A Yes, sir, it was common knowledge, everybody knew it.

Q At any rate, he knew? Was he in your store? A That I have no way of telling.

Q Was anything said to you in complaint about this at that time? A No, sir.

Q When was the first complaint? A Sometime in November of 1930 Mr. Bernstein made several appointments with me which he did not keep, and finally we got together. He complained that business was not good, and he wanted me to reduce his rent, which I told him I could not do. Then he says, "I can't pay the rent that I am paying. Look at these articles that you are selling that I am also selling." I said, "We have always been selling these articles." He said, "It is eating into my business." I said, "I will go back and talk it over with my associates, and if we think it is all right, we will discontinue the sale of articles that you are complaining about." I went back and I discussed it with my associates, and as a result of that I sent him the letter which was offered in testimony.

Q In that letter did you intend to convey the thought that you were violating any covenant? A I did not think that I was violating any covenant. We handled all of this merchandise before. Neither Mr. Bernstein nor his manager ever complained about it.

Q Was this offer of yours as set forth in the letter an accommodation or a consent to eliminate this so-called violation? A Well, it was both. Mr. Bernstein was complaining that his business was not good. As a matter of fact, what he said was this: If I don't reduce his rent he is going to move out and set it up as a defense for breaking his lease. I said, "These things we sell in our store do not amount to enough to fight about." I said I would take it over with my associates.

Q Your associates agreed that you discontinue the sale? A Yes, sir.

Q And did you? A Yes, sir.

Q When? A Mr. Bernstein claims that I did not discontinue the sale at the end of November, as I promised to do. Well, it was my directions to our window trimming department that when our windows are changed for the December trim to take out all of the merchandise, out of the store and out of the window. That is all I heard about it. I assumed it was done. Mr. Bernstein says it was not done. I have no way of telling whether he is right or not. I know that for the January trim we had nothing of that nature in the store or in in the window.

Q When he moved out in January, did he tell you prior thereto that he was going to move out? A No, sir.

Q When you discovered that he moved out, was it news to you? A It was news to me, because Mr. Bernstein in the early part of January turned the store from a jewelry store into an auction store, and he said that he was going to try it out as an auction store. All of a sudden I was called up by my store manager, telling me

that Bernstein is moving out her merchandise and his fixtures.

Q Did he conduct an auction store there? A Yes, sir.

Q Before he moved out? A Yes, sir.

Cross examination by Mr. Fulop.

Q Mr. Rodnon, in your letter of November 6, 1930, which you admitted before, I believe, you state:

"In connection with the telephone conversation with our Mr. Simon Rodnon, we wish to state that your complaint about the conflicting articles of merchandise which you handle in your store and which we handle in our store is well taken."

A Yes, sir.

Q What did you mean by that? A Well, I just testified in answer to my counsel that I had a conversation with Mr. Bernstein, and Mr. Bernstein thought—

Q Will you tell me what you meant by that statement in your letter? A I am trying to tell you.

Q Don't tell me what Mr. Bernstein said. Just tell me what you meant by that statement. A I cannot tell it to you in any other way, except what I had in mind when I wrote the letter.

Q Did you have the lease in mind? A No, sir.

Q What did you mean when you said that his objection was well taken? What other ground of objection could he have? A He felt that he has got to make a living out of his jewelry store. He told me that some of the fountain pens that

we are selling were hurting his business, so I agreed to take them out.

Q This was an act of kindness on your part? A Not kindness—fairness.

Q But you don't know whether they were taken out or not? A I know they were taken out.

Q When were they taken out? A I know that they were taken out certainly by the end of December.

Q Did you see the store? A Yes, sir.

Q Did you hear these men testify that these pictures were taken in January? A Yes, sir.

Q Can you swear that those articles were not in there? A I cannot swear that this picture was taken in January.

Q Can you swear that the articles shown in that picture were not in there in January? A No, I can't swear.

Q So you don't know whether they were there or not? A Well, not to the extent that I will swear they were not. If Bernstein says they were there, I am fairly certain that they were not there.

Q You did not see that they were not there, did you? A No, no more than I know that this picture was taken in January.

Q Did you, after he complained about this condition, offer to reduce the rent? A No, not after he complained of the condition. Mr. Bernstein asked me for a reduction of rent.

Q Will you answer my question, please? Did you offer to reduce the rent? A Yes.

Q You did? A Yes.

Q How much did you offer to reduce the rent?

Mr. Klein: I object to that as being immaterial.

The Court: Objection sustained.

Q Did Mr. Bernstein refuse that offer? A Yes, sir.

Q In this article 28 of the lease, I note that there is an exception of clocks, watches and shaving paraphernalia. A Yes.

Q You said on direct examination that you were selling these other articles at the time that you opened the store? A Yes, sir.

Q Why didn't you put those exceptions in this lease? A Which exceptions?

Q The other articles. A It is so commonly a cigar store item that we never thought it was necessary.

Q Isn't it a jewelry store item? Isn't a fountain pen a jewelry store item? A Generally items are so overlapping that you cannot tell. Certainly I would not call a fountain pen, a cigarette case or a cigar lighter a jewelry store item.

Q Is a gold pen a jewelry store item? A It may be.

Q Are fountain pens articles usually sold in jewelry stores? A Also in drug stores, department stores and on pushcarts.

Q Are fountain pens articles usually sold in jewelry stores? A No, not usually.

Q They are not usually sold in jewelry stores? A No.

Q Do most jewelry stores have fountain pens? A I believe they have.

Q Then they are usually sold there, are they not? A Do you mean to cover every jewelry

store that handles jewelry? Do you mean that they handle fountain pens? I know some don't.

Q How about vanity cases? Did you have those in your store when you started? A No.

Q Are those articles usually sold in jewelry stores? A We did not handle it.

Q Do you now handle it? A No, sir.

Q You do not handle it now? A No, sir. We handle compacts but not vanity cases.

Q I did not know the distinction. A There is a distinction.

Q How about atomizers? A We handle atomizers.

Q Did you have those in when you started? A No, sir.

Q They are usually handled in jewelry stores? A No, sir.

Q They are not usually sold in jewelry stores? A No, they are usually sold in drug stores. An atomizer is for spraying perfume and toilet waters. They are handled in drug stores and perfume shops.

Q Are they ever sold in jewelry stores? A I believe some of them do.

Q Do most jewelry stores sell them? A I would not say that most of them do.

Mr. Fulop: That is all.

Mr. Klein: If your Honor please, I move for a direction of a verdict.

I move for a direction of a verdict as to the first month's rent, January, 1931, during which time the tenant was an occupant. The tenant cannot set up a defense of eviction unless he has moved from the premises.

Defendant's motion for direction of a verdict.

I move for a direction of a verdict on the whole case, on the ground that a covenant in the lease to pay rent by the tenant and a covenant by the landlord to keep the tenant from encountering competition are independent covenants, and a breach of an independent covenant is not a defense to a suit for non-payment of rent.

A further ground is that if the defendant had any right under the lease by virtue of this covenant, the tenant is now estopped from setting it up, in that it permitted the landlord to conduct this business for a period of years without making any serious objections, or without at that time removing from the premises.

The Court: The dispute here is as to whether the tenant did complain. There has been some testimony that he did complain, and I think there is a question of fact raised. I shall submit all of the issues to the jury.

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

Exception noted as ground of appeal.

Mr. Fulop: May I move for a directed verdict, and assume your Honor will deny the motion, and then may I have an exception?

The Court: You never know what is going to happen. If you are just doing it to waste time, I would suggest that you do not waste time. If you are honest about it, and you think you have any merit in it, make your motion, assuming that it is a meritorious motion, and the Court will so view it. If there is good ground for your motion, the Court will agree with you.

Mr. Fulop: The reason I said that was that I thought your Honor expressed the opinion that the questions here are for the jury.

The Court: That is my notion. You might change my view.

Mr. Fulop: The ground of my motion is that the plaintiff has admitted violations of the lease, that the interpretation of the lease made between the parties is that these are violations of the 28th clause. The plaintiff has admitted it, and all the evidence shows, a complaint was made and there was a promise to repair the condition.

The Court: I do not think that is exactly the testimony. As to the interpretation of the lease, you have given your interpretation. One of the witnesses does not agree with you that that is a proper interpretation. He says he considered that it was not fair for them to do what they were doing, but he does not say that it was in his opinion necessarily a violation of the lease. I think he has quite clearly made that point in his testimony. So I would not say that, as a matter of law, that is an admission. I think a question of fact is raised, and for that reason your motion will be denied.

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

Exception noted as ground of appeal.

Mr. Klein: I move for a direction of a verdict in favor of the plaintiff on the defendant's counter-claim, on the ground that the defendant has failed to prove any damages.

The Court: We have some testimony here with respect to the difference in the rental value of the premises, with the restriction and without the restriction.

Mr. Klein: To which I objected, and which I think is not the proper damage.

The Court: Motion denied.

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

Exception noted as ground of appeal.

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

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

AFTER RECESS.

Mr. Fulop sums up for defendant.

Mr. Klein sums up for plaintiff.

CHARGE TO JURY.

The Court charges the jury as follows:

PORTER, *J.*

Gentlemen of the jury:

The Silver Rod Stores, Inc., appears to have been the lessee of premises at Beaver and Market street, Newark. Under date of July 15, 1927, it executed a lease to Kalman Bernstein trading as K. Burns & Son, by which lease it leased a part of the premises to Mr. Bernstein for a period of years, at a monthly rental of $479.17, the rent being due and payable on the first of each month.

In the lease, which is in evidence and which you will take to the jury room with you, you will find a provision to the effect that no other part of the premises controlled by the landlord would be used for the sale of goods that were therein specified. There was in the lease what is called

a restrictive covenant, restricting the use of the rest of the premises, providing that the rest of the premises could not be used for the sale of certain things in competition with the defendant.

You will also find in the lease, I think, a provision that a month's rent was to be paid by the tenant and retained by the landlord as security for the faithful performance of the various covenants in the lease, and to be applied (in the event of there being no breach of the terms of the lease) to the last month's rent. I have not read the lease, but I understand that that was one of the provisions therein contained.

It is not disputed that Mr. Bernstein paid his rent for the premises up to and including the month of December of 1930. On the 28th of January, or thereabouts, he vacated the premises and moved away.

The suit that we are trying was brought by the landlord, Silver Rod Stores, Inc., to recover from Mr. Bernstein the rent that the plaintiff claims the defendant owes or did owe at the time this suit was started; namely, the rent for the months of January and February of 1931. The suit was started in March of 1931 at which time there was two months' rent due. We are not concerned with anything that might be due from then on; we are only concerned with whether or not the defendant owes rent for the months of January and February of 1931.

Mr. Bernstein does not deny that he did not pay the rent for January and February. But he does deny that there is due from him any such sum as is claimed. He says that there was a breach of the terms of the lease, not by him but by the landlord, in that it violated its obliga-

tion not to sell in its store or not to permit to be sold on the premises by anyone else any of the things that Mr. Bernstein was selling in his jewelry store except watches and clocks, I think. The lease is before you, and you can read the 28th clause for yourself. The defendant says that the landlord had a store adjoining his at the time he entered into this lease, and at that time it was a place of business without a front, without a door, that it was a business place for the sale of foodstuffs, light lunches, cigars and cigarettes; that later on the plaintiff changed its whole scheme of merchandising and put a front on the place, as well as show windows, and enlarged its business by adding a new line of merchandise; that, whereas in the beginning it was not selling these articles complained of, later on it began to sell the very things that the defendant was selling in his store, such articles as fountain pens, which Mr. Bernstein says are commonly sold in jewelry stores and the sale of which he says was prohibited by the 28th clause of the lease.

In answer to that, Mr. Rodnon, the president of the plaintiff corporation, says, "That is not true. We were selling substantially those things when the lease was made. We did later on take out our lunch counter, our soda fountain, and we did change the physical appearance of the store a little bit, and we did enlarge our line to some extent. But it is not true that the plaintiff changed its whole business scheme, it continued to sell the same general line of novelties that it sold in the beginning, and the sale of those things is not violative of the 28th clause in the lease because those items are not things that are

essentially jewelry store items, fountain pens and compacts and cigarette holders and humidors and atomizers are not jewelry store accessories but are just as much cigar store accessories."

So there is a dispute between the plaintiff and the defendant with respect to whether or not the sale of those items violates one of the provisions in the lease.

Then Mr. Bernstein says that he not only had to suffer that competition but he repeatedly complained about it, he brought it to the plaintiff's attention. Mr. Rodnon admitted that it was not quite fair, that he promised to do otherwise, although he does not admit that it was a violation of the provisions of the lease. Mr. Rodnon further says that as far as he knows the promise was kept.

The defendant comes here and denies responsibility. In addition to that, he brings a counter suit. He says that there was no breach on his part and therefore the $479.17 deposited with the landlord should be returned to him; that the lease terminated when he left not by his act but by the act of the landlord, and therefore he owes no rent for the period beginning February 1, 1931; that for the rent for the month of January he has deposited a sum of money and asks that he be credited for that amount. On that theory the defendant says that he not only owes nothing, but there is money due him because under the terms of the lease he was to receive 4% on that money during the time it was on deposit with the landlord; that he has received no interest on that sum of money which the landlord has had the use of since July 15, 1927. The defendant also asks that he be compensated for

damages that he has suffered by reason of the breach that has occurred, the breach being that the landlord did not keep his covenant not to sell or permit to be sold on the premises these restricted articles. He says that he paid more rent because of the restriction than he otherwise would have paid; that he left because he could not get what the landlord was under contract to give him; that the value of the lease to him was less than it would have been if the landlord had kept the bargain; that the rental value of the property without the restriction was about $1,000 a year less than the rental value with the restriction. That is the measure of damages that he asks at your hands.

If the plaintiff's contention is correct, that there was no breach on its part, then it is under no obligation to return the $479.17 or to credit it. If you should find in favor of the landlord on these questions of fact which are in dispute, then the plaintiff is entitled to a judgment at your hands for the amount that it asks—$958.34—together with interest at 6% on half of it from January 1, 1931, to date and on the other half from February 1, 1931, to date. Under those circumstances there would be no obligation on the part of the landlord to credit the amount that the defendant had on deposit because in that event there would have been a breach on the part of the defendant here; and if there was a breach on the defendant's part, under the terms of the lease he forfeited the amount of money which he put up as security for his faithful performance of the terms and conditions of the lease.

But, on the other hand, if you should find the facts to be as Mr. Bernstein contends, you will say how much is due the plaintiff and then how much is due the defendant on his counter-claim. You are not to subtract one from the other. You will bring in two verdicts, one on the main case and another on the counter-suit. The verdict on the main case will be a money verdict and the verdict on the counter-suit will be either a verdict of "No cause of action" or a money verdict.

The question presented in this case is one of fact, as to whether or not there was a breach of the contract by the landlord or by the tenant or by both. Each side charges the other with breaching the contract. That raises the question of fact as to whether the articles sold by the landlord were covered by the restrictive clause. You have heard the discussion about that, you have heard the articles mentioned.

It is contended by the defendant that the plaintiff itself sold articles that were restricted under the terms of the lease and also rented another part of the premises to an optician. The plaintiff denied that there was any violation. That raises a question of fact for you to determine.

It is the function of the jury to decide questions of fact. I decide questions of law, but you decide questions of fact. It is because these witnesses raised questions of fact which are in dispute that the Court denied the motions that were made on both sides, those motions being based on the proposition that there were merely questions of law to be decided.

You must decide the questions of fact under the rules that I have laid down in my charge.

You will decide them from your recollection of the testimony and not from mine. If I have misstated the testimony in any respect, you will disregard such misstatements and depend entirely on your own recollection.

You say what the real facts are. When you have decided what they are, you will bring in two verdicts, one verdict with respect to the plaintiff's case and another verdict with respect to the defendant's counter-claim, because there are really two suits being tried here.

The landlord wishes to recover the amount of money which he claims due because of his claim that there was a breach of the contract by the defendant, and he asks you to award him the rent for the months of January and February. The defendant denies that he owes any rent for February, because he vacated the premises before the 1st of February; he says he owes nothing because he moved out due to the fact that there was a breach of the covenants of the lease on the part of the landlord; and he further says he paid the rent for January because he had already deposited it. In addition to that, the defendant asks for interest on his deposit from the date of the signing of the lease, together with damages which he claims to have sustained because of the breach on the part of the landlord.

So you will bring in two verdicts, either money verdicts in both cases, or money verdicts in one case and "No cause for action" in the other, as the facts may warrant.

You may retire.

(The jury retires.)

Mr. Fulop: May I take an exception to your Honor's charge with respect to the forfeiture of the sum which was deposited, since I think that should be credited as a part of the damages to which the plaintiff is entitled, if any. He is not entitled to keep the forfeiture and recover damages.

Exception noted as ground of appeal.

Mr. Fulop: I also except to your Honor's refusal to charge as requested.

Exception noted as ground of appeal.

DEFENDANT'S REQUESTS TO CHARGE.

1. Under the 28th paragraph of the lease, the plaintiff agreed not to rent any other store in the building for the sale of articles usually sold in a jewelry store, or for the demonstration or sale of any such articles; except the demonstration and/or sale of clocks, watches and shaving paraphernalia, which articles were sold and demonstrated by the plaintiff in its store at the time of the making of the lease.

If you find that the plaintiff sold or demonstrated such articles in its store, then the plaintiff cannot recover for rent under the lease after the defendant removed from the premises. Hiatt Inv. Co. *v.* Buehler, 16 S. W. (2nd Series) 219 (Mo.). University Club *v.* Deakin, 265 Ill. 257, 106 N. E. 790.

Note: We have been unable to find any New Jersey cases in point, but Chief Justice Gummere held this to be the law when denying motion to strike out the defense.

Defendant's Requests to Charge.

2. If you find that the plaintiff sold or demonstrated, or permitted any other tenant to sell or demonstrate the prohibited articles in the building, then the defendant is entitled to recover any damages which he suffered by reason of the violation. University Club *v.* Deakin (*supra*); Hiatt Inv. Co. v. Buehler (*supra*).

3. Under the construction which the parties themselves placed upon this contract, it was as much a violation of this contract for the plaintiff to sell the prohibited articles in its own store, as to permit other tenants to sell such articles. Van Dyke *v.* Anderson, 83 N. J. Eq. 568, at 570. (As to interpretation of contract by parties.)

4. If you find that the plaintiff rented another store in the building to a tenant who sold or demonstrated articles usually sold in a jewelry store, then the defendant may recover the damages which he suffered by reason thereof.

5. If you find that the plaintiff violated its covenant by selling or demonstrating, or permitting another tenant to sell or demonstrate the articles prohibited by the lease, then the defendant is entitled to recover the deposit of $497.17, together with interest from July 15th, 1927, at 4% per annum, in addition to any other damages proved.

6. If you find that the plaintiff violated its contract, then the defendant is entitled to recover the difference between the value of the lease with the restriction enforced and the value of the lease without the restriction for the period during which the restriction was not enforced.

Defendant's Requests to Charge.

7. If you find that the plaintiff is entitled to recover any rent, then the sum of $479.17, together with interest at 4% per annum, from July 15, 1927 (amounting to $75.24—total $554.41) must be credited to the defendant and deducted from any amount which the plaintiff may be entitled to recover.

Exhibit P. 1.

EXHIBIT P. 1.

June 9, 1931.

THIS AGREEMENT BETWEEN SILVER ROD STORES, INC., a New Jersey Corporation, as Landlord and Kalman Bernstein, trading as K. BURNS & SON, of Newark, N. J. as Tenant WITNESSETH:—That the said Landlord let unto the said Tenant and the said Tenant hired from the said Landlord Store #1 in Premises No. 203-205 Market street, Newark, New Jersey, being approximately 7 feet x 36 feet for the term commencing August 1st, 1927 (or as soon thereafter as premises are made ready for occupancy) and terminating July 31st, 1932—payment of rent, however, is to commence 10 days after the mailing by the landlord to the tenant of a registered letter informing the said tenant that the store and basement are completed and ready for occupancy; possession, however, to be given to the tenant immediately upon the execution of the within lease, for the purpose of making the necessary alterations and equipment. To be used and occupied only for a jewelry store for the wholesale and retail sale of jewelry at private or auction sale upon the conditions and covenants following:

1st. That the Tenant shall pay the annual rent of Five Thousand Seven Hundred Fifty ($5,750.00) Dollars, payable as follows: Four Hundred Seventy-nine and 17/100 ($479.17) Dollars on the 1st day of each and every month in advance, during the term hereof. All rent hereunder is payable at the New York Office of

Exhibit P. 1.

the Landlord, No. 95 South Fifth street, Brooklyn, N. Y. City.

2nd. That the Tenant shall take good care of the premises and shall, at his own cost and expense make all repairs and at the end or other expiration of the term, shall deliver up the demised premises in good order or condition, damages by the elements excepted.

3rd. That the Tenant shall promptly execute and comply with all statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and City Government and of any and all their Departments and Bureaus applicable to said premises, for the correction, prevention, and abatement of nuisances or other grievances, in, upon or connected with said premises during said term; and shall also promptly comply with and execute all rules, orders and regulations of the New York Board of Fire Underwriters for the prevention of fires, at his own cost and expense.

4th. That the Tenant shall, in case of fire, give immediate notice thereof to the Landlord who shall thereupon cause the damage to be repaired with reasonable speed; but if the premises be so damaged that the Landlord shall decide to rebuild, the term shall cease and the accrued rent be paid up to the time of the fire.

5th. That the Tenant shall not assign this agreement or underlet or underlease the premises, or any part thereof, except as hereinafter otherwise stated, or make any alterations on the premises, without the Landlord's consent in writing; or occupy, or permit or suffer the same to be occupied for any business or purpose deemed disreputable or extra-hazardous on ac-

Exhibit P. 1.

count of fire, under the penalty of damages and forfeiture and in the event of a breach thereof, the term herein shall immediately cease and determine at the option of the Landlord as if it were the expiration of the original term.

6th. The said Tenant agrees that the said Landlord and Agents, and other representatives, shall have the right to enter into and upon said premises, or any part thereof, at all reasonable hours for the purpose of examining the same, or making such repairs or alterations therein as may be necessary for the safety and preservation thereof, or in order to comply with any of the terms and covenants of the within lease.

7th. The Tenant also agrees to permit the Landlord or its Agents to show the premises to persons wishing to hire or purchase the same; and the Tenant further agree that on and after May 1st next preceding the expiration of the term hereby granted, the Landlord or its Agents shall have the right to place notices on the front of said premises, or any part thereof, offering the premises "To Let" or "For Sale," and the Tenant hereby agrees to permit the same to remain thereon without hindrance or molestation.

8th. That if said premises, or any part thereof, shall become vacant during said term or should the Tenant be evicted by summary proceedings or otherwise, in the event of non-payment of rent or a breach of any of the covenants herein contained, the Landlord or representatives may re-enter the same by force or otherwise, without being liable to prosecution therefor, and the Tenant shall pay at the same time as

Exhibit P. 1.

the rent is payable under the terms hereof a sum equivalent to the rent reserved herein, and the Landlord may re-let said premises on behalf of the Tenant, applying any moneys collected, first to the expenses of resuming or obtaining possession, second, restoring the premises to rentable condition, and then to the payment of the rent and all other charges due the Landlord, any surplus to be paid to the Tenant, who shall remain liable for any deficiency.

9th. That in case of any damage or injury occurring to the glass in the demised premises or damage and injury to the said premises of any kind whatsoever, said damage or injury being caused by the carelessness, negligence, or improper conduct on the part of the said Tenant Agents or Employees, then the said Tenant shall cause the said damage or injury to be repaired as speedily as possible at his own cost and expense.

10th. That the Tenant shall neither encumber nor obstruct the sidewalk in front of, entrance to or halls and stairs of said building, nor allow the same to be obstructed or encumbered in any manner.

11th. The Tenant shall neither place, or cause, or allow to be placed, any sign or signs of any kind whatsoever at, in or about the entrance to said demised or any other part of same, except in or at such place or places as may be indicated by the said Landlord and consented to by it in writing. And in case the Landlord or representatives shall deem it necessary to remove any such sign or signs in order to paint the demised premises or make any other repairs, alterations or improvements in or upon said

Exhibit P. 1.

demised premises or any part thereof, they shall have the right to do so, providing they cause the same to be removed and replaced at its expense, whenever the said repairs, alterations or improvements shall have been completed.

12th. It is expressly agreed and understood by and between the parties to this agreement, that the Landlord shall not be liable for any damage or injury by water, which may be sustained by the said Tenant or other person or for any damage or injury resulting from the carelessness, negligence, or improper conduct on the part of any other Tenant or Agents, or Employees or by reason of the breakage, leakage, or obstruction of the Croton Water or soil pipes, or other leakage in or about the said building.

13th. That if default be made in any of the covenants herein contained, then it shall be lawful for the said Landlord to re-enter the said premises, and the same to have again, re-possess and enjoy. The said Tenant hereby expressly waive the service of any notice in writing of intention to re-enter as provided for by any law of the State of New Jersey.

14. That this instrument shall not be a lien against said premises in respect to any mortgages that hereafter may be placed against said premises, and that the recording of such mortgage or mortgages shall have preference and precedence and be superior and prior in lien of this lease irrespective of the date of recording and the Tenant agree to execute any such instrument without cost, which may be deemed necessary or desirable to further effect the subordination of this lease to any such mortgage or mortgages, and a refusal to execute such instru-

ments shall entitle the Landlord, assigns and legal representatives to the option of cancelling this lease without incurring any expense or damage, and the term hereby granted is expressly limited accordingly.

15th. The Tenant has this day deposited with the Landlord the sum of Four Hundred Seventy-nine and 17/100 ($479.17) Dollars as security for the full and faithful performance by the Tenant of all of the terms and conditions upon the Tenant's part to be performed, which said sum shall be returned to the Tenant after the time fixed as the expiration of the term herein, provided the Tenant has fully and faithfully carried out all of the terms, covenants and conditions on his part to be performed. Security to bear interest at the rate of 4% per annum, payable annually.

16th. That the security deposited under this lease shall not be mortgaged, asssigned or encumbered by the Tenant without the written consent of the Landlord.

17th. It is expressly understood and agreed that in case the demised premises shall be deserted or vacated, or if default be made in the payment of the rent for any part thereof as herein specified, or if, without the consent of the Landlord the Tenant shall sell, assign, or mortgage this lease or if default be made in the performance of any of the covenants and agreements in this lease contained on the part of the Tenant to be kept performed, or if the Tenant shall fail to comply with any of the statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and City Government or of any and all their Departments and Bureaus applicable to said premises, or hereafter established

Exhibit P. 1.

as herein provided, or if the Tenant shall file a petition in bankruptcy or be adjudicated a bankrupt or make an assignment for the benefit of creditors or take advantage of any insolvency act, the Landlord may, if it so elect, at any time thereafter terminate this lease and the term thereof, by giving to the Tenant five days' notice in writing of its intention so to do, and upon the giving of such notice, this lease and the term thereof shall terminate, expire and come to an end on the date fixed in such notice as if said date were the date originally fixed in this lease for the termination or expiration thereof. Such notice may be given by mail to the Tenant addressed to the demised premises.

18th. That upon the failure of the landlord to insist upon a strict performance of any of the terms, conditions, and covenants herein, it shall not be deemed a waiver of any rights or remedies that the Landlord may have and shall not be deemed a waiver of any subsequent breach or default in the terms conditions and covenants contained herein.

19th. The Tenant shall pay to the Landlord the rent or charge, which may, during the demised term, be assessed or imposed for the water used or consumed in or on the said premises, whether determined by meter or otherwise, as soon as and when the same may be assessed or imposed, and will also pay the expenses for the setting of a water meter in the said premises should the latter be required. If such rent or charge or expenses are not so paid the same will be added to the next month's rent thereafter to become due.

Exhibit P. 1.

20th. That the Tenant will not nor permit undertenants to do anything in said premises, or bring anything into said premises, or permit anything to be brought into said premises or to be kept there, which will in any way increase the rate of fire insurance on said demised premises, nor use the demised premises or any part thereof, nor suffer or permit their use for any business or purpose which would cause an increase in the rate of fire insurance on said building, and the Tenant agrees to pay on demand any such increase.

21st. It is agreed by and between the parties hereto that the tenant may, at his option, secure a renewal of the within lease for a period of five years additional at a rental of Six Thousand Two Hundred ($6200.00) Dollars, per annum, payable in equal monthly installments on the 1st day of each and every month, in advance of Five Hundred Sixteen and 75/100 ($516.75) Dollars; provided, however, said option is exercised by registered mail directed to the Landlord's New York Office, No. 95 South Fifth Street, Brooklyn, N. Y., on or before March 30th, 1932.

22nd. It is expressly understood and agreed by and between the parties hereto that the Tenant herein is to procure plate glass insurance, at his own cost and expense, for the benefit of the Landlord, insuring the plate glass of the demised premises herein, and upon the tenant's failure to procure same, the Landlord may procure such insurance and charge the cost thereof to the Tenant, and the sum so paid shall be collectible as rent hereof, and shall be payable with the rent then due and be collectible with such rent.

Exhibit P. 1.

23rd. (See #23 on rider attached)

24th. The Landlord herein agrees to furnish steam heat in the premises hereby demised during the usual business hours during the period prescribed by law. (See balance of #24 on rider attached)

25th. It is understood and agreed that the Landlord herein is not the owner of said premises, but is the tenant of the said premises by virtue of a lease made between Rachel Bierman, as Landlord and the Silver Rod Stores, Inc., a New York Corporation, as Tenant, which said lease is dated January 25th, 1927, and recorded in the office of the Register of the County of Essex State of New Jersey, on January 26th, 1927, in Block Y-75 of Deeds for said County, Pages 202-208, and which said lease has been duly assigned to the Silver Rod Stores, Inc., a New Jersey Corporation, by assignment dated March 23rd, 1927, and consented to by said Rachel Bierman, in writing, which consent is dated May 18th, 1927.

This lease is subject and subordinate to the said lease, and subject to all of the terms, covenants, conditions and provisions of the said lease, applicable to the herein demised premises —all of which terms, covenants,

And the said Landlord doth covenant that the said Tenant on paying the said yearly rent, and performing the covenants aforesaid shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

And it is mutually understood and agreed that the covenants and agreements contained in the within lease shall be binding upon the parties

Exhibit P. 1.

hereto and upon their respective successors and legal representatives.

WITNESS the signatures and seals of the above parties this day of nineteen hundred and twenty-seven.

SILVER ROD STORES, INC.,

Signed, Sealed and delivered in the presence of

By SIMON RODNON Pres.
KALMAN BERNSTEIN (L. S.)

SILVER ROD STORES, INC.
Corporate
SEAL
1927
New Jersey

Witness:
E B SCHECK.
as to Kalman Bernstein

(25th contd.) conditions and provisions, the Tenant herein agrees to perform with the same force and effect, as if said terms, covenants, conditions and provisions were herein set forth at large.

23rd. The Landlord herein agrees to provide the tenant with basement space directly underneath the store, the dimension to be 7½x36 feet; the basement to have a cement floor and to be partitioned from the rest of the basement by hollow tile blocks.

(24th contd.) provided, however, the landlord shall not be liable for damage as a consequence of the heating system becoming out of repair—

Exhibit P. 1.

the landlord agreeing, however, to repair the same forthwith.

26th. Permission is hereby granted to the tenant to assign or sublet the within demised premises, provided, however, that such assignment or sublease shall not be for a business which will conflict with the business of any other tenant in the Premises 203-205 Market Street, Newark, N. J., at the time of such proposed assignment or proposed subletting and upon the further condition that the lessee herein shall at all times remain liable on this lease.

27th. The landlord agrees to furnish sufficient electric light outlets for the tenant's requirements.

28th. The Landlord agrees that it will not rent any other store in the building in which the demised premises are a part, for the sale of jewelry, silverware and other articles usually sold in a jewelry store, or for the demonstration or sale of any such articles; except the demonstration and/or sale of clocks, watches and shaving paraphernalia, which articles are sold and demonstrated by the landlord herein in the store occupied by it in the said premises.

29th. The landlord agrees to complete the store and have same ready for occupancy, the ceiling and walls of the demised premises, to be covered with metal and to be painted with two coats of paint in a color selected by the tenant.

30th. The landlord herein agrees, at its own cost and expense to cause an opening to be made in the brick wall in the rear of the demised premises and to protect same by iron bars, said opening to be made in accordance with the rules and regulations of the various departments

Exhibit P. 1.

having jurisdiction thereon, and in the event that said opening is deemed to be a violation by the departments having jurisdiction thereof, that then and in that event the landlord may, at its own cost and expense cause the opening to be filled in and the tenant to have no claim of any kind against the landlord therefor.

31st. The landlord herein further agrees, at its own cost and expense, to raise the ceiling of part of the demised premises, as indicated in a certain consent this day delivered to the landlord herein, to a height of eight inches—it being expressly understood and agreed and as a condition precedent to the raising of the said ceiling, that in the event the T-Square & Triangle Co. Inc.,—the tenant occupying the premises directly above the premises demised to the tenant herein, removes from the said premises, that then and in that event, the tenant shall, within ten days after demand made upon him by the landlord herein, restore the ceiling to its original condition, at the tenant's own cost and expense, and upon the failure of the tenant herein to do so, that the Landlord herein may cause same to be leveled to its original condition, and charge the cost thereof to the next month's rent becoming due.

32nd. Consent is hereby given to the tenant to build a store front of the tenant's own selection, at the tenant's own cost and expense, and substantially in accordance with the blue print this day initialed by the parties hereto.

Exhibit P. 1.

STATE OF NEW YORK }
COUNTY OF } SS.:

On this day of 1927, before me personally came KALMAN BERNSTEIN to me known and known to me to be the individual described in, and who executed, the foregoing instrument, and acknowledged to me that he executed the same.

.....

STATE OF NEW YORK }
COUNTY OF } SS.:

On this day of 1927, before me personally came SIMON RODNON who, being by me duly sworn, did depose and say that he resides in the Boro of Brooklyn, City of New York that he is the President of SILVER ROD STORES, INC., the corporation mentioned in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order as President of said Company.

Exhibit P. 1.

SILVER ROD STORES, Inc.

TO

KALMAN BERNSTEIN
trading as K. Burns & Son

LEASE.

Dated, ...1927

LIPPMAN & SACHS,
Counsellors-at-Law
285 Madison Avenue,
N. Y. City.

Exhibit D. 1.

EXHIBIT D. 1.

SILVER ROD STORES
473 Kent Avenue
Brooklyn, N. Y.

December 2, 1930
Telephone
Staag 6700

Simon Rodnon, Pres.
Louis Rodnon, Vice Pres.
Samuel Becker, Treas.
David Rodnon, Secy.

K. Burns,
641 Broad Street
Newark, New Jersey.

Dear Sir:

Your rent for the month of November 1930 as well as for December still remains unpaid.

It is absolutely necessary that we get a check for the rent for these two months by return mail.

We incidentally want to call to your attention the fact that we are rectifying your complaint about the handling of certain merchandise in our store which you claim are in conflict with some of the merchandise which you handle.

We are removing from our store which is next to yours in Market Street, Newark all novelties excepting clocks and watches which we usually did sell in our store at all times.

Yours truly,

SILVER ROD STORES INC.,

SIMON RODNON.

Exhibit D. 2.

EXHIBIT D. 2.

SILVER ROD STORES
473 Kent Avenue
Brooklyn, N. Y.

November 6, 1930
Telephone
Stagg 6700

Simon Rodnon, Pres.
Louis Rodnon, Vice Pres.
Samuel Becker, Treas.
David Rodnon, Secy.

K. Burns,
640 Broad Street
Newark, New Jersey.

Dear Sir:

We wish to acknowledge herewith the receipt of two checks in payment of rent for the months of September and October 1930.

Our bookkeeping department through some erroneous entries have lead us to believe that you rent for the month of September has been paid up. A rechecking however showed that your rent has not been paid and therefore the two checks which was received by us were properly made out for the months for which you were in arrears and right now you owe us rent for the month of November.

In connection with the telephone conversation with our Mr. Simon Rodnon we wish to state that your complaint about the conflicting articles of merchandise which you handle in your store and which we handle in our store is well taken and we are going to correct the nature of

Exhibit D. 2.

the merchandise which we handle in our store so that it will not conflict with yours with the exception that we will continue to handle clocks and watches as we did heretofore.

This change however cannot be affected until the end of this month when our windows are being retrimmed.

Hoping that this will meet with your entire satisfaction, we beg to remain

Yours truly,

SILVER ROD STORES, INC.,

SIMON RODNON.

SR:AB

Exhibit D. 3.

OCT. 1932

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Exhibit D 3

1 OCT.1932

Exhibit D. 3.

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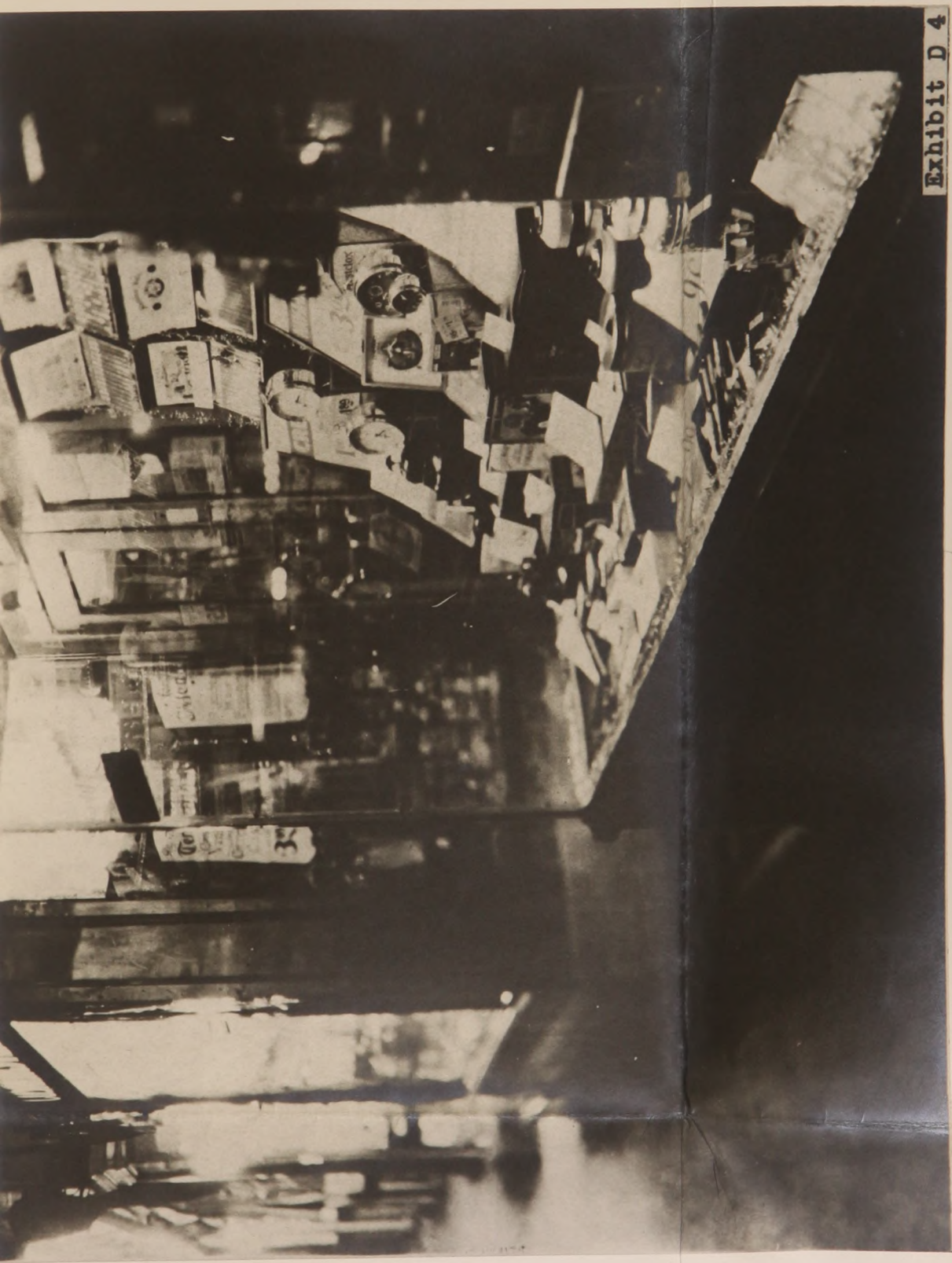
Exhibit D. 4.



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

New Jersey Court of Errors and Appeals

SILVER ROD STORES, INC., a corporation of New Jersey, *Plaintiff-Appellant,* *vs.* KALMAN BERNSTEIN, trading as K. Burns & Son, *Defendant-Respondent.*	*Action at Law.* *On Appeal from Supreme Court, Essex County.*

APPELLANT'S BRIEF.

Facts.

Plaintiff, on or about July 15, 1927 by written indenture of lease, let unto the defendant a portion of premises located at Nos. 203-205 Market street, Newark, New Jersey, more particularly described as store No. 1, for a period of five years commencing August 1, 1927 and terminating July 31, 1932 at a rental of $479.17 monthly, payable in advance.

Said lease also contained a covenant (paragraph 28) that "it would not rent any other store in the building, of which the demised premises were a part, for the sale of jewelry, silverware and other articles usually sold in a jewelry store, or for the demonstration or sale of such articles; except that the demonstration and/or sale of clocks, watches and shaving paraphernalia, which articles were sold and demonstrated by the landlord herein in the store now occupied by it in said premises."

Defendant entered into possession of the aforesaid premises on August 1, 1927. It deposited with the plaintiff the sum of $479.17 as security

for the faithful performance of the terms of the lease.

The defendant vacated the premises on January 28, 1931. It is undisputed that no rent was paid for the months of January and February 1931 amounting to the sum of $958.35, for the recovery of which this action was commenced.

Defendant filed an answer setting up a constructive eviction because of the breach of paragraph 28 of the aforesaid lease and also counterclaimed for damages for the breach of said paragraph 28 and for the return of his security under the lease.

ARGUMENT.

For convenience, appellant will argue its points out of their numerical order.

POINT 5.

That the Court, on motion of the plaintiff, refused to direct a verdict for the plaintiff on the first count of the plaintiff's case.

This count sought the recovery of rent for the months of January and February 1931. It is undisputed that the defendant was in possession for the month of January. Plaintiff's action was based on the breach of the covenant to pay rent by the defendant, which covenant is an independent covenant. By way of defense to this suit for rent defendant set up a breach of a restrictive covenant. It is our contention that in a suit for rent, which is an independent covenant, it is no defense to said suit for rent to set up a breach by the plaintiff of another independent covenant (restrictive).

As was said in the case of *Bailey* v. *White,* 3 Ala. 330—"Either party may recover damages from the other for the injury he may have received for a breach of covenant in his favor and it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff." Cited in Platt on Cov. 71.

The remedy of the defendant for said breach on the part of the plaintiff is for damages on the covenant. Of this the defendant has availed himself, viz: by filing and pressing his counterclaim. The Court by refusing the plaintiff's motion for a direction of the verdict in its favor on the first count of the complaint in effect concluded that the defendant might have been evicted and therefore it became a jury question.

In *Metropole Construction Company* v. *Hartigan,* 83 N. J. L. 409, at page 412, Justice Minturn speaking for the Supreme Court said:

> "In Johnson v. Oppenheim, 12 Abb. (N. Y.) Pr. N. S. 449, the rule is laid down as follows: 'Where the landlord commits an act of trespass which interferes more or less with the beneficial enjoyment of the premises, but which leaves the demised premises intact, and does not deprive the tenant of any part of them, so that though he may be injured he is not thereby dispossessed, here the rule is, inasmuch as the wrongful act of the landlord stops short of depriving the tenants of any portion of the premises, that such trespass is no defense against the liability for rent, and the tenant's sole remedy therefore is an action for damages against the wrongdoer."

After an exhausted research into the law of this jurisdiction counsel has been unable to find a case precisely in point. What authority there is, however, points a way to the repeatedly declared doctrine that the Courts lean to the con-

struction of independent rather than dependent covenants. *Allen* v. *Greenbaum,* 41 N. J. L. J. 178; *Stewart* v. *Childs,* 86 N. J. L. 648, 35 C. J. 1185 and cases cited.

So in *Vannatta* v. *Brewer and Moon,* 32 N. J. Eq. 268, the Court said:

> "And where it is doubtful whether a clause in a deed be a covenant or condition, the Court will incline against the latter construction. 4 Kent's Com. 132. The rule is settled, that a breach of the covenants of a lease in the absence of a stipulation that a breach shall have that effect, does not work a forfeiture or determine the term. Bockover *v.* Post, 1 Dutch 290, 25 N. J. L. 285."

In *Allegaert* v. *Smart,* 10 Wkly N. C. (Pa.) 260, the landlord covenanted with the tenant not to lease any of the remaining buildings in the block for the millinery business during the term of the lease. The Court said:

> "It would seem that the agreement not to let for a millinery shop is not a condition but a covenant; and all that plaintiff (on appeal) can claim is damages for the breach; such breach does not suspend the rent."

In *Stewart* v. *Childs Co.,* 86 N. J. L. 648, the landlord covenanted that he would at all times during the tenure of the lease keep the cellar waterproof at his own expense. The evidence of the tenant showed a breach of that covenant with substantial damage ensuing therefrom. The defendant contended that the failure of the landlord to do what was lawfully required of him either by the terms of the lease or otherwise, which rendered the demised premises unfit for the purpose for which they were leased, or which seriously interfered with the beneficial enjoyment thereof, in consequence of which the tenant abandoned the premises, constituted a constructive

eviction, and released the tenant from the obligations under the lease to pay rent accruing thereafter. The plaintiff contended that his failure to perform his covenant cannot be said to constitute an eviction in fact or constructively. The trial court held that the two covenants were independent and directed a verdict for the plaintiff. The Court, in affirming judgment for the plaintiff, said:

> "A breach of his (landlord's) covenant was not a defense to the action. The ruling of the trial court in directing a verdict for the plaintiff was not error."

POINT 2.

2. That the Court, over the objection of the plaintiff, as incompetent and immaterial, permitted the following question:

To the witness, Lester Finger: Page 40, State of the Case.

> "What was the value of these premises, on a monthly rental basis, for a five year lease, at the time this lease was made in 1927, without any restrictions as to competition?"

The question objected to was not competent and material because it did not measure the damages properly in a counter-claim or suit for breach of a covenant of the nature of the one at bar. It was only proper in a suit for eviction.

> *Monica* v. *Di Bennedetto*, 3 M. 1145, 130 at 730, 32 C. J. 282.

As we have argued before (Point 5) the defendant could not legally prevail on his defense of eviction and hence could not counter-claim therefor.

For these reasons the question objected to called for an answer based on the theory of eviction and not for breach of a covenant such as the one at bar.

POINT 7.

7. That the Court, on the motion of the plaintiff, refused to direct a verdict for the plaintiff on the counter-claim of the defendant.

Our contention being that the defendant on his counter-claim proved damages for eviction (Point 2) although the proof does not show an eviction in fact or law, and there being no other proof of other damage, the Court should have directed a verdict for the plaintiff on counts one and two of the counter-claim.

Count three of the counter-claim sought the return of the security held by the plaintiff for the faithful performance of the terms of the lease on the part of the defendant.

It following that if defendant was not evicted, then the defendant did not faithfully perform the terms of the lease because of his removal and refusal to pay rent, and hence was not entitled to the return of his security.

> *Vailsburg Amusement Co.* v. *Criterion Investment Co.*, 9 M. 951, 156 At. 114.

Paragraph 28 of the lease, which is claimed to have been breached by the landlord, reads as follows:

> "28th, The landlord agrees that it will not rent any other store in the building in which the demised premises are a part, for the sale of jewelry, silverware and other articles usually sold in a jewelry store, or for the demonstration or sale of any such articles; except that the demonstration and/or

sale of clocks, watches and shaving paraphernalia, which articles are sold and demonstrated by the landlord herein in the store occupied by it in the said premises."

We contend that a fair reading of the plain language of the covenant is repugnant to the premise that it prohibited the plaintiff (landlord) from engaging in the jewelry business. There is absolutely no prohibition derivable or inferable therefrom limiting the plaintiff's right to engage in the jewelry business.

For the aforesaid reasons the Court should have granted the motion of the plaintiff for a directed verdict in its favor on the defendant's counter-claim.

POINT 3.

3. That the Court, over the objection of the plaintiff, permitted the witness, Herman Weissman, to qualify and testify as an expert, although incompetent.

The Court, over the objections of the plaintiff, permitted the witness Weissman to testify as to the fact that certain articles sold by the plaintiff in its store were articles of jewelry, which were sold by the plaintiff in violation of the restrictive covenant. This testimony was in the nature of expert testimony. Expert testimony may be defined as "The evidence of persons who are schooled in some art, science, profession or business, which school or knowledge is not common to every fellowman and which is common to such experts by reason of special study and experience in such art." *Louft* v. *C. & J. Pyle Co.*, 75 Atl. 619.

The articles alleged by the defendant to have been sold by the plaintiff in violation of the cov-

enant are not such articles as called for expert opinion but are articles common to every fellowman. The Court, by allowing such testimony, over the objection of the plaintiff, usurped the province of the jury. It would be captious to argue that the error was not substantial, prejudicial and reversible. The courts and commentators have consistently declared against the abuse of opinion and expert testimony. It is preposterous to argue here that the issue which devolved upon the jury to determine as to what articles are usually sold in jewelry stores require skilled or highly developed accomplishments.

POINTS 1 and 4.

1. **That the Court, over the objection of the plaintiff, as incompetent and immaterial, permitted the following questions:**

To the witness, Kalman Bernstein:

Page 23, State of Case.

> "After you had been in the premises for some time did the Silver Rod Stores demonstrate or sell any articles in their store which are usually sold in jewelry stores?"

Page 27, State of Case.

> "What articles that are on display there are usually sold in jewelry stores?"

4. That the Court, over the objection of the plaintiff as incompetent, permitted the following question:

To the witness, Mitchell Stern:

Page 52, State of Case.

> "Did the selling of these articles in the neighboring store injure your business?"

The answers to the above questions called for the witness' conclusion, which conclusion should

have been within the province of the jury and not the witness and it was prejudicial for the Court to permit the aforesaid questions over the objections of the plaintiff.

We respectfully submit that for all of the aforesaid reasons, this Court should reverse the judgment of the Supreme Court.

KLEIN & KLEIN,
Attorneys for and of Counsel
with Plaintiff-Appellant.

MORRIS KLEIN,
On the Brief.

New Jersey Court of Errors and Appeals

Silver Rod Stores, Inc., a corporation of New Jersey, Plaintiff-Appellant, *vs.* Kalman Bernstein, trading as K. Burns & Son, Defendant-Respondent.	Action at Law. On Appeal from Supreme Court, Essex County.

BRIEF FOR RESPONDENT.

I.

Preliminary Statement.

This was a suit in the Supreme Court, Essex Circuit, for rent by Silver Rod Stores, Inc., as landlord, under a lease for a store at Market Street near Beaver Street in the City of Newark for the months of January and February, 1931, against Kalman Bernstein, trading as K. Burns & Son, as tenant. The tenant removed from the premises on January 28, 1931. The defense was based upon the violation by the landlord of its covenant to refrain from renting any other store in the same building for a business competing with the tenant's jewelry store. Defendant also counterclaimed for damages which it had suffered by reason of such violation of the landlord's covenant prior to removal and for one month's rent which was deposited with the landlord as security on the lease.

Prior to the trial plaintiff applied to the Chief Justice to strike out the defendant's answer on the same grounds now advanced. The motion was denied.

The jury found for the plaintiff for rent for January, 1931, during which the tenant had occupied the premises. The jury found in favor of the defendant for his deposit, interest on the deposit up to January 1, 1931, and $750.00 damages for the breach of the covenant by the landlord during the period that the tenant remained in occupation in reliance upon the promises of the landlord to discontinue the improper conduct.

Plaintiff appeals from the judgment entered on this verdict.

(NOTE: The third count of the counterclaim was added by amendment with the consent of the plaintiff, and it is erroneously printed without proper heading on page 12 of the State of Case. That it was properly filed is not disputed, however, and it should appear on page 11, following the second count of the counterclaim.)

II.

The Trial Court's refusal to direct a verdict for the plaintiff on its case was not error.

A.

Since there were material facts in controversy under the evidence, the Trial Court was justified in sending the case to the jury.

The appellant's main ground of appeal is based upon the refusal of the Trial Court to direct a verdict in favor of the plaintiff on its suit for rent.

> "A motion to direct a verdict is in effect a demurrer to the evidence and entirely under the control of the court."

> WALKER, C., in *Cook* v. *American Smelting & Refining Co.*, 99 N. J. L. 81 at 82 (Ct. of E. & A., 1923).

In considering an appeal from a refusal to direct a verdict, it is not for the Appellate Court to consider what its verdict would be on the printed case, but whether on the evidence the Circuit Judge should have taken the case from the jury. And all of the evidence presented by the party against whom the direction of verdict is sought must be accepted as true.

> *Hayward* v. *North Jersey St. Ry. Co.*, 74 N. J. L. 678 (Ct. of E. & A., 1906).

If there are any material facts in controversy under the evidence, a verdict should not be directed.

> *Marzella* v. *Bonafede*, 6 N. J. Misc. Rep. 288; 140 Atl. 881.

Judge Porter denied the motions for direction of verdict on both sides on the ground that there was conflicting evidence which he was required to submit to the jury (Case, pp. 65, 66 and 72).

Defendant proved that a covenant against competition had been made by the landlord, in reliance upon which defendant entered into the lease, that the covenant was a material factor in the enjoyment of the premises for the purposes for which they were leased, that there were repeated breaches of the covenant by the landlord resulting in serious damage to the defendant which deprived him of the beneficial enjoyment of the store, that there had been a failure of consideration for the rental, and he had been forced to vacate. He also proved that he had repeatedly complained to the plaintiff and that he had stayed

for a time in reliance upon the plaintiff's promises to discontinue the violations and that these promises were not kept.

Plaintiff denied that the acts complained of were a breach of the covenant and controverted the materiality of the breach.

It was for the jury to decide upon the credibility of the witnesses, and whether the acts of the landlord had in fact deprived the tenant of the enjoyment of the premises. This the jury properly decided in favor of the defendant.

The authorities agree that it is a question of fact for the jury whether or not there has been a constructive eviction, under the circumstances of the case.

Landlord and Tenant, 36 C. J. 278:

> "Accordingly, the question as to whether or not a tenant has been evicted, depending, as it does, upon the intention of the landlord and the circumstances of the particular case, is always to be decided by the jury, under proper directions from the court; and similarly the question whether the tenant waived a constructive eviction is for the jury to determine. If the evidence on a question of fact is conflicting or permits of different inferences by reasonable men, it may be, and must be, submitted to the jury. * * *"

See also:

> *Albrecht* v. *Thieme,* 97 N. J. L. 103, affd. 98 N. J. Law 249.

Appellant did not submit requests to charge and took no exceptions to the charge of the Court. The charge properly left it for the jury to decide whether or not the landlord had failed to give the tenant the consideration for his rent which the landlord had covenanted to give (Case, p. 71, ll. 10 and 11). The jury was permitted to find

that the tenant was excused from paying the rent after vacating the premises, if he had thus been deprived of the consideration.

By failing to except to the charge, plaintiff in effect assented thereto and cannot now complain.

Hexamer v. *Public Service Ry. Co.*, 4 N. J. Misc. Rep. 184 (Sup. Ct., 1926).

B.

The facts.

The evidence, which must be accepted as true for the determination of the propriety of the Trial Judge's disposition of the motion and which the jury believed, was to the following effect:

The tenant leased the premises on July 15, 1927, for the selling of jewelry at wholesale or retail, at private or auction sale (Case, p. 77), and agreed to pay $479.17 per month for the store and the exclusive right to conduct that business in the building (Case, p. 87). At that time the landlord was conducting a lunch stand and cigar counter with an open front in the building. There were no glass show windows on the landlord's store (Case, p. 21). None of the articles now complained of were sold in the plaintiff's store. Watches and clocks and shaving paraphernalia were sold, and the lease especially excepts these articles from the operation of the restrictive covenant (see par. 28 of Lease, Case, p. 87). There was at that time no store in the building except the defendant's handling items usually sold in jewelry stores.

The landlord's covenant above referred to reads as follows:

> "The Landlord agrees that it will not rent any other store in the building in which the demised premises are a part, for the sale of

> jewelry, silverware and other articles usually sold in a jewelry store, or for the demonstration or sale of any such articles; except the demonstration and/or sale of clocks, watches and shaving paraphernalia, which articles are sold and demonstrated by the landlord herein in the store occupied by it in the said premises."

Thereafter, in 1929, an optician took a store in the building and sold eyeglasses of the same class as were sold in the respondent's store. Respondent objected and after several months the optician moved out (Case, p. 25).

Approximately a year before respondent removed from the premises, the appellant, the landlord, changed the character of its own store, installed show windows and a new stock of merchandise (Case, pp. 25-33, *et seq.*). Many of the new items were articles usually sold in jewelry stores and sold by the respondent in his store. Over the repeated protests of the tenant and in spite of the promises of the landlord to discontinue them, the competing articles were increased in number. In January, 1931, the appellant's store had on display fountain pens, pencils, cameras, flasks, beverage shakers, cigarette cases, lighters, atomizers, vanity cases, compacts, bath salts in fancy containers, perfumes, smoking sets, ash trays, humidors, cigar and cigarette holders and traveling clocks, in addition to the ordinary watches, clocks and shaving paraphernalia permitted by the lease (Case, p. 29; Exhibits D-3 and D-4, Case, pp. 94 and 95). Also pocket knives, pearl handled knives and cutlery (p. 31). This was the class of merchandise which constituted the principal business of the respondent in his store, since the location was not suitable for the doing of a large business in the more expensive items such as watches and diamonds (Case, p. 34).

Appellant undersold the respondent on some of these items (Case, p. 31) and respondent's business was seriously affected by the competition (Case, pp. 52 and 55).

In response to complaints of respondent, appellant wrote two letters to respondent. One of these letters, dated November 6, 1930 (Exhibit D-2, Case, p. 92), states:

> "In connection with the telephone conversation with our Mr. Simon Rodnon we wish to state that your complaint about the conflicting articles of merchandise which you handle in your store and which we handle in our store is well taken and we are going to correct the nature of the merchandise which we handle in our store so that it will not conflict with yours with the exception that we will continue to handle clocks and watches as we did heretofore."

The other, dated December 2, 1930 (Exhibit D-1; Case, p. 91) states:

> "We incidentally want to call to your attention the fact that we are rectifying your complaint about the handling of certain merchandise in our store which you claim are in conflict with some of the merchandise which you handle.
>
> We are removing from our store which is next to yours in Market Street, Newark, all novelties excepting clocks and watches which we usually did sell in our store at all times."

These letters admit every contention of the respondent with respect to the handling of conflicting merchandise, respondent's complaints and appellant's repeated promises to remedy the condition. They admit that the items objected to had not been sold by the appellant at the time of the making of the lease in 1927, and they show the construction which the parties themselves placed

upon their contract. They also explain why respondent delayed removing until he was convinced that the promises of appellant were not made in good faith.

C.

The breach of covenant found by the jury deprived the tenant of the beneficial enjoyment of the premises and excused the tenant from continuing under his lease.

In the face of the foregoing facts and the jury's finding, appellant contends that the law is so out of accord with the common understanding of fair play among men, that it continues to bind the tenant even though the landlord has so flagrantly disregarded his obligation.

Appellant relies upon *Stewart* v. *Childs*, 86 N. J. L. 648. That case was decided upon the ground that:

> "We are unable to find in the record any evidence that shows that the landlord or by his procurement, did anything with the intention of depriving the tenant of the enjoyment of the premises."

The claim of constructive eviction was there based upon the failure of the landlord to keep the cellar waterproof as he had covenanted to do. Whatever the facts were which led the Court to the conclusion that there was no intent upon the part of the landlord in that case to deprive the tenant of the enjoyment of the premises, the evidence in this case shows that the landlord deliberately and with knowledge, after repeated complaints by the tenant, did so deprive the tenant. The case is also distinguishable on the ground that the tenant could do his own waterproofing and set up the cost by way of recoupment to a claim for rent. But in this case no act on the part of

the tenant could have remedied the affirmative misconduct of the landlord or prevented its dire consequences.

Decided cases by authoritative Courts on the precise point here in question are not numerous. Those cases which have been decided, and which represent the weight of American authority, hold that the breach of the landlord's covenant against allowing competition with the tenant in the building constitutes a constructive eviction.

16 R. C. L. 761:

> "It has been held that the letting by a property owner of a storeroom for the sale of articles which by a lease signed by both parties, of another room in the buliding, he has covenanted with its lessee not to do, justifies the latter in rescinding his contract and surrendering possession of the property."

In *University Club* v. *Deakin* (Ill. Sup. Ct.), 265 Ill. 257, 106 N. E. 790, plaintiff brought suit to recover rent alleged to be due under a lease. From a judgment for the plaintiff defendant appealed.

Plaintiff had leased a store in its building to defendant. The lease provided that defendant should use the room for a jewelry and art shop, and for no other purpose. It also contained the following clause: "Lessor hereby agrees during the term of this lease not to rent any other store in said University Club building to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls."

Thereafter plaintiff leased another room in the same building to one Sandberg. Sandberg made a specialty of the sale of pearls in connection with the conduct of his general jewelry business as soon as he took possession of the room leased to him.

Defendant, upon plaintiff's refusal to cancel his lease, vacated the premises, surrendered the keys, and refused to pay any further installments of rent because of the failure of plaintiff to enforce the twelfth clause of his lease.

The Supreme Court held, Cooke, J.:

> "The court properly held that the lease in question was a bilateral contract. It was executed by both parties and contained covenants to be performed by each of them. The proposition so held with reference to the effect of the lease also correctly stated the law. By holding these propositions the court properly construed the twelfth clause as a vital provision of the lease, and held that a breach of that provision by the lessor would entitle the lessee to rescind. * * * While there was no provision in this contract that plaintiff in error should have the option to terminate it if the terms of the twelfth clause were not observed, it is apparent that it was the intention of the parties to constitute this one of the vital provisions of the lease. It was concerning a matter in reference to which the parties had a perfect right to contract, and it will be presumed that plaintiff in error would not have entered into the contract if this clause had not been made a part of it. It is such an essential provision of the contract that a breach of it would warrant plaintiff in error (defendant) in rescinding the contract and surrendering possession of the premises. * * *"

In *Hiatt Inv. Co.* v. *Buehler* (Mo., 1929), 16 S. W. 2nd, 219, the plaintiff sued for rent under a lease containing a provision that: "It is expressly understood and agreed that there is to be no other drug store in the holdings of the Hiatt Investment Company." The defense and counterclaim were based upon a breach of this covenant by a lease to another drug store in a nearby building owned by the landlord. The Court held:

"The covenant in the case at bar goes to the whole consideration; it was not merely incidental to the main purposes of the lease, and defendant elected to surrender the lease. The evidence shows that the lease would not have been executed if it had not been for the insertion of the restrictive covenant in it; that it was vital to the protection of defendant's business. It was said in the case of University Club *v.* Deakin, *supra,* 265 Ill., loc. cit. 262, 106 N. E. 792, L. R. A. 1915 C. 854;

'The lessee contracted with the defendant-in-error (the lessor) for the sole right to engage in this specialty in its building, and if defendant-in-error saw fit to ignore that provision of the contract and suffer a breach of the same, plaintiff-in-error had the right to terminate his lease, surrender possession of the premises and refuse to perform on his part the provisions of the contract'."

* * * * * *

"Defendant herein had a choice of several remedies: 1st. He could rescind the lease, in which case he would not have been required to pay any further rent; 2nd. He could have continued under his lease and at the end of the term sued for loss of the profits suffered by reason of the competition of the Crown Drug Company; 3rd. He could have treated the violation of the covenant by the plaintiff as putting an end to the contract for the purposes of the performance and sued for damages."

(Citations.)

Constructive eviction has been defined as follows (36 C. J. 261, Landlord and Tenant, par. 988):

"An intentional act or omission of the landlord, or by those acting under his authority or with his permission, that permanently deprives the tenant without his consent of the means or the power of the use and beneficial

enjoyment of the demised premises or any substantial part thereof, in consequence of which he abandons the premises, constitutes a constructive eviction. An eviction is not necessarily an actual forcible taking of possession of the demised premises by the landlord, nor does it necessarily consist in the expulsion or actual ouster of the tenant or a physical interference with the demised premises. To constitute an eviction, it is not necessary that there should be a manual or physical expulsion or exclusion from the demised premises or any part thereof. It is necessary, however, in order to constitute a constructive eviction, that the landlord, by some intentional act or omission, materially and permanently interferes with the beneficial enjoyment or use of the demised premises or a material part thereof. * * *"

Landlord and Tenant, 36 C. J. 261, par. 989 (Intent):

"* * * However, it is not necessary that there should be an express intention of the landlord to compel the tenant to leave the demised premises or to deprive him of the beneficial enjoyment thereof. A man is presumed, in law, to intend the natural and probable consequences of his acts; and, therefore, acts or omissions of the landlord, which are calculated to, and do, make it necessary for the tenant to remove from the demised premises constitute a constructive eviction."

In the case of *Metropole* v. *Hartigan*, 83 N. J. L. 409, Mr. Justice Minturn quoted with approval from 7 Am. and Eng. Ann. Cas. 591, as follows (p. 412):

"But in modern times the rule has been liberalized in favor of the tenant, and now any act of the landlord, or of anyone who acts under authority or legal right given him by the landlord, which renders the demised premises unfit for the purpose for which they were

> leased, *or which seriously interferes with the beneficial enjoyment thereof,* in consequence of which the tenant abandons the premises, constitutes an eviction by construction of law; and whenever it takes place the tenant is released from the obligation under the lease to pay rent accruing thereafter" (our italics).

Tiffany—"Real Property" (1912) Chapter 4, par. 51, page 128:

> "The tendency of the modern decisions is to hold that any act or default by the landlord which deprives the tenant of the beneficial enjoyment of the premises, followed by the tenant's abandonment thereof, will constitute an eviction."

II Williston on Contracts—Constructive Eviction, par. 892, page 1709:

> "Permitting adoining property of the landlord to be used for purposes inconsistent with the purpose for which the property in question was rented, * * * *or in any way substantially depriving the tenant of the enjoyment of the leased premises in violation of a duty assumed by the landlord, amounts to an eviction."* (Our italics.)

See also *Cline* v. *Altose* (Washington Supreme Court, 1930), 290 Pac. 809; 70 A. L. R. 1471.

Whether or not the acts of the landlord deprived the tenant of so material a part of the consideration for the promise of the tenant to pay rent as to excuse him from continuing under the lease must be decided by the application of common sense to the facts of each individual case.

Higgins v. *Whiting* (1925), 102 N. J. L. 279 (quoted, *supra*);
II Williston on "Contracts", par. 826, page 1578;
Covenants, 15 C. J. 1221.

This principle is illustrated by what seem to be contradictory decisions in our courts, which can readily be harmonized by a consideration of the facts of each case.

In *McCurdy* v. *Wyckhoff*, 73 N. J. L. 368, the Supreme Court held that a failure to keep a drain pipe clear constituted a constructive eviction. In *Weiler* v. *Pancoast*, 71 N. J. L. 414, it was held that permitting another part of the premises to be used for immoral purposes constituted a constructive eviction. And in *Higgins* v. *Whiting* (1925), 102 N. J. L. 279; *Stewart* v. *Childs*, was distinguished, and failure to heat an apartment was held to be an eviction.

Appellant relies upon the contention that the landlord's covenant in this case was independent of the covenant of the tenant to pay rent. The entire subject and the history of dependent covenants is discussed in *II Williston on Contracts*, par. 812, *et seq.* It appears that originally all exchanges of promises were treated as independent. If a contract of sale was entered into, the seller could sue for the price and recover without alleging delivery of the goods. The buyer would then be forced to his action for the goods. Lord Mansfield pointed out the absurdity of this situation and modified the doctrine. Thereafter the doctrine of dependent covenants arose so that it is now the rule that the plaintiff must do or tender the thing to be done on his part before he can recover, unless the provisions of the contract clearly require the defendant first to perform.

See:

Lord Mansfield in *Boone* v. *Eyre*, 1 H. Bl. 273, note a, 126 Reprint 160;
Ackley v. *Richman*, 10 N. J. L. 304.

Whether covenants are dependent or independent now depends upon the intention of the parties,

the good sense of the case, and the dictates of justice.

So in the section on Covenants in 15 C. J. 1221, it is stated:

> "While the order of time in which covenants are to be performed is an important consideration in determining whether they are dependent or independent, it is difficult to lay down any general principle by which to determine what covenants are dependent and what independent, the cases being agreed that this question must be determined by the intention and meaning of the parties as it appears in the instrument, *and by the application of common sense to each particular case,* to which intention when once discovered, all technical forms of expression must yield. In doubtful cases the courts are generally inclined to construe covenants to be dependent * * *" (our italics).

Professor Williston in his treatise on contracts, Vol. II, p. 1580, par. 827, states the same principle as follows:

> "But the theory of mutual dependency of the promises in a bilateral contract is based on fundamental principles of justice, and if the court conceives of its action in enforcing such dependency as due not to the will of the parties but to the inherent justice of the situation, there is no difficulty in so applying and molding the principle of failure of consideration as to protect the defendant without subjecting the plaintiff to the risk of unjust forfeiture. Therefore promises will be regarded as mutually dependent whenever it is possible to do so."

P. 1578, par. 826:

> "The proper point of view is indicated in Poussard *v.* Spiers (1 Q. B. D. 410), where the court left to the jury the question whether, under the circumstances, it was reasonable

to refuse further performance from the plaintiff."

In *Higgins* v. *Whiting* (1925) 102 N. J. L. 279, Mr. Justice Black said, at p. 280:

> "This * * * involves the legal question, whether the covenant to pay rent and to supply heat are mutual and dependent covenants?
>
> In 24 Cyc. 918, it is said that covenants are to be construed as dependent or independent according to the intention and meaning of the parties *and the good sense of the case.* Technical words should give way to such intention. 7 R. C. L. 1090, Sec. 7. So, the rule is thus stated; where the acts or covenants of the parties are concurrent, and to be done or performed at the same time, the covenants are dependent and neither party can maintain an action against the other without averring and proving performance on his part. 13 Corp. Jur. 567."
>
> * * * * * *
>
> "In the present case, the covenant to pay rent and the covenant to heat the apartment are mutual and dependent. In the modern apartment house equipped for heating from a central plant, entirely under the control of the landlord or his agent, heat is *one of the things for which the tenant pays under the name of 'rent'* " (our italics).

In the present case the landlord's performance was to be simultaneous with that of the tenant. The covenant was an essential part of the consideration for the agrement to pay rent, "one of the things for which the tenant pays under the name of 'rent'." The usefulness of the premises for the purpose for which they were leased was so materially impaired by the acts of the landlord that there was failure of consideration.

Appellant gains nothing by placing the case upon the theory of dependent and independent

covenants. The same dictates of justice and common sense are decisive whether the case is considered on the question of dependency of covenants, failure of consideration or deprivation of beneficial enjoyment.

In the last analysis, the reasonable conduct standard is applicable. Could the tenant be expected to continue in the premises and to pay rent, when the landlord was depriving him of the business which would produce the rent, in direct violation of the landlord's solemn covenant to refrain from so doing? Or was the tenant justified in saying, "I took this lease in reliance upon your promise that I alone could sell these articles in this building, I would not have taken it without that provision, now you've destroyed the heart of the contract, have shown bad faith, I cannot expect fair treatment from you, I'm not getting what I bargained for, and, therefore, I will not occupy the premises and will not pay rent for that which is useless to me?"

In *Metropole* v. *Hartigan*, 83 N. J. L. 412, Mr. Justice Minturn said at page 412:

> "The payment of rent which at common law was substituted for the rendering of feudal service, was based upon the theory that the land demised was the necessary factor to produce the rent, and that where the landlord directly or indirectly deprived the tenant of the use of the land in whole or in part, the tenant's inability to reap or produce the rent from the land, formed an insuperable obstacle to its collection, and, consequently, the payment of rent was suspended until the landlord made it possible for the tenant again to produce the rent, by possessing the land under the terms of the demise. Co. Litt. 47; 2 Bl. Com. 41; 1 Wealth Na. 190; 3 Found. Leg. Liab. 289."

The analogy between the facts in this case and the historical situation is noteworthy.

It is respectfully submitted that the law, as well as justice, fully sustains not only the refusal of the Trial Court to direct a verdict, but also the verdict of the jury.

III.

The question objected to under Point Two of Appellant's Brief was properly admitted.

A.

There was no proper objection or exception to the question.

The question objected to under appellant's Point 2 appears on page 40 of the State of the Case, at line 25. The objection appearing at lines 29 and 30 is:

> "Mr. Klein: I object. I do not think this witness is qualified as to that."

The argument printed at page 41, lines 13 *et seq.*, is addressed to the qualifications of the witness.

No objection or exception was taken to the question on the ground now made by appellant.

Precipio v. *Insurance Co. of Penna.*, 103 N. J. L. 589, at 595;

Semkin v. *Hollander*, 84 N. J. L. 488, at 487;

Willett v. *Village of St. Albans*, 83 Atl. 72, 69 Vt. 330.

B.

The question was proper.

The objection now made is that this question did not elicit evidence of the proper measure of damages.

The objection is based upon a misapprehension. The measure of damages applied was the difference between the agreed rental *with the covenant* and the market value of the premises *without the covenant* which was disregarded by the landlord for the *period during which the tenant remained in occupation* in reliance upon the landlord's promises to correct the condition. Appellant apparently confuses this with the damages for the loss of the balance of the term, *after eviction*. No such damages were sought. The measure would have been different. The latter damages would have been the difference between the agreed rental and the market value for the balance of the term *after removal,* and *including the restrictive covenant.*

The question was a proper aid to the jury in assessing the damages.

In *Keebler* v. *Land Title & Trust Co.,* 266 Pa. 440, 109 A. 659 (1920), the Supreme Court of Pennsylvania held that the difference between the rental value of the leased premises without a restriction against competition and the rental provided for in the lease was the proper measure of damages for the breach of a covenant such as that here before the Court.

In 35 C. J. 1191, par. 500 (Landlord and Tenant), it is stated:

> "The measure of damages usually laid down for breach of a covenant of the lessor with respect to the condition or use of the demised property is the reduced rental value of the property, that is, the difference between the rental value of the property if the covenant had been complied with, and its rental value in the absence of such compliance; * * * While it is stated in some of the cases that the measure of damages for the breach of a covenant of the type in question is usually the difference between the rental value of the

> premises and the rent agreed to be paid for the same, and it is generally true, that in the absence of other evidence the agreed rent may be regarded as the fair rental value of the demised premises in the condition as called for in the lease, it would seem that the stipulated rent is not conclusive as to the rental value of the premises. * * *"

Since the appellant prevented the introduction of evidence as to the value of the lease with the restriction (Case, p. 40) and itself introduced no evidence to contradict the value agreed upon by the lease, it cannot complain that the agreed rental was accepted as the true value.

The evidence showed not an isolated breach of the covenant, but a complete disregard thereof with frequent violations. The defendant had no benefit from the covenant.

The question was proper.

IV.

The Trial Court properly refused to direct a verdict on the counterclaim.

Point 7 of Appellant's Brief is based upon the refusal of the Court to direct a verdict on the defendant's counterclaim.

Even if no eviction had been proved, the defendant was entitled to damages for breach of the plaintiff's covenant.

Metropole v. *Hartigan,* 83 N. J. L. 409.

As to the third count, in which a recovery of deposit was sought, plaintiff made no motion at the trial addressed to this count. A motion for direction of verdict on the counterclaim was made on the ground that the defendant had not proved

damages. This clearly referred to the first two counts and the Trial Court was not asked to direct a verdict as to the deposit. Certainly not for the reasons now advanced. Appellant cannot now complain of a matter which it did not raise at the trial and upon which the Trial Court did not rule.

Garretson v. *Appleton,* 58 N. J. L. 386, (1895; Court of Errors and Appeals).

However, the jury's finding for the defendant on this point was correct, since an eviction was proved.

The argument is also made that it was not a breach of the plaintiff's covenant for it to engage in the jewelry business. Even if this were so, the letting to an optician was clearly a breach of the covenant. But a reading of the covenant makes clear the intention of the parties that the landlord was not himself to compete with the tenant. The covenant provides: "except that the demonstration and/or sale of clocks, watches and shaving paraphernalia, which articles are sold and demonstrated by the landlord herein in the store occupied by it in the said premises". If it was not intended to limit the landlord in the use of its own store, this exception would be foolish and the parties would not have inserted it. The essence of the covenant is that no competitive business should be operated in the building.

In *University Club* vs. *Deakin* (Ill. Sup. Ct.), 265 Ill. 257; 106 N. E. 790, the covenant in the lease was against *renting* another store "to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls." The landlord set up that it had specifically prohibited the second tenant to make a specialty of the sale of pearls, although it had not attempted to enforce this restriction. The Supreme Court held:

> "Plaintiff-in-error contracted for the exclusive right to engage in this particular business in that building. * * * He contracted with defendant-in-error for the sole right to engage in this specialty in its building, and, if defendant-in-error saw fit to ignore that provision of the contract and suffer a breach of the same, plaintiff-in-error had the right to terminate his lease, surrender possession of the premises, and refuse to further perform on his part the provision of the contract."

In *Snavely* v. *Berman* (1923; Maryland Court of Appeals), 121 Atl. 842, the defense to a suit on a similar covenant was based upon the fact that the landlord did not "rent" to the second tenant for a competing business, but merely permitted the other tenant to engage therein in violation of this lease. The second tenant held under a lease prior in time to that of the plaintiff. The Court held that the failure of the landlord to protect the plaintiff from the competition was a breach of his agreement not to "rent" for a similar business.

See

Aiello Bros. v. *Saybrook,* (1930) 106 N. J. Eq. 3, V. C. Backes;

In *Van Dyke* v. *Anderson,* 83 N. J. Eq. 568, at 570, V. C. Backes said:

> "* * * Whenever a dispute arises as to the meaning of a contract, that construction which the parties themselves place upon it, and as to which they deal with each other, is, as between them, the one to be adopted, and to be given by the courts."

See to the same effect,

Kislak v. *Muller,* 100 N. J. Eq., 110, Vice-Chancellor Griffin.

In this case the parties themselves interpreted the lease as a restriction upon the landlord's use of his store.

See the letters written by appellant (Case, pp. 91 and 92), and the exception in the covenant itself.

> "The moral rule as laid down by Dr. Paley is also the accepted rule of law and equity, as well as the law of nations: 'To give to the contract the sense in which the person making the promise believed the other party to have accepted it.' 2 Kent. Com. 557".
>
> *Weinstein* v. *Sheer*, (Ct. of E. & A. 1922) 98 N. J. L. 511.

Words in a contract are to be construed most strictly against the contractor.

> *Newcomb* v. *Kloeblen*, 77 N. J. Law 791, 74 A. 511, 39 L. R. A. (N. S.) 724.

The construction contended for by appellant is unreasonable. If it were accepted, the landlord might itself have used every other store in the building as a jewelry store with impunity.

IV.

Appellant's Point Three is not based upon any exception taken at the trial. The question now objected to was proper.

Appellant's Point 3 is that it was error to permit the witness Weissman, who had been engaged in the jewelry business for twenty years and at the time of his testimony was a jobber engaged in selling novelty jewelry and diamonds, to testify that certain named articles were usually sold in jewelry stores. The only objection to this man's

testimony at the trial was that the witness was not qualified on the subject. No objection was made and no exception taken to any of the questions put to this witness, nor was it objected that the line of questions was improper (Case, pp. 47 and 48). The qualifications of the witness are not attacked by the appellant here. It is now sought, for the first time, to object to the question asked. This cannot be done.

> *Precipio* v. *Insurance Co. of Penna.*, 103 N. J. L. 589, at 595;
> *Semkin* v. *Hollander*, 84 N. J. L. 485, at 487.

There was adequate evidence to support the decision of the Trial Court upon the qualifications of this witness as an expert.

In *Essex County Park Comm.* v. *Brokaw* (1930), 107 N. J. L. 110, at 111, this Court held:

> "The question of whether a witness, called as an expert, is qualified to give expert testimony is one to be primarily passed upon by the trial court, whose decision will not be reversed if there is any evidence to support it, or unless it is clearly shown to be erroneous in matter of law. *Ringwood Co.* v. *North Jersey District Water Supply Commission*, 105 N. J. L. 165; *In re Morris and Cummings Dredging Co.*, 96 N. J. L. 248; *Ross* v. *Palisades Interstate Park*, 90 *Id.* 461; *Brown* v. *Short Line Railroad Co.*, 76 *Id.* 795; 22 C. J. 526, Sec. 610, &c."

The customs of a business and the meaning of a commercial phrase may be shown by expert testimony and a practical man engaged in that business for 20 years is qualified to testify thereto.

> *Wallace, Muller & Co.* v. *Leber*, 65 N. J. L. 195; 47 Atl. Rep. 430;

Schenck v. *Mercer County Mut. Fire Ins. Co.*, 24 N. J. Law 447.

Since the articles which were sold in the plaintiff's store and of which the defendant complained, were named in the evidence, the jury had before it the basis of the expert's statement. If it were a matter of common knowledge, the jury could judge for itself whether the articles named were usually sold in jewelry stores. If it was error, it was harmless. However, the jury could not be expected to know the stock carried by jewelry stores generally, while a jewelry jobber does know.

Unless it can be presumed that all men are so familiar with the subject that they can derive no information on the subject from an expert, the testimony of the expert is admissible within the discretion of the Trial Court.

Gardner v. *Commercial Machine Co.* (1920), Sup. Ct. of New Hampshire, 79 N. H. 452, 111 A. 317.

V.

Appellant's Points One and Four are without merit.

The defendant Kalman Bernstein, who had been engaged in the jewelry business for 25 years (Case, p. 21), testified to a list of articles sold in the plaintiff's store, which are usually sold in jewelry stores. No proper exception was taken to the question on page 23 of the State of Case. However, the witness was qualified as an expert and, in any case, was merely testifying to specific articles of which he complained in the suit. That the named articles were sold in the store of plaintiff is a fact. That those articles are usually sold

in jewelry stores is also a fact, not an opinion. The questions called for a statement of compiled fact, as observed by a trained and experienced observer.

Even a lay witness may express his opinion upon a matter of common knowledge as an equivalent for congeries of facts which he has observed.

Koccis v. *State*, 56 N. J. Law 44; 27 Atl. 800.

If it was error to allow the question in this form, it is hard to conceive of any harm to the plaintiff, in view of the fact that the articles in question were all named.

The question put to Mitchell Stern, as to whether the selling of these articles injured the defendant's business, was a statement of fact.

The manager of a store for 10½ years (Case, p. 51) is competent to say that certain competition hurt his business. In any event, plaintiff was not harmed because the damages were based upon the diminished rental value and not upon the loss of business. While the latter could also have been recovered, no damages were sought or allowed for the loss of profits.

VI.

Conclusion.

Since there were material facts in dispute, the Trial Court properly sent the case to the jury. There were no exceptions to the charge.

There was no error in the admission of evidence. Most of appellant's contentions are afterthoughts, not made at the trial. The Trial Court had no opportunity to pass on such questions; respon-

dent had no opportunity to correct them. There can be no reversal based on these.

The entire case was fairly decided upon jury questions fully presented. It is respectfully submitted that the judgment below should be affirmed.

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with Respondent.