INDEX

TESTIMONY

SUMMONS.

THE STATE OF NEW JERSEY TO—JAMES M. KIERMAN,

(SEAL) JAMES W. KIERNAN,
AND JOSEPH PERLMUTTER

YOU ARE SUMMONED to answer the annexed complaint of ADELINE M. OVEREND in an action at law in the Hudson County Circuit Court.

And take notice that unless you file your answer to said complaint with the Clerk of the said Hudson County Circuit Court, at Jersey City within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, Hon. W. Ackerson, Judge of the Circuit Court at Jersey City this seventeenth day of April nineteen hundred and twenty-five.

WILLIAM E. SEWELL,
Attorney.

JOHN J. McGOVERN,
Clerk.

ACTION AT LAW.—COMPLAINT.

HUDSON COUNTY CIRCUIT COURT

ADELINE M. OVEREND,

Plaintiff,

vs.

JAMES M. KIERNAN, JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendants.

Plaintiff, residing in the City of Jersey City, County of Hudson, and State of New Jersey, says that:

1. On the 25th day of April, 1923, plaintiff entered into a written lease, copy of which is attached hereto, and made part hereof, with Perlmutter's Inc., a corporation of the State of New Jersey.

2. That on the said 25th day of April, 1923, defendant James M. Kiernan was an officer and director of the aforesaid corporation: that on the same date, defendant James W. Kiernan was an officer and director of the aforesaid corporation: that on the same date, defendant Joseph Perlmutter was the manager and did have charge of the business and store conducted by the aforesaid corporation.

3. That on the day and in the year aforesaid, the aforesaid corporation was engaged in conducting a ladies clothing and furnishing store: that on the day and in the year aforesaid, defendant James M. Kiernan was absent from the City of Jersey City, and did execute his power of attorney, or did otherwise duly authorize defendant James W. Kiernan, his son, to transact business incident to this corporation, for and instead of the said James M. Kiernan.

4. That at the time aforesaid, defendant James M. Kiernan was the principal stockholder in said corporation.

5. That prior to the execution of the said lease, and on the said 25th day of April, 1923, plaintiff did inquire of defendant James W. Kiernan, who was acting individually as a director and officer of the said corporation, and also as the duly authorized agent of defendant James M. Kiernan, and officer and agent of the corporation, and of defendant Joseph Perlmutter, as to the status of the holding or tenancy of the corporation aforesaid in premises known as No. 116 Monticello Avenue, Jersey City, and plaintiff was informed by defendants James W. Kiernan, and by defendant James M. Kiernan through his agent aforesaid, and by defendant Joseph Perlmutter, that the said corporation had a lease on the said premises for the period of fourteen years: that the said lease did commence in the year 1917: that the said defendants did further inform plaintiff that the corporation was in a solvent condition: and that relying upon the false representations made by the defendants aforesaid to plaintiff, plaintiff did thereupon enter into the said lease, and did enter into possession under and by virtue of the terms of said lease.

6. That upon plaintiff's entering into possession of the premises aforesaid, plaintiff did expend large sums of money in fitting said premises for occupancy and business as a millinery shop, and did purchase adequate and sufficient stock, at great cost, for the conducting of said business: that plaintiff did remain in possession of the said premises for a period of about six weeks, whereupon defendant James M. Kiernan did inform plaintiff that the store occupied by the aforesaid corporation would close for a couple of days, in order to liquidate, and that she, plaintiff, could thereupon re-open her department and continue her business.

7. That after a period of about seven weeks, plaintiff was informed by defendant Joseph Perlmutter, who had been general manager in charge of the store conducted by the aforesaid corporation, that the store would re-open her department.

8. In compliance herewith plaintiff re-opened her department and continued her business at the said premises up until February 4, 1924, at which time plaintiff was evicted from possession of her said department, and her stock and fixtures were appropriated by defendants, or one or more of them, and plaintiff was informed by defendant Joseph Perlmutter that she could no longer conduct her business at the premises as her lease was no longer operative.

9. That from the time of plaintiff's entry into possession of the said department, under and by virtue of said lease plaintiff did fulfill all the terms and requirements of the said lease.

10. Plaintiff shows that Perlmutter's Inc., the corporation hereinbefore mentioned, had no lease on the premises 116 Monticello Avenue, on the said 25th day of April, 1923, or at any time, but simply occupied same as a monthly tenant or otherwise: that said premises had been leased by the owners of said premises to James M. Kiernan for a period of fourteen years from the year 1917, and at the time the said lease to plaintiff, as it was but a monthly Perlmutter's Inc., and this plaintiff, the said corporation had no legal right to give the aforesaid lease to plaintiff, as it was a monthly tenant; that the defendants and each and all of them knew that plaintiff relied upon the false representations made by defendants, that the said corporation was the holder of the lease aforesaid whereas they knew that defendant James M. Kiernan individually was the holder of the said lease that further, defendants and each of them knew or should have known that plaintiff relied upon the false representations made by the defendants to plaintiff that the said corporation was solvent, and financially sound, whereas the defendants knew or should have known that the said corporation was in an insolvent condition, and that said corporation was ready to close up its business at that time: that defendant James M. Kiernan, did bring about the secession of business, and bankruptcy of the corporation in order that he, defendant James M. Kiernan might repossess himself of the premises aforesaid, in order to obtain a higher and greater rental therefor.

11. That as a result of the fraud and misrepresentation of the true state of the facts made

by defendant James M. Kiernan through his agent and servant, and attorney in fact, James W. Kiernan, and James W. Kiernan personally, and defendant Joseph Perlmutter, plaintiff entered into said lease, and as a result thereof, suffered great damage and loss of profits, which she otherwise would and could have earned in conducting said business, under and by virtue of said lease.

Second Count

1. Plaintiff repeats all the allegations referring to defendant Joseph Perlmutter, in the first count, and makes the same a part hereof.

2. Plaintiff, at the demand of Joseph Perlmutter did, on the 28th day of April, 1923, give to said defendant Joseph Perlmutter, her check in the sum of $450, which check was duly cashed by the defendant Joseph Perlmutter.

3. That plaintiff was informed by Joseph Perlmuter that said check had to be paid by plaintiff to said Joseph Perlmutter as agent of the corporation aforesaid, and that the same was demanded of the plaintiff by the corporation aforesaid.

4. That said Joseph Perlmutter did obtain the aforesaid check in the sum of $450 from plaintiff by fraud and misrepresentation, in that he, the said Joseph Perlmutter, was not authorized or instructed by the said corporation to obtain the aforesaid check in the sum of $450 from plaintiff, and that he, said Joseph Perl-

mutter, did personally receive and keep the aforesaid sum of $450, obtaining same by the fraud and misrepresentation aforesaid.

Plaintiff demands damages in the sum of $20,000 against all of the defendants on the first count.

Plaintiff demands damages in the sum of $450 against defendant Joseph Perlmutter on the second count.

WILLIAM E. SEWELL,

Attorney of Plaintiff.

THIS AGREEMENT made the 25th day of April, in the year of our Lord one thousand nine hundred and twenty-three

BETWEEN, PERLMUTTER'S INC., a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the first part, and ADELINE OVEREND of the City of Jersey City, County of Hudson and State of New Jersey, party of the second part,

WITNESSETH: That the said party of the first part has hereby let and rented to the said party of the second part, and the said party of the second part has hereby hired and taken from the said party of the first part the front part of the premises on the second floor, (about 600 sq. ft. in area) of the store and building known as street Number 116 Monticello Avenue, Jersey City, N. J. for the purpose of conducting

a millinery shop, together with the right to use the entrance to said premises for the ingress and egress of her customers and the stairway leading to the second floor thereof for the term of three years, to commence on the 10 day of April, A. D. 1923, with the privilege of a renewal of this lease for another two years.

It is specifically understood and agreed that the party of the second part cannot assign or sub-let this lease without the consent of the party of the first part.

The rent for said premises for the first three years shall be based upon the basis of ten per cent of the gross income received from the conduct of said business and the rent for the re- 20 newal shall be on the basis of fifteen per cent of the gross business.

It being specifically understood that said rent is to be deducted on the first of each and every week beginning June 1st, 1923, from the proceeds of said business and it being further specifically understood that the clearance of all sales shall be made through the office of the party of the first part and that the party of the first part shall on the first of each and every week 30 and from time to time as requested render to the said party of the second part statements showing the condition of said business.

It is also further understood that the party of the second part herein is not to be charged anything for this service, and that the business of the party of the second part is to be conducted under the name of Perlmutter's Inc.

The said party of the second part covenants to pay to the said party of the first part the 40 said rent as heretofore specified.

And it is also agreed that if the said rent shall be due and unpaid or any false record of any particular sale be made, or account sale be made and not recorded or if default be made in any of the covenants herein, that it shall be lawful for the party of the first part 10 to re-enter said premises and to remove all persons therefrom.

And at the expiration of the said term, or the termination of the lease, the said party of the second part will quit and surrender the premises hereby demised in as good a state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

The said party of the second part shall pay 20 all of its operating expenses such as employees, advertising, boxes, paper, delivery, etc., pertaining to said millinery business, the party of the first part giving space, light and heat.

And the said party of the first part covenants that the said party of the second part, on paying the said rent and performing the covenants aforesaid, shall and may peaceably and quitely have, hold and enjoy the said demised premises for the term aforesaid. 30

IN WITNESS WHEREOF, the said party of the first part hath caused its corporate seal to be hereto affixed and attested by its secretary, and these presents to be signed by its President, and the said party of the second part has

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hereto set his hand and seal the day and year first above written.

Signed, sealed and delivered
in the presence of

THOMAS H. BROWN
Attest.

.....
Secretary

(Seal)

PERLMUTTER'S INC.,
Per
JAMES W. KIERMAN,
Asst. Treas.

ADELINE M. OVEREND.

State of New Jersey }
County of Hudson } ss.:

BE IT REMEMBERED that on this day of April, in the year of our Lord one thousand nine hundred and twenty-three, before me the subscriber, personally appeared who being by me duly sworn on his oath says that he is the of Perlmutter's Inc., the lessor mentioned in the within Indenture of Lease and that is the President of said corporation: that deponent well knows the corporate seal of said corporation; and the seal affixed to said Indenture of Lease is such corporate seal

and said Instrument was signed and delivered by said President as and for his voluntary act and deed, and for the voluntary act and deed of said corporation, in the presence of deponent, who thereupon subscribed his name therein as witness.

Sworn and subscribed before
me at Jersey City, the date
aforesaid.

ACTION AT LAW.—ANSWER OF DEFENDANTS JAMES M. KIERNAN AND JAMES W. KIERNAN.

HUDSON COUNTY CIRCUIT COURT

ADELINE M. OVEREND,

Plaintiff,

vs.

JAMES M. KIERNAN, JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendants.

The defendants James M. Kiernan and James W. Kiernan, both residing in the City of Jersey County of Hudson and State of New Jersey, answering the complaint of the Plaintiff say:

FIRST COUNT

1. They admit paragraph 1.

2. They admit paragraph 2.

3. They admit paragraph 3.

4. They admit paragraph 4.

5. They deny paragraph 5.

6. They deny paragraph 6.

7. They have no knowledge or information sufficient to form a belief as to the contents of paragraph 7.

8. They have no knowledge or information sufficient to form a belief as to whether the plaintiff re-opened her department and continued her business as set forth in paragraph 8. They deny that either of these answering defendants evicted the plaintiff from possession of her said

department or appropriated her stock and fixtures, as set forth in said paragraph.

9. They deny paragraph 9.

10. They deny paragraph 10.

11. They deny paragraph 11.

SECOND COUNT

As all the allegations in the paragraphs of the Second Count refer to the defendant Joseph Perlmutter, no answer is made thereto by these defendants.

SEPARATE DEFENSE

1. These defendants say that any lease executed between the plaintiff and Perlmutter's Inc., a corporation, was terminated when said corporation was adjudged a bankrupt in the United States District Court for the District of New Jersey, and not through any act of these defendants.

2. That Plaintiff had full notice and knowledge that Perlmutter's Inc. had been declared a bankrupt, and since said bankruptcy has occupied said premises as the tenant of some other person or corporation, than the said Perlmutter's Inc.

FRANK J. HIGGINS,
Attorney for Defendants,
James M. Kiernan and James W. Kiernan.

Filed Clerk's Office,
Hudson Co. N. J. May 15, 1925

JOHN J. McGOVERN,
Clerk.

ACTION AT LAW.—ANSWER.

HUDSON COUNTY CIRCUIT COURT

ADELINE M. OVEREND,

Plaintiff,

VS.

JAMES M. KIERNAN, JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendants.

The defendant, Joseph Perlmutter, residing in the City of Jersey City, in the County of Hudson and State of New Jersey, answering the complaint of the plaintiff says that:

1. He admits the allegations contained in paragraph one of the complaint.

2. He admits the allegations contained in paragraph two of the complaint.

3. Defendant has not sufficient information to form a belief as to the allegations contained in paragraph three of the complaint.

4. Since the allegations in this paragraph contained refers entirely to the defendants James M. Kiernan, no answer was made by this defendant.

5. He denies each and every allegation contained in paragraph five of the complaint.

6. He has no sufficient knowledge to form a belief as to the allegations contained in paragraph six of the complaint.

7. He denies each and every allegation contained in paragraph seven of the complaint.

8. He denies the allegations contained in paragraph eight of the complaint.

9. He denies the allegations contained in paragraph nine of the complaint.

10. He denies each and every allegation contained in paragraph ten of the complaint.

11. He denies each and every allegation contained in paragraph eleven of the complaint.

SECOND COUNT

1. This defendant in answer to paragraph one of the second count repeats all the answers given to the allegations in the first count contained and makes said answers a part hereof.

2. Defendant denies that he received a check from the plaintiff at his demand, but does admit that he received the check referred to in accordance with the terms of an agreement entered into between them.

3. This defendant denies the allegations contained in paragraph three of the second count.

4. This defendant denies each and every allegation contained in paragraph fourth of the second count of the complaint.

SEPARATE DEFENSES

As and for a distinct and separate defense the defendant, Joseph Perlmutter sets forth the following:—

FIRST SEPARATE DEFENSE

Any Lease executed between the plaintiff and Perlmutter, Inc., a corporation, was terminated when the said corporation was adjudged a bankrupt in the U. S. District Court for the District of New Jersey; and not through any act or acts of this defendant.

SECOND SEPARATE DEFENSE

The plaintiff had full notice and knowledge that Perlmutter Inc. had been declared a bankrupt and that since said bankruptcy that Perlmutter Inc. had no right in said store under the Lease hereinbefore referred to.

BARISON & KRIEGEL,
Attorneys for Defendant.

ACTION AT LAW.—REPLY TO ANSWER OF DEFENDANTS JAMES M. KIERMAN AND JAMES W. KIERMAN.

HUDSON COUNTY CIRCUIT COURT

ADELINE M. OVEREND,
Plaintiff,

vs.

JAMES M. KIERNAN, JAMES W. KIERNAN and JOSEPH PERLMUTTER,
Defendants.

Plaintiff denies each and every allegation contained in the Answer filed in behalf of defendants James M. Kiernan and James W. Kiernan.

WILLIAM E. SEWELL,
Attorney of Plaintiff.

Let the within Reply be filed as within due time.

FRANK J. HIGGINS,
Attorney for Defendants, Kiernan.

Dated July 21, 1925.

Filed Clerk's Office, Hudson Co.
N. J. July 23, 1925.

JOHN J. McGOVERN,
Clerk.

ACTION AT LAW.— REPLY TO ANSWER OF DEFENDANT JOSEPH PERLMUTTER.

HUDSON COUNTY CIRCUIT COURT.

ADELINE M. OVEREND,

Plaintiff,

vs.

JAMES M. KIERNAN and JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendants.

Plaintiff denies each and every allegation contained in the Answer filed in behalf of defendant Joseph Perlmutter.

WILLIAM E. SEWELL,
Attorney of Plaintiff.

Filed in Clerk's Office, Hudson Co.
N. J. July 23, 1925.

JOHN J. McGOVERN,
Clerk.

CASE.

HUDSON COUNTY CIRCUIT COURT.

ADELINE M. OVEREND,

vs.

JAMES M. KIERNAN and JAMES W. KIERNAN and JOSEPH PERLMUTTER.

Before:
HON. HENRY E. ACKERSON, JR. J.,
and a Jury.

Jersey City, N. J

June 14, 1926.

APPEARANCES:

WILLIAM E. SEWELL, ESQ., for the Plaintiff;

FRANK J. HIGGINS, ESQ., for the Defendants, Kiernans;

MORRIS BARISON, ESQ., for the Defendant, Perlmutter.

A Jury was duly empanelled; being found satisfactory, they were sworn.

Counsel opened to the Jury.

ADELINE M. OVEREND, sworn:

Direct Examination by Mr. Sewell:

Q. Miss Overend, where do you live? A. 2684 Boulevard, Jersey City.

Q. How long have you lived in Jersey City? A. All my life.

Q. How long have you known Mr. James M. Kiernan? A. For many years; since I was a small child.

Q. How long have you known his boy, James W., the other defendant? A. Practically the same time.

Q. How long have you known Mr. Joseph Perlmutter? A. I met him about three months before I went in the store.

Q. That would be the early part of 1923? A. In February 1923.

Q. Where was Perlmutter's Incorporated conducting its shop? A. 116 Monticello Avenue, Jersey City.

Q. Did you have any negotiations with Mr. Perlmutter about starting a millinery department there? A. Yes, sir.

Q. When did you first have your negotiations in connection with that? A. In March 1923.

Q. How did you come about to enter into negotiations? A. Mr. Perlmutter was introduced to me by a mutual friend of his and mine and about two weeks after the introduction, Mr. Perlmutter made a proposition to me.

Q. Where did he come, to your house? A. To my home.

Q. What proposition did he make to you? A. He said he had something good for me, knowing

that I was in the millinery line. He said, it would be a good move for me to have the upper part of his shop on Monticello Avenue, about 600 square feet, to be used as a millinery shop, and I asked what the proposition really was, and he said that I could have a lease for a long period of time of it, and that with the Perlmutter name and the reputation of his shop, selling high grade goods, that my merchandise would go good in conjunction with his.

Q. How many times did you see him after that up until the 25 of April 1923? A. I would figure half a dozen times.

Q. Did you call on him, or did he call on you? A. He called on me.

Q. At your home? A. Yes, sir.

Q. Prior to that time, had you ever been to the shop to see him? A. Right before I went in and took it, I went to see it.

Q. To see what you were taking? A. Yes, after he had made the proposition.

Q. I show you a paper and ask you if that is your signature? (Handing witness) A. Yes, that is mine.

Q. Whose signature appears above? A. Young Mr. Kiernan, James W. Kiernan.

Q. What does this represent?

Mr. Barison: I object to that.

Q. This is the lease that was entered into on the 25th of April 1923? A. Yes, sir.

Mr. Sewell: I offer it in evidence.

Accepted and Marked as Plaintiff's Exhibit P-1 of this date.

Q. Who was present there that day representing Perlmutters Incorporation, besides Mr. Perlmutter? A. Mr. James W. Kiernan.

Q. That is the son? A. Yes; having power of attorney for his father.

Mr. Higgins: I object to that, and move to strike it out.

The Court: Sustained.

Q. What conversation did you have with Perlmutter and with young Mr. Kiernan just prior to the signing of this lease?

Mr. Barison: I object to that as immaterial. The lease speaks for itself. Any conversation had prior to the signing of the lease has no bearing.

The Court: This is a case of fraud, objection overruled.

Q. Go ahead? A. Why, Mr. Kiernan, Mr. James W. Kiernan, with myself, read the lease together. He had one copy and I had the other, and in parts we conferred with the advice of counsel, on different parts of the lease, and after I had finished reading, my lawyer asked him if that was O. K. to him, and he said "All right to me". Then I asked Mr. James Kiernan, if the place was financially all right and if it was safe for me to go in. He said "Absolutely; the corporation has a fourteen or twelve years lease",—something to that effect, for a long period of years, "We have absolutely the best confidence in Mr. Perlmutter and anything he says goes".

Q. Just repeat to us again what he said about

the long term lease of the corporation? A. He said, "It is absolutely financially all right for you to go in.". I said, "You can understand my feelings about this matter. I want to feel I am safe". He said "Perfectly", he said, "As we have, the Corporation has, a 14 or 12 year lease"—I don't know which it was, but it was for a long period of years,—"to go on our lease, and you are perfectly all right in going upstairs", and even added that his father, knowing me for many years, that he would be ever so pleased to have me there, and that "we have absolute confidence and implicit faith in what Mr. Perlmutter said."

Q. You knew Mr. Kiernan for a long while? A. Yes, sir.

Q. Did you rely on the statements of Mr. Kiernan? A. Absolutely.

Q. Did you know anything to the contrary? A. Nothing.

Q. You took as true what they gave you? A. Absolutely.

The Court: As I understand, Mr. Perlmutter had nothing to do with that?

The Witness: He just stood by; he just witnessed it.

Q. Did you ever have any conversation with Perlmutter prior to that date, regarding the lease? A. Not so much about the lease, but on the conditions of being upstairs and he spoke about the period of the lease, that is, none of the lease conditions.

Q. What did he say? A. He said the lease had been sent over there, he was reading it over and he said that Mr. Kiernan, Mr. James W. Kiernan, is to take care of it.

Q. That was junior? A. Yes, sir.

Q. Did Perimutter ever say anything about a fourteen year lease? A. Yes, many times he said the corporation has a fourteen years lease, and "Mr. Kiernan and I are partners".

Q. Now, did young Kiernan say anything to you the day that he was signing this lease about any partnership arrangements? A. The conversation would lead me to believe that they were.

Q. You cannot testify to what you were led to believe. You can only testify to what was said. A. He said the corporation has it.

Q. On the 25th of April, what did you do? A. I started to prepare the shop, fixing it up; it took me about three weeks, buying merchandise, fixtures, furniture and draperies etcetera.

Q. You testified to certain facts in Judge Higgins office about three weeks ago? A. Yes, sir.

Q. You testified about a certain amount of money you spent? A. About $600. Oh, in the whole thing?

Q. Yes? A. About $2500.

Q. What is the correct amount that you spent there, that is putting up your fixtures and your draperies? A. And furniture?

Q. Things incidental to that? A. About six to $700. for them.

Q. How much did you spend for stock? A. $1000. Between $1000. and $1100.

Q. That would be somewheres around $1700. altogether? A. Yes.

Mr. Higgins: $1,600. or $1,700.

Q. How long were you in the store uninterrupted? A. Six weeks to the day.

Q. In the meantime Mr. Kiernan senior came home? A. Mr. Kiernan came home about two days after I opened the shop on May 9th.

The Court: Which one is that?
Mr. Sewell: Mr. Kiernan senior.

Q. About May 9th? A. About May 11th or 12th.

Q. Did you see Mr. Kiernan? A. Mr. Kiernan visited me.

Q. How frequently did he come into the store? A. I saw Mr. Kiernan while I was there every Saturday night, and two or three, maybe four mornings a week.

Q. He kept in touch with the business? A. All the time.

Q. Did he ever have any discussion with you about your occupancy, or about the lease, or anything about the concern? A. He visited me in the shop about two or three days after I opened, around May 12th or 13th.

Q. What conversation did you have with him? A. He said he was glad to see me there, rather surprised I should be, that it should be me, but he was glad it was. He thought I could make money there, because he liked the way I had it fixed; told me to be cautious about employing help, and gave me advice, as I thought good business advice.

Q. Did you discuss the lease at all with him? A. No; I asked him if he was surprised about me being there. He said, "Yes, but satisfied".

Q. He said he was satisfied? A. Yes, sir.

Q. Did you have any further conversation with Mr. Kiernan, up until when you were put out

of the place? A. Two or three times downstairs. Just asked me if I was moving downstairs, if business was going good; just discussed business matters casually.

Q. Well, in six weeks, what happened? A. Around June 17th or 16th, Mr. Perlmutter came upstairs to me and told me that he didn't want me to get nervous or upset, but something was going to happen. He said Mr. Kiernan has come home and he just doesn't like the responsibility of the business any longer, and he is going to pull out. I said "What is going to happen; are you going to run it alone?" He said, "I think so". He said, "In a few days, we are going to liquidate. He is going to slip out and I am going to continue, but don't you get excited, because you are perfectly all right." I didn't get the understanding or idea of bankruptcy. I didn't know what it was all about. I didn't really think of anything like that going to happen.

Q. He didn't mention bankruptcy? A. He said "liquidation"; never bankruptcy.

Q. Did he speak about the lease at that time? A. Mr. Perlmutter?

Q. Yes? A. No, he didn't discuss it; he simply said I was all right.

Q. You were safe? A. Perlmutter said.

Q. What happened after the conversation with him? A. That Tuesday. That was Monday, I think that was June 16th or 17th. The very next day, I got kind of nervous about the thing and I called Mr. Kiernan up at his factory in the morning.

The Court: Which Mr. Kiernan?

The Witness: Mr. James, senior. He

answered and I told him I heard something was coming up and I was very nervous about it, I could not understand it, "will you explain to me how I fit in". He said, "Don't be excited. I will be up to the store, a meeting at 10:30," which he did.

Q. What did he say? A. He went downstairs. "I have no time to see you now".

Q. Who said that? A. Mr. Kiernan. Then Mr. Perlmutter sent me up a note about 15 minutes later, "Mr. Kiernan will see you now, I think". I came downstairs and Mr. Kiernan told me that I had no reason to become excited, that it was perfectly all right. He said, "Why all the excitement?". I said, "I am nervous. You realize the amount of money I spent on this proposition. I have only been here six weeks". I said, "Don't tell me that I am going to have Receiver's signs all over the windows". He said, "Nothing like that is going to happen". He said, "I have accummulated money. I enjoy it. I take trips a couple of times a year, and of course my vocation isn't here when I am home. I have my own details to take care of in my own business, so I am going to slip out of here and Joe Perlmutter is going to take it over for himself".

Q. Who said this? A. Mr. Kiernan. And, "You have no reason to worry. This won't affect your lease in any way, because you will be all right". He said, "You may be closed for a day or half a day probably".

Q. Then what happened after that? A. This was on Wednesday morning, the day that the place went into bankruptcy, or whatever happened in the afternoon. That was about 10:30 or 11

o'clock in the morning. Ten minutes to six in the evening, when I was going out, about six o'clock, Mr. Weitz was downstairs, standing at the desk. He said, "Probably you could help me out"? "I won't take only a minute". Mr. Perlmutter was gone now, or there was one of the salesladies, the head one. I said, "What is the matter; what is the trouble?"

Mr. Higgins: I object to that.
Mr. Sewell: You can't testify to that.

Q. How long did you remain in the premises after that? A. I didn't remain in. I went home that night and didn't come back for seven weeks.

Q. Why didn't you go back? A. It was closed.

Q. Could you get back? A. I went in a couple of times and the Receiver was still there.

Q. Could you go in there and do business? A. No.

Q. During the seven weeks you just referred to, did you have any talk with Mr. Kiernan senior? A. Yes; Mr. Kiernan called at my house various times about getting a Court order to open up the shop for my other business.

Q. What conversation did you have with Mr. Kiernan during the seven weeks? A. Called me invariably about getting a Court order, and the Court order was withdrawn. I thought I would get in there at any time I wanted. In fact, he made an appointment with, but I think he went to the shore. I had to go in for Mr. Weitz for some orders.

Q. Who went to the shore? A. Mr. Kiernan went to his summer home.

Q. How many times did you talk to Mr. Kiernan during that seven weeks? A. Why, I would say eight or ten times, that is telephone conversations. I didn't visit Mr. Kiernan, but he called me.

Q. What were the general nature of his talks?

Mr. Higgins: I object.
The Court: Not the general nature.

Q. Take the last telephone call? A. He was always apologizing for not taking my business, that he had not lived up to his agreement, that I was—

Mr. Higgins: I object and move to strike the answer out.
The Court: Strike it out.
The Witness: He was negotiating with one of the ladies to go downstairs and open up. In fact he said, "I should get dressed; she would be at my home directly. And where I should meet Mr. Kiernan."

Q. Did he keep the appointment? A. I got a telephone call it was off.

Q. Who called you up to tell you? A. That lady, Mrs. Press, who had been formerly and they had her the last to go, I believe.

Q. What other conversation did you have with Mr. Kiernan about opening up the store, about your lease or anything incidental to the business? A. That Joe Perlmutter was having some trouble over stock. They had to wait for the Courts, he said, I think, that is the delay in

opening up, he said, "in opening you up, but you will be perfectly all right".

Q. Then, when did you finally go back in? A. August 14th, I went there.

Q. 1923? A. Yes, sir.

Q. Who was there then? A. Mr. Perlmutter and Miss Turley, and a couple of new girls downstairs.

Q. While you were in the store during the six weeks, Miss Overend, did you live up to your arrangements as far as paying the ten per cent as rent? A. I paid $4.50 first.

Q. Your cash went where? A. He handled that. He deducted his ten per cent before I got my weekly check. I have statements.

Q. You have the statements? A. In my files there.

Q. Where are these statements? A. Also a day book.

Mr. Sewell: Unless counsel will agree.

Mr. Barison: I am not in a position to agree to anything.

The Witness: Here you are; here are some of them.

Q. Explain to us what that is? A. That is a weekly statement. This is a statement for the first three days. I opened on May 9th, to May 12th. $200.—

Mr. Higgins: Just a minute. Before you tell us that; what is it?

The Witness: A statement.

Mr. Higgins: Who made it out?

The Witness: Mr. Perlmutter's bookkeeper.

Mr. Sewell: That is Perlmutters, Inc.

The Court: There isn't any question that she got her money.

Mr. Sewell: No.

Q. I show you a check dated April 28th. 1923, and ask you what is that check? A. That is for $450. made out on April 28th, that I was supposed to give the Corporation for the rights of the place, before I went into it.

Q. Who was that check made payable to? A. Mr. Perlmutter made it out to himself. I was to pay it to the Corporation.

Q. Is that Mr. Perlmutter's writing on the check? A. Yes, sir.

Mr. Sewell: I offer the check in evidence.

Accepted and marked as Plaintiff's Exhibit P-2 of this date.

Q. Was that check for $450. subsequently paid through the Bank? A. Yes, sir.

Q. And cleared through the Bank? A. Yes, sir.

Q. I show you a check dated June 19th, 1923? A. That was in payment of a dress, $53, on the day that the store was closed. Mr. Perlmutter said, "I have a c.o.d. for you for $53." He said, "bring the check back with you and make it out to me because I handle the money for the Corporation".

Q. Was that check cleared and paid? A. Yes, sir.

Mr. Sewell: I offer that in evidence.

Accepted and marked as Plaintiff's Exhibit P-3 of this date.

Q. What was your money loss in stock, Miss Overend?

Mr. Barison: I object to that; I don't think that is the proper way to prove it.

Q. What was your money loss in stock, the value of the stock when you were evicted from the premises at the end of the six weeks?

Mr. Barison: I object to that too.

The Court: What is the purpose of that. What her stock was worth?

Mr. Sewell: Yes, what was it worth.

Mr. Barison: I object. If she has books, they ought to be produced.

The Witness: I have.

Q. What have you got there?

Mr. Barison: You are speaking of the time in 1924?

Mr. Sewell: I am speaking of the so-called bankruptcy.

Mr. Barison: But didn't you say when she was evicted; when she was closed?

The Witness: When I started I had about $1,100. worth of merchandise. That is at the opening. Of course I did business for six weeks. I kept putting more money in. I took in $900. in six weeks.

Q. $900. during that six weeks? A. Yes, sir.

Q. Can you tell us how much stock you had

bought in addition to the $1,100. during that six weeks? A. Yes, I did.

Q. How much more stock did you buy? A. I think easily $300. worth more.

Q. What profit were you making on what you sold when you say you took in $900. That doesn't mean that you paid out $900. worth of stock-cost to you? What did that stock cost you? A. You mean what the new stock of the additional stock?

Q. The stock that you disposed of? A. $1100.

Q. Now, the stock that you disposed of that you got $900, for?

The Court: He wants to know the profit on the $900?

The Witness: I figured in the first six weeks about $75. week profit, as accurately as I could figure.

Q. Then, when you went back in the Corporation?

The Court: The first six weeks.

Q. When you went back at the end of the seven weeks that the store was closed, was the stock there? A. What was left of it.

Q. Had any disappeared? A. No.

Q. Then you started business again? A. Yes sir.

Q. How long did you stay in the second time? A. From August 14th until February 4th 1924.

Q. When you went back in that business the second time, did you have any conversation with Mr. Kiernan before you went back in? A. I

had a conversation in August with Mr. Kiernan.

Q. Tell us what that conversation was? A. He told me that Mr. Perlmutter was taking the shop over and was going to run it. I was going to be open in a few days. I think that was the 7th or 8th of August.

Q. Did he give you any advice as to what you were to do? A. He said he thought I would be all right.

Q. To go in? A. Yes, that I could continue on as before.

Q. During the months that you were in there, August to February, what happened? A. I went in and Mr. Perlmutter created a gigantic sale, to sell out the stock he had bought in. He advised that if I had some merchandise upstairs, as it had been lying there seven weeks and the season was about over, and I was compelled to sell hats that had cost me from $12.50 to $20. for $10., at a sacrifice, which I did, to convert them into money, that I could do very well. I continued to replenish from week to week. I kept all my statements, just the same, with the usual ten percent deducted and I continued.

Q. You mean that the ten percent went now to Perlmutter Shop? A. That is the sales slips and every other way Perlmutter's Inc. as they were before.

Q. Have you kept some of these sales slips? A. Yes, these are all on the new, on the same stationery.

Q. And these all took place after you went back the second time? A. Yes, sir.

Mr. Sewell: Any objection to offering these slips in bulk.

Mr. Higgins: She has already testified it was a new arrangement.

Accepted and marked bundle of slips as one Exhibit, P-4 of this date.

Q. What happened after you got in, and continued to have these slips with Perlmutter Inc. on? A. Things didn't go on as they had. That is, I didn't do the business as good as I had. I didn't have as much dealings with Mr. Perlmutter. We corroborated on sales and advertising. I paid my advertising, as I had before.

Q. What happened around Thanksgiving? A. Why, after Thanksgiving, he made things rather unpleasant for me, by taking my stock out of the window and leaving only a couple of hats. I had six or eight or ten hats in the window and he reduced it, and when I asked him why he said he didn't care to have the window full up with hats, that was all he was going to allow, and I ignored it.

Q. Then what happened? A. He continued, made it unpleasant for me on other things which were in my lease. It said my things should be delivered there. He said I would have to take them myself, which I did.

Q. What happened then, did you get out? A. Mr. Perlmutter sent me a notice on December 23rd or 24th, right before Christmas, telling me that he wanted the premises, to vacate within eight days.

Q. Then what happened? A. And I consulted a lawyer on it.

Q. Did you get out? A. No; he advised me not to.

Q. Continue with the story right along? A. I continued on. Then Mr. Perlmutter took all the hats out of the window, gave me no show place at all. I continued with the business but with different customers. I had very little business for the six weeks prior to my eviction.

Q. Then what happened finally, when you were evicted? A. Why, Mr. Perlmutter did not come upstairs. I went home on Saturday and I had taken an inventory of my things and when I went back on Monday morning and got upstairs, I found my place literally torn apart.

The Court: When was that?

The Witness: On February 3rd 1924. It was the first morning; everything was out of the department. Silk linings that were draped in the show cases and draperies and shower draped and different fixtures, draperies and hangings, were all lying around. Merchandise had been taken out of the drawers and apparently was in the boxes, I suppose they were, in the back of the shop, and the furniture was all thrown back there.

Q. Did you sjeack to Mr. Perlmutter about it? A.I went out and called my lawyer first, and he told be to go right to the office.

Q. Did you speak to Mr. Perlmutter about it afterwards? A. No, I didn't go to Perlmutter at all. He ignored me. I went back next day upon the advice of counsel. I put my things with someone back in my department and when I had completed it, Mr. Perlmutter came up the rear way of the shop and took me by the

shoulder; told me to get out, or he was going to throw me out, that I had no right in there at all.

The Court: When was this?

The Witness: On February 4th.

Q. 1924? A. Yes, sir. And he took all of the furniture and fixtures that I had replaced and carried them back into the department, threw it back where he had it when I arrived that morning. I accused him of having done that. He said he didn't do it. I said "You did that over Sunday."

Q. What was the value of your stock? A. $1200.

Q. What was the value of your fixtures? A. My fixtures, around $1000, probably, or $950. and the furniture about $250.

The Court: What stock?

The Witness: Altogether $1200. Fixtures, stock and all, that is at the cost price, not selling.

Q. Did you ever go back and open up the store after that? A. I went back a few times and received the same treatment, to get out on five minutes notice, and I was afraid to stay there.

Q. Did you ever open your store there again? A. Never.

Q. Why not? A. Because I could not get in.

Q. What had been your average weekly profit from your business during the first seven weeks, or six weeks that you had been in under the original plan? A. That is profits?

Q. Yes? A. About $75.

Q. What were your profits, the average profits, after you went back the second time? A. Around $60. up until the six weeks prior to the eviction.

Q. Up until the six weeks before the eviction? A. Yes, sir.

Q. Have you been employed since? A. Never.

Q. Since February 1924? A. I haven't earned a dollar.

Q. Why not?

Mr. Barison: If your Honor please, I object.

The Court: She may state what her circumstances were.

Q. What were your circumstances after you were put out of this business? A. I was physically unfit.

Q. What about financially? A. Why, I didn't have anything. I had no money at all.

Q. Have you had the money since then to go back into business? A. No, I have not.

Mr. Higgins: I object to that as immaterial.

The Court: Yes. The question is, was she damaged by this fraud.

Mr. Sewell: Mr. Ruskin has been good enough to offer his lease in evidence.

Accepted and marked as Plaintiff's Exhibit P-5 of this date.

(Witness temporarily excused)

SAMUEL RUSKIN sworn:

Direct Examination By Mr. Sewell:

Q. You are the Samuel Ruskin mentioned in this lease? A. I am.

Q. There is a James K. Kiernan mentioned in this lease, does that indicate one of the defendants, James M. Kiernan; that is Mr. Kiernan senior, is that, the man that is named in this lease? A. Yes, it is.

Mr. Higgins: We have admitted that.

Q. You were, on June 7th 1918 the owner of these premises known as 116 Monticello Avenue? A. Yes, sir.

Q. Is this lease still in operation today? A. It is.

Q. That is, has Mr. Kiernan still got possession of these premises today, under this lease? A. He has.

The Court: What is the date on it?

Mr. Sewell. June 7th, 1918.

The Court: How long a term?

The Witness. Ten years.

Q. The rental is $1800. a year? A. Right.

Cross Examination By Mr. Higgins:

Q. You remember when Perlmutter Inc. went into bankruptcy? A. I do, yes sir.

Q. You remember that the claim was made that Mr. Kiernan had got this lease for the benefit of Perlmutter Inc. although it was made in his own name; you remember that at the hearing?

Mr. Sewell: Just a moment; who made the claim? That is not binding upon this plaintiff.

The Court: It would not be under the circumstances as far as you have gone.

Q. I ask you if you remember any claim made by the Receiver in the bankruptcy proceedings that this lease, although made out to Kiernan, was really made out for the benefit of Perlmutters Inc.?

The Court: It would make no difference whether he would make the claim or not.

Q. Do you recall there was a claim made at the time. A. Not by the Receiver.

Q. By somebody? A. By an attorney, but they could not prove it. An attorney by the name of Millberg. He tried to show it, but he could not show it.

Q. I only knew there was such a claim? A. You asked if the Receiver made that claim and I said no, an attorney did.

Q. There was a claim made? A. By Mr. Millberg.

Q. And these goods in the place were put up for sale by the Receiver? A. I don't know anything about that.

Q. Including the lease? A. Not including the lease.

Q. Did you not bid on it? A. No, I didn't.

Q. Didn't you bid on the goods? A. No, sir.

Q. Didn't you bid on the fixtures? A. No, sir.

Q. You didn't bid on the lease either? A. No, the lease was not put up for sale.

Q. Did you make a bid? A. The lease was not put up for any bids at all.

Q. Did you make any bids there at all for anything? A. For nothing.

Q. You never made a bid? A. I wasn't present at the sale.

Q. Was anybody there representing you? A. Nobody had any interest in it.

Q. You were the owner of the building? A. Yes, sir.

Q. You won't say now, under oath, that you were not bidding on the lease? A. I do, I say under oath that I did not. Mr. Kiernan is on this lease and Mr. Kiernan was responsible for it; therefore it didn't make any difference to me how many times Perlmutters went into bankruptcy.

Q. You were there the day some claim was made by some lawyer? A. In the Court?

Q. You were there? A. I was subpoenaed by Mr. Millberg.

Q. Before the Bankruptcy Court? A. Right.

Q. Was that the only time you were before the Bankruptcy Court? A. That is the only time.

Re-direct Examination by Mr. Sewell:

Q. At that time the lease was not put up for sale? A. No sir; nothing was put up for sale.

Re-cross Examination by Mr. Higgins:

Q. You don't know anything about the sale part of it? A. No, I don't know anything about the sale.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

ADELINE M. OVEREND recalled:

Cross Examination by Mr. Barison:

Q. When was the lease first entered into between you and Perlmutter Incorporated? A. April 25th 1923.

Q. April 1923? A. Yes, sir.

Q. Pursuant to that lease, you entered into possession, didn't you? A. Yes, sir.

Q. And how long after was it that Perlmutter Incorporated had some difficulties? A. Six weeks.

Q. Six weeks after you went in there? A. Yes, sir.

Q. And they went through bankruptcy, didn't they? A. Yes, sir.

Q. How long were you out? A. Seven weeks.

Q. You were out seven weeks? A. Yes sir.

Q. And then, who did you talk to concerning going into the place again? A. Mr. Perlmutter and I had the arangement with Mr. Kiernan the day the place closed that I was to; it was to be taken over and I was to continue, not knowing that I would have to be closed seven weeks though.

Q. Who did you have that arangement with? A. Mr. Kiernan.

The Court: Senior?

The Witness: Mr. Kiernan, senior, the morning of the day that the shop closed.

Q. Was that the day that Mr. Kiernan told you he was going to get out? A. Yes, sir.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. And although he told you that he was going to get out, you knew he was going to get out, you continued to make arrangements with him about the future; is that right? A. Yes; he arranged it. He made arrangements with me.

Q. You knew he was getting out? A. Yes, sir.

Q. He told you he was getting out? A. Yes, sir.

Q. You knew he would not have anything further to do with that business? A. The business, something to do—

Q. Still you made arrangements with him for the future; is that right? A. He and Mr. Perlmutter both.

Q. We are talking about Mr. Kiernan now. You didn't mention Mr. Perlmutter. What talk did you have with Mr. Perlmutter after the bankruptcy? A. Many talks with him after the bankruptcy.

Q. About getting back into the store? A. Right from the beginning, from the night that it closed, I had telephone conversations. He wasn't there when it closed. He called me on the phone later.

Q. Who did? A. Mr. Perlmutter; and told me that he had made arrangements with Mr. Higgins to get me back into the shop. I asked how he did that, that he was out of town when it closed, and he said he got Mr. Higgins at his home.

Q. You were out seven weeks? A. Seven weeks, yes, sir.

Q. You knew at the time when Perlmutter

Inc., went into bankruptcy; you knew that you had no further rights in the lease, didn't you? A. No, I didn't.

Q. Didn't you know that your rights terminated when anybody else took it over? A. No, I didn't really look at it from that view.

Q. You knew that even the name was lost, and they had to start business under a new name; you knew that? A. I didn't know that only we were going on month after month. I think they changed the name on the window. I never saw the record of the change. I heard about it.

Q. Did you know that any changes at all were going to take place? A. Yes; Mr. Perlmutter told me he was going to run it alone.

Q. How did you pay rent after you went back? A. Just the same as I had started.

Q. Nothing was said about making a new lease? A. No changes, none whatsoever. That was the arrangement the day it was closed up; by Mr. Kiernan that I was to continue under the same terms and conditions.

Q. In other words, the arrangements you had for the new party were made with Mr. Kiernan you were to stay there, you were to reopen under the same conditions? A. Under the same terms and conditions.

Q. You made that arrangement with Mr. Kiernan? A. And Mr. Perlmutter too, in the office; both agreed upon it.

Q. How much were you making a week? A. You mean profit?

Q. Yes, the first six weeks? A. About $75. profit.

Q. How much was the average profit on the hats that you sold? A. Well, it differs; sometimes 50, sometimes hats 100; some 33 1/3; some not any.

Q. What would your sale have to be on an average for you to earn $75. a week? A. Well, about $150. to $175. a week. If I took that in in the week.

Q. Including the ten per cent to Mr. Perlmutter? A. Yes, sir.

Q. This check that you showed us, fifty some dollars; what was that for? A. That was for a dress that my mother had purchased from Mr. Perlmutter.

Q. You want to say that you purchased it? A. I handed the check to Mr. Perlmutter on the day the store was closed, still thinking he controlled the money. That should have been paid to the Corporation.

Mr. Barison: I move that that be stricken out.

The Court: Yes; strike it out.

Q. Do you know what that check was for? A. This one was for the rights of the place.

Q. When was that check given to Mr. Perlmutter? A. On April 28th.

Q. At the signing of the lease? A. No, a few days after.

Q. For what rights did you give that check? A. I asked him what rights.

Q. I am asking you what rights? A. I don't know.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. You are over twenty-one? A. I hope so.

Q. You have been in business how long? A. In business? That was my first venture.

Q. The first time? A. Yes, sir.

Q. Had you been working prior to that? A. Yes, sir.

Q. A few days after Mr. Perlmutter asked you for $450. for his right? A. Mr. Perlmutter had asked that in the store, at the start of the proposition. He said the Corporation demanded it for the rights. I asked him what rights, and he said the reputation and having 4000 customers to trade with.

Q. Isn't it a fact that the check was given by you to Mr. Perlmutter to pay him for circularizing, he claiming all these people, that he had some 4000 customers? A. Indeed not.

Q. Were they circularized about your opening? A. He gave me a mailing list, yes; I assisted in the addressing of them.

Q. Did he pay for any of the postage? A. No, indeed; I have the bills.

Q. What is that? A. No, I have my bills for all my announcements and everything.

Q. Now, about the time that you say you were put out, when was that? A. February 3rd, 1924.

Q. He told you to get out when? A. In December.

Q. Told you to get out? A. Last December gave me eight days notice, written on a small piece of paper.

Q. He told you to get out in eight days? A. Yes, sir.

Q. Finally he put you out, when? A. February 3rd.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. You didn't know anything about business when you entered this proposition, did you? A. I didn't know anything about business?

Q. Yes. A. Well, I think I did.

Q. Well, I asked you that a moment ago; did you or didn't you? A. I did.

Q. When you gave this $450. it wasn't money on the lease; it wasn't mentioned in the lease? A. I called up people before I gave the $450. and asked if they ever heard of it before and they said, yes, they had in certain departments, when you were running a department. Friends of mine who were in the millinery line, they said they had heard of it.

Q. And when the first lease was made, the lease mentioned in these papers, you say both Mr. Kiernan and Mr. Perlmutter told you that the Corporation had a long term lease? A. Yes, sir.

Q. Are you sure they said the Corporation had a long term lease? A. Yes, sir.

Q. When did you first find out you were dealing with a corporation? A. When I first found out? Why, from the start Mr. Perlmutter spoke of the corporation.

The Court: Counsel just asked you about Mr. Kiernan; which Mr. Kiernan, junior?

The Witness: Mr. Kiernan junior, yes sir.

Q. Every time they spoke to you they made that very clear to you, didn't they, that the Corporation had the lease? A. Absolutely.

Q. And not them individually? A. Yes, sir the Corporation had the lease.

Q. They always made sure you knew that thing? A. Yes, sir.

Q. So that Mr. Perlmutter never spoke to you without saying that the Corporation did give you the lease? A. Yes, sir.

Q. Mr. Kiernan, junior, never spoke to you except when he said the Corporation will give you the lease? A. Yes, and the length of time, a long term period.

Q. He always made it very clear that it was the Corporation giving you the lease? A. Yes, sir, always.

Q. He always made it clear that the Corporation had a lease from the owner of the building? A. Yes, absolutely.

Q. You are sure about that? A. Yes, sure of that.

The Court: I would like to ask you; you say just before you went back in August 1923, you had a talk with Mr. Kiernan senior about going back?

The Witness: Yes, sir.

The Court: Was Mr. Perlmutter there at the time?

The Witness: No, it was a telephone conversation.

The Court: With Mr. Kiernan?

The Witness: Mr. Kiernan called me up I think from his office. I think he was at the office at the time.

The Court: Won't you just tell us what he said?

The Witness: He said the store was going to be opened in a short time, that he was trying then, I think, to locate Mr. Perlmutter; that he had been out of town for a few days. He said, "I have an appointment made at the Elks Club for lunch, and I will know the correct time when the store is to be opened, in a few days, a week, or three or four days". Something to that effect. "You will be all right. everything is going on just the same". And in reference to my getting a hat or something out of the shop, that I had to see the Receiver about it.

The Court: At that time, or prior thereto, had he told you that Mr. Perlmutter was going to continue alone?

The Witness: Yes, sir.

The Court: And that he was out of it?

The Witness: Yes; he said he had not the time to give to it, and that Joe Perlmutter was going to run it alone.

Q. Now, Miss Overend, that was February 1925? A. Twenty four.

Q. Up until the time that you went into Perlmutter, Inc. you had always been in business, is that right? A. Yes, always.

Q. You never had any difficulty prior to April 1923— A. No.

Q. (Continuing) In getting a position or doing something for a livelihood? A. Never.

Q. It was only after you left Perlmutter Shops that it was impossible for you to get anything to do? A. Yes, sir.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

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

Q. Miss Overend, you want to tell this Court and Jury— A. The truth.

Q. Just wait until I finish my question. Up until April 1923, you never had any difficulty whatever in making a livelihood?

Mr. Sewell: I object to what she wants to tell the Court and Jury.

Mr. Barison: I withdraw the question in that form.

Q. Prior to April 1923, you never had any trouble in getting a position? A. Didn't seem to.

Q. You never had any difficulty about making a livelihood in the hat business, in the millinery trade? A. No.

Q. Since February 1924, you haven't been able to earn even a penny? A. I haven't up until two months ago and since that time I have, since the first of April of this year.

Q. You haven't earned a penny until when? A. The first of April this year.

Q. Do you remember, on the stand, in answer to a question by Mr. Sewell, not half an hour ago, you said that you hadn't earned a penny until this moment? A. I beg pardon. I have since the first of April. I believe I gave them in my examination before trial, in Mr. Higgins' office, that I had been earning money since the first of April.

Q. But do you remember this morning, in answer to Mr. Sewell's question, saying that you have not made a penny; do you remember saying that? A. Yes, I do.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. Will you tell the Court and Jury why you forgot until a few minutes ago to mention that you had earned money in April of this year? A. Why, I don't know why I shouldn't say it; only that I have. I have been doing business from home since the first of April. I gave a full account of all that in Mr. Higgins' office.

Q. You were rather positive in your statement to Mr. Sewell? A. I thought that was understood. I thought that was on the record.

Q. From February 1924 until April 1926, a period of over two years and one month? A. Two months.

Q. You haven't earned a penny? No.

Q. You haven't earned anything? A. No.

Q. How hard did you try? A. I was trying hard, but I was incapacitated. I lost my voice for nine months.

Q. How did that happen? A. From my nerves, shocks, according to the doctors.

Q. You lost your voice from your nerves? A. I could not speak.

Q. Then, if you had not lost your voice from your nerves, you would have been able to go in some business and done just as well? A. Absolutely.

Q. And that is the reason why you have not earned any money for the last two years, because you lost your voice? A. My health, my whole condition.

Q. And that is the reason why you haven't earned any money? A. Yes, sir, absolutely.

The Court: And has the condition prevailed ever since the time, in February 1924?

The Witness: March 4th, that was my first examination by a doctor, and I could not speak above a whisper, and I believe in the police Court, you will remember I had some trouble, a recurrence of it.

The Court: Of course, there can be no recovery for that.

Q. Weren't you sick at the time that this new arrangement between you and Perlmutter Shops broke up, when you had this argument; weren't you sick at that time, getting down to business late, wasn't that the cause of the argument? A. Not at all. I could not use the telephone downstairs. I had to use the one home. I used my own telephone at home.

Q. You were not feeling well, Miss Overend, for a few months, were you? A. Yes, I was nervous, high strung.

Q. Isn't it a fact, that the second time you were there, after Perlmutter Shop had reopened, isn't it a fact that all the trouble was the result of your coming in very late and sometimes not at all and Mr. Perlmutter asking you— A. Indeed not.

Q. In reference to the fact that the department was going to smash? A. Indeed not; absolutely not.

Cross Examination by Mr. Higgins:

Q. Miss Overend, you don't say that either of the Kiernans had anything to do with having you put out at the end, do you? A. No, but they knew about it.

Q. They had nothing to do with it? A. No, they didn't take part, as far as I know.

The Court: You are referring to the second time?

Mr. Higgins: When she was put out actually.

Q. That was Perlmutter did that? A. Absolutely.

Q. You knew that the place reopened after the bankruptcy, and that neither Kiernan had anything to do with the place after that? A. Why, I thought that they were connected.

Q. You knew they had nothing to do with the business? A. (No answer)

Q. This check that you gave—

The Court: Is that right; you did not answer.

(Question read as follows: You knew they had nothing to do with the business?)

The Witness: Yes, sir.

Q. This check that you gave to Mr. Perlmutter was dated April 28th, wasn't it, and that is three or four days after you signed the lease? A. Three days.

Q. You knew that the lease was with Perlmutter Inc. didn't you? A. Yes, sir.

Q. You knew then, or thought that Mr. Kiernan had some interest in Perlmutter, Inc.? A. Yes, surely.

Q. You drew a lease with the Corporation, for which you were to pay only ten percent? A. Of my gross sales.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. And it had in it nothing at all about this $450. did it? A. No.

Q. And then you are suing now Mr. Perlmutter personally for this, aren't you? A. Yes, sir.

Q. Claiming that he defrauded you out of this amount of money? A. Yes, sir.

Q. You don't claim anything of this from the Kiernans? A. Only that I thought it was going into the Corporation.

Q. You thought so; you found out afterwards it didn't? A. When I got my Bank statement.

The Court: There is no proof of that yet, that the Corporation did not get this money.

Mr. Higgins: Well, in their complaint they are suing on a separate account against Perlmutter.

The Court: They will have to prove it more than they have done.

Q. Can you give us any reason, Miss Overend why, if you made the lease with the Corporation, in which you knew that Mr. Kiernan had an interest, and, by the way, you knew Mrs. Perlmutter had an interest in it, didn't you? A. Mrs. Kiernan?

Q. Mrs. Perlmutter? A. I think I heard something about it.

Q. If you knew that, can you tell us why you gave Mr. Perlmutter personally $450? A. Yes; I can explain.

Q. For executing a lease with the Corporation? A. He made the check out and I signed it. I

Adeline M. Overend—For Plaintiff—Recalled—Cross.

didn't question it. I thought I was dealing with two honest men.

Q. You were dealing with one man about that? A. He told me; I can explain that.

Q. Just a minute; didn't he first ask you to make this check out to cash? A. Yes, sir.

Q. You have given testimony— A. Yes, I think the check he sent was simply made out to cash, that Mr. Perlmutter sent to me, to make out to cash.

Q. That is what he sent you? A. He sent that.

Q. After you made the lease? A. The messenger boy, Sidney, I can't remember his other name. He sent that by him to my home and he called me up about it, that was to make it out to cash.

Q. You knew that you had taken the lease with the corporation at that time? A. Yes, sir.

Q. You made some objection to him making it out to cash? A. Yes; I said I didn't care to do business that way.

Q. And then he said to make it out to him personally, didn't he? A. No, he didn't; he didn't say anything.

Q. He did make it out? A. Yes, he did so.

Q. Did you question why it was made out to him personally? A. I brought the book down.

Q. Did you ask him why it was made out to him personally? A. Yes, I can answer that. "Why, didn't you try to be smart", he said. "Why did you ask so many questions. You would think this was a million dollar affair you were going into. I thought you were bright, asking questions like that. Don't you know I am boss. Mr. Kiernan relies on me. I make the

money", he said, "This is perfectly all right, it is going into the Corporation".

Q. Did he say anything more to you about it? A. I never heard another word of the $450.

Q. Didn't you gather from his conversation that he was getting a bonus for himself with the $450. for executing this lease? A. No, I didn't.

Q. What did you think he meant when he said these remarks that you just gave us, said "I am the boss. Don't be childish. Give me the money?" A. I thought he controlled the entire business, that Mr. Kiernan depended upon him.

Q. You have been in business long enough to know after the controversy and he still insisted, first that you give him a check payable to cash and then to his personal order, that it wasn't going into the corporation? A. No, I didn't, Mr. Higgins.

Q. You still thought it was? A. Yes, sir.

Q. You really want us to believe that? A. Absolutely.

Q. You found out however afterwards that it didn't go into the Corporation, didn't you? A. Yes, sir.

Q. You made a criminal complaint against Mr. Perlmutter, charging him— A. Obtaining money.

Q. Obtaining the $450. under false pretenses? A. Yes, sir.

Q. And he was arrested on that day? A. I questioned him after.

Q. He was arrested on your complaint for that? A. Yes, sir.

The Court: You questioned him afterwards?

The Witness: Yes, sir.

The Court: What did he say?

The Witness: I think after the shop closed. I said "What about that $450.". He said, "Why, that is perfectly all right". I said, "I paid for something, and I didn't get anything apparently". He said, "Well, you are all right. Didn't Mr. Kiernan tell you you were all right"

Q. This last check of June 19th, that was at the time of the bankruptcy? A. The day.

Q. The day of the bankruptcy? A. You, see, I still had confidence.

Q. You knew then that Perlmutter Inc. was the Corporation that owned the place? A. Yes, sir.

Q. And that it was in bankruptcy? A. Yes,— no, I guess I just heard that around in the morning, I didn't know the details.

Q. You wanted to get a dress out of there? A. No, that dress was bought the second week I was there. It was a c. o. d. He wanted me to pay for it.

Q. You didn't get it yet? A. Yes, it was a c. o. d.

Q. He asked you to pay for it? A. Yes, it was my mothers.

Q. You knew the dress belonged to Perlmutter Inc.? A. Yes, and I brought my bank book up with the intention of making the check.

Q. When Mr. Perlmutter said "Make it out to my order," you still had some confidence in him and made it out to him personally, didn't you? A. That is right.

Q. You knew at that time anything due to the Corporation should have gone to the Receiver, didn't you? A. No, I didn't.

Q. You didn't believe so? A. No, I didn't know that.

Q. You had all your dealings up to that time with the Corporation, hadn't you? A. Yes, sir.

Q. What suddenly made you think you could pay corporation debts to Mr. Perlmutter? A. I don't know.

Q. You don't know? A. Only that Miss Early (?) corroborated it.

Q. As a matter of fact, you had complete confidence in Mr. Perlmutter? A. Absolutely.

Q. You did anything that Mr. Perlmutter suggested in the way of payment, believing he was saying the right thing? A. Yes, and believing that I was dealing with both men as honest. I thought it was perfectly all right.

Q. I am talking about your dealings with Mr. Perlmutter? A. I had no doubt.

Q. When you made your complaint against Mr. Perlmutter for obtaining this $450. by false pretenses you gave Mr. Kiernan as one of your witnesses and had him subpoenaed? A. I beg pardon.

Q. He was subpoenaed? A. Mr. Messano, the Grand Jury subpoenaed him.

Q. That is the prosecutor? A. Yes, sir.

Q. He himself had gotten the name from some place? A. I think they figured it out, someone in the Grand Jury, or someone else wanted him; not me.

Q. When you signed this lease with Perlmutter Inc., up to that morning you had had no talk

with young Mr. Kiernan or the older Mr. Kiernan about that lease? A. Up until that morning?

Q. Up until that morning? A. No.

Q. You had however talked about it with Mr. Perlmutter? A. Yes, sir.

The Court: Speaking of what morning?

The Witness: Of the morning I signed the lease; I had a talk that morning with Mr. Kiernan.

The Court: Mr. Kiernan junior?

The Witness: Mr. Kiernan junior, yes, sir.

Q. Didn't I understand you to say that up to that morning, when he came there, you had had no talk with Mr. Kiernan junior about the lease? A. No.

Q. You had several talks with Mr. Perlmutter didn't you, about it? A. Yes, sir.

Q. You had arranged the details? A. Well, my lawyer did.

Q. You had a lawyer? A. Yes, sir.

Q. Mr. Brown, wasn't it? A. Yes, sir.

Q. You had arranged all these details before you got there that morning, before you said a thing to Mr. Kiernan junior? A. No, I hadn't signed the lease yet. I had really arranged—

Q. Up to that morning, you had not talked to any of the Kiernan's, or young Mr. Kiernan at all about it? A. No.

Q. Your lawyer drew the lease, Mr. Brown? A. Yes, sir.

Q. Then Mr. Perlmutter told you to go there

Adeline M. Overend—For Plaintiff—Recalled—Cross.

that morning and sign the lease, and he would have Mr. Kiernan there to sign? A. And Mr. Brown did too.

Q. You had your lawyer there too? A. Yes, sir.

Q. How long before that was it you first talked to Mr. Perlmutter about the lease? A. From March I think it was.

Q. From March? A. Yes, sir.

Q. Up to when? A. The last of March.

Q. About a month was it? A. About a month.

Q. You had frequent consultations at his place? A. Not at his place; at my home.

Q. Regarding that? A. Yes, sir.

Q. During all that period you had no conversation with any of the Kiernans about it? A. No, because Mr. Kiernan was away at the time.

Q. You knew that Mr. Perlmutter was the active manager of the store, didn't you? A. Yes, sir.

Q. You were in that place about seven weeks before the bankruptcy? A. Six to the day.

Q. And then you knew that Perlmutter Inc. was in bankruptcy; from various reasons you found that out? A. Yes, but Mr. Kiernan didn't tell me that.

Q. You put an advertisement in the paper that you were conducting a bankruptcy sale? A. No, I didn't, Mr. Perlmutter did.

Q. You assisted in making it up? A. No, I didn't, Mr. Higgins. I didn't even know it was going on until—

Q. You assisted, or arranged to use at least part, you consulted on it and agreed to it? A. Yes, prices, yes, sir.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. That is what I mean; you knew that was a bankruptcy sale that you were advertising? A. Yes; I didn't know it before.

Q. Before you didn't know; then you did? A. When I saw it, yes, sir.

Q. You had this bankruptcy sale, and then after the bankruptcy sale, you went on there doing business again, didn't you? A. Yes, sir.

Q. After, you went on under the new Corporation of Perlmutter Shop, didn't you? A. Apparently.

Q. You knew that, didn't you? A. I never saw any record.

Q. I know, but didn't you know it. You knew that there was a new Perlmutter Shop; it was in the advertisements, wasn't it? A. Yes, sir.

Q. You knew that Perlmutter and Miss Turley were the stockholders? A. I didn't know that. I didn't know who were the stockholders. I knew of Mr. Perlmutter; that's all.

Q. You knew it was a new Company? A. Yes, sir.

Q. You went on under the new Company, up to February, when Mr. Perlmutter put you out, you say? A. Yes, sir.

Q. This money you put in when you started, as I understand, was about six or $700. for fixtures and $1000. worth of stock? A. Yes, when I started; that is what I actually spent initially.

Q. I understand that the stuff you sold, you replenished afterwards? A. Yes, sir.

Q. You didn't lose any of that stock, the original stock? A. I didn't lose it, the bulk I had to sell at a sacrifice.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. You were willing to sell it at the price you sold it for? A. I didn't want to—was I willing, you say?

Q. I said you were willing to sell these at the price you sold them for? A. I had to.

Q. The Receiver didn't take any of your goods? A. No.

Q. Your goods were not disturbed at all by the bankruptcy? A. No.

Q. Simply closed up for five or six weeks? A. Six.

Q. And then you reopened again and went on? A. Yes, sir.

Q. You filed a claim in the bankruptcy? A. No, I never did.

Q. You filed a claim for some $27. or $37? A. I didn't; Mr. Perlmutter did not me.

Q. What for; what was it for? A. I didn't know anything about it until I received the check.

Q. There was a claim filed in the bankruptcy in your name for $39. some cents, wasn't there? A. Evidently, but I didn't do that, Mr. Higgins.

Q. You know it was filed? A. I didn't know anything about it until I got a check. I know that $39. of my money was in there safe; in fact I took it up with Mr. Weitz personally.

Q. You got the money? A. Yes, sir.

Q. Didn't you testify before trial that "I had to file a claim for it, to get it"? A. No, I didn't say I filed a claim.

Q. You didn't so testify? A. No, I simply asked Mr. Perlmutter.

Q. Didn't you sign a claim? A. No.

Q. Didn't you make an affidavit to it? A. No, I didn't.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. You didn't file any other claim against Perlmutter, Inc.? A. No.

Q. When was the first time Mr. Kiernan told you, after the bankruptcy, that Mr. Perlmutter was going to run the business, and he was going to get out? A. He told me the morning of the day; it happened in the store.

Q. He spoke to you, told you that same thing several times after that, didn't he? A. Yes, several times.

Q. Always saying he was going to get out and Mr. Perlmutter was going to run it hereafter? A. Yes, run the business.

The Court: Referring now to Mr. Kiernan senior?

The Witness: Yes, sir.

Q. Now at that time, the morning of the bankrutcy, and after that, Mr. Kiernan had nothing to do with the business, except as to what interest he may have had in the building? A. Yes, and that he was going to take an interest in me.

Q. That is, a friendly interest? A. I don't know. It seemed to be for my business end of it.

Q. You knew from that time that he had nothing at all to do with the business that was conducted in that establishment? A. No, I didn't.

Q. He told you he was through? A. He did when I got out that seven weeks this was pending.

Q. He tried to make a friendly arrangement to get you to stay in the store? A. Yes, sir.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. Gave you some very friendly advice? A. Yes, sir.

Q. He was friendly? A. Yes, he was.

Q. And he told you he had nothing more to do with the business; you had no reason to disbelieve him? A. Yes, sir.

The Court: Who does that apply to. Mr. Kiernan senior?

The Witness: Mr. Kiernan senior.

The Court: Did he say his son was out of it too?

The Witness: No, he didn't.

Q. You never had any other dealings with his son?

The Court: He said Mr. Perlmutter was running it for himself?

The Witness: Yes, sir.

Q. You knew that the son, Jim, had very little to do with the business anyhow? A. Yes, sir.

Q. He never was around there. These things of yours were out in storage? A. I learned they were.

Q. You found out they were? A. Eight months after.

Q. You never took them out of storage? A. Why should I.

Q. You could have taken them out if you paid the storage? A. I didn't put them there; I could not take them out.

Q. You found out; you went to the place where they were in storage? A. Yes, sir.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. You found out if you paid the storage, you could take them out? A. He would bring them down to let me take them out if I would pay the bill.

Q. You didn't want to pay? A. I absolutely refused to pay it.

Q. As far as you know, they are still in the storage warehouse? A. Part of them, according to the inventory. Not what I left.

The Court: Mr. Sewell, what do you claim are the items of damage?

Mr. Sewell: We claim the items of damage are $1200. stock and fixtures in the store when she was evicted by Perlmutter at the end of the seven weeks, February 1924: then we have a claim for loss of earnings from this business, for the period of the lease.

(Argued)

Cross Examination by Mr. Higgins (resumed):

Q. After the bankruptcy, Miss Overend, you went back under the new corporation of Perlmutter Shop; you had nothing to do with either of the Kiernans regarding the business until you were evicted, did you? A. No, I don't think so. I saw them occasionally.

Q. Since you went out of the store, until the efforts you made to get employment, did you go to the place, any place you worked before? A. Yes, sir.

Q. And there was no opening for you? A. No, sir.

Adeline M. Overend—For Plaintiff—Recalled—Re-cross.

Q. You didn't try any other place because that you said was humiliating? A. You asked me, but you didn't ask me the reason.

The Court: Why didn't you?

The Witness: I didn't not then; I could not upon the advice of my physician.

Q. On account of your illness, you could not do any more work? A. That has continued,——

Q. That continued? A. It has continued right up to the present time. I am still treating.

Re-cross Examination by Mr. Barison:

Q. You have testified that you had Mr. Perlmutter arrested in reference to this charge, in reference to the check and the fraud charge? A. Yes, sir.

Q. And all of those charges were dismissed in Court? A. No, I don't know, because it is not so.

Q. You don't know that they have been dismissed, do you? A. No.

Q. You know that you have heard nothing since the time this case was first heard in the Police Court and Mr. Perlmutter was paroled— A. Yes, only Mr. Perlmutter's conversation on the phone to me pertaining to it; that is the only thing I know.

Q. You know that since that time he was paroled and you presented your case, you have heard nothing? A. I appeared before the Grand Jury again.

Q. Other than that you have heard of no action. When did you appear before the Grand Jury? A. Last September.

Adeline M. Overend—For Plaintiff—Recalled—Re-direct.

Re-direct Examination by Mr. Sewell:

Q. What conversation did you have with Mr. Perlmutter? A. I appeared before the Grand Jury in September, at the September term. I think the first day it happened on a Friday and on the Monday following, sometime in September, Mr. Perlmutter called me on the phone and said that I would be surprised it was he that was calling, and he said that he had heard I had been before the Grand Jury; he had also learned that I was up there and going back again on the following Friday, and he said 'I have you licked again, because I have it fixed".

Q. Was Mr. Pigott ever introduced to you by Mr. Perlmutter? A. Yes, sir.

Q. Who did Mr. Perlmutter introduce him as? A. Shortly after I signed the lease, he brought this gentleman upstairs and introduced him as a dress salesman, and he looked the place over. I met him again, I guess every day for three weeks—for six weeks he was in and out every day.

Q. How many days was it after you signed the lease that you first saw Mr. Pigott around the place? A. Why, I signed the lease on Wednesday and I think on the following Saturday.

Q. The following Saturday, two or three days later? A. Yes, sir.

(Witness excused)

EDWARD PIGOTT sworn:

Direct Examination By Mr. Sewell:

Q. By whom were you employed in April 1923? A. Credit Clearing House, New York.

Q. Did you have occasion to go to Perlmutter Inc. during that month, to 116 Monticello Avenue, Jersey City? A. I did.

Q. Did you meet Miss Overend there? A. I did.

Q. What did Mr. Perlmutter introduce you as? A. Mr. Perlmutter: I met Mr. Perlmutter downstairs and he told me about this millinery department upstairs and he said, "I will bring you upstairs and introduce you to the young lady, but keep your mouth closed". We went upstairs and he introduced me as Mr. Pigott, a dress salesman from New York.

Q. What was your mission there? A. To collect money for accounts averaging between 38 and $40,000. on past due accounts and also on credit extension.

Q. Now, had Perlmutter Inc. been given a credit extension prior to April 25th 1923? A. They were all the time.

Q. All the time had credit extensions? A. Yes; at that time they were in financial difficulties, and there was a creditors meeting called and a credit extension was granted.

The Court: When was that you called?

The Witness: Well, to tell you the truth, I cannot give you the exact date. It was sometime in September, I think it was, of 1922.

The Court: September 1922?

The Witness: Either August or September 1922?

Q. Well, describe what a credit extension is? A. A credit extension is when a dealing is going behind with all his bills, they call a creditors meeting and instead of putting the party into bankruptcy, they give him a credit extension, whereby he is supposed to pay so much on account of the past due accounts, to pay them off, and on the new acounts, he is supposed to pay within thirty days.

Q. Was it under such an arrangement that Perlmutter Inc. was operating? A. Yes, sir.

Q. You say their total bills were between 38 and $40,000.? A. Yes, between those figures.

Q. Did Mr. Perlmutter tell you why he misrepresented you in the introduction? A. Well, as far as he said, he told me that Mr. Kiernan was away—he kept telling me—and that when Mr. Kiernan came back to the place, that he would put additional money into the business that he had taken out previously.

Q. Who had taken out? A. Mr. Kiernan.

Q. Did he say anything about Miss Overend who was upstairs? A. He told me about the millinery department, what a good thing it would be for the corporation, how much money they were making at it, trying to build a mountain out of nothing.

Q. When did you next see Miss Overend over there? A. I used to see Miss Overend every time I went into the place and bid her the time of day.

Q. Did Perlmutter ever have anything further to say about upstairs? A. Well, the next time he

spoke about upstairs was after the bankruptcy matter, when I came over there to find out what the conditions was. He told me about a party that put in so much money, and that negotiations with another party to the business to put in $10,000. more.

Q. Did he say anything about Miss Overend? A. At that time, I asked Mr. Perlmutter why Miss Overend was kept closed for seven weeks. He said, "That was for my benefit".

Q. Whose benefit? A. His benefit, Mr. Perlmutter's.

Q. Why, did he say? A. I asked him why and he turned around and walked away from me. If I am not mistaken, Miss Overend was with him at the time when I asked that question.

Q. Did he ever have any further conversation with you regarding Miss Overend? A. He did. It was about three or four weeks after. I don't know when exactly, when I came in, he started to tell me about this party that was about to put in $10,000. into the business; but that he wanted Miss Overend to stand the responsibility of putting money in.

Q. Wanted her to do that? A. Wanted Miss Overend to practically take charge of it, but Miss Overend could not see her way clear, from what he told me, to stand that responsibility.

Q. You mean he wanted her to put $10,000. into the business? A. No, this party was going to put the money in and they wanted Miss Overend to act as general manager, more or less, of the place, and Miss Overend could not see her way clear to do that.

Q. What was she to do so far as the $10,000. was concerned? A. Mr. Perlmutter was negotiating with friends of hers to put the money in. Mr. Perlmutter told me that Miss Overend would not take the responsibility.

Q. Of having friends put in $10,000? A. Yes; he said, "I am going to throw her out of the place" and then I had no more dealings with either of them until the last time when I was with the Credit Checking and Adjusting Corporation. I received a claim from one of our clients in New York by the name of Warshow, and I wrote to Perlmutter Shop to find out whether Miss Overend was out or in and we received a letter back, written on the bottom of it, "Miss Overend isn't here any more. You can find her at 2684 Boulevard, Jersey City. For further information come to see me". Then I picked up the telephone and called Perlmutter, didn't tell him who was talking, and he told me he had thrown Miss Overend out. I said, "Why, how could you do that". He said, "Well, I did it. That is how it was done". I then wrote Miss Overend. She asked me to come over to see her regarding the claim, and in regard to the general condition of from the Corporation. I laughed because the her place. She then told me she had a lease Corporation never had a lease.

Q. Did you tell her so? A. I told her so at the time.

Q. Was that when she came to me?

Mr. Barison: Which he doesn't know?

The Witness: I can't tell you that, Mr. Sewell.

Q. Did you ever have any talk with Mr. Kiernan? A. I had a talk with Mr. Kiernan, yes, sir.

Q. Mr. Kiernan, senior? A. Senior and junior.

Q. When was the talk? A. I went over to see them at the paper box place, down there after some money.

Q. When was that? A. That was right before the bankruptcy.

Q. Go ahead; did you have any talk with him about the financial standing of the business, the status of the business? A. Yes, because I knew if I could not get any money, I knew what the result would be. I also knew there was a creditors meeting to be called.

Q. How soon did you know there was going to be a creditors meeting called? A. About ten days or two weeks before it was called.

Q. When was it called as near as you can remember? A. That was, if I am not mistaken, sometime in June.

Q. Of 1923? A. Yes, if I am not mistaken, sometime in June.

Cross Examination by Mr. Barison:

Q. The first time you met Perlmutter was in reference to extending credit, wasn't it? A. The first time I met Mr. Perlmutter was when I was down to collect money off him.

Q. He took you around and showed you the place, did he? A. Not the first time. I had been going into that store about six to seven months previous to taking me around.

Q. When was the first time you spoke to him about Miss Overend being closed seven weeks? A. That was when the new corporation was opened, when I came there.

Q. That is the new corporation was opened? A. And the new Corporation was opened; then

I asked him why he kept her closed up for seven weeks.

Q. Why were you so particularly interested in asking about Miss Overend? A. Well, at that time I was out getting credit information and credit conditions.

Q. He knew that, didn't he? A. Yes, sir.

Q. Although he knew you were looking for information, you tell this jury that he said to you that he kept her closed for seven weeks? A. For his own benefit.

Q. He told you that? A. Yes, sir.

Q. Although you were investigating credit conditions, and his character and his actions would govern the terms of credit that he would get? A. Yes, sir.

Q. Although at that time he was more or less under obligation to you? A. Yes, sir.

Q. He still told you, sarcastically, that he kept her closed for his own benefit? A. Yes, sir.

Q. Mr. Perlmutter isn't exactly a fool; he is a pretty shrewd gentlemen, isn't he? A. Yes, he is.

Q. He has been in business a number of years, hasn't he? A. Yes, sir.

Q. You knew him for some time? A. I did.

Q. And although he was a shrewd business man, and he was trying to get an extension of credit from you, he still said he got her out of the business for his own benefit? A. He knew at that time he could never get any credit from the firm I was with.

Q. He said he did it for his own benefit? A. He did.

Q. When did you see him after that time? A. Well, it was a couple of weeks maybe, two or three weeks afterwards.

Q. What did you say took place at that time? A. He started to tell me about this man putting this money in, and he wanted Miss Overend to take the responsibility and she would not do it.

Q. At that time, he knew he would not get any credit from you? A. Yes, sir.

Q. This was a few weeks after? A. He thought if he could show me $10,000. in the bank he could get credit.

Q. What did he tell you on this occasion? A. He told me about this party wanting to put money in, and wanting Miss Overend to take upon herself the responsibility—

Q. Was she there? A. I don't know if she was.

Q. Where did he state all this to you? A. We were in the private office.

Q. And the first time Miss Overend told you that she had a lease with Perlmutter Inc. you laughed? A. I positively did.

Q. Just why did you laugh? A. Why, because I knew they never had a lease.

Q. You knew they didn't have a lease; you knew that Perlmutter Inc. didn't have a lease? A. Yes, sir.

Q. And you laughed because she had a lease from Perlmutter Inc. who didn't have a lease? A. Yes, sir.

Q. Perlmutter Inc. were in possession? A. Perlmutter was in the place when she told me she had a lease.

Q. How long have you been in this credit game? A. I was in the credit business for about four years. I am not in the credit business today.

Q. You are not in the credit business today? A. No, sir.

Q. You knew that this lease that the Corporation had given her was no good, didn't you? A. Yes, sir.

Q. You knew that? A. Positively.

Q. Because the lease was held by the Kiernans? A. Yes, sir.

Q. You knew that? A. Yes, sir.

Q. You knew that the corporation had given her a lease? A. I did then for the first time.

Q. That was the time you laughed? A. Yes, sir.

Q. You knew that the Kiernans were part of the Corporation? A. Kiernan was the whole corporation.

Q. Kiernan was the whole corporation, is that right? A. Right.

Q. You knew that Kiernan had the lease? A. Yes, sir.

Q. You knew that Kiernan or the Corporation had given her the lease, is that right? A. Yes, at that time the lease was shown to me. It was signed by the Corporation by Kiernan junior.

Q. But this Kiernan who owned this corporation had a perfect right to give a lease, didn't he? A. Not a corporation lease.

Q. He had a perfect right to give his own lease? A. Positively.

Q. If he at any time wanted to give his own lease, or give his lease to the corporation, he had a perfect right to do that, didn't he? A. Yes, sir.

Cross Examination by Mr. Higgins:

Q. You say that Kiernan was the whole corporation; you knew whether he was? A. Accordon her? A. I did.

ing to the records of the Credit Clearing House.

Q. Just a minute; do you know anything about that yourself? A. My records showed that the Kiernan family was in the corporation.

Q. I am asking you outside of your records; you don't know anything about who owned the Corporation, do you? A. No.

Q. And when Perlmutter asked you to pretend that you were somebody else to Miss Overend, you pretended? A. I didn't pretend. He introduced me to her.

Q. As who? A. A dress salesman from New York.

Q. On your own name? A. Yes, sir.

Q. You were not a dress salesman from New York? A. No, sir, I was not

Q. He told you before hand he was going to deceive Miss Overend that you were? A. Yes, sir.

Q. You carried on the deception? A. Yes, sir.

The Court: You didn't contradict it, telling her anything different.

The Witness: No.

Q. You knew it was imposing on her? A. I had intended to tell Miss Overend every time I went into the place, but Mr. Perlmutter talked to me all the time.

Q. You wanted to tell her that you were imposing on her? A. That I was from the Credit Clearing House, New York.

Q. That you were not a dress salesman? A. Yes, sir.

Q. You knew that day you were imposing

Q. You were helping Perlmutter to do something to her, you didn't know just what? A. Positively.

Re-direct Examination by Mr. Sewell:

Q. Had you gotten a check from young Mr. Kiernan, or other checks prior to the signing of this lease on April 25th? A. I did, from Mr. Perlmutter and Mr. Kiernan Jr.

Q. From both? A. Yes, sir.

Q. What were those checks for? A. Checks to deliver to the different accounts that were past due.

Q. You knew of your own knowledge, did you, whether the two Mr. Kiernans knew of this credit extention under which this concern was working? A. Positively.

Q. Was it on account of the arrangements they gave you some moneys? A. Yes, sir.

Re-direct Examination by Mr. Higgins:

Q. What you mean us to understand, Mr. Pigott, is that you saw some checks of the corporation, Perlmutter Inc. with both signatures, either the younger or elder Mr. Kiernan, as officers of the corporation? A. Mr. Kiernan junior gave me checks.

Q. It was a corporation check? A. Yes, sir.

Q. And signed as assistant secretary? A. Yes, sir.

Q. And that is what you mean?

The Court: You don't mean his own personal check?

The Witness: No, it wasn't his personal check; corporation check.

Re-direct Examination by Mr. Sewell:

Q. You mean that when you got this check, you went to Mr. Kiernan to get it? A. Yes, sir.

Q. You told them what you wanted it for? A. They knew what I wanted it for.

Q. How do you know they knew? A. Because every time I came in, I told them exactly what I came in for.

Q. They gave you a check? A. Yes, sir.

Q. The only interest you had in the place was for the credit extention payment? A. To get money.

Q. According to the credit extention? A. According to the credit extention; also the new business falling behind.

Re-cross Examination by Mr. Higgins:

Q. Did you get these checks at Perlmutters' place? A. Yes, sir.

Q. Of course, the new business that was falling behind was Perlmutters Shop? A. No, Perlmutters Inc., not Shop.

Q. New business of the old Company? A. After the credit extention, they were supposed to pay new obligations within thirty days. They did pay it until a certain time, when claims started to come in against the corporation.

Q. You got all your checks up at the store? A. Yes, sir.

(Recess to 2 P. M.)

(After recess 2 P. M.)

Officer EDWARD FLYNN sworn:

Direct Examination by Mr. Sewell:

Q. What precinct are you connected with? A. No. 4.

Q. Were you connected there in August 1924? A. Yes, sir.

Q. Did you have occasion during that month to go to Perlmutters Shop on Monticello Avenue? A. Yes, sir.

Q. What did you do when you got there and what did you see? A. I was called in by Mr. Perlmutter. He said there was two women he wanted ejected from the store. I asked what the trouble was, and he said, he didn't know, they must be crazy women. When I got in, I saw Miss Overend and another young lady upstairs. They were standing at a table. He said, "Here they are. I want them ejected." I asked Miss Overend what the trouble was and she told me she had a lease on the place and that she was told by her counsel to take possession, that is, go up there. So Perlmutter insisted that she be put out of the place. I said "I won't put this woman out if she has a lease on the place. That is a Court case." He said it was already in the Courts and she was ejected from the place, she was ordered away from the place. I said I didn't know anything about that, you had better take it to Court again and get a writ. If you want her ejected from the place, you will have to get a writ to have her ejected.

Q. Did you then go away? A. That is all I did. Then he called Miss Overend vile names and everything else.

Q. Called Miss Overend vile names? A. Yes; I said "That has got to be cut out". I said, "The only way out of it is, you might as well step out, what is the use of going on arguing," so she says "All right, I will leave the place", so she came downstairs.

Q. That's all you know about it? A. That is all I know about it.

Cross Examination by Mr. Barison:

Q. You were called by Perlmutter? A. Yes, sir.

Q. When you got there, she told you something about a lease? A. Yes, sir.

Q. In your presence Mr. Perlmutter called her vile names? A. Yes, sir.

Q. You were in uniform? A. Yes, sir.

Q. A member of the Police Department? A. Yes, sir.

Q. What did you do when he called her vile names? A. I said "That has got to be cut out'.

Q. Is that all you did? A. That's all.

Q. You didn't take him along with you? A. No, sir, I didn't.

Q. In other words, you just left them as they were? A. Yes, sir.

Q. Although you heard him call her these names? A. Yes, sir.

Q. What did he say when he sent for you? A. He came around the corner of Monticello Avenue.

Q. What did he say? A. A couple of women in the store he wanted ejected.

Q. What else did he say? A. He said he didn't know, they must be crazy.

Q. And when you got there, you saw Miss Overend? A. Yes, sir.

Q. You didn't know the lady by name? A. Yes, sir.

Mr. Higgins: No questions.

Mr. Sewell: He committed no crime in your presence that you could arrest him for?

The Witness: No, sir.

ELSIE MURPHY sworn:

Direct Examination by Mr. Sewell:

Q. Where do you live, Miss Murphy? A. 264 Woodlawn Avenue, Jersey City.

Q. You are a friend of Miss Overend? A. Yes, sir.

Q. Did you at any time go to the store of Mr. Perlmutter with her? A. Yes, on several occasions.

Q. Did you ever hear Miss Overend request Mr. Perlmutter to give her information as to where her effects were? A. Yes, I did.

Q. When was that, do you remember? A. Some time in August 1924.

Q. What did she say to Mr. Perlmutter and what did Mr. Perlmutter say to her? A. She asked Mr. Perlmuter where her merchandise was and he told her to get out of the store, go out in the street and look for it.

Q. Did he tell her where it was? A. No, he didn't give any information where it was. He told her to go out in the street and look for it.

Cross Examination by Mr. Barison:

Q. You don't know what actions of Miss Overend caused Mr. Perlmutter to take that attitude, do you? A. No, I don't know, only she asked where her merchandise was and he told her—

Q. What did she ask for, merchandise or hats? A. Merchandise.

Q. When did you say this was? A. August 1924, some time in August.

Mr. Higgins: No questions.

SARAH ANAPOL sworn:

Direct Examination by Mr. Sewell:

Q. Where do you live? A. 502 West 139th Street, New York City.

Q. Prior to April 1923, were you in business? A. At the time.

Q. What business were you in? A. Millinery.

Q. Did Miss Overend work for you? A. Yes, previously.

Q. Previous to April 25th 1923? A. Yes, sir.

Q. It was a millinery store? A. Yes, sir.

Q. What did you pay milliners? A. I paid most of them $30.

Q. After February 1924, did Miss Overend come back to see you? A. She certainly did,

and asked me for a position which I could not give her, because it was taken by somebody else.

Q. About when was that in the year 1924? A. I could not tell you, because I could not remember.

Q. Was it around Easter? A. It was just before the season in which I employ people.

Q. What is the season? A. Beginning April.

Q. It was just before that? A. Yes, sir.

Q. You could not give her any position? A. No, I have somebody in her place.

Q. Have milliners salaries remained the same or increased or decreased?

Mr. Barison: I object as immaterial and incompetent.

The Conrt: I can't see the relevancy The question is, what did this women do, did she make efforts to get employment, and what was she damaged by this fraud.

Mr. Barison: No questions.

Mr. Higgins: No questions.

ADELINE M. OVEREND recalled:

Direct Examination by Mr. Sewell:

Q. I show you a paper and ask you in whose handwriting that paper is? A. Mr. Perlmutter's.

Q. I show you an envelope, and ask you in whose handwriting that is? A. Mr. Perlmutter's.

Mr. Sewell: I offer them in evidence.

Mr. Barison: No objection.

Adeline M. Overend—For Plaintiff—Recalled—Direct.

Accepted and marked as Plaintiff's Exhibits P-6a and P-6b of this date.

Q. I call your attention to the fact, Miss Overend, that the envelope is dated September 20th, 1924, and ask you is that the first notice—

Mr. Barison: I consent to the Notice, but I certainly to not to this envelope. There is no evidence on that at all.

Mr. Sewell :I withdraw it for a moment.

Q. Did that letter come in this envelope? A. Yes, sir.

Mr. Sewell: Now I offer it.

Mr. Barison. I still object.

The Court: What is your objection?

P-6-b now accepted and marked as Plaintiff's Exhibit P-7 of this date.

Q. I call your attention to the fact that this envelope is postdated September 20, 1924, and I ask you is that the first notice you got from Mr. Perlmutter telling you where your stuff was located? A. Yes, the first that I knew where it was, eight months after.

Q. About eight months after he put you out? A. Yes, sir.

Q. Did you then go to McCabe's storage? A. Yes, in the following week.

Q. Did you check over the goods that McCabe had there? A. Mr. McCabe said he could not bring the furniture down, but he would bring the books.

Adeline M. Overend—For Plaintiff—Recalled—Direct.

Q. The hats? A. Suppose to have merchandise, which he did.

Q. Did you go through the books and check them off? A. Yes, I did.

Q. How much of your stuff did you actually find? A. There was 26 hats left out of 148 or 151, I am not sure which.

Q. You had either 148 or 151? A. 26 left.

Q. When he put you out? A. With what was in the books.

Q. You say there was 26 left? A. Yes, sir.

Q. What proportion of the value would that be, of the whole? A. Well, the hats that were there, were simply left overs, would not have amounted to anything at that time.

Q. They were valueless at that time? A. Yes, sir.

Q. What was the selling price of that stock that was in the store when you were put out? A. $1170.

Mr. Barison: I object to that.

The Court: For what?

The Witness: For hats, flowers, trimmings, everything included; everything was gone except 26 or 25 hats.

Q. Is that the price you paid? A. Absolutely.

Q. What price would they bring on the market, to see them? A. Some of them brought 100 percent, others 50, some 33-1/3, depending entirely on the value of the hat.

Q. How much did you figure the total would have brought on the market?

The Court: Speaking as of what time?

The Witness: At the time I was put out.

Adeline M. Overend—For Plaintiff—Recalled—Direct.

Q. As at the time you were evicted?

The Court: Not what you paid for the things; what was the market value?

The Witness: At the time I was evicted, I would say about $1600. They would easily bring be that.

Mr. Higgins: That was the selling price?

The Witness: Yes, at that time.

The Court: The market price; is that what they would bring in the open market?

The Witness: Yes, sir; not what I paid for them.

Q. What price could you have sold them for? A. Yes, that is what I mean, about $1600.

Q. Were there any drapes? A. Yes, and they remained there. He left those.

Q. Did you finally get these drapes back? A. About ten or twelve months after he had rented the department. I think the second tenant was in when I went back for them.

Q. The other tenants had used them? A. Yes, sir.

Q. What condition were they in? A. Very much damaged.

Q. Were they of any use to you? A. I have never used them since.

Q. What was the value of these drapes when you were evicted in February 1924? A. Well, I would say they were worth just as much as they were at the beginning. The silk actually cost $125. which I have bills to prove, and the

Adeline M. Overend—For Plaintiff—Recalled—Direct.

labor; that is only what they cost me in material, the drapes; I have them all marked down

Q. How much is that altogether? A. Draperies amount to $250.

Q. This lady sitting on the end here; you had worked for her at one time? A. Yes, for a year and a half.

Q. In her shop? A. Yes, sir.

Q. After you were expelled in February 1924, did you ever go back to see her? A. Yes, about six weeks after.

Q. What did you go there for? A. I went there to see what she could do about the matter.

Q. About what? A. I wanted to go back and work, if I could do it.

Q. Did she hire you? A. No, she could not.

Q. Why not? A. She had someone in there under contract.

Q. Did you try to get employment any other place? A. I went at intervals to the various shops I had worked, and I could not.

Q. Did you succeed in getting employment? A. No, I didn't.

Q. You said something this morning about having been sick after you were evicted? A. Yes, I was.

Q. Just what sort of sickness did you have, describe it to us? A. About three days after I was evicted, I lost my voice entirely, and I suspected that it was a cold, and had to go over three weeks until it came back. I had a doctor and he claimed it was an inflammation of the nerves of the throat that had caused it.

Q. Did that loss of your voice prevent you from actually working, trimming hats and so

forth? A. No, of course in selling, it would cause me trouble, I could not speak so well.

Q. Were you in a position to sell these hats; why didn't you open up another shop? A. I had no money to go on with.

Q. You didn't have the money? A. No, I didn't have the money. I didn't have the furniture, fixtures, nothing to go on with.

Q. Can you tell us why you didn't get a position after the evicting in February 1924? A. I don't know, unless it was that I wasn't fortunate enough to get it when I applied for it.

Q. How much were milliners being paid at the time? A. $30.

Mr. Barison: I object. I don't see how much milliners were paid has any bearing on this case.

The Court: Sustained.

Cross Examination by Mr. Barison:

Q. After you went to the lady that you worked for before, and she didn't take you back, you went to several other shops? A. Yes, small shops.

Q. How many shops? A. I would say probably ten or a dozen different shops.

Q. You remember that; your mind is clear upon that, that at the time you went to these other shops? A. Yes, sir.

Q. Why did you say this morning that the only place you went to was to this lady where you worked before, and that you didn't go any other place else?

Mr. Sewell: I object to that.

The Witness: I don't think I said that.

Q. Why did you testify you didn't go any other place? A. I suppose I didn't think there were any, because I didn't have the initiative, I didn't feel myself in the condition—

Q. I asked you if you had been any other place and you said 'no', because you were sick you didn't go any place else? A. Yes, I was sick.

Q. Why did you say you didn't go any other place? A. I don't know why. I don't remember saying that.

Q. You were examined before trial in this case, weren't you? A. Yes, sir.

Q. Do you remember there being asked this question:

"Q. Did you try to get a position anywhere"?

A. Yes, I told Mr. Higgins, Yes.

Q. "Answer: Why, I was always figuring on going back into business again, because having gone into a proposition and losing all the money I had, it was humiliating for me to go to this place where I had been employed after going into a proposition and having it fall through through no fault of mine.

Q. Do you mean by that that you didn't seek any employment? A. Yes, I went there and she had somebody in my place and I didn't go further.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. Is that the only effort you made to get employment? A. Yes, sir".

Do you remember that testimony? A. No, I don't remember saying that was the only place.

Q. You did say the same thing this morning? A. I don't remember; only it embarrassed me, I didn't feel myself—

Q. Isn't it a fact that the only thing you did was to go to this place and tried to get your job back? A. No.

Q. You didn't go any other place because it was very humiliating, or else because you were sick? A. No, I can give you many other places where I had been.

Q. You were sick and you were not able to sell? A. My throat; I had throat trouble, and I was forced—

Q. You testified you could not go any place? A. I wasn't so I could not walk. I said I had throat trouble, I could not sell.

Q. When you opened that store, you spent $900. for goods, didn't you? A. Around $950 or $960.

Q. About $900? A. About $1100. that is from memory.

Q. About $900 for hat, $250. for fixtures· wasn't that your testimony? A. I think around that.

Q. That was about $1150? A. No, I nearly spent $1100. for merchandise alone.

Q. When you opened up, you had how much merchandise? A. Nearly $1100.

Q. And in the time you were there, you testified that you purchased about $300. more merchandise? A. During the six weeks, yes, sir.

Adeline M. Overend—For Plaintiff—Recalled—Cross.

Q. That gave you a total of $1400. spent on merchandise? A. Yes, sir.

Q. You also testified that for six weeks, or seven weeks, you approximately earned $75. a week, which would indicate sales of practically $150? A. Yes, I have my books there.

Q. You say the next seven weeks you made approximately $60? A. No, I was closed seven weeks when I made nothing.

Q. After you reopened? A. Continuation of the time from August 14 up to the six weeks previous to being evicted.

Q. How long was that, how long a time? A. About four months; I really was back about five.

Q. During this four or five months, you sold each week about $120. worth of merchandise? A. No, $150. $160. I have all the books here to prove it.

Q. That is during four months, you sold each week about $150. or $160. worth of merchandise? A. Yes, sir.

Q. That is for 16 or 20 weeks? A. Yes, sir.

Q. $160. worth of merchandise? A. Yes, sir.

Q. And during the six weeks, you sold approximately $150. worth of merchandise a week? A. The first weeks I was there?

Q. Yes? A. A little more than that; in the first three $200.

Q. Will you tell this Court and Jury, if you sold $160. worth of merchandise for 16 or 20 weeks every week, $160. or $170. for six weeks, out of $1200. worth of merchandise, you had

$1600. worth of goods when it was put into storage? A. I kept on replenishing.

Q. You testified you bought $300. more goods? A. I beg pardon; that was the first six weeks I bought $300.

Cross Examination by Mr. Higgins:

Q. You said the Receiver took none of your stuff? A. No.

Q. When you opened up again you had just the same goods? A. Just the same.

(Witness excused)

Mr. Sewell: I would like at this time, to read this document now in evidence, to the Jury:

"This agreement made the 25th day of April in the year of Our Lord, one thousand nine hundred and twenty three, Between Perlmutters Incorporated, a Corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the first part, and Adeline Overend of the City of Jersey City and County of Hudson and State of New Jersey, party of the second part;

Witnesseth that the said party of the first part has hereby let and rented to the said party of the second part, and the said party of the second part has hereby hired and taken from the said party of the first part, the front part of the premises on the second floor (about 600 square feet in area of the store and building known as Street Number 116 Monticello Avenue, Jersey City, New Jersey, for the purpose of conducting a millinery shop, together with the right to use the entrance to said premises, for the ingress and egress of her customers, and the stairway leading to the second floor thereof, for the term of three years to commence on the (blank) day of April A. D. 1923, with the privilege of renewal of this lease for another two years.

It is specifically understood and agreed that the party of the second part cannot assign or sublet this lease without the consent of the party of the first part.

The rent for the said premises for the first three years shall be based upon the basis of ten percent of the gross income received from the conduct of said business and the rent for the renewall shall be on the basis of fifteen percent of the gross business.

It being specifically understood that said rent is to be deducted on the first of each and every week, beginning June first 1923, from the proceeds of said business, and it being further specifically understood that clearances of all sales shall be made through the office of the party of the first part and that the party of the first part shall on the first of each and every week and from time to time as requested, render to the said party of the second part, statements showing the condition of the said business.

It is also further understood that the party of the second part herein is not to be charged anything for this service, and that the business of the party of the second part is to be conducted under the name of Perlmutters Inc.

The said party of the second part covenants to pay to the said party of the first part, the said rent as heretofore specified.

And it is also agreed that if the said rent shall be due and unpaid or any false record of any particular sales be made, or account sale be made and not recorded, or if default be made in any of the covenants herein, it shall be lawful for the party of the first part to re-enter said premises and to remove all persons therefrom.

And at the expiration of the said term, or the termination of the lease, the said party of the second part will quit and surrender the premises hereby demised in as good a state and condition as reasonable use and wear thereof will permit, damages by elements excepted.

The said party of the second party shall pay all of the debts, operating expenses, such as employes, advertising, books, paper, etc. pertaining to the said millinery business, the party of the first party giving space, light and heat.

And the said party of the first part covenants with the said party of the second part, that paying the said rent and performing the covenants aforesaid, she may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

In witness whereof the said party of the first part have caused its corporate seal to be hereto affixed and attested by its secretary and these presents to be signed by its President, and the said party of the second part has hereto set his hand and seal the day and year first above written.

Signed sealed and delivered in the presence of Thomas H. Brown.

Perlmutters Inc.
per James W. Kiernan,
Asst. Treas.
Adeline M. Overend.

There is a notarial certificate on the back, unsigned.

Plaintiff rests.

Mr. Higgins: I move for a non-suit so far as the two Kiernans.

It appears from Miss Overend's testimony that she went in there after a month's negotiation with Mr. Perlmutter, which led up to a day when the lease was to be signed, which was prepared by her lawyer and that was the first time she had any talk with younger Mr. Kiernan. The negotiations were had with Perlmutter.

She went in under that lease, whenever that was, and stayed there until the bankrutcy, until the Company with which she made the lease went into bankruptcy, and thereafter she entered into a new arrangement with Perlmutter Shop, with which she said she was perfectly familiar, and she stayed there with Perlmutter Shop, and up to that point, not one of the goods she had, or her fixtures or merchandise had disappeared or been disturbed. Up to that point she had lost nothing, except perhaps from the closing up.

She says she didn't see the older Mr. Kiernan until some time after she executed the lease and went in there, so that nothing he could have led her into signing the lease.

(Argued)

(On application of Mr. Sewell, the Court granted him permission to reopen his case.

Exception to both counsel, Mr. Higgins and Mr. Barison)

JAMES M. KIERNAN sworn:

Direct Examination by Mr. Sewell:

Q. At the time this lease was signed, April 25th, 1923, you were away, were you not? A. Yes, sir.

Q. You returned about when? A. The middle of May.

Q. How did you learn that Miss Overend was in occupancy there? A. When I happened to go up to the store and found out that she was there.

Q. Did you talk to Perlmutter about it then? A. Why, at that time he spoke to me that she was there.

Q. Where is the other copy of this lease? A. I never saw the lease; never had the lease in my hand.

Q. Did you inquire as to what terms she was there under? A. I would say she was there under a ten percent basis.

Q. You saw your son frequently; in fact, he works with you in your office, doesn't he? A. Yes, sir.

Q. Did you have any talk with your son about it? A. No.

Q. No talk at all? A. No.

Q. Did you ever speak to Miss Overend about the terms of her renting there or letting? A. No.

Q. You knew that she was there under a lease? A. No.

Q. Had no idea about it? A. No.

Q. What did you think she was doing there?

A. As far as I was concerned and as far as I knew, she was in there as a tenant, because I really didn't go into the matter, only Perlmutter told me she was in there, under that ten per cent profit basis.

Q. You knew she was in there as tenant? A. In the capacity of tenant. As to the lease, I had never seen it.

Mr. Sewell: The only reason I can urge as against Mr. Kiernan is that I believe he ratified the acts of his agent.

The Court: Do you assert that there would be any rights with Miss Overend under her lease, if there had been a fourteen year lease standing in the name of Perlmutter Inc.

Mr. Sewell: I think so, absolutely.

The Court: As to James W. Kiernan, that is the son, I will deny the motion for non suit.

As to James M. Kiernan, that is senior, I will grant the motion for non suit.

I will grant exceptions both ways.

Mr. Barison: In regard to Perlmutter, I move for a non suit, on the ground that there has been no damage shown as resulting from the fraud, if a fraud was committed.

It appears that the only thing before this Court is an unlawful eviction on the part of Mr. Perlmutter.

As to the second count, I feel that the second count has not been proven; there has been no proof that the Corporation did not receive that $450. check.

The Court: I will deny Mr. Barison's motions and grant him exception.

Mr. Barison: Exception.

Mr. Barison: Does your Honor overrule my motion as to the check?

(Argued)

(Plaintiff's case again re-opened)

JAMES I. KIERNAN sworn.

Direct Examination by Mr. Sewell:

Q. Mr. Kiernan, during the absence of your father in California, you had charge of the corporation matters of Perlmutter Inc.? A. No, all I had was sign such papers as were necessary.

Q. Did Mr. Perlmutter ever turn over to you the sum of $450?

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

Q. Who received the money from the store while your father was in California? A. Why, probably Mr. Perlmutter; whoever was up at the store.

Q. And then what did Perlmutter do with the money as it came in, at the end of the week? A. Probably deposits in the Bank, I suppose.

The Court: Do you know anything about the receipts, yourself?

The Witness: No.

Q. Didn't he make any report to you? A. No, sir.

Q. Did you when this lease was made, instruct Mr. Perlmutter to obtain for the Corporation, the sum of $450. from Miss Overend for the securing of the rights in the building?

Mr. Huggins: I object to that.

The Court: Sustained. It is not shown he had any such authority to represent the Corporation in that respect.

Q. Who were the other officers of the Corporation? A. Why, the only other officer I knew was my father.

Q. And you, you were an officer?

The Court: What was your office?

The Witness: Assistant Treasurer.

Q. What were your duties in the Corporation? A. Well, I would sign such papers as were necessary, when I was told to; that's all I had to do with it.

Q. You were the only officer here in Jersey City when this lease was signed? A. Yes, sir.

Q. Did you, as an officer of the Corporation, instruct Perlmutter, to obtain $450. from this woman? A. No.

Q. You didn't instruct him to get it? A. No, sir.

Q. Did he ever turn over $450. to you? A. No, sir.

Cross Examination by Mr. Higgins:

Q. What did you have to do with the affairs of Perlmutter Inc.? A. Practically nothing.

James I. Kiernan—For Plaintiff—Cross.

Q. Did you hold any stock in the company? A. One share.

Q. You were assistant secretary? A. Treasurer.

Q. You were not a director were you? A. No.

Q. Did you have anything to do with the management of the store up there? A. No, sir.

Mr. Sewell: I object as improper cross-examination.

Q. If the $450. was paid to the Corporation, would you know it? A. I don't quite get that question.

Q. I say if Mr. Perlmutter paid that to the Corporation, you would know it, would you? A. No, it would go right through.

Q. You didn't keep the books of the Company? A. No.

Q. Were you called up there the morning the lease was signed? A. That is when I was called.

Q. Had you heard anything about the lease before that morning? A. Yes, sir.

Mr. Sewell: I object.
(Argued)

Q. (Question repeated) A. No.

Q. Who came there with the lease? A. Why, I believe it was Miss Overend's attorney.

Q. No attorney of yours, was there, with any lease or anything else?

Mr. Sewell: I don't think that is

James M. Kiernan—For Plaintiff—Recalled—Direct.

Q. Did you make any statement to Miss Overend at the time the lease was signed, regarding the lease to the Company or what the financial responsibility of the Company was?

Mr. Sewell: I object to that.

The Court: That is your case; he hasn't gone into that.

Mr. Higgins: I will make him my witness for that.

The Court: Did you have anything to do with the management of the Company at that time with respect to any tenant and with respect to any financial arrangements?

The Witness: I had nothing to do with the operation or financial end of the Company.

Mr. Barison: I want to note my further objection to counsel going on a fishing expedition in an endeavor to obtain some information to sustain a count in the complaint at this late date.

The Court: You may have your objection.

JAMES M. KIERNAN, recalled:

Direct Examination by Mr. Sewell:

Q. Mr. Kiernan, did a check for $450. go into the treasury of the Corporation?

James M. Kiernan—For Plaintiff—Recalled—Direct.

Mr. Higgins: I would like to enter my objection to this.

Q. Did that check for $450. go into the treasury?

Mr. Barison: I object to the form of the question. First find out whether this man knows anything about the funds.

The Witness: I was treasurer of the concern. Mrs. Perlmutter was also interested.

Q. Who were the accounts turned over to? A. They were turned over to Mr. Perlmutter.

Q. Were they turned over to you later on? A. No, they were never turned over. I never made deposits.

Q. You supervised them? A. No, the only deposits I made were regarding my own personal notes.

Q. You took charge of the finances? A. So far as looking over the checks and books.

The Court: Who handled deposits?

The Witness: Mr. Perlmutter.

Q. Was the sum of $450. deposited to the account of your Company on the 28th day of April 1923, or shortly thereafter to the best of your knowledge. In other words, did Perlmutter ever put that $450. into the Corporation? A. Absolutely no.

Q. Was he ever instructed by you to demand $450. from this lady, Miss Overend? A. Absolutely no.

James M. Kiernan—For Plaintiff—Recalled—Cross.

Cross Examination by Mr. Barison:

Q. You testified that Mr. Perlmutter had charge of all accounts? A. Mr. Perlmutter had charge of all the accounts.

Q. Did he ever check up with you on the accounts? A. Why, naturally, when I was up there, I would look over the deposits which were there, to see what there was there.

Q. How often did you check up the accounts with him? A. Mostly weekly when I was there.

Q. Did Mr. Perlmutter pay out all the bills? A. Mr. Perlmutter paid out all the bills, when I signed checks, I had them there signed at the office.

Q. Did you look up this particular item? A. I didn't criticize so carefully as that. It would seem such an amount as that being received, or being deposited, he would call my attention to something out of the ordinary as the deposits were made daily in the Bank.

Q. Each week you would check over the deposits? A. I would go over them maybe every week or 10 days, whenever I was here.

Q. You would see how much came in? A. I would not bother so much with what was going out. I was more interested in what was coming in.

Q. You would check up each week and see whether there were deposits or not? A. I would go over the amount as they were set down from day to day.

Q. When did you go on your trip? A. Sometime early in January.

James M. Kiernan—For Plaintiff—Recalled—Cross.

Q. When did you get back? A. Around about the middle of May.

Q. Well, now, did you check up this $450. on April 28th or 30th or 31st? A. I didn't check at the time any particular item in the amount of money.

Q. You didn't get back until a month after this money was received, did you?

Mr. Sewell: He said he was back the middle of May; the check is dated the end of April.

Q. You didn't get back until when? A. About the 10th of May I guess.

Q. Did you go up and look over the accounts? A. Naturally, if I am a business man I would refer back to see what was going on and find out what the condition of the business was.

Q. How soon after you came back did you go over the account? A. Probably one or two days.

Q. How long? A. Might have been five, six or seven.

Q. Did you check back the business of January, February, March and April? A. I didn't check. I just simply went back to see what was going on. As to who the checks were drawn to and all this, I didn't check these.

Q. Do you know whether or not this $450. was ever deposited in any other way? A. It could not be deposited because it never was made to the Corporation.

Q. True; could Mr. Perlmutter have deposited the $450? A. Not to the Corporation; absolutely not.

James M. Kiernan—For Plaintiff—Recalled—Cross.

Q. Why couldn't he have done it? A. Because it wasn't made to the Corporation. It would have been returned by the Bank; the Bank would not credit it to our account with any such check as that is.

Q. Just get the question; do you know whether or not Mr. Perlmutter deposited this check for $450? A. Absolutely I do know.

Q. Yes? A. That Perlmutter never deposited any check of his for $450. to the credit of the Company, for credit for him.

Q. You know that positively. A. I do know that positively.

Q. You know a bit about business, a little bit, don't you? A. I can say that Perlmutter didn't give the Company any check of his, to the Corporation for an indebtedness of $450. Is that what you mean to ask me?

Q. Yes? A. I say no, absolutely.

Q. Do you know whether he ever deposited any cash or money that might have represented this $450? A. Because a check in the amount of $450 he could never handle that amount of cash. Of course there always was cash deposited, never such an amount of cash as that was.

Q. Can you say whether or not this $450. in any other form was deposited in your account? A. No, I could not say. I could not, that the Company ever received any credit of that $450. whatever.

Q. You can't say it did? A. I can say that it did not.

Q. You can? A. I can say that it didn't

James M. Kiernan—For Plaintiff—Recalled—Cross.

Q. You can say definitely that you didn't receive this $450. the Corporation didn't? A. Yes, sir.

Q. Did you ever check the Corporation account to see whether this $450. was there? A. I say I checks back all of the corporation funds and found no record of any $450.

Q. Did you when you received the papers in this case, did you look up the complaint where it mentioned that check specifically, and did you look up and see whether or not at that time or about that time, whether this was deposited? A. That check was never brought up into question.

Q. Did you look up specifically, after receiving your papers in this case, to see whether or not that was so, so that you would know? A. No, sir, I did not.

Q. Then what you are talking from is memory? A. The best I could.

Q. You were checking up other affairs of the business? A. The best I could when I came back.

Q. What percentage of the stock did Mr. Perlmutter have? A. His arrangement, it was arranged that he and his wife had 50 per cent of the stock.

Q. How much did he take? A. He had none.

Q. So that at the time Mrs. Perlmutter had 50 percent of the stock? A. It was her sister's and hers; it was the Perlmutter estate.

Q. They had 50 percent of the stock? A. Yes, sir.

Q. He was the manager? A. Yes, sir.

The Court: Did you have any corporate action taken with reference to the payment of this $450?

James I. Kiernan—For Defendants—Recalled—Direct.

The Witness: What I know is that it went through a suit, there was a suit against Mr. Joe Perlmutter to redeem the claim of $450. which he took illegally.

The Court: Was there any corporate action by your Company?

The Witness: No, we had no corporate action whatever.

The Court: Requiring this woman to pay this fee?

The Witness: We never knew anything about it.

Mr. Sewell: We rest.

Mr. Sewell: We rest.

The Court: I will deny Mr. Barison's motion on both counts, and allow an exception.

Mr. Barison: Exceptions.

(Recess to 10 A. M. June 15th, 1926)

June 15th 1926. 10 a. m.

JAMES I. KIERNAN recalled:

Direct Examination by Mr. Higgins:

Q. You are the son of James N. Kiernan? A. Yes, sir.

Q. Who was the other defendant in this case? A. Yes, sir.

Q. I believe you testified before, you have one share in this Perlmutter Inc.? A. Yes, sir.

Q. And were Assistant Treasurer? A. Yes, sir.

James I. Kiernan—For Defendants—Recalled—Direct.

Q. Did you have anything to do with the management of the store there? A. No, sir.

Q. Up to the time that this lease was drawn, how many times had you been in that store in connection with business? A. Probably once or twice.

Q. Who was in charge? A. Mr. Perlmutter.

Q. You signed some checks, did you, for the Corporation as Assistant Treasurer? A. Yes, sir.

Q. By what method were those checks signed? A. Well, he usually sent checks down by mail, or by messenger and I signed them at my office.

Q. Did you question anything about what the checks were for? A. No, I didn't.

Q. Did you know anything about the business part of it? A. No, sir, I didn't know about what the checks were or.

Q. Did you know anything about the run of the business up there? A. No.

Q. Perlmutter was the general manager; he ran it all? A. He was entirely in charge.

Q. You just signed such checks as he sent you? A. Yes, sir.

Q. Prior to the day this lease was executed, had Miss Overland spoken to you about any such lease? A. No.

Q. Had Mr. Perlmutter spoken to you about it? A. No.

Q. Had you ever heard of the lease until that morning? A. No.

Q. How came you to go up that day? A. He called me up the night before.

Q. Who did? A. Mr. Perlmutter asked me to go up the following morning.

James I. Kiernan—For Defendants—Recalled—Direct.

Q. You didn't know what you were going up for? A. He said he had made some arrangement with Miss Overend about taking part of the store and wanted me to go up and sign the papers.

Q. You got up there in the morning? A. Yes, sir.

Q. Miss Overend was there? A. I don't know whether she was there when I got there, or we waited, but shortly afterwards everybody came in in connection with it.

Q. A short while after Mr. Brown came there? A. Yes, sir.

Q. Were you handed a lease or some paper to sign? A. No, I was not handed anything.

Q. Well, you signed a paper that day? A. Yes, but I signed it on the desk there.

Q. It was lying on the desk, was it? A. Yes, sir.

Q. On whose desk ? A. Well, I don't know whose desk; it was a desk that was in the office.

Q. Had you had anything to do with the drawing up of that paper? A. No.

Q. Had you ever seen it before it was there on the desk? A. No, sir.

Q. Who told you to sign it? A. Mr. Perlmutter said it was all right to sign it.

Q. Did you hav any conversation with Miss Overend, in which you told her that the Company, Perlmutter Inc. had a ten or twelve year lease on that property? A. No, sir.

Q. Did you have any conversation with Miss Overend in which you said anything about the financial condition of Perlmutter, Inc? A. No, sir.

James I. Kiernan—For Defendants—Recalled—Direct.

Q. Was there any conversation of that kind there at all? A. Nothing about business.

Q. You have known Miss Overend for a long while, haven't you? A. Yes, sir.

Q. What did you talk about, if anything? A. Well, just general conversation in regards to general things, family and so forth.

Q. Did Mr. Brown ask you any questions about the financial responsibility of Perlmutter Inc? A. No.

Q. Did Mr. Brow ask you any questions about the financial responsibility of Perlmutter Inc? A. No.

Q. There was no such talk then, was there? A. No.

Q. You just came up there, the lease was on the table, Mr. Perlmutter told you to sign it, and you signed it? A. Yes, sir.

Q. Is that all that took place? A. Well, that is practically all.

Q. How long were you there altogether? A. Probably half an hour or twenty minutes.

Q. When you left, what became of the lease? A. I don't know; it was left with Mr. Perlmutter.

Q. After that date, did Miss Overend have any talk with you about the lease? A. No.

Q. After the bankruptcy and the new Perlmutter Shop, after they went in there, did she talk to you about it then? A. No.

Q. You remember the time she had Mr. Perlmutter arrested, do you? A. Well, I didn't hear of it until some time afterwards. I didn't know anything about it at the time.

Q. Up to that time, had she said anything to you about this lease? A. No.

James I. Kiernan—For Defendants—Recalled—Cross.

Q. Up until the time this suit was started, on April 17th, 1925, had you heard anything from Miss Overend or from her lawyer, or from anybody else of a claim that you had executed a fraudulent lease? A. No.

Q. That was the first you heard of it? A. The first I heard of it.

Cross Examination by Mr. Barison:

Q. You had absolutely nothing at all to do with the business, did you? A. No.

Q. Who ran the business? A. Mr. Perlmutter.

Q. When you say that he ran the business, just what do you mean by that? A. Well, as far as I know, he had all to do with the management, the operation and the purchasing, buying, selling; everything that constituted the running of the business.

Q. You and your father were also members of the corporation, weren't you, both of you? A. Yes, sir.

Q. What were your duties? A. Well, in the absence of the Treasurer, sign such papers as were necessary for the assistant treasurer to sign.

Q. What were your father's duties? A. The duties of treasurer.

Q. And what did he do, if you know? A. No, I don't.

Q. Did he do anything around there or did he leave everything to Perlmutter? A. Well, I don't know just what he left entirely to Perlmutter. I don't suppose he did anything to the operation of the business.

Q. You didn't tell us he did anything about

James I. Kiernan—For Defendants—Recalled—Cross.

the operation of the business; how often did your father go up there? A. No.

Q. He didn't go up there very often? A. Not to my knowledge.

Q. Your father was engaged in other business, wasn't he? A. Yes, surely.

Q. He was giving his time and attention to other business, wasn't he? A. Yes, sir.

Q. Do you know on an average how aften he did go up to Perlmutters Inc? A. Well, that I can't say. I don't know. I suppose he went there, maybe once or twice, maybe once in two weeks, or a week. I don't know. It was entirely his business.

Q. You know he took practically no interest in the business? A. Practically no interest outside of the funds.

Cross Examination by Mr. Sewell:

Q. Now, Mr. Kiernan, where do you live at the present time? A. 172 Fairview Avenue.

Q. What is your line of business at the present time? A. Well, you mean what kind of business, or what I do?

Q. What kind of business are you in? A. We are in the paper box business.

Q. With your father, you run a factory down here, where? A. 9th and Brunswick Street.

Q. Pretty big factory? A. Fair size.

Q. It is a big factory, isn't it? A. Yes, sir.

Q. What is your position down there? A. I am an assistant treasurer there.

Q. So you have had experience as assistant treasurer for some time? A. No; that was my first experience.

James I. Kiernan—For Plaintiff—Recalled—Cross.

Q. Which was? A. Perlmutter.

Q. You did so well that you were made sasistant treasurer down in your father's Company? A. No, I don't believe that had any bearing on it at all.

Q. How long have you been associated with your fathers business? A. Five or six years.

Q. Down in the factory. You have gone to school, had a pretty good education? A. Fair one.

Q. You know how to read, naturally? A. Yes, sir.

Q. Did you read over this lease before you signed it? A. I don't believe so.

Q. Didn't Mr. Brown go over it paragraph by paragraph with you? A. I don't think it was carefully gone over.

Q. Was it gone over at all; leave out the word 'carefuly'. Was it gone over at all? A. Outside of saying it was an agreement.

Q. Yoy knew what you were signing? A. I knew I was signing a paper to allow her to go in there.

Q. You knew you were signing a lease giving her the privilege of operating there for a period of three years with an option of two more? A. Yes, sir.

Q. So you knew what you were signing? A. I knew it was an agreement.

Q. You knew it was an agreement that she could stay there for three years; in other words, a lease? A. Well I supposed it was.

Q. You knew it was? A. No, I didn't.

Q. You only supposed it was? A. I just did—

Q. Is that your usual practice?

Mr. Higgins: Let him answer.

James I. Kiernan—For Plaintiff—Recalled—Cross.

Q. Go ahead if you want to answer more. Mr. Higgins thinks you want to say more? A. No, I don't.

Q. You don't usually sign papers that you don't know the contents of, do you? A. I don't suppose so.

Q. You don't suppose so. You don't know whether you do or not? A. Well, in a case where a man tells you it is all right to sign and he is operating the business and you have confidence in him, you probably would be a little careless.

Q. You people don't have much confidence in Perlmutter at this time? A. I don't know.

Q. You were running under a credit extension at the time? A. Not to my knowledge.

Q. What was Pigott coming down and geting checks for? A. Coming down and getting checks from me?

Q. Didn't you get any checks from the Company while your father was away? A. Maybe from Perlmutter; not from me.

Q. Didn't you sign checks? A. Maybe I did.

Q. Don't you know? A. I don't know what I signed. I don't have the checks here.

Q. Do you mean to say, Mr. Kiernan, a young man of your experience, holding a responsible position, that you just signed anything that Perlmutter stuck in front of you? A. In the form of checks made out to the Company, why not.

Q. And didn't inquire what it was for? A. He did the entire running of the business.

Q. You didn't even know your Company was

James I. Kiernan—For Plaintiff—Recalled—Cross.

operating under a credit extension? A. No, I didn't.

Q. You thought that were financially all right? A. I knew nothing about the financial condition.

Q. When did your father go away; January, wasn't it? A. Well, it was January or February; I don't know just which.

Q. I think he said January? A. Latter part probably.

Q. Then he was away for two or three months, up until the time this lease was signed, almost three months and you had charge of the finances during that time, representing your father? A. I didn't do any of the financing of the Company.

Q. You held all the mony? A. I didn't.

Q. Why did you endorse checks then? A.Well, sombody had to sign checks.

Q. Why was it necessary; why didn't you just let Perlmutter sign the checks; what was the idea of your signing them too? A. Well, I don't know why that was.

Q. It was a check on Perlmutter? A. A check on Perlmutter?

Q. Yes, certainly, to see that he didn't do anything improper? A. Surely.

Q. You countersigned the checks? A. Yes, sir.

Q. Naturally, you saw to it that he didn't put anything over, didn't you? A. Well.

Q. You said you never heard anything about this case until the summons and complaint was served on you in this case in April 1925. I call yaur attention to this copy of a letter and ask you did you receive the original of that letter? (Handing witness) A. I don't remember.

James I. Kiernan—For Plaintiff—Recalled—Cross.

Q. Didn't you come up to my office one day I was out? A. Yes, sir.

Q. Why did you come to my office? A. Because you called me up and asked me to come to see you.

Q. Did you get this letter too? A. No.

Q. We will come to the telephone conversation. You did know there was something doing in connection with this lease, before you got the papers in this case? A. I didn't know what you wanted. You called me.

Q. You knew there was something doing on this lease? A. You called me up and asked me to come up to see you.

Q. It isn't true that you didn't know about it until you got these papers? A. What I say is that you called me up, to come to see you. I went and you were not in.

Q. I told you I wanted to see you tbout the Perlmutter Shop and Overend lease? A. Well, that means nothing to me.

Q. You never came back to see me? A. I left word with the girl.

Q. I suppose it meant nothing to you? A. No, it meant nothing to me.

Q. You never came back to see me after that time? A. No.

Q. You had known Miss Overend for a long while, hadn't you, for a good many years? A. Yes, sir.

Q. You were naturally anxious to protect her, being an old friend? A. I didn't want to do any harm to anybody.

Q. You were anxious to protect her, too? A. Protect her, I suppose.

James I. Kiernan—For Plaintiff—Recalled—Cross.

Q. You were anxious to protect Miss Overend, being an old friend of the family, your father and so fourth? A. Yes, sir.

Q. What was the discussion in your present that morning regarding this lease and about the arrangments of her going into the store. What was spoken, anything? A. Why, yes. It was told me that she was going to go there on a precentage cases and that was about all.

Q. How long were you together in signing this lease? A. Signing, about 15 or 20 minutes, I suppose.

Q. What else did you talk about during the 15 or 20 minutes? A. Well, there was a good many things talked about; talked about business conditions.

Q. Yau mean that this girl was ta'king to you about business conditions for 15 or 20 minutes, when she was signing this lease, and never said a word about the lease to you? A. Not previous to signing.

Q. Not a word? A. Outside of she was going to take this place upstairs and so fourth.

Q. She didn't discuss with you the prospects of weather or not she would be successful? A. Well, I hoped she would be.

Q. Didn't she bring it up and discuss it? A. I don't know what she could have much to discuss with me.

Q. What did you talk about during the 15 or 20 minutes you were all together there, besides she was going on a ten percent basis; what else was said during the fifteen or twenty minutes? A. Well, I said we had a general conversation.

Q. Tell us about what? A. About general things at the families had known each other; we spoke about that, the way her father was and mother and so forth and so on.

Q. What else did you talk about; did you discuss matters of history, or theatricals or what were you discussing? A. I just told you.

Q. How long did it take you to talk about her father and mother; a couple of seconds, or how long? A. I can't remember.

Q. Do you want to remember? A. Yes, I do; surely.

Q. You would not say that you didn't tell this girl you had a lease on this store, would you? A. What is that?

Q. Would you testify today you are not sure and you didn't tell this woman your corporation had a lease on this store? A. I didn't tell her that.

Q. Did you tell her your father had a lease on that store individually? A. No, sir.

Q. Why didn't you tell her that? A. Why didn't I tell her; I don't know.

Q. Didn't know it. Had no idea of it. Who did you think had a lease? A. I suppose the store had it, seeing Mr. Perlmutter told me it was all right.

Q. You supposed the store had it? A. Yes, sir.

Q. How did you get that information, that you thought the store had the lease? A. Because Mr. Perlmutter told me it was all right to sign that agreement with this girl.

Q. Did you ask Perlmutter whether the Corporation had authority to grant a lease of this kind? A. No.

Q. Why didn't you? A. Because he told me it was all right.

Q. You are an intelligent young man? A. Yes, but I told you I believed this man.

Q. You believed him? A. I did.

Q. Do you remember Mr. Piggot going down to your plant, bringing you up to the store and having you sign two checks? A. No, I don't.

Q. Did he or didn't he? A. I don't believe so.

Q. Are you sure that he didn't? A. No, I am not.

Q. You know Piggott? A. No, I don't know him.

Q. Did you ever meet Mr. Pigott? A No, I don't recognize him; I didn't when he came on the stand.

Q. You knew there had been a couple of creditors meetings, don't you? A. No, I don't.

Q. So when this bankruptcy came, it was like a thunderbolt to you. You had no beforehand information about it? A. No, I had no financial interest in it.

Q. You have a financial interest in everything your father is in; you try to preserve his interest. You are working for him? A. No, there are lots of things he has to do I don't have.

Q. Whatever you do, you try to do to the best of your ability? A. To the best of my ability, yes sir.

Q. Did you know that Mr. Perlmutter was getting $450. in a check in connection with this transaction? A. No, sir.

James I. Kiernan—For Plaintiff—Recalled—Cross.

Q. You say you never came around to the store before Miss Overend was in there, did you? A. Only to purchase things.

Q. Did you ever go afterwards? A. Yes, I believe we bought a couple of hats there.

Q. I mean when you didn't purchase anything. You went in the store sometimes? A. Once or twice maybe, that was all.

Q. What did you go there for? A. Well, I went there once or twice with my father; took him there.

Q. What for? A. I don't know what he went there for. I just went with him. I didn't go in with him. He talked to Mr. Perlmutter. I stayed outside in the store.

Q. I don't recall your answer, Mr. Kiernan, as to whether or not you did get this letter addressed to 172 Fairview Avenue? A. I said I don't remember receiving the letter.

Q. If you got that, you would remember a letter of that kind, threatening you with suit? A. No, I don't know that it threatened.

Q. Before instituting proceedings in this matter, did you ask your father whether he had any knowledge of it? A. I don't deny I did receive the letter. I say I don't recollect the letter. I recollect your telephone call, because I know I went up there.

Q. What else did you do that morning besides sign this lease when you did sign it? A. In what way do you mean.

Q. What else did you do with Miss Overend. I am not talking about the signing of the lease. What else did you do just before this lease was

James I. Kiernan—For Plaintiff—Recalled—Re-cross.

signed? A. I probably wished that she would have good luck and success.

Q. Where did you go with her; didn't you go up and look the place over with her and talk about it upstairs with her? A. I think we did go upstairs.

Q. What did you go upstairs for? A. I don't know as any particular reason.

Q. You were anxious to get this young lady into your father's corporation so that she could occupy your father's building? A. Was I anxious?

Q. Yes, you were authorized by your father to get a subtenant in there? A. I can't say that I was, it meant nothing to me.

Q. It meant something to your father? A. It may have.

Q. Anything you could do to help him, you were out to do? A. Naturally, I tried to help anybody I can.

Re-direct Examination by Mr. Higgins:

Q. Mr. Perlmutter was not an officer of the Company, was he? A. No.

Q. The stock was held by the estate of his wife, Mrs. Perlmutter? A. His wife's estate.

Q. So he could not sign checks himself? A. No, the Bank would give him no authority to sign checks.

Re-cross Examination by Mr. Sewell:

Q. The Bank would have given him authority to have signed checks if the Corporation had so

directed the Bank, wouldn't they? A. Well, I don't know about that.

Q. You know enough about banking, don't you? A. Nothing whatever. I have been connected with it,—I knew it had to be somebody connected with the corporation or Company.

Q. He was connected with the Company as general manager. You knew enough about banking that if Perlmutter Inc. had directed the Bank to honor his signature on checks they would have done so, don't you? A. I don't know whether they would or not.

Q. You don't know that? A. I don't know that. I am not familiar with banking laws.

Q. You are not; what are you familiar with? A. Well, my principal occupation is selling.

Re-direct Examination by Mr. Higgins:

Q. How old are you? A. Thirty.

Q. This was three years ago? A. Yes, sir.

Q. You had just been in business about two years? A. That's all that I had an active interest in anything.

Re-cross Examination by Mr. Sewell:

Q. You say you have only been in business two years?

The Court: At that time.

Q. What were you doing before that time? A. Well, I was working but not for my father.

Q. You were going to business were you not? A. No, in a way I had nothing to do.

Q. How long have you been out of school? A. Since 1914.

Q. So you have been in business, about 12 years? A. Oh, no; I didn't get out of the service until 1920.

Q. You didn't go into the service in 1914? A. I went in in 1917.

Q. We all went in then. What did you do when you came out of the service; you say you were in until 1920?A. Yes, sir.

Q. You are confused in your dates? A. 1919

Q. What did you do during the last seven years? A. I have been cnnected with business, but I didn't have any capacity like I have now.

Q. You have been where you had to use your head a little bit? A. Not so much. I was working around the factory and so forth.

Q. What, as a laborer? A. Not exactly; seeing how the operations of the plant went on and so forth.

The Court: In this month of April 1923, were your duties connected with the Perlmutter Stores or some other concern?

The Witness: With another concern.

The Court: So your time wasn't devoted to Perlmutter Inc.?

The Witness: Not at all.

The Court: Your being there to sign this lease, was that in the regular course of business or by special appointment?

The Witness: By special appointment.

The Court: You put in your time every day at this business?

The Witness: With Perulmtter, no.

James I. Kiernan—For Plaintiff—Recalled—Re-cross.

The Court: Just occasionally?

The Witness: I only went there once or twice.

The Court: What you really had was a nominal office?

The Witness: That's all; a nominal office, not deriving anything from it.

The Court: No pay from it?

The Witness: No.

The Court: You have no time to it?

The Witness: No.

Q. You had received a power of attorney from your father when he went to California, didn't you? Your father had confidence in you to give you a power of attorney? A. Yes, sir.

Q. At that time, in April 1923, you were working for your father at his box factory? A. Yes, sir.

Q. You did whatever your father asked you to do, didn't you? A. How do you mean?

Q. He was your employer; he was your boss in other words? A. Yes, sir.

Q. Your father, before he went to California, directed you to take care of all matters in connection with Perlmutter Inc. and gave you power of attorney? A. I had power; that had nothing to do with Perlmutter, the power of attorney.

Q. He told you to take care of things, didn't he? A. Yes, because that came up regarding that power of attorney.

Mr. Higgins: That is our case.

Adeline M. Overend—For Plaintiff—Rebuttal—Direct.

ADELINE M. OVEREND called in rebuttal:

Direct Examination by Mr. Sewell:

Q. Miss Overend, young Mr. Kiernan who was just on the stand, testified that at the time this lease was signed, there was practically nothing talked about in connection with the lease, except that you told him you were going in under a ten percent arrangement. How long were you people together that morning? A. About there quarters of an hour easily.

Q. What was dicussed in connection with this lease and in connection with the Corporation and so forth; tell us in your own words? A. Mr. Brown passed each of us a copy of the lease, read parts and as we read the lease, Mr. Brown asked us if we individually understood each part.

Q. What do you say, asked you if you understood each paragraph of the lease? A. Individually; he asked Mr. Kiernan "Do you understand that". He said "Perfectly". "Miss Overend, do you perfectly understand". He said "Satisfactory?", and we would answer individually.

The Court: Was Perlmutter there then?

The Witness: Yes, sir.

The Court: Did he ask him too?

The Witness: No, he didn't say much to Mr. Perlmutter; didn't refer to Mr. Perlmutter, only at the end.

Adeline M. Overend—For Plaintiff—Rebuttal—Direct.

Q. You had a copy of the lease, and young Mr. Kiernan and Mr. Brown had copies of the lease? A. Yes, sir.

Q. Go ahead? A. When we stopped reading the lease, we affixed our signatures. I affixed mine and Mr. Kiernan signed and Mr. Brown.

Q. Before you signed the lease, did you ask Mr. Kiernan any questions? A. Yes, I did.

Q. If you did, tell us what questions?

Mr. Higgins: I think this is reiteration.

Mr. Sewell: I think your Honor, I can rebut any testimony of Mr. Kiernan.

The Court: There is no doubt about that. He said he didn't say any such thing. She said he did.

The Witness: Yes, he did.

The Court: What I am interest in is this: did Mr. Perlmutter participate in the conversations preparatory to the execution of the lease?

The Witness: Yes, sir, he did.

The Court: You have suggested, as I recall it, that something was said by you and Mr. Kiernan junior about the term of the parent lease, and also something about the financial condition of the Company? Did Mr. Perlmutter participate therein?

The Witness: He didn't say anything Mr. Perlmutter witnessed it. I asked Mr. Kiernan if the Corporation was financially sound and Mr. Kiernan said "Absolutely", and I asked him of he felt it was safe for me to go upstairs.

Adeline M. Overend—For Plaintiff—Recalled—Rebuttal—Cross.

The Court: Was Mr. Perlmutter there then?

The Witness: He witnessed it.

The Court: Pior to that, had you said anything to Mr. Perlmutter on the subject of financial responsibility?

The Witness: Yes, I asked the same question of Mr. Perlmutter at the time the proposition was first mentioned.

Q. What did he say? A. Mr. Perlmutter said it was perfectly O. K. That was the expression that Mr. Perlmutter used.

The Court: What did you ask when he said "perfectly O. K."?

The Witness: I asked Mr. Perlmutter "How safe is that Corporation", and "Is it financially all right"? He said "Why, perfectly, all right. It is all O. K." I asked Mr. Kiernan the same question the morning of the signing of the lease, and Mr. Kiernan said it was perfectly all right.

Cross Examination by Mr. Higgins:

Q. I think you testified yesterday that you have been negotiating with Mr. Perlmutter for about a month before the time of the lease? A. Mr. Perlmutter had negotiated with me.

Q We will put it that way. For a month before that, he had been negotiating with you to get you in the store? A. Yes, sir.

Adeline M. Overend—For Plaintiff—Recalled—Rebuttal—Cross.

Q. You had a number of meetings about it at your house? A. About three.

Q. Didn't you testify yesterday that there was about a half dozen? A. Well, I testified at the shop, when he took me through to see the department.

Q. How many times did you go to the shop? A. Only twice.

Q. How many times did he come to your house? A. I would say three or four probably.

Q. That is about five or six, we will say, to be accurate? A. Yes, sir.

Q. You had agreed with him on what the terms were before that morning; how much you were to pay, what percentage? A. Yes, sir.

Q. You had agreed on all that with Perlmutter? A. Yes, sir.

Q. Up to that time, you had not seen Kiernan at all about it? A. No, but Mr---

Q. You hadn't seen him at all up to that morning he came in there and that morning you had the lease from your lawyer already drawn up for you? A Yes, sir.

Q. Now, when was it that you made your complaint against Perlmutter, the criminal complaint? A. In April 1925.

Q. That is two years after the lease was signed, wasn't it? A. Yes, just about.

Q. You appeared in Judge Sullivan's court?

Mr. Sewell: I object to this line of cross examination. We have gone over that. It is not proper cross examination at all.

The Court: Overrule the objection.

Adeline M. Overend—For Plaintiff—Recalled—Rebuttal—Cross.

Q. You did testify in Judge Sullivan's court, didn't you? A. Yes, sir.

Q. Did you, in the Court in which your complaint against him--your complaint against him was for fraud? A. Obtaining money under false pretenses.

Q. Under false representations? A. Yes, sir.

Q. Mr. Sewell was there then as your counsel? A. Yes, sir.

Q. Mr. Barrison was there as Mr. Perlmutter's counsel? A. Yes, sir.

Q. Did you testify there upon a question of Mr. Sewell, that the money was given in conjunction with a five year lease of the place over Perlmutter's store?

Mr. Sewell: I don't think that is the proper way of proving it.

The Court: If the testimony has been taken, the testimony will have to be produced and read, to contradict her if she so testified.

Mr. Higgins: I think I have the right to ask her without the testimony; if she says that she didn't, I might possibly be able to contradict it.

Q. Did you say that in Judge Sullivan't court? A. I believe I did.

Q. Did you say then, in answer to a question of Mr. Sewell, that Mr. Perlmutter had no right personally to grant the lease, because his business at that time was being carried on by a corporation? A. I don't think so.

Q. You don't recall whether you said that or

not? A. I have had the lease with Perlmutter, Inc. I don't see how I could say that.

Mr. Higgins: I don't want to press it.

Q. Did you testify that he obtained the check for $450. which you gave to Mr. Perlmutter, for entering into this lease which he had no right to execute with you. Did you testify that way in court? A. I don't think so, because I didn't have the lease with him.

Mr. Sewell: May I inquire if Judge Higgins is reading from the record.

The Witness: I didn't have the lease with Mr. Perlmutter.

Mr. Higgins: It is not the record. It is what purports to be a newspaper record of the proceedings.

Q. In your complaint here, you claim that Mr. Perlmutter fraudulently, with intent to decieve you, entered into a lease; don't you? A. No.

Q. You don't claim that in this case? A. In this case. I thought you meant the criminal case.

Q. You also claim that Mr. Kiernan, junior and Mr. Kiernan senior fraudulently entered into the same lease? A. Yes, sir.

Q. There isn't a criminal complaint against Perlmutter for that? A. No, for the conversation I believe.

Q. You made no criminal complaint against Mr. Kiernan? A. No.

Q. You made no complaint to anybody about the Kiernans until this suit was started? A. Just this suit.

Q. The lease was executed April 25th, 1923? A. Yes, sir.

Q. The first complaint you made against the Kiernans was through your lawyer, a letter on February 13th 1925? A. No, I wrote a letter personally to Mr. Kiernan.

Q. Have you got that letter? A. I think it is among my files.

Q. You testified before trial you had a copy of the letter? A. I believe I have it. It may be with the papers, with the affidavits.

Q. What affidavit do you mean? A. The storage man.

Mr Sewell: Maybe Mr Kiernan can produce the original

The Witness: I wrote the letter, still thinking my lease was a lease

Mr. Sewell: I will look for it.

Q. While Mr. Sewell is looking for it, have you any other papers you have not produced in connection with the lease, any correspondence with Perlmutter or Mr. Kiernan or anybody else? A. You mean pertaining to the lease after I was out.

Q. Yes; have you anything else here you haven't produced yet? A. Why another affidavit is there too. They must be with the papers.

Q. Have you any copy of letters you wrote to Mr. Perlmutter? A. I wrote a letter. I visited him and the conversations. I have that somewhere with me.

Q. Did you write any letters addressed o Perlmutter Shop corporation; when did you write that letter? A. In December.

Q. What year? A. 1924.

Q. That was the first time you wrote him about this? A. I had called him a couple of times.

Q. That was the first time you wrote him, December 1924? A. Yes, sir.

Cross Examination by Mr. Barison:

Q. You have testified just now that when you spoke to Mr. Perlmutter, you asked him concerning the financial condition of the corporation. Just how did you put that question? What did you say to him? A. Upon the first visit we spoke of it, in my home, I first asked him the condition of the corporation.

Q. Just what words did you use? A. I asked him about how much money was involved there, how big a store it was. He mentioned that it was very big, does $100,000 worth of business a year and he said, "Jim Kiernan has got a hundred percent on his money since he had been in there. You can see what is in it for you".

Q. You didn't ask about te financial responsibility of the concern? A. You mean in regards to their funds?

Q. Yes? A. I asked him the first night I visited the shop with my sister.

Q. After he had told you of what a big company it was? A. I looked at the department.

Q. Then you asked him whether they were financially responsible? A. Yes, sir.

Q. You also asked him whether or not they had a long lease? A. I did, yes, sir. He always bragged about the long lease.

Q. You asked if the corporation had a long lease? A. Yes, sir.

Q. Miss Overend, that was the first time you had gone into business? A. Yes, sir.

Q. They were taking you in not as a partner nor as a member of the corporation, but merely as a tenant? A. Yes, sir.

Q. And you want to tell this Court and Jury that you, going into these premises merely as a tenent, asked whether or not the concern, the corporation, was financially in good condition, and secondly, as to how long a lease the corporation had?

Mr. Sewell: I object, on the ground that it is immaterial what this witness intends to tell the Court and Jury.

The Court: The question is, what does she tell them.

The Witness: I didn't have to ask. He always bragged about the wonderful lease they had.

Q. Did he also brag about the financial condition? A. Certainly; "the biggest shop in Hudson County and the best".

Q. He said it was the biggest and best? A. Absolutely.

Q. That is all he said? A. And the money behind it.

Re-direct Examination by Mr. Sewell:

Q. He was rather a loquacious gentlemen, Mr. Perlmutter? A. Yes, sir.

Q. He was rather talkative? A. I should say.

Q. He would tell you plenty? A. Yes, sir.

Re-cross Examination by Mr. Higgins:

Q. This he told you the first time you talked to him? A. Oh, yes, sir.

Q. And the second time when you went to the store? A. Several times.

Re-direct Examination by Mr. Sewell:

Q. You say you called on Mr. Kiernan several times? A. I think twice, Mr. Sewell.

Q. And spoke to him about this matter? A. I asked him twice, and I got one of the boys, one of Mr. Kiernan's sons. They said their father was there, he had come back, but he was on the long distance phone and could not speak to me.

Q. After you told who you were, they said he was on the long distance phone? A. Yes, sir.

Q. Then did you call again? A. Yes, sir.

Q. Did they ever give you any satisfaction? A. None whatever; my letter was ignored.

Q. This business was the first business venture you were in and you wanted to be careful? A. Yes, sir.

Q. You didn't have money to throw away? A. No, I borrowed money to go in.

Mr. Higgins: You were so careful you went and got a lawyer to represent you?

The Witness: Yes, naturally.

Q. Who was it notified Mr. Kiernan to come up that morning to sign the lease? A. Mr. Brown telephoned to me that he had spoken to Mr. Higgins on the phone.

Mr. Higgins: I ask that that be stricken out, what Mr. Brown told her.

The Court: Yes, strike it out.

Re-cross Examination by Mr. Higgins:

Q. You were there with your lawyer? A. The morning of the lease?

Q. There was no lawyer representing Perlmutter Inc? A. No.

Re-direct Examination by Mr. Sewell:

Q. They had a lawyer representing them, Judge Higgins? A. Yes, sir.

ALL SIDES REST

Mr. Barison: I now move, if your Honor please, for a direction of verdict in favor of the defendant Joseph Perlmutter for the following reasons:

First, the misrepresentation, if any, of a material point, if any, was not the cause of any loss, if any, sustained by this plaintiff. The loss sustained by this plaintiff, if she did sustain a loss, was because of one of two reasons.

One was the action of law, the going into bankruptcy of Perlmutter Inc. and if that was not the cause of the loss, because she was taken back, the cause of any loss that she might have sustained would be due to the eviction, if her story is true, and uncontradicted, by Perlmutter in February or March of 1924.

Also that the lease in this case is a straight lease of landlord and tenant, under which the

tenant, instead of paying a bulk sum per month in rent, agrees to pay ten percent of gross income.

As to the second count, I ask a direction on the ground that, if true, the only one who would have a cause of action against the defendant Perlmutter for the money mentioned in the second count would be the Corporation.

The Court: I deny the motions and will allow you an exception.

Mr. Higgins: I move for a direction of verdict on behalf of Mr. Kiernan, junior:

On the first ground, that they have not proven the three elements that are necessary to charge him with fraud.

First, that any representation he made, they have fail to show that he knew that the representation was false. In fact, all the testimony in the case shows that he didn't know whether that true or false, and there has been no evidence in the case as to whether the financial condition of the Company was as represented by anybody.

Further, to convict him of this fraud, they must show that she relied on this statement, and that she acted on it. Her own testimony this morning is to the effect that the negotiations up to the moment of the formal signing of the papers were made with Perlmutter, and that the first time she saw Perlmutter, he made this statement to her, told her it was the biggest place in town, there was millions &c. Mr. Kiernan was advised of this lease and all he had to do was to sign the lease which her lawyer had prepared.

On the third ground, she has failed to prove the third element of fraud, that she lost anything by reason of any statement, admiting they were made by Mr. Kiernan. She has testfied that up to the time that the store was closed by the bankruptcy proceeding, she was making $60. a week, and that after she reopened, she made $75. a week, sometimes $100.....no I am wrong on that.

(Further argued)

The Court: I will deny your motion and grant you an exception.

Counsel summed up to the Jury.

(On the statement in summation by Mr. Sewell that "two and a half years at $75. week would be around $10,000."

Mr. Barison: At this time, I feel I am entitled to a mistrial. Counsel has at no time any right to indicate to the Jury any amount. He has no right to mention to the Jury any definite figures as to how much she has lost.

The Court: Your rule is all right, but its application is at fault. It is a fair comment. I deny your motion and allow you an exception.

Mr. Barison: Exception.

Mr. Sewell resumed his summation.)

The Court then charged the Jury as follows:

CHARGE.

The Court: Gentlemen of the jury.

Adeline M. Overend originally brought this suit as plaintiff against James M. Kiernan,

James W. Kiernan and Joseph Perlmutter, as defendants, and in that suit there was two counts, the first count charging fraud committed by James M. Kiernan, James W. Kiernan and Joseph Perlmutter, and the second count charging a fraud alleged to have been committed by Joseph Perlmutter alone.

Now, you want to keep that in mind in deliberating on this case, that in the first count there are three defendants, whereas in the second count, there is only one.

During the course of the trial the Court granted a non-suit in favor of the defendant, James M. Kiernan, that is the senior of the two Kiernans, and so he drops out of the case, leaving only two defendants now to answer to the first count and only one defendant, Mr. Joseph Perlmutter, to answer to the second count.

You must remember, Gentlemen, too, that this action is not based upon any eviction of Miss Overend from this property, nor is it based upon a claim that she was made ill by reason of any representations, or by reasons of the failure of the Perlmutter Company, of which I will speak later on. The two causes of action are based on allegations of fraud alone.

So, for all intents and purposes, Gentlemen, it makes no difference what Mr. Joseph Perlmutter may have done with regard to evicting, or atempting to evict, or with regard to the removal of Miss Overend from the premises at the time when she finaly quit and left.

The plaintiff here claims that she made a lease with Perlmutter & Co. on April 25th, 1923, whereby she rented about 600 square feet

of floor space on one of the floors occupied by this Company, and that the term of the lease was for three years, giving her the option of more years if she desired. And the plaintiff claims, that James W. Kiernan represented to her that Perlmutter & Co. held a long term lease of from ten to twelve or fourteen years, according as you may find the testimony to have been, whereas in fact it is claimed they didn't have any written lease at all, but that they were merely tenants from month to month; that she relied upon that representation, and that she was damaged.

She also claims that this same young man represented to her that this Company was all right financially. I think those were the terms used, and she also insists that Mr. Perlmutter made these same representations to her with respect to the length of the lease and with reference to the financial condition of Perlmutter & Co.

Now, those claims are set forth in the first count of the complaint.

The second count charges that Mr. Joseph Perlmutter represented to her that Perlmutter & Company, the Corporation with whom she had the lease, required $450. to enable her to go into the premises, as a sort of bonus, if you please. The purpose of it does not seem to be very clear, but she claims that the misrepresentation was that Perlmutter represented to her that Perlmuter & Co., the Corporation, required this payment from her, and that it was not he himself who was requiring it for his own personal ends. She says that this was represented, and she relied on it, and she was damaged.

Now, Gentlemen, the plaintiff must prove to you by a fair preponderence of the evidence one or both of these frauds alleged to have been made, and that she, relying thereon, was damaged as the natural and proximate result thereof.

Now, it makes no difference of she was damaged, if there was no fraud perpetrated by any of these defendants, or either of them. But, in order to establish fraud, Gentlemen, legal fraud as here alleged, the plaintiff must prove every element necessary to constitute fraud by a fair preponderance of the evidence, because fraud is never presumed. It must be proven by competent proof.

Now, what are the necessary elements to constitute a legal fraud:

Some of these rules I am going to give you are rather complicated and involved, and you must give them your close ateention.

First: it must be shown that the defendant..... quoting now frim our Supreme Court.....made some representation to the plaintiff, meaning that he should act upon it.

Secondly: That such representation was false and that the defendant, when he made it, knew it to be false.

Third: that the plaintiff, believing such representation to be true, acted upon it and was thereby injured. Not injured by something else, but injured by the fraud.

And the representation must have been upon a material point, and as the plaintiff can recover nothing in the action without proving a material fraud, that is, such as resulted in actual damage, she can recover only for such

damage as she can show to be the direct consequence of such fraud.

That the plaintiff must show with reasonable certainty in the proof. Meaning by preponderance of the evidence, not only what the fraud was by which she was injured, but also its connection with the alleged damage, so that it may appear that the fraud and the damage sustained to each other the relation of cause and effect, be such that the one might have resulted directly from the other Therefore, the first thing that you want to investigate, Gentlemen, is whether a representation, meaning it to be relied upon, was made by either of these defendants, because of course, if one defendant did not make it and the other did, you could not charge a misrepresentation as against the one that did not make such a representation. If young Mr. Kiernan did not make the representation about the term of the lease held by Perlmutter & Co., as he says he did not, and if he did not represent that the Company was financially all right, that ends the case so far as he is concerned, because under such circumstan, ces, he would not have made a misrepresentation. And so as to Mr. Perlmutter: if he did not make the statements accredited to him by Miss Overend in the first count, with respect to the term of this parent lease held, or alleged to be held, by Perlmutter & Company, and with respect to the financial standing of this Company; or if he did not represent to her that the $450. was required by Perlmutter & Company, in order that she might go into possession of the property or as a payment to them for allowing her to get the benefit of this lease, or whatever the arrangement was, as claimed by her; there could

be no fraud perpetrated by him, and you would have to find, in such a situation, a verdict in favor of such person who did not make such misrepresentation.

Now, it makes no difference, Gentlemen, what Miss Overend expected might accrue to her from this arrangement with Perlmutter & Co. She might have thought that this Company was going to continue on there for a lifetime. She might have thought that this Company was perfectly sound financially. But, unless there was misrepresentation upon those points, Gentlemen, with respect to the terms of the lease, or as to the financial standing of this Company at that time, there would not have been any fraud perpetrated, no matter what her expectation may have ben. If you find that such representations were made and that they were made to be relied upon by Miss Overend, then in the second place, Gentlemen, dealing now with the second element required to establish fraud, you should inquire, if the representation or representations, whichever you may find, were in point of fact false, and if so, the defendants whose conduct you are investigating, at the time knew such representation to be false; but fraud in representations of fact may be either in the knowledge of their falsity or without knowledge of their truth or falsity, in coupling the representations with an express or implied affirmation of personal knowledge of their truth.

And so, if the representations as claimed, were in fact made by Mr. Kiernan junior, were they untrue at the time when he stated, if he did state anything upon the subject, were such statements untrue? For example, if he represented that the Company was financially all right, was it in fact

so at the time; because if so, there certainly could not be any misrepresentation. There is not a great deal of proof either upon the standing of the Company at that time. You have got to take that into consideration.

If that is so, if there was no misrepresentation with respect to such subjects, there was no fraud, no matter if the Company thereafter became insolvent. The Company, you see, might have been perfectly solvent, might have been financially all right according to the claim made with respect to the representations, but it might have gone on the rocks thereafter.

So you have got to find out what the situation was at that time, and the relationship of the representation if any, to the situation as it existed at the time the representation was made, and of course that would apply to Mr. Perlmutter as well. If he made no representation at the time and the situation did not justify the plaintiff in saying there was misrepresentation, there was no fraud.

Then upon the second count: if the representation regarding the $450. that the Company, Perlmutter & Co. required, if it was made at all, was true, there could be no fraud upon this second count.

If, however, these representations were made, meaning to be relied upon, and you find as a fact that they were false and then known to be false, within the rule I have given you, as to either or both of these defendants, then the third question arises: did the plaintiff believe such representation or representations to be true and act in reliance thereon and was she thereby injured?

Now, there you have a question of considerable

difficulty. Of course, if Miss Overend did not believe any such representations, if they were made, to be true, or if she did not rely thereon, but relied on her own judgment, there could be no recovery by her as no legal fraud would have been perpetrated upon her under such circumstances, and furthermore, if it should appear that she was thereby injured—in other words, it must appear that the fraud and the damage sustain each other the relationship of cause and effect, or at least that one might have resulted directly from the other.

Now, Gentlemen, there comes into the case at this point another question.

Even though you should find that all of the elements of fraud were present, justifying you in saying that fraud had been perpetrated, did Miss Overend waive the fraud? Because, if she did, she could not now insist upon recovery upon the ground of fraud.

Waiver is the act of waiving or not insisting on some right, claim or privilege ,a foregoing or giving up of some advantage which, but for such waiver, the party would have enjoyed; an election by one to dispense with something of value, or to forego an advantage he might have taken or insisted upon; the giving up, relinquishing, or surrendering of some known right; an intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment or waiver of such right.

Waiver may be made by an express agreement or promise, declaring an intention not to claim the supposed benefit or advantage, and such agreement or declaration will not only waive those matters given expressly within its terms,

but will extend to other matters which by a natural and necessary implication would be affected

The more usual manner of waiving a right is by conduct or acts which indicate an intention to relinquish the right, or by such failure to insist upon it that the party is estopped to afterward set it up against his adversary.

Now, as I shall say to you in just a moment, if you find that Miss Overend is entitled to recover here, she would be required to minimize her damages as far as it is in her power so to do.

So, if you find what she says regarding the closing of this business due to bankruptcy, to be true, and that thereafter, in about a period of six or seven weeks, she went back again, but under Mr. Perlmutter as an individual, then, whether the terms by which she continued there were the same as existed with Perlmutter & Co. or not it is for you to say whether or not she had waived her claim against this defendant, if she had any claim, and chose to go on with the situation without making any claim, waiving her rights.

Of course the burden rests upon the defendant of proving that to your satisfaction by a fair preponderance of the evidence.

But, if she went there for the purpose of minimizing her damage; in other words, was going to make the best of a bad bargain, and had no intention of waiving the rights which she might have, if she did have any rights against these defendants, why, then of course there would be no waiver.

Now, a great deal has been said about the bankruptcy of Perlmutter & Co. That was an unfortunate situation for Miss Overend. But,

Gentleman, you see the fact, if it is a fact that this Company was declared bankrupt, if that is so, that would have no bearing with respect to Miss Overend's right of a cause of action here, unless there had been fraud by these two defendants. I emphasise that because I don't want you to be carried away by the thought that this woman put into this business and the business failed, and that therefore she ought to be compensated. I say that is not her cause of action; her cause of action is based upon a charge of fraudulent misrepresentation, made by these two defendants.

Now, if the plaintiff has not established all of these elements of fraud which I previously related to you, as against James W. Kiernan, the young man, then as to him, there would be no cause of action and your verdict would be in his favor and against this plaintiff.

If she has not so established these elements as against Joseph Perlmutter on the first count there would be no cause of action and your verdict upon that count would be against the plaintiff and in favor of Joseph Perlmutter of 'no cause of action'; and with respect to the second count, if these elements of fraud have not been proven by a fair prepondernce of the evidence against Perlmutter on that count, then again your verdict would be in favor of the defendant Perlmutter and against the plaintiff of 'no cause of action'.

But if she has not so established fraud as against Mr. Kiernan, but she has established it as against Mr. Perlmutter on the first count, then there would be no cause of action as

against Kiernan and your verdict would be in his favor and against the Plaintiff, irrespective of what you might find with respect to Mr. Perlmutter. Which is equivalent to saying to you that in this case you may find that there had been fraud committed and the plaintiff had sustained damage thereby, but that one of the defendants was not guilty thereof, but that the other was. In such event, then, your verdict would be in favor of the defendant who had not perpetrated the fraud, or such fraud as caused damage to this plaintiff under the rules I have given you; but it wiuld be against the other defendant if you find all the elements of fraud had been proven as against him.

I might say right here, if you arrive at a point where you find that the plaintiff is entitled to recover at all, you would have to bring in two verdicts, that is, one verdict on each count, because they are rested upon different misrepresentations as claimed. So you take them up separately; the first count, you understand, is against both Perlmutter and Kiernan, and respect to that, it is open for you to find whether both are liable or only one liable, or neither one liable, in which event you would say as to the first count: "We find that the defendants, or one of the defendants", as the case might be, "is entitled to a verdict as against the plaintiff of 'no cause of action'". Or, "We find that the plaintiff is entitled to a verdict against both, or one of the defendants", according as you might find.

You would also take up and consider the second count in your verdict, and say, "We find in favor of the plaintiff and against Perlmutter",

stating the amount of the finding; or "We find in favor of the defendant Perlmutter and against the plaintiff, as to the second count, of 'no cause of action'."

I think I have made myself clear as to the forms of verdict.

Now, Gentlemen, of you reach the point where you find that the plaintiff is entitled to a vertict as against one or both of these defendants upon the first count, then you will have to take up the question of the admeasurement of damages.

The General rule with respect to damages in cases of fraud is; that the wrong doer must answer for those results and injuries to the other party which must be presumed to have been within his contemplation at the time of the commission of the fraud, and it is undoubtedly the rule that in the ordinary case brought by a lessee, through eviction, if you please or failure on the part of the lessee to enjoy the term of the lease, due to some act or conduct on the part of the lessor, the real measure of damages is the difference between the market value at the time of the eviction and the time of the expiration.

And that would be the rule in this case. and we would be limited, and there would not be any proof of the market value of the balance of this term, if it were not for the fact that this lease is a peculiar lease in itself. It involves the question of personal relationship. The rent if based upon the gross sales made, being limited to ten percent of the gross receipts, and these receipts have to be turned over in gross to Perlmutter & Co. the lessor, and then Perl-

mutter & Co. was to account to Miss Overend for all except the ten percent reserved, and you see that it would not be fair to apply the ordinary rule of damages as the Court gives it.

So that we will refer back to that original rule which I gave you: those damages which are the natural and proximate result of the wrong done.

And so, if you find in this case that there was a cessation of this business due to the fraud by either of these parties, within the rules that I have given you, then you would ascertain what damages were the natural and proximate result of that condition, and Miss Overend would be entitled to the benefit or value of her bargain, and if that might be recoverable so far as that resulted in loss of profits to her in this business, then competently and adequately proven. But only with relation, Gentlemen, to the injury done as the natural and proximate result of the fraud, remembering that you have no concern here with what Mr. Perlmutter, even though he is a defendant in this case, may have done by way of attempting or actually putting Miss Overend out of the property. That would be the proper subject matter of a suit for trespass, if you please, brought by Miss Overend as against Mr. Perlmutter individually. And I say that even though he is a party to this suit, because the suit is based, as I said in the beginning upon a charge of fraud and not upon eviction.

And so, it gets back really to what is the difference between what this women would have to pay to stay in that property for the length of time that she would otherwise have been

entitled to, and what was the reasonable value of the business during that time. In other words, she could not say that her gross sales were so much and ask to recover that, because she would have to pay a certain amount of that out.

On the other hand, the question of what may have resulted to her by way of benefit under this contract is open to a great many conjectures, which would have to be taken into consideration in applying the original rule I have given about what were the natural and proximate damages resulting to this women from the wrong alleged to have been committed upon her.

I should say possibly, there was some testimony as to the amount the fixtures were worth and what the hats were worth that were in this building at the time Miss Overend finally went out and she says there was only something like 26 hats left when she got back. She claims that it was practically a total loss, so far as the hats were concerned, but that is not a proper element of damages in this case, because that would be the proper subject matter of a suit on behalf of Miss Overend against Mr. Perlmutter on an allegation of unwarranted eviction.

I think I have given you the rules with respect to damages and with relation to the other elements involved in this case.

Now, you must not let passion nor prejudice influence your verdict. The fact that this plaintiff is a women should not enter into this case at all. The fact that one of these defendants may or may not have property, or may

be away from the Court, is not to sway your verdict at all. You are to decide the case upon the evidence here and only upon the evidence, Gentlemen, that has been presented.

Motions were made and insisted upon strenuously by councel for both of these defendants, and they were denied by the Court. Now, Gentlemen, do not understand from that, that the Court means that you should find a verdict for the plaintiff. I think sometimes jurors get the idea or impression that the Court is trying, in some subterranean or underneath way, to indicate the way, that they should find a verdict for the plaintiff, that the Court forsooth, does not believe these motions are good. The law gives counsel the right to make motions, raising questions of law for the Court to decide. That is why the Court is here, to decide questions of law which arise during the course of a trial. In passing on these motions, the Court was merely deciding that there were facts in the case to be submitted to you, That is your function, to pass upon the facts, in order that you may find a true verdict, applying the law the Court gives to you. You are to take the law that the Court gives you, and apply it to the facts as you find them, no matter what the Court may have said they were, or counsel may have said they were. Take the case, consider the facts, and apply the law the Court has given you, and then return your verdict, and you will have given complete justice. If you do that, you have performed your duty.

(The Jury retired)

Charge.

Mr. Barison: I would like an exception to that part of the Court's charge wherein the Court charged that the plaintiff would have still a right against Perlmutter as to the ejectment.

The Court: I think I have already covered that sufficiently in my charge.

Mr. Barison: I also ask an exception to what the Court charged as to the measure of damages.

The Court: You may have your exception.

On the Jury returning for further instructions as to verdict, the Court further charged as follows:

The Court: There is one count against Mr. Kiernan junior and against Mr. Perlmutter. Upon that count, you may find that the plaintiff is entitled to a verdict against none or against one, or both. If you find in favor or one or both defendants, you will render a verdict against the plaintiff of "No cause of action".

Now, as to the second count, there is only $450. involved in that and with respect to that $450. check, which she claims it was fraudulently represented to her that the Corporation required, now, Mr. Joseph Perlmutter is the only defendant to that count, so you find against him or for him, but Mr. Kiernan junior is not involved in that second count.

Exceptions granted to counsel.

RULE FOR JUDGMENT.

HUDSON COUNTY CIRCUIT COURT.

ADELINA M. OVEREND,

Plaintiff,

vs.

JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendants.

This action as tried before Hon. Henry E. Ackerson, Jr., with a jury in the presence of counsel for the respective parties in the Hudson County Circuit Court on June 14th and 15th, 1926.

The cause having been submitted to the Jury they returned their verdict as follews: We find in favor of the Plaintiff and against the Defendants James W. Kiernan and Joseph Perlmutter and assess the damages of the Plaintiff on the First Count of the complaint filed herein at Six Thousand ($6000) Dollars against both of said defendants, and we find in favor of the Plaintiff and against the defendant Joseph Perlmutter and assess the damages of the Plaintiff on the Second Count of the complaint filed herein Four Hundred and Fifty ($450) Dollars.

Whereupon it is adjudged that the Plaintiff Adelina M. Overend have judgment against the Defendant James W. Kiernan in the sum of Six Thousand ($6000) Dollars, and against the Defendant Joseph Perlmutter in the sum of Six Thousand Four Hundred and Fifty ($6450) Dollars.

HENRY E. ACKERSON, JR.

Judgment entered this
18th day of June, 1926, on Motion of
WILLIAM E. SEWELL,
Attorney for Plaintiff.

Rule For Judgment.

HUDSON COUNTY CIRCUIT COURT.

ADELINE M. OVEREND,

Plaintiff,

vs.

JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendants.

Judgment entered June 18th, 1926

Damages $12,450.00

Costs .....

Total .....

WILLIAM E. SEWELL,
Attorneys.

Judgment on verdict in the above entitled cause was entered in this Court on the 18th day of June, in the year of our Lord One Thousand Nine Hundred and 26, in favor of the Plaintiff Adeline M. Overend, and, against the defendant, James W. Kiernan in the sum of $6000.00 and against the defendant Joseph Perlmutter in the sum of $6450.00, in a plea of Action-at-Law for the sum of Twelve Thousand Four Hundred and Fifty Dollars and cents damages and Dollars and Cents costs of suit.

Judgment entered and signed this 18th day of June, 1926.

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HENRY E. ACKERSON, JR.,
Judge.

ACTION AT LAW.—ORDER TO SHOW CAUSE WHY JUDGMENT SHOULD NOT BE SET ASIDE AND A NEW TRIAL GRANTED.

HUDSON COUNTY CIRCUIT COURT.

ANNIE M. OVEREND,

Plaintiff,

vs.

JAMES M. KIERNAN, JAMES W. KIERNAN AND JOSEPH PERLMUTTER,

Defendants.

Upon application made within time by Frank J. Higgins, attorney for the defendant James W. Kiernan, it is on this 25th day of June, One Thousand Nine Hundred Twenty-six.

ORDERED that the plaintiff in the above entitled action show cause before this Court on the 26th day of June, One Thousand Nine hundred and Twenty-six, at ten o'clock in the forenoon on said day or as soon thereafter as counsel may be heard, why the judgment in this case against the defendant James W. Kiernan, should not be set aside and a new trial granted. This order reserves to the defendant James W. Kiernan the right to take or prosecute an appeal on the exception taken at the trial of said case.

HENRY E. ACKERMAN JR.
Judge

Made original to Clerk, Sept. 9, 1926.

MEMORANDUM.

HUDSON COUNTY CIRCUIT COURT.

ADELINE M. OVEREND,

Plaintiff,

vs.

JAMES M. KIERNAN, JAMES W. KIERNAN AND JOSEPH PERLMUTTER,

Defendants.

ACKERSON, J.

This matter comes before me upon a Rule to Show Cause why the verdict against the defendant James W. Kiernan in the above entitled matter should not be set aside and a new trial granted, upon the grounds that the verdict is contrary to the eivdence, against the Court's charge, and excessive.

After examing my notes of the testimony, I have reached the conclusion that there is no merit in the contention that the verdict is contrary to the evidence and against the charge of the Court, and this leaves only one ground for consideration, viz: Whether the verdict is excessive.

The plaintiff, after entering into the lease agreement, whereby she was to occupy space in the store of Perlmutter Incorporated, for a period of three years, occupied this space for a period of about six weeks, during which time she made an average profit of $75. per week. At the end of this period of six weeks, the store closed,

due to the bankruptcy of the Company, which had given the lease to the plaintiff and she was out of business for seven weeks, at the end of which time she went back again in the same store, but under an arrangement made with Mr. Joseph Perlmutter, individually and this second opening of the business began August 14, 1923, and ended February 4, 1924, when Mr. Perlmutter apparently evicted her from the premises. Her lease began April 25, 1923, and was for a term of three years and it was slaimed by the plaintiff that she was induced to enter into this lease-agreement because of fraud on the part of James W. Kiernan in representing to her that the company had a ten year lease on the store, whereas the company had no lease, but was merely a tenant from month to month.

After the plaintiff opened up her business again on August 14, 1923, and up until February 4, 1924, she testified that her profits dropped off some and that she only made from sixty to sixty-five dollars per week, and she also testified that after February 4, 1925, when she was evicted by Mr. Perlmutter, individually, that she was unable to carry on her business down to the date of trial.

The attorney for the defendant James W. Kiernan, argued that the most to be recovered under the testimony from Mr. Kiernan, was the loss of profiits during the seven weeks that the plaintiff was prevented from conducting her business, prior to August 14, 1923, and that this would only be at the rate of $75.00 for seven weeks, or a total of $535.00.

It is argued that when the plaintiff went back into the store on February 4, 1924, and contin-

ued on under Mr. Joseph Perlmutter as an individual, that this waived her rights to any further claim of damages and that his sudden eviction of her, although it may result in damage, could not be charged to the defendant Kiernan.

It could not be doubted, however, that the burden rested upon the plaintiff to minimize the damage, and if she could have continued her business, whether under Mr. Perlmutter as an individual, or any one else, it was her duty to do so, and if she did, this would not necessarily waive any claim to damages she may have sustained, and this only effect would have been to lessen the damages.

The Court properly left to the jury the question of whether or not the plaintiff had waived any further claim to damages when she went back into possession on August 14, 1923, and the jury evidently found that she had not, and this being so, it was opened for the jury to find what damages she sustained for the balance of the term of her lease, inasmuch as she was evicted from the premises on February 4, 1924. The Court instructed the jury that no damages could be allowed for the eviction of the plaintiff by Mr. Perlmutter as an individual, although there was testimony to the effect that she lost considerable on her stock of goods, etc. The situation is very similar to that which would have risen if the plaintiff instead of going back into the same store, had secured a lease of space in an adjoining store and had then been evicted by her lessor. She would have been considered as having made an effort to reduce her damages and having failed, would have been entitled to recover what she lost, as the result of the original fraud.

Of course, for an eviction, the ordinary rule of damage is, that the plaintiff could only recover the value of the unexpired term of the lease, but this is a cause founded upon fraud in the procurement of the lease and the lease is something more than an ordinary lease, inasmuch as a business relation resulted between the plaintiff and the defendants and under such circumstances, the plaintiff would undoubtedly be entitled to recover such damages as were the natural and proximate result of the fraud and this would have included the loss of profits as a proper element, and inasmuch as the plaintiff produced evidence to show that she had been unable to engage in business from February 4, 1924, down to the end of her original lease, which would have expired April 25, 1926, and inasmuch as there was testimony that she had been making an average of $75 per week, it could not be said that the verdict in this case was excessive, and the Rule to Show Cause it therefore discharged, and an order may be presented in accordance herewith.

HENRY E ACKERSON, JR.,
Judge.

Filed Clerk's Office, Hudson County,
N. J. July 19, 1926

JOHN J. McGOVERN,
Clerk.

ACTION AT LAW.—NOTICE OF APPEAL.

IN THE
HUDSON COUNTY CIRCUIT COURT.

ANNIE M. EVEREND,

Plaintiff,

vs.

JAMES M. KIERNAN, JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendants.

To William E. Sewell, attorney for the plaintiff.

TAKE NOTICE that the defendant appeals to the Supreme Court of the State of New Jersey, from the judgment against JAMES W. KIERNAN, entered in this case.

FRANK J. HIGGINS,
Attorney for Defendant;
James W. Kiernan.

Dated:
July 21, 1926.

True and legal of the service of the within notice hereby acknowledged this 23rd day of July, 1926.

WILLIAM E. SEWELL,
Attorney for Plaintiff.

Filed Clerk's Office
July 29, 1926
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

ACTION AT LAW.—REASONS ON APPEAL.

HUDSON COUNTY CIRCUIT COURT

ANNA M. OVEREND,

Plaintiff,

vs.

JAMES M. KIERNAN, JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendants.

The defendant, James W. Kiernan, writes down the following reasons why the verdict of the plaintiff against the defendant in the above entitled matter should be set aside and a new trial granted.

1. The court erred in refusing to grant a non suit as to this defendant.

2. The court erred in refusing to direct a verdict in favor of this defendant.

3. That the charge of the court was erroneous in law.

4. That there was no evidence to support the verdict of the jury against this defendant.

FRANK J. HIGGINS,
Attorney for Defendant,
James W. Kiernan.

ACTION AT LAW—ORDER DISCHARGING RULE TO SHOW CAUSE.

HUDSON COUNTY CIRCUIT COURT.

ADELINE M. OVEREND,

Plaintiff,

vs.

JAMES M. KIERNAN, JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendant.

A rule to show cause why the verdict rendered in favor of the plaintiff against defendant James W. Kiernan in this cause, should not be set aside and a new trial granted, having been duly granted, and the argument on the said rule having been presented to the court by Frank J. Higgins, attorney for the defendant James W. Kiernan, and William E. Sewell, attorney for the plaintiff, and for good cause shown, it is on this 4th day of October, 1926,

ORDERED that said Rule to Show Cause be and the same is hereby discharged.

HENRY E. ACKERMAN, Jr.
Judge.

DECISION OF NEW JERSEY SUPREME COURT

NEW JERSEY SUPREME COURT
No. 24 January Term, 1927.

ADELINE M. OVEREND,

Plaintiff-Respondent,

vs.

JAMES M. KIERNAN, JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendants-Appellants.

Submitted January 28th, 1927; decided April 22nd, 1927.

On appeal from a judgment of the Hudson County Circuit Court.

Before Justices Kalisch, Katzenbach and Lloyd.

For the appellants: Frank J. Higgins, Esq., and George L. Record, Esq.

For the respondent: William E. Sewell, Esq., and Benjamin E. Gordon, Esq.

Per Curiam.

This is a defendant's appeal from a judgment of the Hudson County Circuit Court. The plaintiff, Adeline M. Overend, was a milliner. She claimed that in March, 1923, she had been approached by the defendants, who were stockholders in Perlmutter's Inc., a corporation conducting a department store in the City of Jersey City, and was asked to open a millinery shop in the upper floor of the building occupied by the corporation. The plaintiff contended that it was represented to her that the corporation had a long term lease upon the building, that it was financially sound, and that the suggested arrangement would be a profitable one for her. The negotiat ons ripened into an agreement dated April 25, 1923, made between the corporation and the plaintiff, by which the

corporation leased to the plaintiff 600 sq. ft. of space on the second floor of No. 116 Monticello Ave., in the City of Jersey City, for the purpose of conducting a millinery shop, together with the right to use the entrance of the building for the ingress and egress of her customers, etc. The term was for three years with the privilege of a renewal of the lease for two additional years. The rent for the first three years was to be ten per cent. of the gross income of the plaintiff's business, and for the next two years, if the privilege of renewal was exercised, fifteen per cent. of the gross income. The representation made to the plaintiff as claimed by her was that the corporation had a 12 to 14 year lease covering the entire building. The corporation had no lease on the premises. This was known to James W. Kiernan and to Joseph Perlmutter. Another defendant, James M. Kiernan (referred to as the older Kiernan) was made a defendant to the suit, but during the course of the trial he was granted a non-suit.

Six weeks after the making of the lease the corporation was thrown into bankruptcy. The plaintiff was evicted. She later retook possession of the premises under a new arrangement with Joseph Perlmutter, and was again evicted on February 4, 1924. The action then instituted by the plaintiff was based on fraud and deceit. The plaintiff had paid to Joseph Perlmutter for what was termed "the rights of the place" four hundred and fifty dollars.

The complaint contained two counts. One was for the fraud and deceit and the other was for the recovery of the $450. James W. Kiernan (referred to as the younger) had nothing to do with the second eviction. He was, therefore, not concerned with the second count. The jury rendered a verdict for the plaintiff of $6,000. on the first count and $450. on the second count.

A rule to show cause was allowed the defendants by the trial judge. In a well considered opinion he discharged the rule to show cause. The charge of the court at the trial was full. The trial judge went over the case carefully, outlining clearly in his charge the respective rights of the parties.

The appellant in this case is Kiernan (the younger). Perlmutter has not appealed from the judgments. There were only two exceptions taken to the charge of the court. These exceptions were taken in behalf of Perlmutter. Kiernan can-

not take advantage of the exceptions taken by Perlmutter. In *McKeown vs. King, 99 N. J. L. 251*, the Court of Errors and Appeals held that where one of several joint defendants takes an exception to a portion of the charge of the trial court and the defendant so excepting subsequently abandons said exception by omitting to state it as a ground of appeal, another joint defendant cannot avail himself of said exception. The exceptions to the court's charge in the present case will not be considered.

There are only two questions which can be considered on this appeal. The first is, was the motion to non-suit properly refused? The second is, was the motion to direct a verdict for Kiernan (the younger) properly refused?

The motion to non-suit was, we think, properly refused. If there is any evidence, no matter how meagre, to support a plaintiff's cause of action the plaintiff has the right to have the case submitted to the jury. *Barry vs. Bordon Farm Products Co., 100 N. J. L. 106; Dellabello vs. Central R. Co. of N. J., 99 N. J. L. 348.* In the present case the testimony given by the plaintiff was explicit with reference to the statements made by both Kiernan (the younger) and Perlmutter as to the length of time for which the corporation had a lease upon the premises. The lease made to the plaintiff for a term of three years with a privilege of two is corroboration of these statements. The corporation was only a monthly tenant. The plaintiff also gave testimony with reference to what was said to her regarding the financial condition of the corporation. Testimony was offered in behalf of the plaintiff at the trial that for many months prior to the making of the lease to her the corporation had been financially embarassed. These and other facts which were for the jury to pass on justified the refusal of the trial court to grant a non-suit.

What has been said with reference to the motion to non-suit applies equally to the motion to direct a verdict.

We have considered the questions raised upon their merits. We have had some hesitancy in doing so as in the case of *Catterall, Admrx. vs. Otis Elevator Co., 135 Atl. Rep. 865*, (not as yet officially reported), it was said in an opinion

by Mr. Justice Trenchard, speaking for the Court of Errors and Appeals, that:

> " A reason assigned for a new trial that the verdict is contrary to the weight of the evidence, which reason was argued, considered and decided, is necessarily embraced within exceptions to the refusal to non-suit and to direct a verdict which were resolved in the rule and therefore such exceptions cannot be cosidered on appeal."

The judgment is affirmed with costs.

ACTION AT LAW—NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT

ADELINE M. OVEREND,

Plaintiff

VS.

JAMES M. KIERNAN, JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendants

TAKE NOTICE that the defendant, James W. Kiernan, appeals to the Court of Errors and Appeals of the State of New Jersey from the judgment entered against him in this case.

FRANK J. HIGGINS,
Attorney for Defendant,
JAMES W. KIERNAN

Dated:
November 10th, 1927.

Filed with Clerk, Jan. 20, 1928.

ACTION AT LAW—REASONS ON APPEAL FROM NEW JERSEY SUPREME COURT.

NEW JERSEY
COURT OF ERRORS AND APPEALS

ANNA M. OVEREND,

Plaintiff

VS.

JAMES M. KIERNAN, JAMES W. KIERNAN and JOSEPH PERLMUTTER,

Defendants

The defendant, James W. Kiernan, writes down the following reasons why the judgment of the New Jersey Supreme Court affirming the judgment of the plaintiff against this defendant in the above entitled matter, should be set aside and a new trial granted.

1. The court erred in refusing to grant a non-suit as to this defendant.

2. The court erred in refusing to direct a verdict in favor of this defendant.

3. That the charge of the court was erroneous in law.

4. That there was no evidence to support the verdict of the jury or the amount of the verdict of the jury against this defendant.

FRANK J. HIGGINS,
Attorney for Defendant,
JAMES W. KIERNAN

Filed with Clerk,
Feb. 20, 1928.

New Jersey Court of Errors and Appeals

ADELINE M. OVEREND, Plaintiff-Respondent, vs. JAMES M. KIERNAN, JAMES W. KIERNAN, and JOSEPH PERLMUTTER, Defendants-Appellants.	Action at Law. On Appeal from New Jersey Supreme Court Affirming Judgment of Hudson County Circuit Court.

BRIEF FOR PLAINTIFF-RESPONDENT.

Statement of Case.

This case was tried June 14th, 1926, before Judge Ackerson and a jury in the Hudson County Circuit Court and resulted in a verdict in favor of plaintiff, Adeline M. Overend, against defendant James W. Kiernan, in the sum of $6,000 and against defendant Joseph Perlmutter in the sum of $6,500 (see Rule for Judgment, Case, pp. 153-154). The Court non-suited plaintiff as to James M. Kiernan (Case, p. 97, ll. 22-25).

Defendant, James W. Kiernan, thereupon obtained a Rule to Show Cause why the verdict should not be set aside, wherein exceptions for an appeal were reserved by said defendant (Case, p. 155). After a full and complete hearing on that Rule to Show Cause, Judge Ackerson discharged said rule by order printed on page 162 of the Case. The opinion of Judge Ackerson in connection with the argument on the Rule to Show Cause and the

verdict is set forth on pages 156 to 159 of the Case, and the following is taken from said opinion:

> "This matter comes before me upon a Rule to Show Cause why the verdict against the defendant James W. Kiernan in the above entitled matter should not be set aside and a new trial granted, upon the grounds that the verdict is contrary to the evidence, against the Court's charge and excessive. After examining my notes of the testimony, I have reached the conclusion that there is no merit in the contention that the verdict is contrary to the evidence and against the charge of the Court, and this leaves only one ground for consideration, viz: Whether the verdict is excessive" (Case, p. 156, ll. 19-32). * * *
>
> "Of course, for an eviction, the ordinary rule of damage is, that the plaintiff could only recover the value of the unexpired term of the lease, but this is a cause founded upon fraud in the procurement of the lease, and the lease is something more than the ordinary lease, inasmuch as a business relation resulted between the plaintiff and the defendants and under such circumstances, the plaintiff would undoubtedly be entitled to recover such damages as were the natural and proximate result of the fraud and this would have included the loss of profits as a proper element, and inasmuch as the plaintiff produced evidence that she had been unable to engaged in business from February 4, 1924, down to the end of her original lease, which would have expired April 25, 1926 and inasmuch as there was testimony that she had been making an average of $75 per week, it could not be said that the verdict in this case was excessive, and the Rule to Show Cause is therefore discharged, and an order may be presented in accordance therewith" (Case, p. 159, ll. 1-28).

Next an appeal was taken to the New Jersey Supreme Court from the judgment of the Hudson

County Circuit Court, resulting in the affirmance of the judgment.

The opinion of the Supreme Court is printed on pages 163 and 166 of the Case.

Facts.

Plaintiff, Adeline M. Overend, was a milliner. All three defendants, James M. Kiernan, James W. Kiernan and Joseph Perlmutter, were stockholders and directors in a corporation entitled "Perlmutter's Inc." Defendant James W. Kiernan, in addition to being a stockholder and director, was also the assistant treasurer of that corporation. Plaintiff knew defendant James W. Kiernan for many years, and also knew his father, James M. Kiernan, for many years.

In March, 1925, defendant, Joseph Perlmutter proposed to plaintiff that she open a millinery shop in the upper floor of a building on which he represented that Perlmutters Inc. had a long-term lease, and he further represented that Perlmutters Inc. was financially sound, and that the arrangement would be a profitable one for plaintiff. Other negotiations were had which led up to the time when the parties met to negotiate the lease from Perlmutters Inc. to plaintiff (Case, pp. 20-21). The parties met on April 25th, 1923, at the office of Mr. Brown, the attorney who drew the lease. Prior to the signing of the lease by the parties, both defendants, Perlmutter and James W. Kiernan (referred to as young Mr. Kiernan), falsely represented to plaintiff that Perlmutters Inc. was in good financial condition, that there it had a 12 to 14 year lease covering the entire building, part of which was to be leased from that corporation by plaintiff. The lease was thereupon entered into and signed by the parties whereby said plaintiff became a tenant of 600

square feet on the upper floor of the building occupied by Perlmutters Inc. for a period of three years, with an option of renewal for two additional years, providing for certain rentals. The lease is set forth in full on pages 92, 93 and 94 of the Case. At the time the lease was entered into, and both prior and subsequently thereto, both defendants, James W. Kiernan and Joseph Perlmutter, knew that Perlmutters Inc. had no lease covering the premises, and they also knew that the corporation was in financial difficulty. About six weeks later, Perlmutters Inc. was thrown into bankruptcy and plaintiff was, as a result thereof, evicted from her premises. On or about August 14th, 1923, and after the bankruptcy was terminated plaintiff retook possession of the premises under a new arrangement with Joseph Perlmutter, and on February 4th, 1924, was evicted therefrom for the second time.

The cause of action is based entirely on fraud and deceit and is not for eviction or for any other cause.

Reasons on Appeal.

1. The court erred in refusing to grant a non-suit as to this defendant.

2. The court erred in refusing to direct a verdict in favor of this defendant.

3. That the charge of the court was erroneous in law.

4. That there was no evidence to support the verdict of the jury or the amount of the verdict of the jury against this defendant.

The above are printed on page 168 of the Case.

ARGUMENT.

I.

Appellant's right to have this case reviewed by this Court should be denied.

As the Supreme Court points out in their opinion in this case:

> "We have considered the questions raised upon their merits. We have had some hesitancy in doing so as in the case of Catterall, Admrx. vs. Otis Elevator Co., 135 Atl. Rep. 865, (not as yet officially reported) it was said in an opinion by Mr. Justice Trenchard, speaking for the Court of Errors and Appeals, that:
>
> > 'A reason assigned for a new trial that the verdict is contrary to the weight of the evidence, which reason was argued, considered and decided, is necessarily embraced within exceptions to the refusel to non-suit and to direct a verdict which were resolved in the rule and therefore such exceptions cannot be considered on appeal.' " (Case, pp. 165 and 166.)

This point disposes of appellant's reasons 1, 2 and 4 as above stated.

The appellant has already had two full and complete reviews of his case by the Hudson County Circuit Court and the New Jersey Supreme Court, and each time the questions raised by him were disposed of on the merits.

II.

The charge of the Court was not erroneous in law, but was proper and correct.

A reading of the charge, which is set forth on pages 137 to 152 of the Case, should satisfy that the instructions to the jury were full, complete and entirely accurate in every respect. The charge is long and comprehensive and Judge Ackerson is painstaking in placing the proper law applicable to the facts before the jury.

The court's attention is called to the fact that even though the charge were erroneous, the defendant, James W. Kiernan, cannot avail himself of the error, because no exception was taken to the charge of the Court on his behalf, and none is set forth anywhere in the record.

Again the opinion of the Supreme Court in this case, as printed on the top of page 165, disposes of the appellants contention.

> "Kiernan cannot take advantage of the exceptions taken by Perlmutter. In McKeown vs. King, 99 N. J. L. 251, the Court of Errors and Appeals held that where one of several joint defendants takes an exception to a portion of the charge of the trial court and the defendant so excepting subsequently abandon said exception by omitting to state it as a ground of appeal, another joint defendant cannot avail himself of said exception. The exception to the Court's charge in the present case will not be considered."

III.

The reasons assigned, even upon the merits, are insufficient to disturb the judgment in this case.

It is elementary in this State, that where there is any evidence, no matter how meagre, to support plaintiff's cause of action, it must be submitted to the jury by the trial court, and refusal to non-suit or direct a verdict is proper, even though the court, if it were sitting as the jury, would find the facts to be against the plaintiff.

The following is taken from the opinion of the Court of Errors and Appeals in the case of *Barry* v. *Borden Farm Co.,* 100 N. J. L. 106, 125 Atl. 37:

> "Motions for non-suit and for the direction of a verdict for the defendant, for the purpose of the motions, in effect admit the truth of the evidence, and of every inference of fact that can be legitimately drawn therefrom, which is favorable to the plaintiff, but deny its sufficiency in law; and where such evidence or inferences of fact will support a verdict for the plaintiff, such motions must be denied."

To similar effect are:

Dellabello v. *Central R. Co.,* 90 N. J. L. 348, 124 Atl. 59;

Weston Co. v. *Benecke,* 82 N. J. L. 445, 82 Atl. 878;

Uvalde Asphalt Co. v. *Central Union Co.,* 84 N. J. L. 297, 86 Atl. 425.

On pages 22 and 23, 47 and 48 of the case may be found testimony by the plaintiff regarding statements made to her by the younger Kiernan and Perlmutter, that the corporation in which they were interested, had a long term lease covering the prem-

ises, and that the corporation was in good financial cirmumstances. These statements were false and fraudulent.

The testimony of plaintiff as to the bankruptcy and eviction is found on Case, page 26, lines 10-30; Case, page 27, lines 12-40; Case, page 28, lines 1-40.

The testimony as to the damage suffered by plaintiff is found on Case, page 33, lines 9-25.

The witness, Edward Pigott, testified on pages 68, 69, 70 and 71 of the Case that for months prior to April 25th, 1923, the time when plaintiff testified, this defendant, James W. Kiernan, made the false representations to her, the corporation, Perlmutters, Inc., was financially embarrassed and that he as a credit man had obtained credit extensions for that corporation, and that he made frequent and regular visits to all defendants, including this defendant, James W. Kiernan, for the purpose of obtaining checks to be paid to various creditors, who had given extensions of credit in order to avoid bankruptcy for Perlmutters, Inc.

It is respectfully submitted that the appeal of the defendant, James W. Kiernan, should be dismissed, and that the judgment of the Hudson County Circuit Court based on the verdict in that Court by the jury in favor of the plaintiff, and against this defendant, in the sum of $6,000 and the affirmance of said judgment by the New Jersey Supreme Court, be again affirmed by this Court.

WILLIAM E. SEWELL,
Attorney for Plaintiff-Respondent.

BENJAMIN E. GORDON,
Of Counsel.

New Jersey Supreme Court of Errors and Appeals

ANNA M. OVEREND,
Plaintiff-Respondent,

vs.

JAMES M. KIERNAN, JAMES W. KIERNAN and JOSEPH PERLMUTTER,
Defendants-Appellants.

Action at Law. Trial before Judge Ackerson, Hudson County Circuit Court on Appeal.

BRIEF FOR DEFENDANT, JAMES W. KIERNAN.

ON APPEAL TO NEW JERSEY COURT OF ERRORS AND APPEALS.

Statement of the Case.

The plaintiff Anna M. Overend on April 25th, 1923, entered into an agreement or lease with a corporation known as "Perlmutter, Inc." for the front part of second floor of the store #116 Monticello Avenue, Jersey City. The said corporation conducted a ladies' suit and dress store at this address, using the street floor and the rest of the building for this purpose. The business of the plaintiff was to be conducted in conjunction with the corporation's business under the name of "Perlmutter, Inc." and she was to pay for the use of the premises and name and the services rendered by the corporation a sum equal to ten per cent of gross receipts, received from the part of the business conducted by

her. This lease or agreement was signed by the plaintiff and for the corporation by James W. Kiernan as Assistant Treasurer, in the presence of Thomas H. Brown, an attorney at Law, acting at that time as counsel for the plaintiff, Anna M. Overend, and also in presence of the defendant Joseph Perlmutter. Plaintiff had not spoken to defendant James W. Kiernan about the lease or agreement before that day. The document was drawn up by her attorney Thomas H. Brown. Plaintiff testified that defendant James W. Kiernan stated at that time that the Corporation "Perlmutters, Inc." had a twelve or fourteen year lease and that it was financially sound. Defendant James W. Kiernan denied making any such statements, and stated that Joseph Perlmutter had full control and management of the business. That he, Kiernan, had but one share of the stock in the corporation and was only nominally acting as Assistant Treasurer and that he signed the document because he was told to do so by Joseph Perlmutter, who was running the business and in whom he had confidence. He had no knowledge as to whether the corporation had a lease or not, and knew nothing about its financial affairs. The corporation had no lease and was a tenant from month to month. On April 28th, 1923 the plaintiff paid to the defendant, Joseph Perlmutter, individually the sum of $450.00 for what she termed "the rights of the place."

About June 20th, 1923, a petition in bankruptcy was filed against "Perlmutters, Inc." and a receiver took possession. The store was closed for about seven weeks, when a new corporation under the name of "Perlmutter Shop, Inc." was formed by the defendant, Joseph Perlmutter, which continued the business under this name. The plaintiff had

knowledge of the bankruptcy, knew of the formation of the new corporation and that neither of the Kiernans had any interest in it; and went on with this new corporation, on the same terms as contained in the agreement with "Perlmutters, Inc." None of her goods were taken or interfered with by the receiver. She conducted her business under this new arrangement at the same store until February 4th, 1924, when she was evicted from the premises by the defendant, Joseph Perlmutter, who placed her goods and fixtures in a storage warehouse. The defendant James W. Kiernan had nothing to do with this eviction.

This suit was started April 17th, 1925 against James M. Kiernan, James W. Kiernan and Joseph Perlmutter, alleging that, by reason of false and fraudulent representations made by all of the defendants, the plaintiff suffered a loss. The court below granted a non suit as to the defendant James M. Kiernan and the jury brought in a verdict against James W. Kiernan and Joseph Perlmutter in the sum of $6,000.00 on the first count and a verdict against Joseph Perlmutter alone of $450.00 on the second count.

This appeal is by the defendant James W. Kiernan against the judgment rendered against him, which judgment was affirmed by the New Jersey Supreme Court.

ARGUMENT.

First: The Court erred in refusing to grant a non suit as to the defendant James W. Kiernan.

Second: The Court erred in refusing to direct a verdict in favor of the defendant James W. Kiernan.

These reasons are so closely related that they may be argued together. The case against the defendant James W. Kiernan is based on the allegation that at the time the agreement or lease was signed, he made false and fraudulent statements that the Corporation "Perlmutter, Inc." had a twelve or fourteen years lease, and was financially sound. That he knew or should have known such statements to be false. That he knew or should have known that the plaintiff relied upon such statements and that as a result, the plaintiff suffered loss.

When the plaintiff's case closed and when the whole case closed, the proofs failed to establish the elements necessary to hold this defendant: viz (1) That the defendant made some representation to the plaintiff meaning that she should act upon it. (2) That said representation was false and that the defendant when he made it, knew it to be false. (3) That the plaintiff, believing such representation to be true, acted upon it, and was thereby injured.

First Element of Fraud.

As to the first element, the plaintiff's testimony is that for some weeks prior to executing the lease or agreement, she had talked the matter over with the defendant Joseph Perlmutter (P.

20-60). During that time she went over the details with him and he Perlmutter assured her that the corporation had a fourteen year lease, (P. 24). At no time during that period did she see or talk to the defendant James W. Kiernan. She says she said nothing to him until the day of the signing, (P. 59). Meanwhile as the result of her conference with Perlmutter, her lawyer, Thomas H. Brown drew up the agreement from the information received from the plaintiff and the defendant Perlmutter, and on the day of signing handed it to the defendant James W. Kiernan who had never seen it before that day.

It is submitted that the representations which the plaintiff acted upon were the representations of the defendant Joseph Perlmutter and not those made by this defendant, (P. 132-133). She knew that the business was controlled, managed and run by the defendant Perlmutter (P. 56-60), and that this defendant had no active part in it, (P. 64). This is further evidenced by the fact that three days after the lease was signed, she paid the defendant Joseph Perlmutter by a check to his personal order the sum of $450.00, for, as she describes it, "the rights of the place." (P. 45-46) When she made this payment, she testifies that Perlmutter said to her, "Don't you know I am the boss. Mr. Kiernan relies on me. I make the money." (P. 55). When asked what she thought he meant when he said he was the boss, she replied, "I thought he controlled the entire business, that Mr. Kiernan depended upon him." (P. 56) Later on in her testimony she answered as follows:

> Q. As a matter of fact, you had complete confidence in him, Perlmutter? A. Absolutely. (P. 58)

The only reasonable construction to be placed upon this testimony is that the contract or lease

had been arranged and all the details agreed upon, between the plaintiff and the defendant Joseph Perlmutter before James W. Kiernan appeared upon the scene. The minds of the plaintiff and the defendant Perlmutter had met on every point and she had instructed her lawyer to draw up the agreement.

When young Kiernan was brought to the store it was simply a meeting to execute a formal document which had previously been agreed up on.

Assuming that this defendant made the statements, the plaintiff says were made by him, they were, excepting as to the term of the lease, largely in the nature of opinions and an expression of confidence in Perlmutter, which confidence was shared by the plaintiff. She was not influenced by Kiernan. Both she and this defendant relied on Perlmutter, the "boss" to whom she had paid $450.00 for the "rights". She did not pay Kiernan or the corporation for these rights, and did not disclose to them that she had made any such payment.

These "rights" were the right to do business in the corporation's store, under the corporation's name and were fully covered by the lease agreement, and if they were of any value, the payment for the same should have been made to the corporation and not to Perlmutter personally. This was the only money she parted with as a consideration for the lease or agreement and this was paid secretly to Perlmutter and kept from the knowledge of the corporation, or any of its stockholders. It is urged that all of these circumstances, testified to by the plaintiff herself, show that she was not deceived by any action on the part of Kiernan, but was in

reality acting in concert with Perlmutter to deceive the corporation.

So far as this defendant Kiernan is concerned, she was not a defenseless woman dealing with a sharp business man. She had a lawyer present representing her, who drew up the contract from information not obtained from Kiernan. (P. 59-60) This attorney was Thomas H. Brown, a prominent lawyer in Jersey City, and he was not called by the plaintiff, and no explanation was made as to the failure to call him. He was the only person, outside of the parties to the suit present at the time the lease was signed, and it is fair to assume that the plaintiff did not call him because his testimony would not help her case. Kiernan was a young man, whom she testifies she knew had very little to do with the business (P. 64). She had her secret agreement to pay Perlmutter $450.00 which she did not disclose to Kiernan. This is the picture on the morning of the signing, and if any one was deceived, it was young Kiernan, who was without counsel, and was lead into signing the contract, because of his confidence in Perlmutter and his friendship for the plaintiff.

SECOND ELEMENT OF FRAUD.

As to the second element necessary to prove deceit, there was no evidence that one of the statements alleged to have been made by this defendant, viz: that the corporation was "financially all right" was untrue. There was evidence regarding a bankruptcy later on, but an absence of testimony as to who filed the petition in bankruptcy, whether it was voluntary or involuntary, whether the creditors were paid

in full or in part; in fact, no evidence upon which it could be said that it was clearly proven that the corporation was not financially sound or was ever adjudicated a bankrupt. Assuming that it was so adjudicated, acts of bankruptcy are of various kinds, and a corporation can become a bankrupt without being insolvent.

There was no motive for either Kiernan or Perlmutter to induce the plaintiff to sign the lease, if they knew the company was in danger of immediate collapse, because nothing substantial could be received from her in that event. If it can be said that the $450.00 secretly paid to Perlmutter by the plaintiff was a sufficient motive, the answer is that this does not apply to defendant James W. Kiernan, from whom it was carefully concealed by both the plaintiff and defendant Perlmutter.

It is a well known fact that many businesses are at times in a condition where if the concern was called upon to meet all of its matured obligations at once, it would be forced into bankruptcy. It is common knowledge that men in business struggle along with insufficient capital, prevailing upon their creditors to extend them further credit or to delay pressing their debts that have matured, in the hope that eventually they will work out of the difficulty, and it is common knowledge that they oftentimes do so. In such cases it is not fraudulently or even reprehensible for a business man to borrow money, or induce others to act upon the faith of assurances to the effect that his business will continue. In order to establish a fraudulent intent, it will be necessary to prove that the condition at the time the lease was made was financially hopeless. No such proof exists in this case. There is no evidence whatever to

show that defendant James W. Kiernan had knowledge that the company was so hopelessly insolvent, that it would soon have to shut up shop and go out of business. His testimony on that point is uncontradicted.

As to the statement alleged to have been made by this defendant regarding the corporation having a lease, the point should at all times be kept in mind that the loss to the plaintiff was not due to the fact that the corporation could not make a three years' lease, nor was it due to the fact that the representations as to the solvency of the company made by the defendant, were untrue. The fact always to be kept in mind in this case is, that the continuation of the business established by the plaintiff under the said lease and agreement was not stopped except for a short time, either by the bankruptcy of the company or by the inability of the company to make good upon its three year lease. The failure of the company resulted in a reorganization of the business and the formation of the new corporation of "Perlmutter Shop, Inc." under which the defendant Perlmutter continued in exactly the same business and in exactly the same place, with this slight change in the name, and the plaintiff made with Perlmutter's new corporation exactly the same arrangement as she had made with the old company (P. 44).

Her real trouble occurred later on when this new arrangement resulted in a quarrel between her and defendant Perlmutter and her eviction by him. If he had not evicted her, under the new deal, she would still have continued for the full period of three years, and would not have been damaged except in the small amount

involved by the temporary shutting of the doors while the business was being reorganized.

The plaintiff did not establish her claim that she was deceived to her damage by James W. Kiernan in the light of her new arrangement with Perlmutter after the failure, (P. 61). At the time of the failure she knew that the old company was bankrupt, and that a reorganization was advisable, and at that time she also knew that either the old company did not have the right to give her a three year lease or that such lease was by operation of law abrogated by the bankruptcy proceeding. At that time she knew all that she now alleges, as to the false statements of Perlmutter. In face of this knowledge, she made a new arrangement with Joseph Perlmutter for "Perlmutter Shop, Inc." in which company the Kiernan's had no interest, and which was owned entirely by Perlmutter. When she made the new arrangement and started business under it, as hereinafter shown, the old agreement or lease fell to the ground, and of course with it fell all claims for damages created by its non-performance.

There was no evidence that James W. Kiernan, if he made the statements, knew them to be false, or that he was in a position where he ought to have known them to be false. He was not a director of the company, and his position of Assistant Treasurer was nominal and did not bring him into contract with the condition of the business. The testimony of the plaintiff is that Kiernan said "We have absolutely the best confidence in Mr. Perlmutter and anything he says goes". (P. 22). And "We have absolute confidence and implicit faith in what Perlmutter says". (P. 23). Taking

this in connection with the plaintiff's testimony, (P. 59 and 60), that she had all her negotiations prior to the actual signing with Mr. Perlmutter, and that she knew that James W. Kiernan had little to do with the business, shows on her version, that Kiernan did not profess to have knowledge, but only expressed his confidence "in what Perlmutter says". Her renewal of the deal with Perlmutter after the reorganization of the business, under his new corporate name, "Perlmutter Shop, Inc." shows that she relied upon him alone.

THIRD ELEMENT OF FRAUD.

As to the third element of deceit, it is submitted that the plaintiff did not act upon any representation of Kiernan's and even if she did, she was not thereby injured. First, it is urged that the plaintiff acted solely upon the statements made by Perlmutter, to whom she individually paid $450.00 for the "rights". All the facts testified to by the plaintiff lead to this conclusion. This defendant James W. Kiernan was an innocent pawn in the hands of the defendant Joseph Perlmutter and the plaintiff. They made all negotiations between them, had the contract drawn and placed it on April 25th, 1923 before young Kiernan, and practically had him "sign on the dotted line". Three days later, the consideration for the contract, viz: $450.00 passed from the plaintiff to the defendant Perlmutter, without the knowledge of the defendant Kiernan, or the corporation of "Perlmutter, Inc.". If she had not acted as a result of her negotiations with Perlmutter, why did she pay him this money, *after* the signature of young Kiernan was obtained?

PLAINTIFF'S LOSS BY EVICTION AND ILL HEALTH.

Granting for the purpose of this argument that young Kiernan did make false representations, the plaintiff was not thereby injured. Her damage, if any, resulted from her eviction from the premises by Perlmutter on February 4th, 1924, and it is admitted that Kiernan had nothing to do with this. (P. 53). This was the individual act of Perlmutter, over seven months after the bankruptcy of "Perlmutter, Inc." and while she was a tenant of the new corporation known as "Perlmutter Shop".

After the eviction, her loss, if any, was caused by her illness and inability to work at any employment (P. 51-52-66-87-89). This loss was clearly not the result of false representations of anybody. It is not alleged that her illness was caused by the act of this defendant. (P. 38)

NO FRAUDULENT DESIGN ON THE PART OF JAMES W. KIERNAN.

Assuming further that Kiernan did make false representations, there is nothing in the case to show they were made with a fraudulent design, and the circumstances refute any intent to defraud on the part of Kiernan. The plaintiff paid Kiernan nothing for the contract or lease. "Perlmutter, Inc." the corporation of which he was nominally the Assistant Treasurer was not paid anything. The only person who did get anything from the plaintiff was the defendant Perlmutter, who sold the "rights" for $450.00.

Under the terms of the contract, the plaintiff was to pay "Perlmutter, Inc." ten per cent of her gross receipts from the business done by her in that place. For "Perlmutter, Inc." to realize any profits or rent return, the plaintiff must also realize a profit, for if she did no business, there would be no rent to pay. Out of this situation it is contended that no intent to defraud can be spelt. What was the plaintiff defrauded out of by Kiernan? True, she made an investment in stock and fixtures, but they still remained her property. No part of them was taken by Kiernan or by the receiver in bankruptcy, and when she went back under a new arrangement with the new corporation "Perlmutter Shop, Inc.", everything was still there. Her testimony (P. 62) on this point is as follows.

> Q. The receiver didn't take any of your goods? A. No.
>
> Q. Your goods were not disturbed at all by the bankruptcy? A. No.

Her testimony on page 92 is to the same effect.

At the most, her case attempts to show that she was induced to make an investment in goods and fixtures, which remained her property, and for the corporation of "Perlmutter, Inc." to make anything out of the lease, she must also be successful. It was in effect a joint venture, upon the success of which depended the rewards to be received by each of the parties. Assuming that the plaintiff was fraudulently induced to execute the lease, she suffered no damage thereby. Her whole damage resulted from the eviction by Perlmutter in February, 1924.

When the bankruptcy occurred she had certain property in the store, which belonged absolutely to her. The bankruptcy corporation had no claim against it whatsoever, and the receiver surrendered it intact to her, (P. 62-92). Up to that point she had lost nothing. True, she had not made the profits which she hoped to make during the period the store was closed. But these profits depended upon a variety of things: her personal services, and the services of her employees, the ability to continue as a part of the business of "Perlmutter's Inc." and to do business under that name. Her business also depended to an extent upon the number of customers who were attracted to the dress and suit business of the corporation, which was conducted on the first floor of the premises, a portion of whose customers might, whi e in the store, be led to do business with the plaintiff on the upper floor.

All of this was prevented by the operation of law, viz: the effect of the filing of the petition in bankruptcy. There is no testimony that Kiernan Jr. had anything to do with the filing of the bankruptcy petition, or the reasons for its filing, or whether the creditors were paid in full. There is an entire lack of testimony regarding this important fact.

If the corporation had a long term lease, the effect of the bankruptcy would have been just the same to the plaintiff. The conditions of the lease could not be carried out, because there was no longer any "Perlmutter, Inc." to perform the personal services required, so that any misrepresentations as to the lease did not cause any damage to the defendant.

THE AGREEMENT WAS EITHER FOR A LEASE OR A JOINT VENTURE.

It is worth-while to consider the nature of this written agreement. It is in its form a lease of certain premises for a period of years, in which premises the plaintiff was to conduct a business of her own. The lease further provided that her customers were to have access to the leased premises through the store of "Perlmutter, Inc.", and she was to use the company's name. The obvious purpose of this arrangement was that the "Perlmutter, Inc." customers, supposing that this was a part of the same shop, would be attracted to it for trade. She was to have the advantage of convenient access of the "Perlmutter, Inc." customers to her rooms, and the corporation for all of this was to have ten per cent of the plaintiff's gross receipts. This was either a lease pure and simple, and governed by the law of leases or it was a joint venture in trade.

If it was a lease, there is no covenant in it that "Perlmutter, Inc." would continue in business for any length of time. If it was a joint venture, there is nothing in its terms which compels "Perlmutter, Inc." to stay in business at that place. If it is argued that an agreement to stay in business at that place and to keep plaintiff in her business at that place was a necessary implication of the lease, then the answer is that the plaintiff took the lease, if it was a lease, or entered into the joint venture, if it was a joint venture, with the knowledge that all such ventures are subject to business reverses, and that in the very nature of the arrangement, if "Perl-

mutter, Inc." failed, her lease would be valueless, if it was a lease, or the joint venture would have to come to an end, if it was a joint venture. What she really relied upon was the fact that Perlmutter was in business at that place, and that she had known him for a long time, and as she expressly states, had confidence in his statements and in him generally. This means that she believed at the time that Perlmutter was an established merchant and likely to continue as such, and this fact, and not any expression of opinion by young Kiernan, whom she had never known in connection with the business and who had never been in such business, was the real reason why she entered into this lease or joint venture.

In an action for deceit, a false representation without a fraudulent design is insufficient, there must be a moral fraud in the misrepresentation to support the action. Fraudulent intent is a necessary element in every actionable fraud.

Crowly vs. *Smith,* 46 N. J. L. 380.
Sarson vs. *Maccia,* 90 N. J. Eq. 433.
Feldman vs. *Halpin,* 96 N. J. L. 75, Affirmed 97 N. J. L. 324.

The rule of law is elemental and firmly established, that the plaintiff in an action of deceit, must show that he has sustained the damages, which he alleges he suffered.

Bingham vs. *Fish,* 89 N. J. L. 688, and cases cited.

THE TESTIMONY OF THE PLAINTIFF DOES NOT CLEARLY ESTABLISH FRAUD AS AGAINST THE DEFENDANT JAMES W. KIERNAN.

The plaintiff's first testimony as to the representations of James W. Kiernan is as follows:

> "Then I asked James W. Kiernan if the place was financially all right and if it was safe for me to go in. He said 'absolutely, the corporation has a fourteen or twelve years lease,' something to that effect, for a long period of years. "We have absolutely the best confidence in Mr. Perlmutter and anything he says goes." (P. 22)

When asked by her counsel to repeat what he said about the long term lease of the corporation, she answered:

> "He said, 'It is absolutely financially all right for you to go in.' I said, 'You can undertsand my feelings about this matter. I want to feel safe.' He said, 'Perfectly. As we have, the corporation has, a fourteen or twelve year lease.' I don't know which it was, but it was for a long term of years, 'to go on our lease, and you are perfectly all right in going upstairs', and even added that his father, knowing me for many years, that he would be ever so pleased to have me there, and that 'We have absolute confidence and implicit faith in what Perlmutter says.' " (P. 23)

Later on when recalled on the second day of the trial, she testified as follows:

> "I asked Mr. Kiernan if the corporation was financially sound and Mr. Kiernan said, 'Absolutely.'" (p. 126) "I asked Mr. Perlmutter, 'How safe is that Corporation, and is it financially all right?' He said, 'Why, perfectly all right. It is all O. K.' I asked Mr. Kiernan the same question the morning of the signing of the lease, and Mr. Kiernan said it was perfectly all right." (p. 127)

Here are several different versions by the plaintiff of the statements alleged to have been made by James W. Kiernan. It is submitted that these statements are too indefinite to sustain a verdict finding the defendant James W. Kiernan guilty of false representation, knowing the same to be false and with a fraudulent intent to injure the plaintiff. None of this testimony shows any motive on the part of defendant Kiernan either for making false statements, or for injuring the plaintiff, and therefore no such intentions can be inferred.

> "The facts from which fraud will be inferred must clearly establish the inference"
>
> *Summerll* vs. *Summerll,* 83. N. J. Eq. 3, affirmed 83, N. J. Eq. 350.
>
> "The burden of proving fraud was on the party alleging it. The presumption being that business transactions are honest."
>
> *Guerber Engineering Co.* vs. *Stafford,* 96, N. J. L. 280.

> "Clear proof is required to establish fraud."
>
> *Kelso* vs. *Kelso,* 95 N. J. Eq. 544.

THE PLAINTIFF SURRENDERED THE LEASE AND THEREFORE RELINQUISHED ALL CLAIMS ARISING THEREFROM.

In considering whether the plaintiff surrendered her lease with the corporation "Perlmutter, Inc.," it may be pertinent to recite some dates in this controversy. The lease was signed on April 25th, 1923. The bankruptcy receiver took charge June 20th, 1923. The plaintiff reopened her business in the same premises about August 7th, 1923. On February 4th, 1924, plaintiff was evicted by Joseph Perlmutter. On April 17th, 1925, this suit was instituted.

The plaintiff by her action is going back in the premises under a tenancy with the new corporation of "Perlmutter Shop, Inc." controlled by Perlmutter, established the relation of landlord and tenant between them. She did this with full knowledge of all the facts. She knew of the bankruptcy of "Perlmutter, Inc." and of the failure of Perlmutter's previous assurances. She knew that neither of the Kiernans had any interest in the new corporation (P. 63-64-65). This new arrangement, coupled with her failure to make any claim in the bankruptcy proceedings. (P. 62) or against James W. Kiernan until nearly two years later, constituted a surrender of her lease with "Perlmutter, Inc." by operations of law, and this being voluntary, on her part and with one of the parties she charges with fraud, she relinquished all claim for damages

arising out of the lease as against the defendant James W. Kiernan. Her testimony (P. 44) is conclusive upon this point:

> Q. How did you pay rent after you went back? A. Just the same as I had started.
>
> Q. Nothing was said about making a new lease? A. No changes, none whatsoever. That was the arrangement the day it was closed up; by Mr. Kiernan that I was to continue under the same terms and conditions.
>
> Q. In other words, the arrangements you had for the new party were made with Mr. Kiernan, you were to stay there, you were to reopen under the same conditions? A. Under the same terms and conditions.
>
> Q. You made that arrangement with Mr. Kiernan? A. And Mr. Perlmutter, too, in the office; both agreed upon it.

The Mr. Kiernan, plaintiff here speaks of, is the defendant, James M. Kiernan, in whose favor, a non suit was granted, and not the defendant James W. Kiernan who makes this appeal.

> "A surrender by operation of law arises only where the minds meet and execute an intent to relinquish the relation of landlord and tenant.
>
> (*O'Neil* vs. *Pearse* 87 N. J. L. 382 affirmed 88 N. J. L. 733)
>
> "To constitute a "surrender" of lease by act and operation of law, there must

> not only be abandonment by the tenant, but acceptance hereof by the landlord as a surrender; it is necessary that the minds of the parties to the lease should concur in a common intent to relinquish the relation of landlord and tenant, and execute it by acts tantamount to a stipulation to put an end thereto."
>
> (*Banks* vs. *Berliner,* 95 N. J. L. 267).
>
> "Where the minds of party to a lease concur in common intent of relinquishing the relation of landlord and tenant and execute such intent, there arises a surrender of premises by act and operation of law."
>
> "The law is entirely settled in this state that while the assignment by the tenant of a leasehold to a third person with the assent of the landlord may terminate the priority of estate, it will not terminate the priority of contract in the original lease *unless the acts of the parties are sufficient to indicate an abandonment of the contract with the old tenant and the substitution of a new contract with the assignee.* If the minds of the parties to a lease concur in the common intent of relinquishing the relation of landlord and tenant, and execute this intent by acts which are tantamount to a stipulation to put an end thereto, there at once arises a surrender by act and operation of law."
>
> *Earlington Realty Co.* vs. *Berkow,* 128 Atl. Rep. 605;
> *Hunt* vs. *Gardner,* 39 N. J. L. 530;
> *Wallace* vs. *Kennelly,* 47 N. J. L. 252.
>
> "To create a surrender by act and operation of law, the minds of the parties must meet as in a contract, and the surrender must in fact have been effectuated as to change the relation situation of the parties, and in that manner effectually created an estoppel."
>
> *Friedberg* vs. *Parsons,* 128 Atl. Rep. 788;
> *Home Coupon Co.* vs. *Golfarb,* 78 N. J. L. 146;
> *Meeker* vs. *Spalbury,* 66 N. J. L. 60.

There was no evidence to support the verdict of the jury against the defendant James W. Kiernan.

No special damage having been declared by the plaintiff the real measure of the damage the plaintiff was entitled to recover, if at all, was the difference between the market value of the unexpired term at the time of the bankruptcy of "Perlmutter, Inc.," and the rent reserved for the premises. No evidence having been given on this point, the plaintiff was not entitled to a verdict against the defendant James W. Kiernan.

In the case of *Monica* vs. *Di. Benedetto,* 130 Atl. Rep., page 730, the court said "In a case involving the eviction of a tenant," the court said, "loss of profits as such was not the measure of damages, loss of time and earnings was not properly in the case as a subject matter for damages. Then, the evidence of loss of profits was obviously uncertain and entirely remote. The real measure of damages was the difference between the market value of the unexpired terms."

Respectfully submitted,

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