

The defendants, having filed a certificate of incorporation with the County Clerk, having entered into a contract and it being admitted that there being a valid law under which they were incorporated, is a *de facto* corporation and therefore the corporation and not the members individually are liable.

Vancouver v. Young, 32 Law 403.
Stout v. Zolich, 48 Law 324.

POINT 3. The Court properly decided that the plaintiff was estopped from suing the defendant, Maurice B. Susman, individually, since there was no evidence establishing any individual liability on the part of the defendant, Maurice B. Susman.

Plaintiff arguing point three of his brief, argues upon the theory that the corporation was a *de facto* one, and therefore the Court erred in stopping the plaintiff from suing the defendant, Maurice B. Susman.

As argued under Point 1 and Point 2 of our brief, the defendants organized a *de facto* corporation, and if this is so, the Court was unquestionably correct in ruling that only the corporation would be responsible and not its individual incorporators.

For the foregoing reasons, the defendant respondent, Maurice B. Susman, contends that the judgment under review should be affirmed.

AARON HELLER,
 Attorney of Defendant-Respondent,
 Maurice B. Susman.
 JOSEPH A. FEDER,
 Of Counsel.

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Bill of Complaint.

COMPLAINT.

Filed February 6, 1924.

In Chancery of New Jersey

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*To His Honor, Edwin Robert Walker, Chancellor
of the State of New Jersey:*

The complainant, S. Harvey Osborne, of 41 Spruce street, Bloomfield, N. J., respectfully shows that:

1. In the year 1916, complainant and Henry Diffany entered into a verbal co-partnership which by agreement, was to be subsequently reduced to writing, for the purpose of manufacturing metal shaving stands and kindred goods, and each of the parties thereto to share equally in the net profits or losses of said business.

20

2. The defendant, Henry Diffany, for the purpose of such partnership was to furnish the plant, all machinery and to attend to the finances to the same, giving his personal services to that end of the partnership.

3. Complainant was to give directions as to the goods to be manufactured, to insure that they were marketable, and to go out on the road and secure orders for the sale of the goods. The road expenses and New York expenses of the complainant in the selling of the goods were to be placed against his personal account. Each of the parties thereto were to give their entire time and service to the business.

30

4. All the ordinary expenses of the operation of the business were to be first deducted before

40

Bill of Complaint.

the division was made of the half to each partner.

5. Following this verbal co-partnership, the said parties, complainant and defendant, began the manufacture of their said goods and the selling thereof as agreed upon, under the name of
10 Diffany & Co.

6. After two or three years a large profit began to accrue to said partnership by reason of the said business; so that in the years 1919, 1920, 1921, 1922 and 1923, the said partnership was extremely prosperous.

7. Defendant has had the conduct of the books and the knowledge concerning the profits of the said partnership.

8. That complainant has requested defendant to furnish him detailed information concerning the profits and assets of said partnership, but defendant delayed complainant's request from time to time by reason of one excuse or another and has also refused to sign articles of co-partnership, and recently, by his actions, has indicated a denial that complainant was a partner in said business, although complainant charges not only was the agreement of partnership made as herebefore expressed, but that the said defendant has frequently admitted and declared that said partnership existed.
20
30

9. That complainant has frequently requested defendant to file a declaration of said partnership with the Clerk of the County of Essex as required by law, but that defendant has neglected and refused to do so.

10. Complainant charges that said denial of
40 said partnership and the refusal of defendant

Bill of Complaint.

to account to complainant as his partner for the profits of said business is inequitable and wrong, and complainant is without adequate remedy in the common law and therefore, prays:

1. That the said Henry Diffany, who is the defendant in this suit, may answer this bill of
10 complaint and each statement therein made.

2. That this Court may by its decree declare that said complainant and defendant were partners since the year 1916, in the said business of Diffany & Co.

3. That said defendant may be required under the order of this Honorable Court to account for all the transactions involving said partnership and account to the complainant for his one-half thereof.
20

4. That the said defendant may by order of this Court be directed to pay over and distribute to the complainant, one-half of such amount as the Court may find is not necessary for the needs of said partnership.

5. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and abide by such decree as this Court may make in the premises.
30

KING & VOGT,
Solicitors for and of Counsel
with Complainant.

Decree.

articles to be manufactured in defendant's plant, said S. Harvey Osborne to receive as compensation for his services in procuring said orders, a salary of \$20 a week and if the net profit on the sale of said goods by said S. Harvey Osborne should exceed the sum of \$20 per week, said S. Harvey Osborne was to have a one-half part of said profits as a commission, less said salary, and that any new machinery or tools and the like purchased and used in said business were to be the sole property of the defendant.

It is, on this 19th day of February, 1925, by his Honor Edwin Robert Walker, ORDERED, ADJUDGED AND DECREED, that it be referred to Edward O'Byrne, one of the Special Masters of this court, to take a mutual account of all dealings and transactions between said S. Harvey Osborne and defendant under and by virtue of said agreement made in the year 1916, between said S. Harvey Osborne and defendant, for the better clearing of which account the parties are to produce before the said Master on oath or affirmation, if required, and leave with him all books and writings in their custody or power relating thereto and are to be examined upon interrogatories as the said Master shall direct and said Master, in taking of said account, is to make both parties just allowances and is to report what upon such accounting appears to be due from each party to the other and also the balance which upon said account shall appear to be due from each party to the other.

It is further ORDERED, that the complainant is entitled to the value of one-half of the stock on hand at the time of the death of said S. Harvey Osborne, November 25, 1924, for which defendant is hereby directed to account, providing, that

Decree.

in the taking of said account by said Master, it shall appear that said stock was purchased and made up with moneys in which said S. Harvey Osborne had an interest.

And the said Master is to make his report touching the matters hereby referred to him with all convenient speed. 10

EDWIN ROBERT WALKER.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

Approved as to form.

LOUIS J. BEERS, 20
Solicitor of Defendant.

30

40

Henry Diffany, direct.

DEPOSITIONS.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>EDNA C. OSBORNE, administra- trix, etc.,</p> <p style="text-align: center;"><i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>HENRY DIFFANY,</p> <p style="text-align: center;"><i>Defendant.</i></p>	<p><i>On Bill, &c.</i></p> <p><i>Depositions</i> <i>on Account-</i> <i>ing.</i></p>
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20 Depositions taken on the accounting in above-stated cause March 20, 27; April 3; May 1, 22 and June 12, 1925, before the subscriber, Edward O'Byrne, one of the Special Masters of this court, pursuant to order of reference bearing date the 19th day of February, 1925, in the presence of Robert M. Schenck, Esq., of the firm of King & Vogt, solicitors of complainant, and Louis J. Beers, Esq., solicitor of defendant.

EDWARD O'BYRNE,
Special Master.

30 HENRY DIFFANY, the defendant, being duly sworn according to law, in his own behalf, testifies as follows:

Direct examination by Mr. Beers.

Q You are doing business under the name of Diffany and Company, are you? A Yes.

Q During the years 1923 and 1924, you had some sort of bookkeeping system, did you not?

40 A Yes; certainly.

Henry Diffany, direct.

Q Will you explain just what your system of bookkeeping for the years 1923 and 1924 was? A It was double entry.

Q And have you the books of Diffany and Company for the years 1923 and 1924 here? A Yes; they are complete, here they are, cash book and ledger. 10

Q Read off the titles of those books? A Cash book, sales book and ledger.

Q In whose hand-writing are the entries in the books that you have just named? A Well, Mr. Smith, he writes in the books every month. He comes there and does that. He is my father's old bookkeeper. He comes every month and writes them up.

Q From what does he write these books up? A Well, he writes them up from the cash book and sales book, and enters them in the ledger. 20

Q Who keeps the cash book and sales book? A Well, I keep the cash book and sales book, and Mr. Osborne also wrote in that sales book.

Q For the years 1923 and '24? A Yes.

Q So that the entries in the cash book and sales book for the years 1923 and 1924 were made by you and Mr. Osborne? A No; not the cash book; I kept that.

Q Those in the cash books were made by you alone? A Yes. 30

Q But the entries in the sales book were made by Mr. Osborne and you? A Yes; both.

Q Have you ever attempted to balance your books? A Not myself; no. The bookkeeper balances them every month, that is balances what is owing and to be paid.

Q That was Mr. Smith? A Mr. Smith; yes.

Q Did you lately employ Mr. O'Leary, an accountant? A Yes. 40

Henry Diffany, direct.

Q To examine your books? A To examine the books and make a statement.

Q Did he do that; did he examine your books?

A Sure, he did; the books are there.

Q Did Mr. O'Leary, as a result of his examination of your books render you a statement?

10 A Yes.

Q I show you a statement with heading "Diffany and Company, profit and loss statement, December 31, 1923," and ask you from whom you obtained it, and what you understand it represents? A Well, it represents a loss in 1923 of \$1,804.71.

Q Well, it represents the statement of the business for the year 1923, is that correct? A That is correct.

20 Q You obtained this statement from whom?

A Mr. O'Leary, our accountant.

Mr. Beers: I offer this statement in evidence.

(Marked Exhibit D. 1.)

Q I show you a statement with heading "Diffany and Company," profit and loss statement, December 31, 1924," and ask you from whom you obtained that? A From O'Leary and McNeil.

30 Q They are— A (Interrupting.) Expert accountants—tax accountants.

Q What do you understand this statement shows? A It shows a loss of \$6,149.51.

Mr. Beers: I offer this statement in evidence.

(Marked Exhibit D. 2.)

40 Q Referring to Exhibit D. 1 representing profit and loss statement, December 31, 1923,

Henry Diffany, direct.

what does it show with reference to profit and loss? A \$1,804.71 loss.

Mr. Beers: I offer the books in evidence.

(Books are marked Exhibit D. 3, Exhibit D. 4, Exhibit D. 5.)

10

Q What are these books that I show you? A These are sales books.

Q What do they show? A They show the sales from 1917 and part of 1916.

Q Do they actually show the sales? A Some of them have been duplicated. Some of them have not gone out. I could not say. I don't know.

Q You cannot say? A The real entries are in the ledger, but we have not got the ledger.

20

Q What do you mean by "The real entries are in the ledger"? A When they pay the bill of course it is credited up.

Q What? A When they pay the bill it is credited up; we know they got the goods then.

Q Is it true that the sales book might record an order which has never been delivered? A That is true; yes.

Q And that the ledger only shows the sales? A Yes.

30

Q And whether the money was received for that sale or not? A Yes.

Q And the sales book might show an order that was never filled, or, if filled not paid for, is that correct? A That is correct.

Q For the years 1916, 1917, 1918, 1919, 1920, 1921, and 1922, did you have books showing the condition of your business? A Yes, sir.

Q Where are those books? A Well, they were in the factory, on the shelf outside the safe.

40

Henry Diffany, cross.

Q Are they there now? A No.

Q Do you know where they are? A They were burned up with the rest of the stuff there.

Q How came they to be burned? A From the fact that the factory was burned.

Q When? A November 13, 1923.

10 Q The building which was burned is that still standing? A There is a new building there now.

Q Was the old building totally destroyed or almost totally destroyed? A Almost totally destroyed, yes.

Cross examination by Mr. Schenck.

Q Well, now, what period does the cash book cover? A 1922 and 1924.

20 Q Take a look at it and tell me the date it begins. A March, 1922, it begins.

Q What date? A Well, the first day of March.

Q That book was in the safe at the time of the fire? A Yes.

Q And where is the book preceding that, the cash book preceding that? A I don't know. It is destroyed. It isn't there any more.

30 Q Take the sales book. Tell us when that begins. A This one here?

Q Yes. A Well, January 6, 1923.

Q Is that the book which has been re-copied from the old book? A Yes.

Q And from what book is the cash book or sales book a copy? A (Indicating.) From this one.

Q When does this book begin? A It begins October 1, 1919.

40 Q And what is that? A That is a sales book.

Henry Diffany, cross.

Q When does it run to? A November 10, 1923.

Q Where is the sales book for the period from November 10, 1923, to date? A (Indicating.) This one.

(Witness indicates Exhibit Defendant 3.) 10

Q When was this book copied, this sales book? A Somewheres along November, I guess, or December.

Q Of what year? A 1923.

Q And since that time who has entered items here? A Mr. Osborne entered some of these items.

Q And who else? A I entered some.

Q What is the other old book that you have there? A That is some more, further years 20 back?

Q What is that? A Sales book.

Q What period does it cover? A January 8, 1917.

Q Until when? A September 27, 1919.

Q Now, has that book been copied into this one? A No; it is only that one book because this book is in such bad shape.

Mr. Schenck: Are you going to offer these 30 books in evidence?

Mr. Beers: You may go over them if you want to. We won't deny them.

Mr. Schenck: I will offer them in evidence, if Mr. Beers does not.

(Books are marked Exhibit C. 1 and Exhibit C. 2.)

Q In which of these books is the record of your bank account kept? A In the ledger. 40

Henry Diffany, cross.

Q Show me where in the ledger you can find a record of your bank account? A I don't know where there is any bank account. I will have to see. There does not seem to be any there. The Manufacturers and Merchants Bank, I did my banking with.

10 Q Now, as a matter of fact you do not find any bank account in the ledger at all, do you? A No; there isn't any.

Q In what bank was the money in connection with this business kept? A In the Manufacturers and Merchants Bank.

Q Of where? A Newark.

Q And did you have a bank book, a pass book? A Yes.

20 Q You had a check book, didn't you? A Yes.

Q Where are they? A In the safe; at home.

Q Why haven't you got them here? A I wasn't told to bring them here.

Q Did you always bank the proceeds of this business in that bank? A Well, not altogether; I had it in two banks before.

30 Q Well, what two banks? A Three banks altogether.

Q Tell us which ones they were? A The Broad and Market was one, and the Newark National and Essex Banking Company and the Union National Bank.

Q Have you those bank books and check books at home? A No; I have some of them. I guess one or two.

40 Q Where are the others? A Well, they were in use; we had them outside the safe; they are gone too.

Henry Diffany, cross.

Q Who kept your books during the year 1923? A Well, Mr. Smith, the bookkeeper, he kept the books.

Q How long had he been keeping the books for you? A He had been keeping the books for twenty years, I guess.

10 Q Did he ever give you any statement of sales for any year? A No.

Q Did he ever give you any statement or any account for any year? A No, he did not.

Q Did he ever give you any statement at all showing the business done, and the disbursements in connection with the business? A Yes, every month.

Q Have you these statements? A Not all of them. For 1923?

20 Q For any year? A I think so. I ain't so sure.

Q Where are they? A I think they are in the safe.

Q How long has he been making it a practice of giving you a monthly statement? A Every time he comes. I mean every month he comes or every two months.

Q Has he been your bookkeeper for the last twenty years? A Yes, sir.

30 Q And he kept your books for you before you had business relations with Mr. Osborne, didn't he? A Yes.

Q And at the time you began business relations with Mr. Osborne, what sort of business were you carrying on? A Frames and novelties and purses or vanity cases, things like that.

40 Q The books that you used at that time continued to be the books of your business? A Yes; used the same books.

Henry Diffany, cross.

Q You did not open any new set of books?
A No.

Q At that time did you owe any money in connection with the business? A Some; yes.

Q How much and to whom, if you remember? A Well, I owed the bank \$5,000, I know, and some other bills. I owed bills, but how much I couldn't say.

Q You don't remember how much the bills were? A No; I couldn't say.

Q Was that indebtedness of \$5,000 subsequently paid? A Well, it was paid off before 1918 or 1919.

Q And that was out of the proceeds of this business that you conducted? A Not Mr. Osborne's part; no.

Q You say it was paid off? A Yes.

Q How was it paid off? A Outstanding accounts and my business that I had.

Q How long did you continue your frame and bag frame business? A 1918, when we moved, then I stopped altogether the frames.

Q You stopped altogether. A I had some frames in stock. I sold what I had in stock.

Q You did not make any more? A No; I didn't make any more.

Q After 1918? A No; I didn't make any more frames.

Q Did you take an inventory? A No.

Q Never? A No.

Q During those early years, how did you know how much of the business was done in the shaving stand line, and how much in the bag frame line? A It is all in the book there, I could not say how much. It is not separated, but you can tell the different names.

Q Did anybody separate them? A No.

Henry Diffany, cross.

Q When Mr. Smith made up your monthly statement, did he separate it? A No.

Q How could you tell how much you owed Mr. Osborne? A In many ways I didn't owe him anything. He was getting more than I agreed to give him.

Q Did Mr. Smith's figures indicate that to you? A No.

Q Did they show that? A No; they did not show that.

Q What did they show in relation to Osborne? A Well, there was a separate account kept in the book for how much he got.

Q Is that in the book which you have before you there? A Yes; it is separated.

Q Show me where Mr. Osborne's account is separated there, if you will, in any one of them? A (Indicating.) There.

Q And now, you say pages 94 and 95 of Exhibit D. 4, which is the ledger, indicate the account of Mr. Osborne for salary and commission? A Yes.

Q And in whose handwriting are those pages? A Mr. Smith's.

Q Mr. Smith made this? A Yes.

Q From what did Mr. Smith get these items that are entered here? A Cash book.

Q And looking at page 94, beginning at the top, for instance, the item of January 30, what does that mean? A That is to the end of January.

Q "January 30, to S. C.,"—what does that mean? A I suppose in this book.

Q What does "13" mean, do you know? A I will find out.

Q You say Exhibit D. 4 is in the handwriting of Mr. Smith? A Solely, yes.

Henry Diffany, cross.

Q In the cash book is your handwriting? A Yes.

Q Did Mr. Osborne enter anything in there? A No; he did not.

10 Q All he entered in was the sales book? A Sales book; yes.

Q Then, after you gave up selling bag frames in 1918, all you sold or manufactured and sold, were these novelties that you manufactured and sold in connection with Mr. Osborne; isn't that so? A Yes.

Q So that after 1918, all the business that you did was in that line? A Not all. I sold some frames.

20 Q When did you stop selling frames entirely? A I couldn't say that. Maybe a year ago, something like that, maybe two years ago, I could not say. The book will show it.

Q Which book will show it? A Any of these books will show that.

Q Which one in particular? A Well (indicating), this book here.

Q What is that book? A That is a sales book.

30 Q You are pointing to the old sales book? A Yes.

Q That has been re-copied into the new one?

A No. This is the sales book here.

Q I say that is the one you are pointing to?

A Yes.

Q Did you sell these bag frames to more than one person or all to one house? A More than one house.

Q During this period Mr. Smith would give you monthly statements? A Yes.

40 Q Of how the whole business stood? A Yes.

Henry Diffany, cross.

Q You have not any of those monthly statements, have you? A No; I have not.

Q And so far as the— A (Interrupting.) I haven't any statement, of those statements farther back than 1923.

Q What did you do with those statements? A I had them on the file. 10

Q Did you ever give Mr. Osborne any of those statements? A He saw them every month.

Q He saw them? A They were in the book for him to see.

Q It was on the basis of these statements that he made up his figures, was it not? A Oh, no.

Q (Showing witness.) You recognize the handwriting here? A Yes. That is right.

Q These are in Mr. Osborne's handwriting? A Yes. 20

(Papers shown to witness are marked C. 3 for identification and C. 4 for identification.)

Mr. Beers: I am going to object to any testimony as to any statements that were gotten up by Mr. Osborne. In other words, I want to object to the statement of figures in the handwriting of Mr. Osborne being 30 considered in the taking of this account, for any purpose, at this time.

Q You saw these figures in Mr. Osborne's lifetime, didn't you? A I don't know whether I saw these. I saw some figures.

Q And he presented to you a statement, did he not, in his lifetime, as he computed it, of the amount of sales and the amount to be charged against him? A He didn't give them to me, no. He put them in my desk. 40

Henry Diffany, cross.

Q In whose desk? A In my desk.

Q Did he keep them there? A Yes; he kept them there.

Q Is that what you mean by saying that he put them in your desk? A Yes.

10 Q Did you use the same desk, you two men?
A Yes.

Q You saw these figures that he had written, in his lifetime, did you not? A Yes; I saw them.

Q And where did he get the figures that he had, in his lifetime? A Well, he got his sales figures from these totals that he put down—these totals that he put down. These purchases, they are not all down there, the purchases.

20 Q Did he get any figures at all from Mr. Smith? A No; he did not. He saw these figures. They were in the book for him to see. I don't know whether he saw them or not. He had access to the book.

Q Did you and he ever discuss the amount of sales or the amount or disbursements in connection with the business? A Not that I know of.

30 Q Did you and he ever discuss the Smith statement, that is, the statements that Mr. Smith made up? A No.

Q Did you ever draw any money from the business? A Sure, I did.

Q Where would that appear in these books?
A In my account.

Q In the ledger? A In the ledger, yes.

Q From the time the business began you drew something out from it? A The first three years I did not.

40 Q During the first three years, you paid off this \$5,000 note, didn't you? A Yes; but not

Henry Diffany, cross.

from any earnings or profits that Mr. Osborne had anything to do with.

Q Where did the money come from that paid off that note? A From my outstanding accounts that came in, and also the frame business; I was doing the frame business in 1916.

10 Q Were those books destroyed too? A They are destroyed, also. The 1917 sales book is here.

Q Was the stock that you and Mr. Osborne were carrying in the novelty business insured?
A The stock was insured, yes.

Q For how much? A \$4,000.

Q Was that money collected? A Yes.

Q And what disposition was made of it? A It was deposited in my account in my bank.

20 Q Does it show? A No, sir; it does not show.

Q In what bank was it deposited? A Fidelity Union.

Q To your account? A Yes.

Q Is the receipt of that money indicated anywhere in the books? A No, sir. It is not.

Q Why not? A Because Mr. Osborne suffered no loss in the business he was doing.

30 Q Did that insurance received by you cover the loss in stock through the fire? A Not all of my loss. I had some frames there yet, stock of frames.

Q Did that cover all the loss in the Osborne business? A Cover the loss?

Q Yes. A There was not that much there.

Q There was not that much? A No.

Q How much of the \$4,000—you mean to say that you still had bag frames in 1923? A Why, certainly I had.

40 Q How many bag frames, and to what value?
A The value was about \$6,000.

Henry Diffany, cross.

Q You had that much in 1923? A Yes.

Q In bag frames? A Yes.

Q How much stock in the shaving stand business did you have? A About \$800—\$835—something like that.

10 Q How do you fix that figure? A Well, when we uncovered everything. We took everything out, and I found out that much.

Q \$835? A Yes.

Q Who made that up? A What do you mean?

Q Who computed that amount? A The bookkeeper computed it.

Q Mr. Smith? A Yes.

20 Q Was there any record made of it? A Only the paper. That is all.

Q There is nothing in the books? A No. It was already removed to the other factory.

Q Have you any way of telling as to what the sales for the year of 1919 amounted to? A There is the book there.

Q In which book? A In this sales book here, if it is correct.

30 Q You add, "If it is correct," what is there incorrect about it? A I don't know what is incorrect about it. You will have to go over it and see it.

Q Have you ever been over it for the purpose of determining whether or not it is correct? A No; I have not. I have been over it, yes, in a way, checking off some of the frames out of it and trying to find out something about it.

Q Have you found any item that is incorrect? A In 1919?

40 Q Yes. A I could not say that offhandedly. I don't know. They are checked off in there.

Henry Diffany, cross.

Q Have you any idea as to whether or not the true amount of sales shown for that year was \$53,381.83? A No; I could not say that.

Q Will you say that they were not that amount? A I could not say that they were not or they are.

10 Q Have you any way of telling the cash discount for that year? A Not unless I had the ledger.

Q The sales book would show more or less than the ledger? A Well, of course.

Q Which—more or less? A The ledger would.

Q Would the sales book show the receipt of more money than the ledger would or would it show the receipt of less money than the ledger? A I could not tell that.

20 Q Have you any way of telling the amount of the purchases for the year 1919—materials purchased? A Well, they are in that book. Whether they are correct or not. I could not say that either.

Q They are the books of your business, are they? A Yes.

Q You never thought they were incorrect? A I do not go by the sales book. I go by the ledger and the cash book.

30 Q The ledger is gone, is it not? A Yes; that is gone.

Q Is there anything that is any nearer correct, which you have, or which is in existence, than the sales book? A No; I don't know.

Q There is nothing any nearer right than the sales book? A I cannot tell you that. I have nothing to go by.

40 Q You say the sales book shows the material that was purchased during the year? A Some of it.

Henry Diffany, cross.

Q What does it not show? You say "Some of it"? A I could not tell you that now.

Q Why do you say it does not show all of it? A Well, sometimes the bill comes in after the bookkeeper had been there for that month, and it is paid and filed away. For instance, the
10 30th of the month; he comes on the 28th, and I pay it and file it. We try to keep it separately.

Q That is the only explanation? A That is all.

Q Does it show the pay-roll? A No; it does not show the pay-roll.

Q Where does the pay-roll appear? A In the ledger.

Q Does it appear anywhere else than in the ledger? A Yes; we had a pay-roll book.

20 Q Where is it? A I have only got one.

Q Where is it? A I have that in the safe, the one I am using.

Q That is current pay-roll book? A Yes.

Q You will produce that before the master if requested? A Yes; you can have it, but it is copied off in the ledger just the same.

Q Does the ledger show the amount of pay-roll? A Yes.

30 Q You don't know anything about how far back that pay-roll runs, do you? A I could not say.

Q Is there any record of expense other than the sales book? A Expenses don't show in the sales book.

Q Where do they appear? A In the ledger.

Q Do they show in the cash book? A Yes; they show in the cash book also.

40 Q Do they show in the check book? A No; they don't show in the check book, not all. Sometimes they were paid by cash.

Henry Diffany, cross.

Q You did pay sometimes in cash? A Oh, yes; we had to have a petty cash book.

Q Well, now, will you say that the net for the year 1919 was \$11,317.41? A For what?

Q The net profit. A I could not say that.

Q Well, how much was it? A I don't know. 10

Q Have you any way of telling? A No; I have not.

Q Why not? A There is some statement there Osborne has been using. That is the only way I can tell.

Q Is that substantially correct? A I could not say that. I don't know.

Q Well, are you willing to accept it as correct? A No; I do not. No, sir.

20 Q What is the matter with it, in what particular is it wrong? A I don't know what is the matter with it. I cannot say. There is a statement made up showing what the profit really was, as far as we can know about it.

Q Have you any way of telling whether the net profit for the year 1920 was \$20,638.31? A It was not that much.

Q How do you know? A Well, I don't know.

30 Q Then, why do you say it was not that much? A I could not say it was \$20,000 because there was some stock there he didn't figure with, something he didn't deduct.

Q Where is it? A I don't know where it is. I could not tell you.

Q Where is the record of it? A I cannot say at this time. I cannot say where that was.

40 Q Why do you say he did not deduct it? A I don't know what the stock was that time; I could not tell you.

Henry Diffany, cross.

Q How do you know he has not deducted it in that figure? A I could not say.

Mr. Beers: I again object. I take it that my objection goes to all of these figures that are being introduced, for which there is not basis.

10 Q Have you any way of telling as to whether or not the net profits for the business for the year 1921 were \$9,865.25? A I have no way of telling; no, only Mr. Osborne's figures, what he made.

Q Will you say that that was the net profit for that year? A No; I will not.

20 Q Will you say that it was not? A I won't say neither one, because I don't know.

Q Why don't you know? A Because I don't know.

Q Was any statement made of the net profits for for the year 1921? A No; there was not.

Q You had Mr. Smith's statement, didn't you? A Monthly statements, yes, not yearly.

Q From those monthly statements you could make up the yearly statement, could you not? A Yes, you could, but I did not.

30 Q Did you know for the year 1919, 1920, or 1921 how the business stood, for any one of those three years? A No; I did not.

Q Did you know at any time how it stood? A No; I didn't know how it stood. I only know about the bank account.

Q You only know about the bank account? A That is all.

40 Q You have that bank account? A No; I have not. What do you mean bank account. Did I have whose bank account?

Henry Diffany, cross.

Q Have you the check book, or bank book? A No; I have the check book I think for 1919 only.

Q The check book only? A No; the pass book.

Q The pass book? A Yes.

Q Have you got the check book for 1919? A 10 No; I have not.

Q In what bank was the account for those years? A From 1919?

Q Yes. A Manufacturers and also Broad and Market.

Q Have you any way of telling as to whether or not the sales for the year 1922 were \$43,-614.45? A I have no way of telling.

Q If Mr. Osborne had figures that indicated that they were of that amount, have you any idea as to whether those figures were right or wrong? A No; I have not. 20

Q Have you any way of telling what the expenses were for that year? A There is no book here for that.

Q Where is the book for that? A That has been burned up in the fire.

Q Have you any way of telling whether the net profits for the year 1922 were not \$5,546.89? A No; I have no way of telling. 30

Q What was the net profits for that year? A I don't know.

Q Was there a net profit for that year? A I think there was, yes, of some kind.

Q How much was it? A I don't know.

Q Have you any way of telling as to what the net profits for the year 1923 was? A Yes.

Q How? A By the accountants' figures.

Q That is the only way? A There was no profit. There was a loss. 40

Henry Diffany, cross.

Q As a matter of fact, was there not a net profit for the year 1923 of \$14,736.71? A No, sir. There was not.

Q How do you know there was not? A Because the accountant went over the books.

10 Q That is the only reason that you have for saying that there was not that profit? A That is all, yes.

Q And so the only thing that you know about the net profit for any of these years, is what the accountant shows? A That is right.

Q You don't know, of course, where the accountant got his figures from? A Yes; he got them for the statement there.

20 Q What statement did the accountant get them from? A He used Mr. Osborne's statement and whatever we had.

By Mr. Beers.

Q In the sales book are there items of rent received? A Yes, rent received and machinery sold.

Q Whose rent was that? A My own property, rent from my own property.

Q Whose machinery was it? A That was sold?

30 Q Yes. A My machinery.

Q In whose hand-writing in the sales book are the receipts of rent made? A Some is in my hand-writing; some in his.

Q You were asked concerning the shaving stand stock. I understand that that was the stock in which Mr. Osborne was interested? A Yes.

40 Q This stock was stock and not a complete shaving stand? A No; it was not complete; it was not finished.

Henry Diffany, cross.

Q You say they were removed to the present factory? A Yes.

Q And were there used? A They were used.

By Mr. Schenck.

10 Q Do you remember what the bank balance was January 1, 1924? A No.

Q As a matter of fact, was it not around \$15,000? A Something like that, yes.

Q There was that much money in the bank? A Yes.

Q And didn't you suggest to Mr. Osborne that there be a division of that money in the bank at that time? A Well, I did; yes.

20 Q How was it to be divided? A I was going to divide it with him.

Q Why didn't you? A He did not accept it.

Q How much of it was he to get? A Whatever there was, half of it.

Q And it was around \$15,000, was it not? A Yes; but I did that because I did not want to go to law. He was not entitled to it.

30 Q What bank was that in? A The Manufacturers and Merchants.

Q And that was profit from this business, was it not? A Oh, no; not altogether; no, sir.

Q From what business was it? A From everything.

Q That was profit from everything? A Yes; and some of my money that I put in and did not draw out.

40 Q From 1916 on, you and Mr. Osborne had drawn some moneys out of the business, had you not? A Yes.

Henry Diffany, cross.

Q And you had paid the expenses of the business, had you not? A Yes.

Q And in 1924—January 1, 1924—you had around \$15,000 in the bank? A Yes.

Q And it was in the business account, was it not? A Yes. Some of it was my money, 10 though.

Q How much was your money? A The statement shows it.

Q And you offered to divide that money with Mr. Osborne, didn't you? A Yes.

Q Without any deductions? A At that time, yes. I don't offer it now any more. I guess not.

Q Had you, up to that time, anything other than the monthly statements prepared by Mr. Smith? A No; up to that time I had this ac- 20 counting in 1923.

Q When did you have this accounting? A In 1923.

Q You had the accounting in 1923? A This accounting here, whatever he has got there—1923 and 1924.

Q The accounting that you now have, was made up, was it not, after you offered to divide this \$15,000 with Mr. Osborne? A No; it was before. 30

Q I am asking you: Did you have Mr. O'Leary or any other accountant go over your books before you offered to divide this \$15,000? A No; afterwards.

Q How long after? A I don't know. I think it was made in March sometime or February.

By Mr. Beers.

Q You say that you are not now willing 40 to divide that sum of \$15,000? A No, sir.

Henry Diffany, cross.

Q Why not? A I don't do that any more now. I did that before, because I did not want to go to law about this. I was liberal about it.

Q You said that money was in the business account. What do you mean by "Business account"? A Well, Diffany and Company. 10

Q When did you say you had Mr. O'Leary go over your books with reference to the time when you were willing to make a division of this money with Mr. Osborne? A It was right after—about three or four weeks afterwards.

Q Were you willing after that to make a division? A No, sir; not after I found out the affairs, how it stood.

Q What do you mean by that? A Well, how the business stood.

Q What do you mean by "How the business stood"? A Well, seeing what losses I had in the business. 20

Q Do you know whether or not your insurance money formed any part of that \$15,000? A No; it did not.

By Mr. Schenck.

Q Did you pay any income tax for any of those years? 30

Mr. Beers: That is objected to as immaterial and incompetent and irrelevant.

The Master: I will allow the question.

A I paid income tax, but not for the business.

Q Did you file any report of business done by Diffany and Company? A No, I did not.

Q For any year? A No.

Q Did you file any return other than your individual return? A No; I did not. 40

Henry Diffany, cross.

Q Mr. Osborne and you discussed the income tax returns for this business, didn't you?

A No.

Q You say you never filed any? A No.

Q Have you filed any income tax returns for the business for the year 1924? A Yes.

10 Q Have you a copy of that return? A No; I haven't a copy. They have it here.

Q Did you file an income tax return for the year of 1923? A Yes.

Q And have you a copy of that return? A Yes; we have a copy of that.

Q Have you a copy of the return for the year 1922? A No; I have not.

20 Q Where is it? A I don't know. I didn't have anything to do with that. I didn't file any for the business.

Q But you did for 1923, and 1924? A Yes.

Q And you have copies of those? A Yes.

Q Where are they? A Mr. Beers has got them, I guess. They are here somewhere.

Mr. Beers: There are none here among my papers.

Q In what name did you file your returns for the year 1922? A I did not file any.

30 Q For the year 1923? A In my name, and 1924 also.

Q 1924 was in your name, and that included the business done by Diffany and Company? A Yes.

Q And you say that your attorney has that copy of those returns? A I don't know whether he has it or not. I have a copy somewhere, but I don't know where it is.

40 Q Will you produce it before the Master? A Yes, sure. I can get a copy of it.

Joseph A. Schroeder, direct.

Mr. Schenck: You say you have not these returns?

Mr. Beers: No; I haven't them.

Mr. Schenck: That is all for the present for this witness.

10

JOSEPH A. SCHROEDER, sworn as a witness on the part of the defendant, testifies as follows:

Direct examination by Mr. Beers:

Q What is your calling? A Accountant.

Q You are with the firm of O'Leary and McNeil? A Yes.

20

Q Tax consultants and accountants with offices in New York and Brooklyn? A Yes; 44 Court street, Brooklyn.

Q I show you Exhibit D. 1 and ask you to examine it and say what it purports to be or what it is. A It is a profit and loss statement.

Q Of what? A For the year 1923 of Diffany and Company.

Q And what does it show as to profit and loss? A It shows a loss of \$1,804.71.

30

Q How did you reach that result? A Through an analysis of Diffany and Company's books.

Q For the year nineteen hundred and— A For the year 1923.

Q I show you Exhibit D. 1 and ask you to examine it and say what it shows. A It is a profit and loss statement for the year ending December 31, 1924, of Diffany and Company.

Q And what does it show as to profit and loss? A It shows a loss of \$6,149.61.

40

Joseph A. Schroeder, cross.

Q How did you ascertain that result? A Through an analysis of Diffany and Company's books.

Q In what book is the bank account of Diffany and Company for the years 1923 and 1924? A In the cash book.

10

Cross examination by Mr. Schenck.

Q Have you any working papers as to how these items are made up indicating the totals? A We have.

Q Where are they? A I have them in my pocket. Here they are.

Q Take the statement for the year 1923, the sales at \$41,962.96. Show us where you get that total from? A That is taken from the sales book.

20

Q Where are the working sheets that produce this total? A We simply show the total by the sales book for the year.

Q Where are the working sheets that show how you get it. I ask you whether you went by the sales book and took off each item and showed the discount and the amount collected? A What do you mean the amount collected?

Q I ask you to tell me how you arrived at the figure, \$41,962.90? A By taking the various monthly total of sales as they appeared in the day book.

30

Q Are these the working papers that you have before you? A Yes.

Q By which you did that? A Yes.

Q Where did you get the figures, "less return \$707.62"? A That is also taken from the day book.

Q Cash book? A No. This sales book is nothing else but a journal.

40

Joseph A. Schroeder, cross.

Q Which book? A This (indicating Exhibit C. 2) is really nothing else but a journal.

Q And you took it from there? A Yes.

Q And you say that \$707.62 is the total of the returns indicated by that book? A I do.

Q And do the working sheets show it? A They do.

10

Q The item "Less discount, \$901.03" came from where? A That, I don't remember where that came from. I think it came from the cash book.

Q Well, who knows any more about it than you do? A Well, I handle quite a few cases in a year, so I cannot remember just where it was taken from.

Q Look at these books and tell us? A It was taken from the cash book.

20

Q What bank balance did this concern have as of January 1, 1923? A Around \$23,000.

Q In what bank was it? A Part of it was in the Broad and Market, and part in the Manufacturers.

Q Can you tell how much was in each bank? A Well, there was \$14,000 in the Broad and Market.

Q Even \$14,000? A No; \$14,983.89.

Q And what was the amount in the other bank? A \$8,318.45.

30

Q Where did you get that from? A Through an analysis of cash, reconciliation between the bank and the check stubs.

Q In what books does it appear? A It does not appear in any of the books.

Q Did you do it, or did some one else do it? A I did it.

Q Well, in what book did the items that make up that bank account appear? A Well, on the two check stubs.

40

Joseph A. Schroeder, cross.

Q On the check stubs? A Yes.

Q And in the pass books? A In the pass books.

Q And in the name of Diffany and Company? A Yes.

10 Q And at the end of the year 1923, December 31st, what was the bank balance? A That I just gave to you.

Q Have you the amount of the bank balance as of January 1, 1923? A That is approximately \$9,000.

Q Why do you say "approximately"? A Well, we have two different bank accounts.

20 Q What were the items? A There is the Broad and Market, \$4,826.60, and the Manufacturers, \$4,370.82.

Q Where did you get these figures? A That is as between the check stubs and the bank book.

Q Do you know as to whether or not that bank balance was in those banks? A It was in the banks.

Q You checked it with the bank returns, I assume? A I did.

30 Q In your working sheets for the year 1923 do you show any bank balance as of any other time than January 1, 1923? A Which working sheets have you reference to?

Q For the year 1923? A No.

Q You, for your concern, made no analysis of this firm's accounts for any other years than 1923 or 1924, did you? A No; I did not.

Q Where did you get the item of inventory, January 1, 1923, as \$4,022.41? A That was submitted to me.

40 Q By whom? A By Mrs. Diffany.

Joseph A. Schroeder, cross.

Q In what form was it submitted to you? A That I don't remember. I think it was a statement.

Q Where does it appear in your working sheets for the year 1923? A What do you mean—the statement?

10 Q Yes. A I just took the figure and put the figure in my working sheet.

Q Was there any memorandum or book submitted to you indicating that amount of inventory as of January 1, 1923? A There is no account in any book.

Q Was there any memorandum submitted to you? A Yes; a memorandum.

Q Where is it? A That I could not tell you. That was returned when we returned the books.

20 Q Do you remember what else that memorandum showed other than this sum total that you have incorporated in your statement? A I do not.

Q From where did you get the amount of purchases, \$14,829.44? A That is taken from the day book here.

Q Which book? A (Indicating Exhibit C. 2.) This one.

30 Q Your working sheets show what in relation to that? A What do you mean?

Q Well, the items in the total. A The totals each month.

Q Your working sheets show the totals of each month? A Yes.

Q Of the items which you took from Exhibit C. 2? A That is right.

Q And \$14,829.49 is the total for the year? A Yes.

40 Q Where did you get the item of "Less discounts, \$243.45"? A From the cash book.

Joseph A. Schroeder, cross.

Q And do your working sheets show the items that made up that amount? A The monthly totals.

Q Only? A Only.

10 Q And "less returns, \$164.86"—where did you get that from? A I believe it is taken from here (indicating Exhibit C. 2).

Q From where did you get the item "Inventory, December 31, 1923, \$834.31"? A That was submitted.

Q By whom? A I don't remember. Either Mr. or Mrs. Diffany.

Q Where? A At the office.

Q Your office? A At our office.

Q Brooklyn? A In Brooklyn.

20 Q Do you remember in what manner it was submitted? A Memorandum.

Q Do you remember anything else on it besides that one item? A I did not.

Q Were there any other items? A That I could not tell you?

Q Where did you get the items "office salary and commissions, \$2,665.02"? A From the ledger.

30 Q The item of General Expense, \$4,488.96—where did you get that? A That is from the ledger.

Q The item of "Pay-roll, 13,359.63"—where did you get that from? A That is also from the ledger.

Q "Rnt, \$1,400"? A That is from the ledger.

Q What do your working sheets show in reference to these items? A Just the totals.

Q Monthly or yearly? A Yearly.

40 Q Well, taking up the statement for the year 1924, Exhibit D. 2, were the items of sales and

Joseph A. Schroeder, cross.

returns and discounts making up the total of \$34,113.29 arrived at in the same manner as the items in the statement for the year 1923? A They were.

Q From where did you get the item of "Inventory, January 1, 1924, \$834.51"? A That was submitted. 10

Q On a memorandum by itself? A On a memorandum.

Q By itself? A I couldn't say whether it was by itself or not.

Q Where did you get the item of "Purchases, \$17,077.76"? A From the day book.

Q "Less returns \$188.13; discount \$174.05"? A The returns from the day book; the discounts from the cash book.

Q Where did you get the item of "inventory 20 December 31, 1924, \$1,142"? A Submitted.

Q Do you know whether there is anything else on that memorandum besides that one item? A I do not.

Q Have you that memorandum? A No.

Q What was done with it? A I believe it was returned.

Mr. Schenck: I call upon the other side to produce that memorandum which was given to the accountant, if you have it. 30

Mr. Beers: We have not the memorandum you ask for here. Whether they have the memorandum or not, I do not know. I will try to ascertain.

Mr. Schenck: If they are found you will produce them at a later date?

Mr. Beers: Yes, indeed.

Q The items of pay-roll, office salary, rent and expenses shown on the statement as of Janu- 40

Joseph A. Schroeder, cross.

ary 31, 1924, were received from the same source as the similar items on the 1923 statement? A That is correct.

Q And those totals and the items that go to make up the totals are shown on the working sheets for the year 1924? A That is right.

10 Q What was the bank balance as of December 31, 1924? A \$17,589.93.

Q All in one bank? A That I could not tell you?

Q Can you tell what bank that balance was in? A I can tell where part of the balance was.

Q Please tell us. A That was in the Merchants and Manufacturers National Bank.

20 Q And where was the rest of it? A That I don't know.

Q How much was in the Merchants and Manufacturers National Bank? A \$6,589.93.

Q In the account of Diffany and Company? A That is right.

30 Q From where did you get the total bank account and where did you get that particular item in the Merchants and Manufacturers National Bank? A That was checked up, getting the reconciliation of the balance sheets submitted by the bank at the end of that month.

Q Those were checked by you with the pass book and the check book of Diffany and Company? A Yes, with the check book and the Bank statement.

Q Your working sheet shows those items? A That is right.

Q And those (indicating) are the working sheets for the year 1923? A They are.

40 Q And these (indicating) for the year 1924? A Yes.

Joseph A. Schroeder, re-direct.

Mr. Schenck: I ask to have these marked separately for identification.

(Marked C. 3 for identification and C. 4 for identification.)

10 Q These statements marked for identification, C. 3 and C. 4, are the sheets that indicate the items taken by you from the various books that you have told us about and from the memorandums, which have resulted in these statements for the years of 1923 and 1924, that are marked Exhibit D. 1 and Exhibit D. 2? A That is right.

20 Q Did you make any other examination of the books or records of this company other than that embodied in these two sets of working sheets and these two statements? A This is the only work that I was identified with—

Q Just these, you don't know whether your concern made any other examination of the books and records of this company or not? A No.

Re-direct examination by Mr. Beers.

30 Q Mr. Schroeder, I believe you testified that in December, 1923, you found that there was in the banks the sum of \$17,589.93? A By that I mean not necessarily in the bank. That was in cash or on hand.

Q Did you add to the item of cash in the banks the item of \$11,000 of the insurance money? A I did.

Q That was in another bank? A Yes.

40 Q At that time the Diffanys called your attention to the fact that there was not in the Broad and Market and in the Manufacturers Bank seventeen thousand and some odd dollars

Joseph A. Schroeder, re-cross.

of money belonging to the business? A That is correct.

Q That there was not that much money in the bank—is that correct? A That is correct.

Q Didn't they call your attention to the fact that there was \$11,000 insurance money in another bank? A They did.

Q Which covered loss on machinery? A They did.

Q Frames and \$835, I think, shaving stands or \$800. Do you remember they called that fact to your attention? A I don't know just what it covered, but they called attention to the \$11,000 deposited in some other bank, and that is what is recorded on the working sheets here.

Q That is recorded on the working sheets you say? A That is correct.

By Mr. Schenck.

Q Just suppose you turn to your working sheets for the year 1923, to the bank balance at the beginning of the year and at the end of the year? A Here is one of them.

Q What does that represent; is that a memorandum you have got? A That is the only memorandum I have as to that bank balance. That is the amount shown on the bank statement, and this (indicating) would be a check outstanding as of that date, which had not been through the bank.

Q What bank is that? A That is the Manufacturers National Bank.

Q What was the bank balance January 1, 1923? A What do you mean—the total bank Balance?

Q Yes. A I don't know. I will have to figure it up. \$9,157.42.

Joseph A. Schroeder, re-cross.

Q Was that money actually in the bank? A That was in the bank.

Q And to the credit of Diffany and Company? A That is right.

Q So far as you know, it was the avails of the business of Diffany and Company? A That is correct.

Q What do your working sheets show in reference to additions to that amount deposited during the year? A It shows nothing as far as deposits are concerned.

Q Does it show anything as to withdrawals? A No.

Q Where and how did you deal with deposits and withdrawals? A That is all recorded in the cash book.

Q And is that the only place that you deal with the deposits and withdrawals? A Well, it is shown in the cash book, and also in the pass book.

Q And it is shown on the bank statements, too, is it not? A Yes.

Q And you deal with it in all three places, don't you? A I would not say the three places. In two places anyway.

Q Which two? A The cash book and the check stubs.

Q What was your balance as of December 31, 1923? A Actual bank balance?

Q Yes. A That was \$12,302.34.

Q And that was actual money in the bank, was it? A That is as far as I know. That did not include that \$11,000.

Q It did not include the \$11,000 that you spoke about? A No.

Q Where was that? A Well, that was in some other bank account. Which account that was in I do not know.

Joseph A. Schroeder, re-cross.

Q This account was Diffany and Company that you are testifying about, with twelve thousand odd dollars in? A That is correct.

Q Was it all in one bank? A No; in two banks.

10 Q What amount and in what bank? A Broad and Market National Bank, \$3,983.89, and the Merchants and Manufacturers Bank, \$8,318.45.

Q Do your working sheets show anything else in reference to the bank accounts other than those items which you have testified to in answer to the last few questions? A What do you mean?

Q Other than those figures that you have read off, do your working sheets show anything else with reference to the status of the bank account? A These last two figures.

20 Q This one that you read and (indicating) this one? A Surely, and that \$11,000.

Q Where is that considered and dealt with in your working sheets? A That is dealt with in the final balance sheet which would show the actual cash balance.

Q You say the \$11,000 is not included in the \$12,000. What was the cash balance on hand, then, at the end of the year? A At the end of 30 1923?

Q Yes. A \$22,302.34.

Q And what is that the sum total of? A That is the sum total of cash supposed to be in the bank.

Q And how does that total reconcile with the bank account as you have testified it was at the beginning of the year and as it was at the end of the year? A I don't get what you mean.

40 Q Where does the \$11,000 come in? That is what I am trying to get at. A Well, that

Joseph A. Schroeder, re-cross.

I cannot tell you. I don't know what bank account it is in.

Q And the only knowledge that you have about there being any \$11,000 is the fact that you have been told about it. It that it? A That is correct.

10 Q What you have been told about it you have been told by whom? A Either Mr. or Mrs. Diffany.

Q Did they give you any memorandum of it? A They did not give me any memorandum.

Q Did you see any memorandum of it? A That I don't remember.

Q Were you told about it by word of mouth or in writing? A I was told about it.

20 Q The items as to the amount of bank account at the beginning of the year 1924 and at the end of 1924 that you previously have given us, indicate actual cash balance in bank as of those two respective times, do they not? A That is right.

Q And have no relation whatever to the item of \$11,000? A That is included in these figures.

Q You say the balance in the bank, as of December 31, 1923, is twenty-two thousand odd dollars, do you not? A \$22,302.34.

30 Q Turn to your working sheets for the year 1924 and show me where you deal with the bank balance as of January 1, 1924? A Working sheets for 1924?

Q Yes. A That won't show on the working sheets for 1924.

Q Do you deal with the bank balance for year 1924 in your working sheets? A No.

40 Q Well, have you any record of the bank balance as of January 1, 1924? A That would be the same as I gave you for December 31, 1923.

Joseph A. Schroeder, re-cross.

Q Where does it appear in your working sheets? A (Indicating) Right here.

Q Where does it appear in your working sheets for 1924? A The working sheet for 1924— The balance at the end of this year you use as the opening balance. It is not necessary to set it up again. It is a duplication. 10

Q Nowhere in your working sheets for 1924 do you deal with deposits or withdrawals from the bank balance? A No.

Q Do your working sheets for the year 1924 show the bank balance as of December 31, 1924?

A They do.

Q Where? A (Indicating) Right here.

Q And what do they indicate to be the bank balance as of December 31, 1924? A \$17,589.93.

Q And what does that include? A That includes the \$11,000. 20

Q And have you any record in your working sheets of the deposits made in the company accounts that made up the \$22,000 in 1923? A No.

Q Have you any record in your working sheets of the deposits that were made in the account that make up the balance as of December 31, 1920, as \$17,000? A I have.

Q Where? A Here (indicating) is one of them. I believe that I have given you that before. 30

Q That is one bank. Where is the other bank?

A That is all. The other bank had nothing in, and there is another bank with that \$11,000. Which bank that is in I don't know.

Q These are the withdrawals from that account? A No.

Q Are they deposits? A No.

Q What are they? A They are outstanding checks as of December 31. 40

Joseph A. Schroeder, re-cross.

Q Then this item of \$768, is that a deposit?

A That is a deposit; yes.

Q What is the item of \$592.71? A That is also a deposit.

Q Well, now, this one has reference to the Merchants and Manufacturers National Bank account, has it not? A That is correct. 10

Q The account for the year 1923 was in two different banks, was it not? A That is correct.

Q Where is your record of that other account?

A (Indicating) It is closed here.

Q How do you account for the fact that the bank balance, exclusive of the \$11,000 insurance, was \$11,000 December 31, 1923, and had been reduced to around \$6,000 December 31, 1924?

A I don't get what you mean. 20

Q The item of \$11,000 insurance was carried over in both years? A That is correct.

Q And it is included in the total bank account of seventeen thousand and odd dollars of December 31, 1924? A That is correct.

Q What were the withdrawals from the bank accounts for the year 1924, that brought the bank balance down? A Which bank balance?

Q The total bank balance which you showed, from \$22,000 to \$17,000. In other words, where is that \$4,000 or \$5,000? A I couldn't tell you off-hand. I will have to make an analysis of that. 30

Q Is there anything in your working sheets that shows that? A No.

(At this point adjournment is taken to Friday, March 27, 1925.)

Henry Diffany, cross.

Met pursuant to adjournment this twenty-seventh day of March, 1925, at two o'clock in the afternoon.

Appearance as heretofore.

10 HENRY DIFFANY, the defendant, resumes the stand.

By Mr. Schenck.

Q Have you the check books and cancelled vouchers here? A Yes, sir.

Q Where are they? A In the bundle there. They are here.

Q Won't you produce them, please? A (Witness produces papers.)

20 Q This check book on the Broad and National Bank apparently begins June 6— A There has been a couple of years between. There is one further back and it starts a couple of years after that.

Q Apparently it begins June 6, 1911, the first check drawn? A Yes.

Q And the last check drawn, for which there is a stub, is September 30, 1924, is it? A Yes.

Q Is that when you stopped using that book? A Yes.

30 Mr. Schenck: I want that book offered in evidence. Are you offering these books or not?

Mr. Beers: I do not offer them; no. I don't know what they are.

Mr. Schenck: Then I will offer this book. (Marked Exhibit C. 5.)

40 Q Is this (indicating) the bank book that goes with that check book? A When I started the second time; yes.

Henry Diffany, cross.

Q This begins December 19, 1921, does it not? That is the first entry in that book, is it not? A Yes.

Mr. Schenck: I offer this book in evidence. (Marked Exhibit C. 6.)

10

By Mr. Beers.

Q Is this a Diffany & Company bank book? A Yes.

By Mr. Schenck.

Q What bank is this (indicating) book on? A That is the Merchants bank.

By Mr. Beers.

20

Q Is that a Diffany & Company check book? A Yes.

By Mr. Schenck.

Q This check book is on the Merchants and Manufacturers National Bank? A Yes.

Q And it apparently begins, or the first check drawn is July 13, 1923; is that right? A Yes.

Q And the last check is November 12, 1924; is it not? A Yes.

30

Mr. Schenck: Do you offer this book in evidence?

Mr. Beers: No; I do not. You are examining.

Mr. Schenck: All right. I will offer it in evidence.

(Marked Exhibit C. 7.)

40

Henry Diffany, cross.

Q And that check book is continued into the current check book of Diffany & Company, in which the first check is 2997, dated November 13, 1924; does it not? A Yes.

Q And this book is still in use? A Yes; it is.

10

Mr. Schenck: Do you offer this book in evidence?

Mr. Beers: Why ask me those questions?

Mr. Schenck: I am asking the questions to know whether you want to offer the book in evidence or not. I will offer it in evidence.

(Marked Exhibit C. 8.)

20

Mr. Beers: Isn't it improper for me to offer anything when I am not examining the witness? That is my reason for answering as I do.

Q (Showing witness.) Is this the bank book that goes with that account? A Yes.

Q The first entry is June 6, 1923, is it not? A Yes, it is.

30

Mr. Schenck: I offer that bank book in evidence.

(Marked Exhibit C. 9.)

Q Where are the cancelled vouchers? A What cancelled vouchers?

Q That go with these check books? A You didn't ask me to bring them.

Q Well, if I ask you to bring them, will you produce them? A Sure.

Q Where are your income tax returns? A I haven't got them.

40

Henry Diffany, cross.

Q You heard the accountant testify that you had copies of them, didn't you? A No; I haven't any copies. I haven't seen any copies. I thought I had it here along with the account.

Mr. Schenck: I call on the other side to produce them.

10

The Witness: The accountant can get them for you.

Mr. Beers: I haven't got them, or I would produce them.

Mr. Schenck: Where are the income tax returns?

Mr. Beers: You can call for them if you can get them. I haven't got them. You can go through my papers if you want.

20

Q When was the last time you saw the copy of your income tax returns? A I didn't see any copy. I thought I saw something, but I did not.

Q When did you see the original? A I think in O'Leary's office.

Q Did you mail it to the collector or take it to the collector? A No, sir.

Q Did they? A They did.

Q And they prepared it for you? A Yes, sir.

30

Q And you have never seen a copy? A I have never seen any. I didn't get any copy; no. I haven't got it anyhow.

Q Where is the inventory for 1923? A Here it is.

Q In whose handwriting is this paper at the top of which appears the date, December 31, 1922, and the total of which is \$4,072.41? A Mine.

40

Henry Diffany, cross.

Q Where did you get the figures from? A In the factory.

Q When? A The date it says there.

Q Where is the book out of which this page came? A I didn't have no book—just a sheet of paper. That is foolscap paper. That is not
10 a book.

Mr. Schenck: I ask that this paper be marked for identification.

(Marked C. 10 for Identification.)

Q I show you C. 10 for Identification, and ask you where the book is that that came out of? A It is out of no book.

Q Do you mean to say that that paper did not come out of a book? A No, sir; no book.

20 Q Look at it. A It is a double sheet of paper. I got that. I have no book; never had any book.

Q Where did you get the figures that are on this paper, C. 10 for Identification? A I took them out of the factory—bulked them up and made it up.

Q Who made it up with you? A I made it alone.

30 Q When? A One day in that week some time.

Q Will you swear that this paper did not come out of a book? A No, sir; it didn't come out of a book.

Q Did you ever show it to anybody since you made it up? A No. I don't know whether I did or not. I could not say.

Q Did you ever show it to Mr. Osborne? A I think he seen it; yes.

40 Mr. Schenck: I offer that paper in evidence.

Henry Diffany, cross.

(Paper heretofore marked C. 10 for identification is marked Exhibit C. 10.)

Q I show you a paper, at the top of which is the date December 31, 1923, with a total of \$834.51, and I ask you in whose handwriting that is. A That is mine. 10

Mr. Schenck: I ask that this paper be marked for identification.

(Paper is marked C. 11 for identification.)

Q Now, I ask you where you got these figures from that appear on C. 11 for identification? A I made the figures.

Q From what? A From nothing—from the factory—as I went along with it. 20

Q Who made up the amounts that are opposite the various listings? A I made them up.

Q Upon what were those figures based? A Weights and amounts and things like that.

Q Who assisted you in making up this inventory? A Some of the helpers.

Q How long did it take? A About a day I guess; two days or three days; I cannot remember.

30 Q Where is the book out of which C. 11 for identification came? A No book. That is foolscap paper.

Mr. Schenck: I offer that paper in evidence.

(Paper heretofore marked C. 11 for identification is marked Exhibit C. 11.)

40 Q I show you a paper at the top of which appears the date December 31, 1924, and at the

Henry Diffany, cross.

bottom of which appears the total of \$1,142, and ask you what that is? A Inventory.

Q As of the date that appears at the top? A About that, yes.

Q In whose handwriting is it? A Mine.

10 Mr. Schenck: I ask to have this paper marked for identification.

(Marked C. 12 for identification.)

Q Who assisted you in making that up? A In what way?

Q In any way. A Some of the helpers in the factory.

Q Did Mr. Osborne? A No.

20 Q Did you ever show it to him? A I didn't show it. I guess he seen it.

Q Where did he see it? A Around the factory, in the desk.

Q You are sure about that, are you? A Wasn't he dead at that time? How could he see it?

Q I am asking you. Don't ask me. A That was taken long after he died.

Q Then you didn't show it to him? A No.

30 Q And he didn't see it, did he? A No; he did not.

Q You are under oath and you ought to think a little bit about your answers. Where is the book this page came from? A There aint no book. That is foolscap paper.

Mr. Schenck: I offer this in evidence.

(Paper heretofore marked C. 12 for identification marked Exhibit C. 12.)

40 Q When did you make up Exhibit C. 11? A In that week, the day before or the day after.

Henry Diffany, cross.

Q Did you ever show it to Mr. Osborne? A I guess he seen it lying on the desk. It was made up.

Q Have you any other inventories? A No, sir.

10 Q Where are they? A They aren't anywhere. They are burned up.

Q You say they are burned up. Where were these books and papers that were burned up? A They were on the shelf.

Q Where? A Some were outside in the factory and some inside the office.

Q As a matter of fact, the office didn't burn up, did it? A It didn't?

20 Q I am asking you. A All the books and papers and all the stationery burned up outside on the desk.

Q It burned up the desk, too? A No, sir; it didn't burn up the desk.

Q If it did not burn the desk, how is it that it burned the papers? A Because they were burned up. Where was the fire coming from?

Q You say that all the papers that were in the office were destroyed? A Pretty near all, yes.

30 Q Where are those that were not destroyed? A I don't know where they are. Pretty near everything was destroyed in the paper line, like letter files and things like that, books and everything.

Q When did you have this fire? A November 13, 1923.

Q Did you get up and file a proof of loss? A I did; yes.

40 Q With whom did you file that proof of loss? A Niagara Insurance Company.

Henry Diffany, cross.

Q You made up that proof of loss and filed it with the Niagara Insurance Company? A I didn't make it up. The bookkeeper made it up.

Q Who is the bookkeeper who made it up? A Mr. Smith.

10 Q Is he the man who lives in Hartford? A Yes.

Q And he is still keeping books for you? A Well, he comes every month the day he always did.

Q What day of the month? A Why, he usually comes on the Sunday nearest the last day of the month.

Q Does he let you know when he is coming? A No; I make a date up before he leaves.

20 Q When do you next expect him? A I think he is due on Sunday.

Q Does he have a key to your office? A No, sir.

Q Do you go down and let him in? How does he get in? A I let him in.

Q Do you go to the factory to be there when he is there? A Yes.

Q What business is he in? A Why, he is with Smith & Wise or Smith & Company.

30 Q Where are they? A Hartford.

Q What is their business? A Department store.

Q Is he any relation of yours? A No, sir.

Q How many years has he been employed by you? A Well, he was with my father, some ten or twelve years I guess, and he has been with me since about ten more years. I cannot say exactly.

40 Q Who made up your proof of loss after the fire? A Why, Mr. Smith made the last one up.

Henry Diffany, cross.

Q How many did you have made up? A I think there were three made up.

Q Who made the first one? A Mr. Osborne made something. They did not take it, so it had to be written over again.

Q Who made up the next one? A Mr. Smith. 10

Q Then, after he made up the second one, then you had an adjuster to file another A Then the adjuster did something.

Q The adjuster for the fire insurance company? A Yes.

Q Did you have an adjuster? A No; the adjuster of the Niagara Fire Insurance Company.

Q You did not have an adjuster? A No.

Q Have you a copy of the proofs of loss? 20 A No.

Q Any one of them? A No; I have not.

Q Did you ever have one? A No; I did not.

Q Where were those proofs of loss filed? A With the Niagara Insurance Company.

Q Where? A I think in New York, but I am not sure.

Q Who was the agent who wrote your policy? A Lyons & Company. 30

Q Where? A 187 Market street, Newark.

Q Was the proof of loss filed there? A Yes; it was. I think it was.

Q Did they keep a copy? A I could not say.

Q Who prepared the figures on the loss that were incorporated in the proof of loss? A Well, do you mean which they accepted?

Q Any of them? A I think the one they accepted they made themselves. 40

Henry Diffany, direct.

Q From what? A From copies of Smith's.

Q Where did Smith get the information? A I don't know where he got it—from the factory or somewhere.

Q Did you give it to him? A No, sir.

10 Q Did Osborne give it to him? A Why, we all talked about it, and he made it up from that.

Q Now, you haven't any other books? A No, sir.

Q No other books than those which you produced here? A That is all I have.

Q You haven't any other account of the business done by you during the time that Mr. Osborne was with you other than the books and papers that you have produced here? A What
20 I have produced. That is all I have.

Q So far as you know, the only two years you filed income tax returns were the last two? A Yes.

By Mr. Beers.

Q You will endeavor to get from your accountants a copy of your 1923 and 1924 income tax returns, will you? A Yes, sir.

Q And then offer them in evidence? A Yes.

30 Q Did you lend Diffany & Company any money? A I did; Yes.

Q (Showing witness.) I show you a check of Henry Diffany, dated May 1, 1918, to P. H. Seery Tube Company, for \$200, and ask you what it represents.

40 Mr. Schenk: I want to interpose an objection to the proving of any loans by Diffany to Diffany & Company, in view of the fact that Diffany produces no account for

Henry Diffany, direct.

the business done for those years, and for that reason such items cannot be taken into account. The Master can rule later on this, as far as I am concerned.

Mr. Beers: I want to say, if I prove loans made and that they were not repaid, that they would be reflected in any balance of
10 money that appears to be on hand. Further than that, whatever books there were of Diffany & Company that were left after the fire, have been produced here, and therefore it is evident that we have gone as far as we can in giving the record and aiding in ascertaining the true financial state of affairs of Diffany & Company.

Q (Showing witness.) What does that represent? A That is for rent. 20

Q And this is an advance by you, is it? A Yes, sir.

Q Were you ever repaid this sum of \$200? A No, sir.

Mr. Schenk: All of this testimony is subject to the same objection.

The Master: Yes.

Mr. Beers: That is understood. 30

Q I show you a check to the order of Diffany & Company, dated March 28, 1919, for \$50, and ask you what it represents? A That is cash advanced.

Q Then it represents a loan from you to Diffany and Company? A Yes.

Q Has it ever been repaid? A No, sir.

Q I show you a check dated November 18, 1919, Henry Diffany, to the order of F. H. Os-
40

Henry Diffany, direct.

borne for \$22.56 and ask you what that represents? A That was given to Mr. Osborne.

Q Was this on account of the affairs of Diffany & Company? A Yes.

Q Has this ever been repaid to you? A No, sir; it has not.

10 Q By Diffany & Company? A No, sir.

Q I show you a check of September 18, 1919, check of Henry Diffany, to the order of Jacques Kahn, for \$268.45 and ask you what it represents. A That is a loan also.

Q Has it ever been repaid? A No, sir.

Q I show you check of Henry Diffany, dated September 19, 1919, to the order of Diffany & Company, for \$1,500, and ask you what that represents? A A loan to Diffany & Company.

20 Q Has it ever been repaid? A No; it has not.

Q I show you a check dated March 8, 1920, to the order of Diffany & Company for \$200, and ask you what it represents? A Also a loan.

Q Has it been repaid? A No, sir.

Q I show you a check of Henry Diffany to the order of Diffany & Company, dated May 29, 1920, for \$500, and ask you what it represents? A Also a loan.

30 Q Has it been repaid? A No, sir.

Mr. Beers: I now offer in evidence these seven checks which this witness has testified to as representing moneys advanced for the account of Diffany & Company.

(Seven checks marked as one exhibit—Exhibit D. 4.)

40 Q Did you loan Diffany & Company any other moneys? A Yes; Building & Loan money. You have got it all there.

Henry Diffany, direct.

Q I am asking you—

Mr. Schenck: I object to this for the same reason. No time is fixed, and if it is prior to the period for which this account is being submitted, it is incompetent and irrelevant.

The Master: I will take it. 10

Q You spoke about building and loan money. What do you mean by that? A I took some money of the building and loan and put it in the business.

Q How much money was that? A I think it was about \$2,100.

Q When was this? A 1918, wasn't it?

Q 1918? A I couldn't say. You have it there, I gave it to you. 20

Q What do you mean? A A transcript from the building and loan association showing it was deposited in Diffany & Company's account.

Q A check from the building and loan association to you was deposited to the account of Diffany & Company; is that what you mean? A Yes.

Q Is that what you say? A Yes.

Q This was in 1918. Is that correct? 30

Mr. Schenck: I object to any testimony relating to the building and loan association account, on the same grounds as heretofore.

Q When do you think this loan was made? A I think it was 1918.

Q In what sum? A It was two thousand and some odd hundred dollars.

Q What? A Twenty-one hundred dollars I think it was, and some cents. 40

Henry Diffany, cross.

Q Has that ever been repaid to you? A No, sir; it has not.

By Mr. Schenck.

10 Q Why did the business need you to loan it money back in 1918? A Well, bought stock with it and had to have money. You got to have money to buy stock.

Q It was not showing any profit at all? A Profit when? Not now. The business in the fore part of the year does not show any profit.

Q Back in 1918 and 1919? A No, sir; no profit was shown.

Q Did it show any profit at all then? A Very little.

20 Q It subsequently showed a profit, didn't it? A After that, yes.

Q And you mean to say that you never took out of Diffany & Company's funds these loans made by you? A No, sir; I did not.

Q And the money on this check of September 19, 1919, for \$500, you say that has never been repaid to you? A Yes.

30 Q What was that money used for? A Well, I had an account in the Essex National Bank and my checks were going to protest, and I owed them some money at that time and I paid up what check I had and went into another bank. I had to open an account with someone. I had to have money to open it with.

Q And you never got it back? A No, sir.

Q And this \$2,100 that you drew from the building and loan association, what building and loan association was it? A The Court House Building and Loan Association.

40 Q Is that the one in which you are an officer? A Yes.

Henry Diffany, cross.

Q What officer are you? A Director.

Q And you got that money in 1918, you say?

A I think it was. I cannot say the date.

Q What was that money used for? A Continuing on with the business.

10 Q And did you borrow that money from the building and loan association? A No; it was paid-up stock.

Q Did you take back any obligation from Diffany & Company for it? A No, sir.

Q Or for the \$1,500, or any of the money in fact, that you loaned the company? A No, sir.

Q And you say that that has never been repaid? A No, sir.

Q Well, now, how do you know it has not? A Because I haven't got it. I didn't draw it.

20 Q Was any entry made of it in the books of Diffany & Company? A Oh, yes; certainly there was.

Q What sort of entry was made? A Made in my favor wherever it would be, but I don't know exactly where; to my credit, of course.

Q When? A These dates when the checks were made out.

30 Q Is this all the money that you have loaned Diffany & Company? A I couldn't say; I don't know. This is all the checks I have got.

Q These are all the checks you have got? A Yes.

Q You don't remember making any other loans except this loan of twenty-one hundred dollars from the building and loan association? A I don't remember any.

Q Where are these monthly statements that Smith made up for you, that you were to produce here today? A You didn't ask me.

40 Q Yes; I did. A For what years?

Henry Diffany, cross.

Q For all the years? A I don't know whether I got them for 1923 and 1924 or not.

Q The ones before that? A I haven't got any of those.

10 Q Will you produce here at the next hearing the ones that you have got? A What I have got, yes.

Q At the next hearing, will you produce Mr. Smith? A I cannot say that. How can I do that?

Q He is in your employ, is he not? A He is not employed, no. He just comes down as a favor—that is all—and writes up my books.

20 Q You pay him for it? A Yes; but I don't know whether he will leave his business. If you write and enclose a check for a hundred dollars, why, he might come.

Q A hundred dollars? A Yes, sir. Then he might come.

Q How much do you pay him for coming to your concern once a month?

Mr. Beers: Objected to.

The Master: Objection sustained.

30 Q How long does he stay at your office? A Until he gets through.

Q How long does that take generally? A It all depends on when his business is done.

Mr. Beers: I object to this as not being relevant.

40 Q How long does it take him to make up that monthly statement and go over your books? A Sometimes it takes ten or twelve hours; sometimes it takes less.

Joseph A. Schroeder, direct.

Q And he returns as soon as he completes his work? A Yes; he goes right off on the next train.

By Mr. Beers.

Q Where does Mr. Smith live? A In Hartford. You mean his address? 10

Q Yes. He lives in Hartford, Connecticut, doesn't he? A Yes.

Q You have spoken about a monthly statement that Mr. Smith gets up for you? A Yes.

Q Where do you keep those statements? A In the sales book.

Q Where—at the factory or home? A In the factory.

By Mr. Schenck.

20

Q Are they entered in the sales book? A Oh, no; no—just a preliminary statement—just what is going on—money expended, what was paid, what was bought, and what business was done.

Q You keep this in the sales book? A I don't say written in the sales book. It was written on a sheet of foolscap.

Q It was on a loose sheet? A Yes.

30

JOSEPH A. SCHROEDER, a witness heretofore sworn on the part of the defendant, recalled and further examined as follows:

Direct examination by Mr. Beers.

Q I show you Exhibit C. 10, Exhibit C. 11 and Exhibit C. 12, and ask you to examine those 40

Joseph A. Schroeder, cross.

papers and tell me whether you have yourself paper of a like kind.

Mr. Schenck: I object to that as immaterial.

The Master: Objection overruled.

10

A I have seen paper of that kind before.

Q You use it? A I have used it.

Q In what form do you buy it? A It comes in a double sheet form.

Q Bound in book form or not? A Loose.

Q You say "double sheet." Did I understand you to say that? A That is correct.

Q Can you say, from your inspection of these sheets, whether this was in book form or loose?

20

A Well, I should think it was loose.

Q Why? A On account of the edges.

By Mr. Schenck.

Q You never saw these papers before today?

A No; I have never seen this paper.

Q What you have told us about the kind of paper and what it looks like to you, is merely your opinion? A That is my opinion.

30

Q You have not made up any further account or statement of the business of Diffany & Company for the years 1923 and 1924, other than these statements, Exhibit D. 1 and Exhibit D. 2, which were offered at the last hearing? A Those are the only papers that I have made.

Q Did you make up the income tax returns?

A Not personally. I compiled the figures for the tax returns.

Q You saw the returns? A I did not see the returns. I saw a copy of them.

40

Henry Diffany, cross.

Q That was after the original had been sent in? A Well, it would be an exact duplicate of the original.

Q After it had been sent in? A That is right.

By Mr. Beers.

10

Q I show you Exhibits D. 1 and D. 2 and ask you whether the figures shown on these exhibits were used in the 1923 and 1924 income tax returns? A They are an exact copy of the tax returns.

HENRY DIFFANY, the defendant, recalled and further examined as follows:

20

By Mr. Schenck.

Q The accountant at the last hearing testified that there was some eleven thousand dollars of insurance money that was being carried along on deposit in Diffany & Company's account? A Oh, no.

Q That is not true? A No.

Q How much insurance was paid? A \$11,000.00.

30

Q Where did that money go to? A It went to my bank.

Q So that it was never in Diffany & Company's account? A No.

Q And did Diffany & Company get any part of it? A No.

Q Was not part of the \$11,000.00 insurance paid upon the stock of Diffany & Company? A No, sir; it was not.

40

Henry Diffany, cross.

Q Well, you heard the accountant at the last hearing testify that \$836.00 of the \$11,000.00 was due Diffany & Company for insurance upon the property belonging to it that was lost in the fire?

A It did not belong to Diffany & Company. It belonged to me.

10 Q Well, did Diffany & Company get any insurance at all? A No, sir.

Q Didn't they have any insurance? A What?

Q Didn't Diffany & Company have any insurance? A Sure, we had insurance. The insurance was in my name.

Q How much insurance that Diffany & Company had was in your name? A \$11,000.00 I guess.

20 Q You say that was on property of Diffany & Company? A On property of so-called Diffany & Company, yes.

Q How much of it covered stock, and how much machinery? A \$7,000.00 machinery; \$4,000.00 stock.

Q Well, didn't that \$4,000.00 insurance on stock of Diffany & Company then belong to the Diffany & Company business that Osborne was interested in? A Not all of it.

30 Q How much? A About \$800.00. That is about all, but that \$800.00 was insured. The part I had was piled together—couldn't be used at all—my own stuff—Mr. Osborne had nothing to do with.

Q Why do you say \$800.00? A That is, when we dug up the debris we found that amount of stuff.

40 Q That is, \$800.00 is the amount of insurance out of the \$4,000.00 on stock, that you say the Diffany and Osborne business was entitled

Henry Diffany, cross.

to? A It was not entitled to that, because we used it.

Q What do you mean "used it"? A Used it; finished it up and sold it—the raw material, most of it, or all of it—it lay on the floor and all of the stuff that was on top of it was taken off— 10

Q After a thing is burned and you get insurance on it, you do not use the thing that is burned up. A You cannot burn up metal, can you?

Q Why did you get insurance? A Eh?

Q Why did you get \$800.00 insurance? A I was insured for it. That is all. I was not insured enough.

Q Well, now, you say that you used the material that went through the fire, after the fire, do you? A Sure. 20

Q All right. What did you do with the money, the \$800 in money, that you got? A Didn't do anything with it.

Q It went in your account, didn't it? A Yes.

Q Have you turned that over to Diffany & Company? A No, sir; I have not.

Q Don't you owe it to them? A No; I do not. 30

Q Why not? A Because I do not owe it to them. I cannot owe anything to myself.

Mr. Beers: I will say this: As to the \$835.00 item of insurance, that certainly belongs to Diffany & Company, and we will say that it does, notwithstanding the witness does not seem to understand the legal effect of that transaction, for the reason that the material was used. If in that insurance item of \$11,000.00 there was included \$835.00 40

Henry Diffany, cross.

of insurance covering stock of shaving stands and the like, then this item of \$835.00 would belong to Diffany & Company.

Q And who do you say made up or returned that amount of \$835.00? A I did. It amounted
10 to that after we dug it out.

Q As a matter of fact, that amount of \$835.00 is just the same as your inventory as of December 31, 1923, is it not? A You mean the fire loss.

Q Yes; the amount that you were talking about. A No. There was a different amount.

Q I show you Exhibit C. 11, which you say is the inventory as of December 31, 1923, for \$834.00, and ask you if that is the amount that
20 you are talking about? A That is what I am talking about; yes.

Q As a matter of fact, the inventory of December 31, 1923, was necessarily less than the year before and the year after because of the fact that you had just gone through a fire, was it not? A No; it was not much less.

Q Well, your inventory as of December 31, 1922, was \$4,072.41, was it not? A Yes.

Q What had happened between December 31,
30 1922, and December 31, 1923, to bring your inventory down? A We didn't buy so much. That is all.

Q Have you any record of what the amount of your inventory was at the time of the fire, November, 1923? A I don't know what the amount was. It was much smaller than that—that is, with the other stuff that was with it. I couldn't say everything that was there.

Q Have you any record of your inventory?
40 A No; I have not made a record.

Henry Diffany, cross.

Q As of that time? A No.

Q You say you haven't any copy of the proof of loss. To whom was it made? A Lyons & Lyons, agents for the Niagara.

Q They are where? A 187 Market street, Newark, New Jersey.

Q Have you your bank statements indicating
10 your balance in the bank for the years 1923 and 1924? A Yes; I think I have.

Q I ask you to produce those before the Master? A Yes. All right.

By the Master.

Q How soon after the fire of November, 1923, was the plant rebuilt? A I think we were tearing it down until the next March or February. It is not rebuilt yet.
20

Q Is Exhibit C. 11 an inventory of the debris?
A We cleared it away. When we got the debris off, we found—

Q You found the articles listed on Exhibit C. 11? A Yes.

Q All in good condition? A Good condition.

Q Not damaged by water? A They were not finished. They were in the raw state.

Q Where there any manufactured goods? A
30 The manufactured goods were all shipped before the fire.

Q The day of the fire? A Yes, sir.

Q Then, that inventory Exhibit C. 11 was actually taken within a few weeks after the fire?

A About a week or so, or two weeks; I couldn't say.

By Mr. Schenck.

Q As a matter of fact, Mr. Diffany, there was
40 a lot of shaving stands ready or shipment at the

Joseph A. Schroeder, further cross.

time of the fire and they were all burned up, were they not? A No; there wasn't anything. It was all shipped the night before.

Q You are sure about that? A I am quite sure about that.

10 Q What did you mean by \$4,000 insurance on stock? What stock did it represent? A Well, there was other stock in there—my frame business.

Q How much of it was frames? A It must have been \$6,000 worth—\$5,000 or \$6,000.

Q \$6,000? A About that.

Q How much shaving stand stock? A There it is, right there.

Q This is what was left after the fire? A That is all. That is all there was laying around.

20

JOSEPH A. SCHROEDER, a witness heretofore sworn on the part of the defendant, recalled.

Further cross examination by Mr. Schenck.

30 Q I show you Exhibit D. 1 and call your attention to the item thereon, "Inventory January 1, 1923, \$4,073.41," and ask you whether that is the same inventory as shown by the statement of December 31, 1922, also in the sum of \$4,072.41. A It is the same inventory.

Q A difference of one day in the date? A That is all.

(At this point adjournment is taken to April 3, 1925, at two o'clock in the afternoon.)

40

Offer of Exhibits.

Met pursuant to adjournment this third day of April, 1925, at two o'clock in the afternoon.

Appearances as heretofore.

Mr. Beers: I offer in evidence two parcels of checks and ask that they be marked 10 Exhibit Defendant's Checks 1 and Exhibit Defendant's Checks 2.

(Parcels of checks are so marked.)

Mr. Beers: I will voluntarily offer a copy of the 1923 and 1924 income tax returns made by Mr. Henry Diffany, the defendant, with the understanding of course that they are not to leave the Master's possession. They can be examined here. They relate 20 to Mr. Diffany's private affairs. For that reason, I do not think they ought to leave the Master's possession.

(Marked Exhibit D. 1, April 3, 1925, and Exhibit D. 2, April 3, 1925.)

Mr. Beers: I also offer in evidence sheets containing statement of April 1, 1924, May 1, 1924, and June 1, 1924.

(Marked Exhibit D. 3, April 3, 1925.)

Mr. Beers: Also statement dated July 1, 30 1924.

(Marked Exhibit D. 4, April 3, 1925.)

Mr. Beers: Statement of July 30, 1924; also containing statement of August 30, 1924, and September 30, 1924.

(Marked Exhibit D. 5, April 3, 1925.)

Mr. Beers: Also statement of November 1, 1924.

(Marked Exhibit D. 6, April 3, 1925.) 40

Joseph A. Schroeder, further direct—cross.

Mr. Beers: Also statement of December 1, 1924.

(Marked Exhibit D. 7, April 3, 1925.)

10 JOSEPH A. SCHROEDER, a witness heretofore sworn on the part of the defendant, recalled and further examined as follows:

Further direct examination by Mr. Beers.

20 Q I show you a statement headed: "Diffany & Company, Comparative Balance Sheet, December 31, 1923," and ask you to explain what it purports to be. A Well, it is a comparative balance sheet and would show what has happened, how the loss came about or what was done with the profit, if any profit had been made, for the year 1923.

Mr. Beers: I offer this statement in evidence.

(Marked Exhibit D. 8, April 3, 1925.)

30 Q I show you statement headed "Comparative Balance Sheet, December 31, 1924," and ask you what it purports to be. A Well, that is the same as the comparative balance sheet for 1923.

Mr. Beers: I offer this in evidence.

(Marked Exhibit D. 9, April 3, 1925.)

Cross examination by Mr. Schenck.

40 Q Referring to Exhibit D. 8 of this date, the item of "Accounts Receivable," from where did you secure those amounts? A From the ledger.

Joseph A. Schroeder, further direct—cross.

Q And they represent what? A Outstanding balances.

Q As of the dates given? A As of the dates given.

10 Q The items for "Merchandise Inventory" were secured from the sheets that were offered here at the last hearing? A I have testified to that.

Q The item "Machinery, \$18,000," as of December 31, 1922, appearing in Exhibit D. 8 of this date, from what source did you secure that figure? A Well, the figure was secured from Mr. Diffany as the valuation as of March 1, 1913.

Q And you give that date, March 1, 1913, as connected with the making of his income tax return? A That is correct.

20 Q On the basis of the ownership of the machinery? A That is correct.

Q Can you tell us when and in what manner that figure of \$18,000 was communicated to you? A Well, at the time that I was working on his tax report, working up the figures for the tax report. I don't remember just when that was.

30 Q I notice that that is not carried in the balance sheet as of December 31, 1923, also appearing on Exhibit D. 8 of this date. Will you explain how that adjustment is made, including the setting up of the fire loss in the balance sheet? A Well, that amount was all written off in connection with that fire loss in 1923, that is, it showed the \$18,000, less depreciation of some \$9,770, leaving a net, I think, of \$8,230.

Q And upon what is the depreciation item based? A That is based on the \$18,000.

40 Q Arbitrarily fixed? A What do you mean—"arbitrarily fixed?"

Joseph A. Schroeder, further direct—cross.

Q Well, you could have fixed \$10,000 as well as \$9,000, or you could have fixed \$15,000? A What do you mean—\$15,000 as depreciation? No. The way we have figured depreciation, we figure what the life of the machinery will be. Then we take the tables as per the tax department, and we use that figure for depreciation, which in this case happened to be 5%. In other words, we figured that the machinery will have a useful life of about twenty years.

Q Well, during the year 1923, there was a fire loss in this business, as a result of which the item of machinery was entirely eliminated?

A That is correct.

Q And in this balance, is there anything on the balance sheet for the end of the year that has been substituted for that machinery? A Well, the reimbursement from insurance.

Q How much was that? A \$11,000.

Q And you, of course, do not know whether that reimbursement of \$11,000 was for machinery or for machinery and stock, do you? A I think it was for machinery and stock.

Q Have you any information as to what portion of the \$11,000 was machinery and what portion was stock? A The following is a reconciliation of the fire loss:

Machinery, value, January 1, 1913.....	\$18,000
Depreciation to November 8, 1923, date of the fire.....	9,770

Depreciated value November 8, 1923....	\$ 8,230
Merchandise Inventory November 8, 1923	4,320

Making a total of	\$12,550
Insurance received	11,000

Making a loss of.....	\$ 1,550
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Joseph A. Schroeder, further direct—cross.

Q In exhibit D. 8 of this date, the item of "Accounts Payable" was secured from what source? A From the general ledger.

Q And are those accounts listed there, or how did you find them? A Why, you will find a separate account for each item.

Q Will you please explain how the item "Reserve for depreciation, \$9,000," appearing on Exhibit D. 8 of this date, is arrived at and determined? A It is arrived at in this manner: We were given the fair value of the machinery as of March 1, 1913, which was placed at \$18,000. Well, machinery is usually written off at the rate of 5% per annum, based on the income tax tables. Well, on that basis for a period of ten years, there would be fifty per cent. of the value depreciated.

Q So that as far as your balance sheet is concerned, it is just the same as carrying the machinery at a value of \$9,000 rather than \$18,000? A That is correct.

Q Now, explain to us how the item "Capital, Net Worth" appearing on Exhibit D. 8 of this date was arrived at and what it indicates. A Well, that was arrived at—when we were called to work in 1923, we took off a schedule of balances as per books as of December 31, 1922, in order to have a working basis, and after all assets and liabilities had been listed, the difference was set up as "Net Worth," the account not appearing on the books.

Q Well, does that account divide itself into any separate items that appear on your working sheets? A No; that would just represent Mr. Diffany's investment in the business.

Q That investment would include bank accounts, profits and machinery, would it not?

A That is correct.

Joseph A. Schroeder, further direct—cross.

Q And stock on hand? A That is correct.

Q It is the thing that puts it in balance? A Well, you can call it a thing that puts it in balance, but that is not the way it is worked out.

10 Q Is the figure "Capital, Net Worth," for the periods as of December 31, 1923, and December 31, 1924, arrived at in any different manner than the "Net Worth" item as of December 31, 1922? A Yes; it is.

20 Q Explain how, if you please. A Well, assuming the net worth as of December 31, 1922, is correct, to that we add any profits, if there had been any, and subtract any losses, if there had been any, and then if any additional capital is invested, that would also be added to the net worth as of December 31, 1922, and any capital withdrawn would be subtracted from the figure as of December 31, 1922.

Q Well, now, as a matter of fact, your capital items for these three different periods reflect the net loss shown by your profit and loss statement, don't they? A That is correct.

30 Q And that is the only difference there is in any of the three figures? A That is the only difference. If I could not tie in by following that procedure, I would know something was radically wrong with my figures. That is a check.

Q On page 3 of Exhibit D. 9 of April 3, I notice you have set up a schedule supporting the profit and loss statements for the respective years. I want to call your attention to the items of "Sales Discounts" for the month of December, on Exhibit D. 9, April 3, and ask you if you can give any explanation as to why that item is seemingly so much by comparison with the other months.

40 A Those were allowances made up from various

Joseph A. Schroeder, further direct—cross.

accounts as of December 31, and they are all run in as of December 31.

10 Q Can you tell us in connection with what account this is principally connected? A Well, some with the Taylor account and Katz account. I don't remember all of them. There were several of them.

Q So far as the item set up in D. 8 on the balance sheet, as of December 31, 1922, the deposits in the Broad and Market National Bank and the Merchants National Bank, and the accounts receivable and the merchandise inventory, you have no knowledge of your own as to whether they represent an accumulation of profits or not, have you? A No; I have no knowledge.

20 Q And there has come to your attention and for your inspection no record of the company that would indicate whether there were or not, has there? A I have seen no records prior to that.

(At this point adjournment is taken to April 17, 1925, at two o'clock in the afternoon.)

(Further adjournment to May 1, 1925.)

30

40

Henry Diffany, further cross.

Met pursuant to adjournment this first day of May, 1925, at two o'clock in the afternoon.

Appearances as heretofore.

HENRY DIFFANY, the defendant, re-called and further examined as follows:

10

By Mr. Schenck.

Q At one of the hearings you testified about making certain loans to the Diffany Company, the Osborne business, and I think you gave the amounts, did you not? A I did; yes.

Q Those were moneys that you actually advanced to this business, were they? A Sure.

Q Those sums have not been repaid to you? A No, sir.

20

Q So near as you can tell, that is all the money that you advanced? A Oh, I guess there is more.

Q How much more? A I couldn't tell you. Mr. Beers knows by the account which I had Mr. Schroeder make up. You have it all down there.

Q I haven't got it. A Mr. Beers has got it. You have seen it.

By Mr. Beers.

30

Q Do you refer to the sheets which are in evidence? A No. Those that you have. You have got those. Mr. Schenck saw them. He said he did.

Q The sheets that we submitted? A Yes.

By Mr. Schenck.

Q Then, these specific amounts that you testified to some days back, in detail, were the actual amounts and so far as you know all of the actual

40

Henry Diffany, further cross.

amounts that you advanced? A There was more than that. I couldn't say how much more. That is all I had, because some of those checks were destroyed. They are too far back.

Q You know of no others? A I don't know of any others; no.

Q Now, when did you begin to draw money out of the business? A 1919, I think.

10

Q You had drawn nothing prior to that? A I have \$126 in December, 1919.

Q That was the first? A Yes; and then afterwards I drew some more. It is on the books or on the papers that we have.

Q Have you a record of what you did draw? A I have; yes.

Q Where is that? A We didn't bring it with us. I have a little handbook that I have in my pocket.

20

Q I will ask you to produce that at the next hearing. A Are you going to keep this up forever?

Q Yes—until we get what we are entitled to. Show me any paper in this case that—

Mr. Beers: This testimony with reference to money advanced by the defendant was covered a month ago.

30

Q I ask you to show me in any of the books offered in evidence before the Master the moneys drawn by you since 1919. A I haven't any books, but I have a passbook where I have got it in.

Q Where is that passbook? A I haven't got it here now. I had it here right along.

Q You will produce it at the next hearing, will you? A Yes; I will produce it.

40

Henry Diffany, further cross.

Q You did not draw any money before December, 1919? A Not before; no.

Q What did you live on? A That's none of your business what I lived on. That is practically none of your business. I will draw the line now.

Q Did you have any other business besides this? A Yes; I have some others on the side.

Q From 1916 to 1919 did you have any other business besides this business? A Not a business; no.

Q What did you live on during that period? A I had money of my own right along.

Q You drew that from your own personal accounts? A Yes; my own money, yes.

Q Where? A What I had coming in.

Mr. Beers: I object to any questions in relation to his own personal accounts.

Q From what? A I have other stuff coming in. I have rents and things coming in.

Q In 1916 did you own property? A Yes; sure.

By Mr. Beers.

Q Don't you tell about your own personal affairs. A It's enough on that; I ain't going to answer.

By Mr. Schenck.

Q Did you buy any property between 1916 and 1918? A No; I did not.

Q You say that you drew no money from this business until 1919? A No. I did not.

Q You always drew the checks and the moneys for the payroll for the factory, didn't you? A Yes.

Henry Diffany, further cross.

Q Did you always draw the exact amount of the payroll? A No.

Q More than the amount of the payroll? A Always a little more. I drew Mr. Osborne's money, and I drew for miscellaneous expenses, things like that, not very much either, ten or twelve dollars; sometimes nothing at all.

Q Did you keep any record of the petty expense for the difference between the pay roll and the checks for the payroll? A Sure; yes.

Q In what book? A We had a little book.

Q Then, if that was the case, why did you, every month or two months or three months, draw checks for general expenses in addition? A Because we laid that money out—sometimes—not every time I drew. I always gave out more than I drew.

Q Do the books show the transactions in connection with the business for the period they cover? They do, do they not? A Yes; and the petty expense, too.

Q So that if the excess of some of the checks over and above the payroll does not appear to have been applied to petty expense, what has become of the money? A It always has been applied, always a record kept of that. The book was always balanced up.

Q Who balanced it up? A Mr. Smith. It might have went on for a couple of months.

Q And that is the only explanation you can give us as to the difference in the amount of the payroll and the payroll checks? A Always drew a little, but not always, but some of the times; and also Mr. Osborne's expenses went out of there, that he handed in.

Q I notice that in the book there is a charge of \$665.00 on December 31, 1924, for accounting fees? A Yes.

Henry Diffany, further cross.

Q To whom was that money paid? A O'Leary and McNeil.

Q For what accounting was that money paid out? A Making this accounting up.

Q Which account are you talking about? A This account which was asked by your firm.

10 Q And have you a receipt for that payment? A Yes; we have.

Q I notice that there is also the amount of \$190.00 paid in 1923 and \$190.00 paid in 1924. What are those payments for? A I made them for the income tax return including some of this here. It was in connection with the business or else it would not have been put down.

Q Who paid it? A I paid it.

20 Q From what? From Diffany & Company moneys? A No. I made out a personal check for that because I had to pay it when it was due. I didn't have my check book with me, so—

Q So you paid it out of your personal funds? A Yes.

Q And then afterwards took it from the Diffany & Company business? A Yes.

Q As a matter of fact, that is for an account that was made up for the years 1916 to 1922, was it not? A Some of it.

30 Q Where is that account? A Mr. Beers has got it, and so have you. You have a copy of it.

Mr. Schenk: I ask Mr. Beers to produce it.

Mr. Beers: Mr. Beers won't produce it. Mr. Beers has already said that there is no account. There is no account. There are no books. It has been testified to that these books have been destroyed; and the account that Mr. Diffany now refers to is nothing

40

Henry Diffany, further cross.

more than a statement. Mr. O'Leary, the head of the firm, when I asked him if he would take the stand and testify to the figures on the statement that Mr. Diffany has just testified to, said: "Why, no." He said: "It is based on the statement of Mr. Osborne's business, solely upon what he showed came in by way of sales," and he said, "There is absolutely nothing accurate about it." He said: "I did this as a mere tabulation. That is all." In other words, I want to say this for the record: These figures that I had do not purport to be an accounting of the business for the years 1916 to 1922. They are just simply statements based upon statements of Mr. Osborne showing the amount of sales, and they tried to work out some result through that, and the result worked out certainly is beneficial to Mr. Diffany, but I am not going to have these figures go in, because they are based, as I said, upon a statement of sales submitted by Mr. Osborne, not upon what the books of Diffany & Company showed, because those books were not in existence; they were burned in the fire, as has been testified to.

30 Q And for doing that typewriting work that Mr. Beers speaks of, you paid \$665.00? A Exactly what is on the books; yes, sir.

Q Why should that be charged against Diffany & Company business? A Who should it be charged to?

Q Well, it was done for you, was it not? A It was not done for me. It was done for you, because you asked for it.

40

John J. Mallon, direct.

Q All right, let us have it. I ask you again to produce it. If it is paid for and chargeable to us, let us have the benefit of it.

Mr. Beers: It will not be produced.

10 JOHN J. MALLON, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Schenck.

Q What is your business? A Fire insurance adjuster.

Q Connected with what office or company? A Niagara Fire Insurance Company.

20 Q Were you so connected in 1923? A I was.

Q Did you have anything to do with the loss to the Diffany factory? A I did not.

Q Were you the adjuster in that matter? A I was not.

Q In what capacity are you employed in the office of Lyon & Lyon? A Lyon & Lyon are the agents of the Niagara Fire Insurance Company, and I am employed as an adjuster in that office.

30 Q Of whom does the firm consist? A Charles C. Lyon and E. A. Lyon.

Q Are they actively engaged in the business? A One of them is. Mr. Charles Lyon is at present.

Q (Showing witness.) Is this your signature attached to this letter? A That is my signature.

40 Q And that was written in response to a letter from King & Vogt of Morristown, under date of March 28? A March 28th, yes, sir.

John J. Mallon, direct.

Q And you have been subpoenaed to produce the proof of loss in this matter? A I have.

Q Have you it? A Yes. (Papers produced.)

Q Are these the two proofs of loss on which the sum of \$11,000.00 was paid to Henry Diffany or Diffany & Company on this fire loss? A To the best of my knowledge, they are. 10

Q Is there not a further inventory or memorandum of the property covered or claimed to have been lost, other than these papers that you present? A There was a memorandum, I believe, made at the time that that proof was made. However, it has nothing to do with the loss. The loss was settled, as I understand it, off the books of the company.

Q Who had that paper that was made up? A Mr. Lyon, who adjusted this loss, had the paper at the time. 20

Q Was it filed with this proof of loss? A No. That was never a part of the proof of loss.

Q When did you last see it? A The paper?

Q Yes. A Well, I don't know. If I looked in the pocket I saw it this morning when these proofs were pulled out. It was probably there.

Q When you say "looked at the pocket," what do you mean? A These things are naturally kept in a pocket such as I carry with me every day. 30

Q Is there anything else in that pocket besides these proofs of loss and the memorandum that you speak of? A Several things—notice to the company, copy of our policy, anything that might develop in the event of a loss. Everything concerning that loss is in that pocket.

Mr. Schenck: I want to offer these proofs of loss in evidence. 40

John J. Mallon, direct.

Q Can we understand that you will file copies rather than leave the originals here? A We can have these copied, if you want. We would rather go to that expense than have the originals floating around.

10 (Proofs of loss marked Exhibit C. 1, May 1, and Exhibit C. 2, May 1.)

Q That memorandum on file was a memorandum relating to the personal property, was it not? A So far as I know, Mr. Diffany only was interested in personal property. That is the only thing we had anything to do with, in any event.

20 Q Are both of these policies on personal property? A Absolutely. There are two policies covering the same material, issued at different times.

Q The memorandum about which you speak is a further itemization of the stock account? A I am not familiar with that. As I say, Mr. Ernest Lyon, one of the managers of our firm, adjusted the loss with Mr. Diffany. I know nothing of the details. If there are any items, it would only be working up this statement, showing how they arrived at the loss.

30 Q What is the address of Mr. Ernest Lyon?
A 185 Market street, Newark.

Q His home address? A He lives on South 17th street, Newark; I do not know the address.

Mr. Schenck: I offer in evidence letter from Lyon & Co.

40 Mr. Beers: I object to it. It has no place in this record.

Charles Rothfuss, direct.

The Master: I will admit it.

(Letter is marked Exhibit C. 3, May 1, 1925.)

Q I understand from you that rather than leave these papers here at this time, you are going to file with the master photostat copies of these proofs of loss? A Yes. 10

CHARLES ROTHFUSS, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Schenck.

Q Were you employed by Diffany & Company at their factory in Newark? A Yes. 20

Q Have you been employed by Diffany & Company? A Yes; Park street.

Q Are you employed by them now? A No.

Q When did you leave? A About two months ago; about six weeks ago.

Q Were you there when the fire was? A Yes.

Q What did you do in the factory; what was your position? A Why, I did most everything in the factory. 30

Q That does not mean very much. What particular work did you do? Were you foreman or manager or what? A I would have to think—

Q Did you have anything to do with the shipping out of goods and so forth? A No.

Q Did you know that goods were shipped? A I seen it there; yes. 40

Charles Rothfuss, direct.

Q On the night of the first was there any goods there ready for shipment? A Yes.

Q Do you know to whom and in what quantities? A How many?

Q Yes. A There was about three cases. I don't know how many was in the case.

10 Q How many ordinarily were there in a case? A About five gross.

Q How much a gross were they worth? A I couldn't tell you that.

Q Were they destroyed in the fire? A None of the stuff was in the fire. All was used up when Osborne was there. It was all used up, every bit of it.

20 Q You mean that after the fire it was salvaged? A Yes; after the fire they had it all fixed up and it was sent out again.

Q Was the machinery burned up? A No.

Q What happened to the machinery? A They cleaned it up again.

Q How long did it take? A About two months.

Q And who did the work? Who cleaned it up? You men who worked in the factory? A The men in the factory, yes.

30 Q Was there any outside help employed on it? A No.

Q How long did you work there? A I worked there over eleven years.

Q You began about what year? A About around 1913.

Q And so you were there when Mr. Osborne came there, were you not? A Yes.

40 Q When Mr. Osborne came, Mr. Diffany had been in the bag frame business, had he? A Yes.

Charles Rothfuss, direct.

Q Did he do any bag frame business after Mr. Osborne came? A Well, a little bit; not much. It didn't last long. He made shaving stands.

Q How long? A I don't know just how long.

Q As much as one year or two years? A 10 No, no.

Q So that in less than a year the business was all shaving stand business, was it?

Mr. Beers: I object to the question. It is decidedly leading.

(Question withdrawn.)

Q When did the bag frame business stop, so near as you can tell, after Mr. Osborne came? A 20 About six months.

Q So that after that time there was not any bag frame business done? A No.

Q Was material purchased down through the years to make shaving stands with, while you were there? A I tell you we cleaned everything up and sent it out again when Osborne was there. There wasn't any goods went to the bad altogether.

Q Was there any stock of bag frames on hand when the fire was? A Yes; a whole lot when the fire was.

Q How much, if you know? A I don't know just how much.

Q Did you help make an inventory at any time? A Yes; after the fire.

Q Is that the only inventory you ever worked on? A Yes.

Q With whom did you work on that inventory? A Mr. Osborne. 40

Charles Rothfuss, cross.

Q Do you think you would recognize that inventory that you helped make, if you saw it again? A I don't know about that.

Q Well, I show you that paper and ask you if you ever saw it before? A I thought he had that down in a book.

10 Q You don't think you ever say this paper before? A I might have.

Q The inventory you helped Mr. Osborne to make, you think he put in a book, is that it? A Yes.

Q You don't remember how much it amounted to, do you? A No.

Q And you don't know what he did with it? A No.

20 Q When was the last time you ever saw the books? A The last time I was up there before he died.

Q At Mr. Osborne's you saw it? A Yes; at the house; yes.

Q When was that, if you can tell me? A That was just after the fire was there.

Q By the way, how many men worked on getting the machinery cleaned up after the fire? A Three men.

30 *Cross examination by Mr. Beers.*

Q Did Mr. Diffany work on this machinery that you have spoken of as having been cleaned after the fire? A What do you mean working on?

Q After the fire did he do any work at all upon this machinery? A Yes.

Q Do you know how long, about, he worked upon it? A You mean to shape it up?

40 Q Yes. A I say about two months.

Henry Diffany, further cross.

By Mr. Schenck.

Q You recall the fire being in November, 1923, don't you? A Yes.

Q You did not start to ship goods again until February, 1924, did you? A I don't know about that. I know we sent it out. 10

HENRY DIFFANY, the defendant, recalled.

Mr. Beers: I will say this, that if it develops upon the submission of a statement that any work that was done was not properly charged, it may certainly be excluded. That is the proper thing to do, but it is not proper to bring in a statement that is based upon figures of the deceased and which are not at all reliable and which are not based upon the figures of the firm. I haven't those papers here. I will look them up again. In other words it is not an account based upon the records of the business. 20

Further cross examination by Mr. Schenck.

30 Q Mr. Diffany, you will produce the itemized statement of these charges at the next hearing? A Yes; sure.

Q And will you tell me why it was that you paid this out of your own personal funds when there were several thousand dollars in the bank to the credit of Diffany & Company? A Because I had only my own personal check book, a single check book, in my pocket; I cannot carry three check books to pay these bills with. 40

Henry Diffany, further cross.

Q And then do I understand from that that you paid these men in New York on a visit to their office? A Yes. Sure I went over there.

Q Now, going back to 1916, when you began your first operations with Mr. Osborne, you had been in the bag frame business for a period of time, had you not? A Yes.

Q And you had certain machinery at that time? A Yes.

Q What did it consist of? A Presses of all kinds.

Q How many? A Oh, I don't know. I couldn't tell you. Lots of them.

Q Were they ever inventoried? A Some years ago they were; yes.

Q At that time, in reference to 1916? A No. They were in some book. What year I don't know.

Q Where is that book? A That is burned up. The books were there for twenty years back.

Q What was the approximate value of that machinery in 1916? A I couldn't say. Mr. O'Leary has got that. I couldn't say exactly. Maybe sixty odd thousand—\$65,000.00—something like that.

Q It is carried at \$18,000.00 in your accountant's report. Why do you now say sixty odd thousand? A Originally it cost that.

Q Well, in 1916, how much was it worth? A I couldn't say what it was worth. I don't know.

Q Well, in 1923? A Whatever the accountant has got down there for 1923, that is about right. Depreciation went off, you know, every year.

Q Did you have any stock on hand that was used in the shaving stand business in 1916 when

Henry Diffany, further cross.

you began operations with Mr. Osborne? A Yes; sure.

Q Now, what stock did you have on hand? A I couldn't say. They have got it down there somewhere—\$4,000.00 or \$5,000.00.

Q Who has got it down? A It is down on these papers. You have it there. The stock that was there. I couldn't say what it was.

Q I ask you to point out to me where it is put down. A I don't know exactly where it is now.

Q With the assistance of your wife and your accountant and your counsel, I ask you to point out to me where the item is to which you refer as indicating the value of the stock in 1916 when you began business with Mr. Osborne. A There is a schedule here of some kind. Where is it? These (indicating) have nothing to do with it. There was \$3,800 worth of steel and about \$800 or \$900 worth of nicked tin; there might have been more than that—more than \$900.

Q Anything else? A That is about all.

Q Was that material used up in the novelty stand business? A No; it was not. We made the first shaving stands out of steel and nicked tin.

Q Well, that was material that was purchased after Mr. Osborne came with you?? A No; before, that was.

Q How much of that was there? A I told you \$3,800 worth of steel and \$900 worth of nickel tin.

Q That material was used up in the shaving stand business? A Yes; it was.

Q So that was a contribution that you made to the business right at the beginning? A "Contribution?" What do you mean?

Henry Diffany, further cross.

Q You put that much material right into the business? A Stock, sure.

Q At the beginning? A Yes.

Q Anything else—any other stock on hand at that time, besides these two items, \$3,800 and \$900? A There might have been some nickel iron, silver iron, something like that.

10 Q How much did that amount to? A About \$1,200, something like that.

Q Approximately what was the value of your machinery at that time? A I couldn't say.

Q Give a rough estimate? A \$60,000 or \$65,000. We had an oil engine that was worth \$5,500 alone.

Q Is that what it cost new—\$60,000? A About that, yes, when it was new.

20 Q Now, that machinery continued in use, did it not? A Yes.

Q Down until the time of the fire? A Yes.

Q All of it? A Sure.

Q In addition to that, you bought, from 1916 down to the time of the fire, various tools, did you not? A No; I didn't buy any tools.

Q You didn't buy any tools? A No; I made them.

30 Q You had to buy the material to make them, didn't you? A Yes.

Q Did you buy any more machinery? A I bought a small curling machine, but that came with some stock. I bought some stock at the same time. I bought a fellow out in New York and the stock and all that came with it.

Q How much was paid for that? A \$120 all told.

Q \$120 was involved in that transaction? A Yes; this fellow I bought him out.

40 Q Was \$120 all that it cost? A That is about what I recollect, yes.

Henry Diffany, further cross.

Q Did any of this machinery wear out from 1916 down? A No.

Q It was all in use, in other words, in 1923? A It had repairs once in a while like everything else.

Q Now, you say that you did do some bag frame business after 1916 when Mr. Osborne came in. A I sold some.

10 Q You didn't make up any? A No; we didn't make up any. Maybe a few we made up.

Q But your sales were principally of stock that was on hand at the time Mr. Osborne came with you? A Yes; sure.

Q Have you a record of the bag frame business that you did in the year 1917, 1918 and 1919? A Only what the books have here.

20 Q As a matter of fact, the bag frame business for the year 1917, which was handled through Diffany & Company, amounted to \$1,174.23, didn't it? A That is what comes off the books, I believe.

Q And the amount for 1918 was \$1,123.81? A I cannot tell exactly in my mind. You have the figures down there, so you know.

Q That is as near as you can tell. That figure was taken from the books, was it not? A Yes.

30 Q And the amount of bag frames sold in 1919 and included in the Diffany & Company sales amounted to \$667.60, didn't it? A If you say so. You have got it down. I cannot remember everything. I don't know.

Q That appears from the records in the case?

Mr. Beers: What records do you refer to?

Mr. Schenck: Included in the statement of sales.

Henry Diffany, further cross.

A In the bag frame business?

Q As I understand it, substantially all of these bag frames that were sold in those years were made up before Mr. Osborne came there?

A Yes, they were stock stuff.

10 Q So that there was no money paid out of the business after Mr. Osborne came with you, for making up that stuff? A No. Maybe for putting them in a box and shipping them off.

Q Of course, the shipping expense, the expense of handling the goods, sending them out, that was charged right in along with the rest of the business, was it? A Yes.

20 Q Approximately what percentage of the sale price does that shipping of it amount to? A About fifty cents a case. Second-hand cases we used.

Q For instance, on a thousand dollars worth of the bag frame business, how much is properly chargeable to shipping it out? A About fifty cents.

Q For a thousand dollars worth? A You can get a thousand dollars worth of frames in a dry goods case costing fifty cents.

30 Q Now, the insurance premiums were on both the machinery and the stock, including whatever bag frame stock there was on hand; they were always charged against the Diffany & Company business, were they not? A Used in the business—yes.

Q So that the Diffany & Company business paid for the insurance on your machinery, did it not? A Sure.

40 Q And it also paid for insuring your bag frame stock, whatever it amounted to? A The stock; yes; sure.

Henry Diffany, further cross.

Q Were Lyon and Lyon your insurance agents through the whole period? A No; we changed; not always; I don't think so; I couldn't say.

Q Can you tell me how much a year the average premiums were? A No; I don't know; I couldn't say. I have no idea. 10

Q Have you the bills for any of the years? A No; I haven't the bills.

Q Can you tell me all of the agents who insured your property for this period of time? A I could not tell you. Lyon & Lyon is one of them.

Q Did you have more than one agent at the same time? A I did some years, yes.

Q Who were some of the other agents? A 20 Byrne was one.

Q What Byrne and where? A Joseph Byrne on Market street. He used to be on Broad street.

Q Who else? A I couldn't say any other. I don't recollect. There might have been a fellow from New York, but I couldn't say, by the name of Price.

Q Where was his address? A I couldn't say. Broadway somewheres. Some years ago. I couldn't say just when it was. Just lately, maybe three or four years, Lyon's has been doing it. Morelock I think is the man that takes care of it. 30

Q Lyon's office do you mean? A No it ain't Morelock, this last, the Niagara Insurance Company.

Q This \$11,000 insurance money was paid to you, was it? A Yes.

Q Did you enter it in the books anywhere? A No, sir; I did not. 40

Henry Diffany, further cross.

Q Why didn't you? A Because I didn't want to. I can do with my money what I like, can't I? I didn't have to enter it in the books.

Q What did you do with it? A Put it in the bank. You asked me that before.

Q In what bank did you put it? A Fidelity-
10 Union.

Q How much of it belonged to Diffany & Company? A I don't know of any that belonged to it as I know of.

Q Well, there was \$4,000 of it on stock and merchandise? A Yes.

Q And \$7,000 was machinery, was it not? A Yes.

Q Was this device that you manufactured with Mr. Osborne a patented device? A Yes; it
20 was my patent; yes, sir; I originated that.

Q When was it patented? A 1916 or 1917, something like that; I don't know which.

Q And was the patent issued to you? A Yes, sir.

Q Have you it now? A I think I have.

Q You haven't it here, of course? A No. I don't know whether I have it home either.

Q If you have it home and if we have another hearing, will you produce it before the master?

30 A If I can find it, yes. You know that patent has run out by this time.

Q Mr. Osborne, from time to time, spoke to you about putting more insurance on the shaving stand stock, didn't he? A Not that I know of.

Q And you did put on additional insurance? A I put it on myself when I saw fit to do so. In the Fall always I increased the insurance.

Q You did increase the insurance, didn't you,
40 \$5,000? A No; no; not \$5,000.

Henry Diffany, further cross.

Q You did increase the insurance on the machinery, didn't you. A When?

Q In 1923? A Altogether \$5,000?

Q Yes. A It might have been.

Q Why did you put \$3,000 additional insurance on the machinery and only \$2,000 on the
10 stock, if you didn't buy any additional machinery? A Why, I didn't have—it wasn't half insured.

Q How near half insured was it? A Well, it was about half insured. I did that because the place was getting empty; they were taking the watchman off the building; so I thought I might as well have it insured a little heavier on account of that.

Q Out of the company funds, on January 18,
20 1919, you paid a thousand dollars on a note, did you not? A What time?

Q January 18, 1919? A Yes.

Q Do you remember the bank? A The Merchants Bank.

Q To whom was it paid? A To the Merchants Bank.

Q Was the note discounted there? A No; I borrowed the money.

Q Now, out of this Diffany & Company money
30 you paid Bannister & Pollard \$800, did you? A Yes.

Q And the Glen Ridge Brass Company \$550? A Yes. I don't know. You have got it there. It must be.

Q You paid the Union National Bank approximately \$6,000 on obligations owing to it?

A I think only \$5,000.

Q They were obligations that you owed before you took up this business with Osborne,
40 were they not? A Oh, no.

Henry Diffany, further cross.

Q Eh? A No; no; they were made up afterwards.

Q Were they your own personal obligations or obligations of the business? A For the business, this shaving stand business because
10 seventy per cent. has to be bought outside; only thirty per cent. is manufacturing; and you have to have money to buy these things or else you cannot get them; they only give you fifteen days' time to pay it; you have to have the stock on hand to do any business.

Q So that you say that the \$6,000 or \$5,000 that you paid the Union National Bank was for money that you borrowed after Mr. Osborne came with you? A I don't know. I was borrowing right along. I could not say.

Q I want to divide it up with you however it ought to be divided. I want to know what portion of the \$6,000, if any, you borrowed before Mr. Osborne came with you? A I don't think I owed \$6,000.

Q Well \$5,000 or \$6,000? A I couldn't say how much it was.

Q How much of it did you incur after he came with you? A I don't know. I think that money was borrowed right then and there.

Q All of it? A I think the most of it. Yes; it was paid off and borrowed again.

Q The Bannister & Pollard account was a running account? A It was a running account. We were buying stuff every day.

Q Was that incurred before Mr. Osborne came in the business with you or after? A It was a running account.

Q Incurred before or after Mr. Osborne came with you? A I could not say.

Q The Glen Ridge Brass Company, \$550? A
40 We bought brass from them right along.

Henry Diffany, further cross.

Q Before or afterwards? A Afterwards, too.

Q When was this indebtedness of \$550.00 incurred—before Mr. Osborne came in the business or afterwards? A I couldn't say. I had bought some brass. I don't know what we are making then, whether it was shaving stands or what it was. We are buying brass now from them.

Q I am only calling your attention to this account— A I couldn't say what it was.

Q Have you an itemized bill for the account of \$550.00? A No. That is not all. Those are different items.

Q All right. Have you all the bills that make up this amount? A No; I haven't any.

Q And you haven't any of the bills or records that make up the item of \$5,000.00 or \$6,000.00 that you paid to the Union National Bank? A I think there is a record here of that.

Q You think there is a record here of that? A How it was paid.

Q I find in the books an item that you paid Mr. Beers in March, 1924, \$140, and charged that against the business? A I don't know what that was for. Mr. Beers had some collections for me. I couldn't say. There was a suit on, too. We had several thing there.

Q It was for something in the business? A Yes.

Q Did you pay any city taxes for any of those years? Are you assessed by the City of Newark for your stock and machinery in this business? A Yes.

Q Were you always so assessed? A Yes; sure. We got tax bills.

Henry Diffany, further cross.

Q Do you remember what your assessment for stock is or was? A No; I couldn't say that.

Q Have you your tax bills? A I don't know whether I have or not.

10 Q You don't know, I suppose, what your assessment for machinery was? A No; I couldn't say. It was taxed always as a whole, I believe.

Q As a matter of fact, there isn't any sign upon your factory, is there? A Which one?

Q The one before the fire, did you have any sign up? A No.

Q Why not? A Can't I do business without a sign? I ain't got a sign up now.

20 Q Now, where did you write the 1923 sales-book from, that we have here, that you have offered in evidence; where did that come from? A It came from the big book there.

Q Was that all re-copied? A Yes; because it is in such bad condition, that book, we could not use it when we had to use it. We have to have it to refer back to prices.

Q Do you remember selling brass scrap of Diffany & Company in any quantity and being paid? A I don't know what quantity you mean. Whenever we have scrap brass we sell it.

30 Q About how much does that average a year? A I couldn't say. It is all down on the book.

Q That money has all been turned into the business? A That has all been turned into the business.

Q And properly credited? A Just the same as any other money that comes in.

40 Q Have you any record as to how much money you drew from the business in 1919? A Well, in 1919, in December, I think I paid a coal bill of \$126.

Henry Diffany, further cross.

Q As a matter of fact, in the year 1919, didn't you draw \$4,420.01? A No, sir; not 1919.

Q And in 1920, didn't you draw \$3,961.30? A I guess there is something down there for it. I don't know what it is. You have the figures. Whatever I drew is down there.

10 Q For 1921, you drew \$1,095.00, didn't you? A Whatever is down there is correct.

Q And for 1922, you drew \$2,336.27, didn't you? A If it is down there, that is correct—whatever is down there. Is that our figures?

Q For 1923, you drew \$2,680.27, didn't you? A Whatever is down there—I don't remember.

20 Q Well, now, as a matter of fact, for the purpose of getting up an account of this particular business, in addition to submitting to your accountants the books that you have offered in evidence, you gave them certain other records of the amounts that you drew from the business, didn't you? A Yes.

Q And those amounts that you gave them were correct, to the best of your knowledge, were they not? A Well, I always put down what I drew; I figured it at the end of the year and put it in a little book.

Q Where? A At home.

30 Q That little book that you have at home correctly tells the amounts that you drew from this business for these various years, does it not? A Yes.

Q You have not offered that book in evidence, have you? A No.

40 Q If we have another and further hearing in this matter, will you produce that book and read from it the amounts that you say you drew from the business in those various years? A Yes; sure.

Joseph A. Schroeder, further cross.

JOSEPH SCHROEDER, heretofore sworn as a witness on the part of the defendant, recalled.

Further cross examination by Mr. Schenck.

Q Your figures upon which you have compiled Exhibits D. 8 and D. 9, come from where? 10

A They come from the books.

Q Both of them? A Yes.

Q In Exhibit D. 9 on the schedule supporting the profit and loss statement, the item of purchases for October, 1924, of \$1,921.19, I call your attention and ask you where you secured the amount of that item? A I haven't the working sheet here. I would need that to tell what I had. I know one amount is the Backus Motor Company. 20

Q As I understand you, you haven't your working sheets here that will indicate how you arrived at that particular item? A No.

By Mr. Beers.

Q Will you bring them with the next time?

A Yes.

By Mr. Schenck.

Q I ask you to look at Exhibit D. 4, page 30 79, an item under date of December 31, 1924, accounts receivable \$1,001.62, under sales discounts, and ask you to tell me where that item came from, if you can tell. Are there some other papers that you have that would be of assistance to you in ascertaining that particular item? A I believe I have left this other one in the office, too, at the same time I drew up this statement. You can find all of these items in the various accounts 40 here.

Joseph A. Schroeder, further cross.

Q I call your attention to the fact that your profit and loss statement as of December 31, 1923, Exhibit D. 8, shows no sales for the month of November, 1923. A We have been advised that there were no sales. That is the fire month.

Q If, as a matter of fact, the salesbook shows that there were sales prior to the fire, those amounts have not been taken into consideration in your report? A We have not taken any sales of those months. 10

Q You do not know, then, from the books, as to whether or not the sales prior to the fire in the month of November, amounted to \$1,751.60?

A I do not.

Q Then, strictly speaking, your report is not taken from the books, is it? A It was taken from the books as we had them at that time. 20

Q Did you have this sales book? A There were no sales in the book at that time for the months of November and December.

Q Will you look at the book and see if there are now? A There are.

Q Have you a list of the accounts payable as of December 31, 1924? A Not with me.

Q But you have it at your office and can produce it? A I can.

Q I call your attention to the item of "General Expense" for 1923 on Exhibit D. 8, amounting to \$4,488.96, and ask you where you secured the amount of it? A Probably taken from your expense account. 30

Q Will you look and see? A It does not appear in these books here.

Q Might it be necessary for you to have some other paper that you have at your office? A It might not only be that; I would probably have to refresh my recollection. 40

Joseph A. Schroeder, further cross.

Q Will you do that for a subsequent hearing and produce those sheets? A Yes; I will do that.

Q You have a schedule of accounts payable, have you not? A Yes.

10 Q As of December 31, 1924? A Yes; we have.

Q You will bring that with you at the next hearing? A I will do that.

Q As a matter of fact, will you bring all of your working papers with you the next time? A Yes.

20 Q I call your attention to Exhibit D. 9, which indicates that as of December 31, 1923, there was \$8,318.45 in the Manufacturers National Bank and nothing as of December 31, 1924. Can you tell us what happened to that account in the mean time? A Well, it was all drawn out.

Q Well, I show you Diffany & Company pass book in the Merchants and Manufacturers National Bank, dated December 31, 1924—the bank statement—and there is a balance of \$5,844.89, and I ask you how you explain that? A The amount on this statement is possibly the wrong bank account. That is where that is. One bank had no balance; the other had a balance.

30 Q I show you pass book of the Broad and Market National Bank, Exhibit C. 6, and call your attention to the fact that as of September 12, 1924, there is a balance of \$287.91. A Well, as of September 30, 1924. You will find a check withdrawing that amount.

Q Was there ever any accounting made of the interest on that account? A Certainly.

Q Where? A I could not tell you that off-hand.

40 Q You say that Exhibit D. 9, the amount on deposit as of December 31, 1924, stated as being

Joseph A. Schroeder, further cross.

\$6,589 and some cents, should be rather the amount on deposit at the time in Manufacturers National Bank? A The Merchants and Manufacturers National Bank.

10 Q If that is so, I ask you how it is that the item as you have it is more than the bank statement as of the same day? A Well, the bank statement does not take into consideration deposits as of December 26, of \$768.80 and another item of \$592.71.

Q When? A The same date.

Q Can you tell from what those two items are derived? A I can tell you what the latter item is derived from—\$590.35 received from Butler Brothers.

20 Q Have you any way of telling where the other item comes from? A No; I have not.

Q As of the same date, that is, December 31, 1924, and December 31, 1923, where did you get the item of \$11,000.00? A That item was given to me by Mr. Diffany. I testified to that fact before.

Q That was the only source of your information in regard to that? A That is the only source. I don't know where it is or what has happened to it.

30 Q Well, then, subject to your later knowledge as to that particular item, I assume that your statements, as you submitted them, D. 8 and D. 9, are correct, according to your opinion? A Surely. The \$11,000.00 is an asset of the business. That is why it should be shown up as such.

Q Well, Mr. Diffany says it belongs to him, does he not? A Well, he is the business.

Q Where is this item of machinery carried—anywhere? A It is not on the books.

40 Q You got that from Mr. Diffany? A That is correct.

Joseph A. Schroeder, further cross.

Q What I want is an explanation as to why, if in the year 1923, the machinery was destroyed by fire and the insurance loss was paid on it, they are both carried? A They are both carried when?

10 Q That date? A I don't believe it. I don't see it.

Q Well, so far as the machinery is concerned, you have carried that on your schedules as belonging to the defendant, too, have you not? A That is correct.

Q And as belonging to the business? A That is correct.

20 Q Well, at the end of 1923, the company did have some machinery? A Well, they might have had some machinery, but as far as we are concerned, the original machinery that they had held had no value.

Q Why not? A They were reimbursed for its loss in the fire and they received \$11,000.00 for it, which was considered fair.

Q If, as a matter of fact, that machinery was all salvaged, it should be carried at some figure, should it not? A How can I say what it is worth?

30 Q Well, the expense of salvaging it that was paid by the company, how would that be treated? A They would be repair items, if anything.

Q And they would be chargeable against the business? A Yes.

Q And they were charged, as a matter of fact, against the business, were they not? A They were.

40 Q Have they been charged against the company or against Diffany? A Charged against the business.

Joseph A. Schroeder, further cross.

Q If, as a matter of fact, the machinery belonged to Diffany and is now claimed by him, should not the items charged for its salvage, the salvage of that machinery after the fire, be a personal charge against him? A No, sir; the machinery is used in the business and any repairs to that machinery would be a repair charge to the business. 10

Q That was Diffany's capital contribution, was it not? A Well, regardless of that, it is being used in the business and any repair to the machinery is a charge against the business.

Q But it is a charge against the capital account? A No; not against the capital account.

20 Q If Mr. Diffany was supposed to contribute that machinery for the use of the joint business of Mr. Osborne and Mr. Diffany and the machinery was charged off as a total loss as a result of the fire of 1923, and it was subsequently salvaged for the use of the Diffany & Company business with Osborne, the items chargeable for this salvage should really be chargeable against Diffany's contribution to the joint business, should they not? A Not if they are small items, but from what I understand from Mr. Diffany, he repaired all of that machinery himself, so that there was practically hardly any disbursements of any kind putting that machinery into shape again for its use. That is what I understood. 30

Q As a matter of fact, the payrolls for the period after the fire until they began operations, ran something like \$1,500.00 to \$2,000.00, didn't they? A I know nothing about that.

Q Well, that appears on the books, does it not? A Yes, but I don't know what that applies against. 40

Joseph A. Schroeder, further cross.

Q If they had no factory and were not conducting any manufacturing operations during that period of time, there is no justification for the payrolls being charged against Diffany & Company or in their business was there? A Well, from what I understood at the time, they were manufacturing.

Q Well, assuming that they did not begin manufacturing operations until February 24, 1924, February 24, 1924, being the first sale, would you say that payrolls charged in January and December were manufacturing charges or capital account charges? A Well, they might have been manufacturing charges. I don't know when they started manufacturing again. He might have started manufacturing in December or he might have started in January.

Q Well, would the fact that the first sale is February 24, 1924, change your opinion any? A No, sir, because he might have manufactured for stock.

Q Well, it was your concern, was it not, to whom this \$665 was paid in December, 1924? A It was.

Q And your concern did some work for that money, did it not? A We certainly did.

Q You have your working sheets and you submitted a report, did you not? A Well, it would not necessarily all be in working sheets. Some of it is for working sheets.

Q Some of it is working sheets? A Some of it is working sheets.

Q And for the reports that were submitted? A Yes.

Q And those reports were submitted to Mr. Diffany, were they not? A That is correct.

Joseph A. Schroeder, further cross.

Q You have copies of those reports that were submitted? A I believe we have.

Q And you also have the working sheets upon which these reports were based, have you not? A That I could not say.

Q Well, in the natural course of business, you would assume that you have? A No; not that particular matter, no, because we were not doing an audit. As explained before, we were just assuming figures.

Q Don't you keep your working papers? A We probably would not make any working papers on that.

Q In order to make up a report to submit to Mr. Diffany, you certainly would have to do some preliminary figuring and have some working papers, would you not? A Whether Mr. O'Leary has working papers, that I could not say. I was not connected with that matter. I had nothing to do with it.

Q If you have these working papers, you can produce them at the next hearing? A We can.

Q As well as a copy of your report that was submitted to Mr. Diffany? A That is up to Mr. Beers whether he wants to submit it or not. I will bring it so that he can submit it if he wants to.

Q You will have it here? A I will bring it. If he wants to submit it, that is for him to decide.

Q When you went over the books, you found, did you not, that the pay-roll checks did not agree with the pay-roll? A I did.

Q And did you find in any place where the difference was accounted for? A That I don't remember.

Q Where do you account for it? A I believe I account for it in the petty cash account.

Joseph A. Schroeder, further cross.

I have worked up schedules showing the amount of pay-roll checks and the actual amount of pay-roll and the difference I run into petty cash, assuming that it was put into petty cash.

Q What was it charged to? A Well, probably general expense. I had no means of telling what it was spent for.

Q So that notwithstanding the fact that you had no means of telling what that money was spent for, yet you did charge it to general expense and submitted this statement to the Master as being a correct statement, have you not? A Well, as far as my knowledge is concerned, it is a correct statement, because the assumption can be made that that money was spent for petty cash, drawn out in petty cash, out of which small expense items are paid, incidentals. That is the usual procedure in the average business.

Q You are a certified public accountant, are you not? A No; I am not.

Q Your firm is? A No.

Q You have no other explanation as to the correctness of your account or as to the correctness of carrying that difference between the actual pay-roll and the pay-roll check, in general expense, than what you have given? A That is the only explanation I can give to you.

Q Is that statement a correct statement, that is, are D. 8 and D. 9 correct statements of the business during the years 1923 and 1924? A That is, books. I have not gone beyond the books.

Q Notwithstanding the difference that I have indicated to you between them and the books, do you still say that they are correct statements? A Well, there are differences now. I don't know whether there will be after the next hearing.

Joseph A. Schroeder, further cross.

Q You say that even though no machinery is shown as of December 31, 1923, and December 31, 1924, that your statement is still correct? A I do. There is no book value to the machinery. That is from information we had at the time the report was made up.

Q What is your reason for saying that, in view of the fact that it appears from the testimony given in your hearing that the machinery was salvaged and the same machinery was used after the fire as before in this joint business? A Well, I know the machinery was salvaged, but I don't know who salvaged the machinery or how much was spent on salvaging that machinery.

Q Well, it is in the books, is it not? A The salvage cost?

Q Yes. A I have not seen it.

Q The pay-rolls from the time of the fire are part of the expense? A Oh, no. They mean nothing to me. Part of that pay-roll might be cost of manufacturing. He certainly had to manufacture in order to start selling in February.

(At this point recess is taken until May 22, 1925, at two o'clock in the afternoon.)

Henry Diffany, further cross.

Met pursuant to adjournment this twenty-second day of May, 1925, at two o'clock in the afternoon.

Appearances as heretofore.

10 HENRY DIFFANY, the defendant, re-called and further examined as follows:

By Mr. Schenck.

Q This book, on the cover of which it says "1916," Mr. Diffany, is a book in which you kept a record of the amounts drawn by yourself and by Mr. Osborne? A Yes, sir.

Q These same figures have been incorporated in the statement? A They were totals on the books.

20 Q These figures in this book are totals from the ledger at that time, are they? A The ledgers at that time.

Q And these same figures have been incorporated in the statements prepared by your accountants? A Yes.

30 Mr. Schenck: We offer this book in evidence. I have suggested to Mr. Beers that rather than have the book retained here, for the purposes of the record the items be copied.

Q The "S. H. O." at the top of the page stands for S. Harvey Osborne, does it not? A Yes.

Q This indicates that in 1916 he drew \$1,260.09? A Yes, sir.

Q In 1917, \$1,961.35? A Yes.

Q 1918, \$2,369.90? A Yes.

40 Q 1919, \$2,670.23? A Yes.

Joseph A. Schroeder, further cross.

Q 1920, \$2,505.75? A Yes.

Q 1921, \$4,076.07? A Yes.

Q 1922, \$2,167.85? A Yes.

Q 1923, \$2,665.02? A Yes.

Q Now, the "H. D." stands for Henry Diffany, does it not? A Yes.

Q This book shows, does it not, that in 1918, 10 Henry Diffany, which is yourself, drew \$126.04? A Yes.

Q In 1919, \$4,420.01? A Yes.

Q In 1920, \$3,961.30? A Yes.

Q In 1921, \$1,095? A Yes.

Q In 1922, \$2,336.27? A Yes.

Q In 1923, \$2,686.27? A Yes.

Q Those are the amounts as indicated in this book, are they not? A Yes.

Q Those are the amounts as indicated in this 20 book, are they not? A Yes.

Q Those amounts were put in there from time to time by you from the company's ledgers? A Yes.

Mr. Schenck: I offer this book in evidence.

(Book is marked Exhibit C. 1, May 22.)

30

JOSEPH SCHROEDER, already sworn on the part of the defendant, re-called and further cross examined.

By Mr. Schenck.

Q Now, perhaps your recollection is refreshed as to the items that you were to look up between the last hearing and now. Proceed to tell us how 40 you analyze the various items then in question.

Joseph A. Schroeder, further cross.

A Well, I found additional amounts which had not been posted to expense account.

Q That applies to what items? A Various items.

Q Make it as plain as you can. A Do you want the detail?

10 Q Yes. A \$38.12—

Q Since it is on that sheet before you, can you indicate it on the sheet? If you do that, we will offer the sheet in evidence. A (Witness does at requested.)

Q You have indicated the items on the sheet before you? A Yes. I will leave the sheet here. I will make a copy of it. Then there is an amount of \$1,001.62 of discounts.

20 Q For when? A 1924 I believe it was. I will leave a copy of that also.

Q That will explain that in detail? A That is right.

Q What was the other item? A The other item was that difference in purchases. That was due to an error in addition, so that we would have to increase sales to tie in, and you would have the same result; it would not change the result any. That would have represented larger sales.

30 Q Is that all? A That covers all.

Q With the exception of the working sheets used to prepare the reports. Where are they? A As I said before, there were no working sheets.

Q Whatever the papers were that you had? A They were simply made up from data submitted by Mr. Diffany.

Q Have you that here? A No; we haven't it in our possession any longer.

40 Q Where are they now? A I believe Mr. Diffany has it.

Joseph A. Schroeder, further cross.

Q For the purpose of identifying the papers, I assume they are some of these that you have here. A Not that we have here.

Q Well, that Mr. Diffany has? A These are the figures that Mr. Osborne had made up. That is what we used.

10 Q Those were the figures that go with that book that Mr. Diffany has? A No; they don't go with the book.

Q Are they not? A No.

Q You say there were no working sheets? A There were no working sheets.

Q Then, what is the explanation of this charge of \$665 by your firm? A Mr. O'Leary submitted his statements.

20 Q Where are the statements that he submitted? A Mr. Beers has them.

By Mr. Beers.

Q These statements? A That is correct.

(Papers produced by Mr. Beers.)

(Statement offered in evidence and marked Exhibit C. 2.)

Q Where are the statements that this charge was made for? A That I could not tell you.

30 Q What was done with them? A They were turned over to Mr. Diffany.

Q Were there any working sheets for those statements? A No other working sheets, except, as I said before, copies of Mr. Osborne's figures.

Q Haven't you got a copy of the statement? A I haven't a copy of it.

40 Q You haven't got a copy of the statement that you submitted? A Not of these statements.

Joseph A. Schroeder, further cross.

Q Do you mean to say that you would make up a statement for a firm and make a charge for it and not keep a copy of it? A What do you mean—these statements here?

Q I mean the statement for which the charge was made. A You are talking about working sheets—is that correct? 10

Q The result—yes. A One of these statements is on file here. It was offered in evidence.

Mr. Beers: Two of them.

Q These totals on these bills indicate five different statements? A That I couldn't tell you.

Q Well, then, do you say two of them are on file? A I have seen at least one. Mr. Beers says two of them are here. 20

Mr. Beers: That is my recollection. There were but two exhibits.

Q So that these two exhibits— A (Interrupting.) Those were balance sheets and profit and loss statement.

Q I direct your attention to bill of September 13, 1924, charge of \$165, and I ask you: For the preparation of what statement is that a charge? A I could not tell you what statement that is a charge for. 30

Q Can you tell what any of these five statements are charges for? A I cannot. All I know is that it is for work prepared for Mr. and Mrs. Diffany.

Q Is there anybody connected with your office that knows? A Mr. O'Leary would know. 40

Joseph A. Schroeder, further cross.

Q Do your books show? A I could not tell you that. I haven't access to the books.

By Mr. Beers.

Q Are you a member of the firm. A No I am not a member of the firm. 10

Mr. Schenck: I call on the other side to indicate to me or to the Master what the various items of charge on these statements are charges for.

Mr. Beers: You will have to find that yourself. If Mr. Schroeder does not know, I don't know. How can I tell you more than what he tells you?

Q You know of your own knowledge as to what these various statements are charges for, do you not? A Well for work in connection with the figures submitted by Mr. Osborne, working them into schedule form. 20

Q Did Mr. Osborne submit figures to you? A No; he didn't submit them to us.

Q Who did? A Mrs. Diffany.

Q How do you know that they are Osborne's figures? A Well, I don't know. That is what I was told. 30

Q And on the basis of those figures, your concern made an analysis, did they not, of the condition of Diffany & Company business? A We made no analysis. You could not make an analysis from that.

Q Well, you made a report? A Just prepared them in schedule form. That is all.

Q And you say you have no copies of these schedule forms? A We haven't any—not that I know of. 40

Joseph A. Schroeder, further cross.

Mr. Schenk: I now call upon the other side to produce the copies or originals.

10 Mr. Beers: I have repeated over and over again that I will not submit and I object to any figures going in the record based upon figures made up by Mr. Osborne. Any statement that might have been made up based upon Mr. Osborne's figures cannot go in. If there were statements here in the handwriting of Mr. Osborne, they could not go in because we could not cross-examine and test the accuracy or correctness of the statement.

20 Q I notice in the profit and loss statement of December 31, 1923, you have "Less amount lost in fire, \$4,320." What is the basis for that figure in your report? A What do you mean "what is the basis" for it?

Q Where did you get it from? A Well, by working against that \$18,000 machinery account depreciation, to get at the depreciated value, as shown by your profit and loss statement.

Q This \$4,320 is merchandise, is it not? A I don't know.

30 Q Well, I ask you to look at Exhibit D. 8 on the third page and see if that is not the case. A You say the profit and loss statement shows a loss of \$4,320.

40 Q I read it from here. I am asking you where you got that (indicating) from. That is all. It says: "Profit and Loss" up there. A It says: "Schedule supporting profit and loss." \$4,320 is deducted from purchases because that amount is supposed to have been destroyed in the fire, which would leave you only \$14,000 purchases instead of \$19,000.

Joseph A. Schroeder, further cross.

Q Where did you get the figure from? A That was submitted to us.

Q By whom? A By either Mr. or Mrs. Diffany. I don't know which one. I don't remember.

10 Q Do you know whether or not that includes the bag frame stock? A I do not.

Q If it does, it should not be deducted here, should it? A That I could not tell you. I don't know. There were no differences made between the various kinds of stock.

Q But if this purports to be a statement of the shaving stand business, it should not contain items relating to bag frames, should it? A Why shouldn't it?

20 Q Why should it? A Well, why shouldn't it? It is Mr. Diffany's business, isn't it?

Q Is that the only reason? A That is the reason. Any merchandise that is there belongs to Mr. Diffany.

Q Then, do I understand that this report is based upon the figures that have been given you and which you have taken as true rather than being based upon analyses that have been drawn from the books themselves? A I don't know what you mean by that.

30 Q Do you stand upon the report as being a correct statement of the business as shown by the books? A Well, outside of inventory figures that I would have to take from the client. The client has to submit those.

Q And, as I think you have previously testified, no detailed inventory was submitted to you, was there? A Not to me.

40 Q Well, to anyone connected with your firm? A That I couldn't tell you. The detail was submitted here.

Rosa Diffany.

Q The detail was submitted here? A Surely, quite a while ago.

10 ROSA DIFFANY, called as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Schenck.

Q Did you have anything to do with the inventories of these goods for any of the years? A No.

Q Well, the accountant has mentioned the fact that you gave him certain figures, and I wanted to know what figures they were that you gave him. He doesn't seem to know. A Well, 20 what figures do you refer to?

Q Relating to the inventory. A No; I don't know anything about an inventory.

Q And you gave him no figures relating to it? A No; not that I recall.

Q Did you give them any figures showing the rents that had been included in the business account? A Well, I deducted them from the book that is there. I found that Mr. Osborne had included the rents that belonged to Mr. Diffany 30 in his sales.

Q They had been included in the sales? A In Mr. Osborne's sales; yes.

Q What rents were they? A From Mr. Diffany's real estate.

Q Can you tell us the amount? A Well, I believe it was \$1,650 per year.

Q \$1,650 per year? A Yes; I think that was the correct amount.

Q Are you willing to say that that is the 40 correct amount? A I think it was \$137.50 a

Rosa Diffany.

month. Doesn't that make \$1,650 a year? I rather think that is it.

Q And in what figures did you say the rents had been included? A In the sales; in the sales book.

Q And over what period? A 1916 and 1917; and then we sold the place. 10

Q It was \$1,650 per year for those two years? A Yes, each year—not the two years—each year.

Q Then you say you sold the place? A Yes.

Q Then after that wasn't there some deduction, or were there other rents included? A Yes.

Q What rents were they? A Rents that Mr. Osborne had not included in the expense account. 20

Q Where did he get those items from? A The sales book.

Q What years do they cover? A Well, as many years as the sales book contains—a number of years.

Q And is that the sales book that has been produced in evidence here? A I don't know. If you will show it to me, I will tell you.

Q When did you last see it? A I do not recollect when I last saw it. I think I saw it last year. 30

Q Does this book show the sales for the various years? A Yes.

Q That is the book that was damaged by fire, was it not, in the fire? A Well, they were both.

Q What were the books that were here as having been damaged in the fire? A The sales books.

Q Just the sales book? A The sales books, 40 both sales books.

Rosa Diffany.

Q The ledger is where? Has that been produced here? A We have not got that. That was in the fire. That is gone. We tried to rescue it but could not find it.

Q Where was the ledger in the fire, did you know, at the time of the fire? A I don't know anything about that. 10

Q And you have had something to do, have you not, with the preparation by your accountants of these various statements? A Yes.

Q And you have a statement that covers the whole period of years that the business was in operation, have you not? A Yes.

Q Have you that statement here? A I don't know. It is not in my possession.

Q Well, where was it when you last saw it? A I don't recollect. I imagine in court. I don't know. 20

Q Well, I will ask you to produce the statement, if you will and show me which one you are talking about? A Which one I am talking about?

Q Yes. A I don't know which one you are talking about.

Q I am willing to hear you designate the statement that you have in mind as having been prepared by the accountants, which you say shows the business over a period of years. Which statement is it? I don't know the one that you are talking about. A I believe you have them all. 30

By Mr. Beers.

Q Let me ask you a question. The statements that you are speaking of, are they based upon Mr. Osborne's figures? A On Mr. Osborne's 40

Rosa Diffany.

figures, and then I found Mr. Osborne's figures were erroneous.

Q Are they based upon Mr. Osborne's figures? A Yes.

By Mr. Schenck.

Q You say you found Mr. Osborne's figures to be erroneous? A Yes. 10

Q In what respect were they erroneous? A Because he included Mr. Diffany's sales, his bag-frame sales and his vanity case sales and included the rents, and had charged them all up as sales for himself.

Q To what extent? You have certain figures. You can tell to what extent these figures are erroneous? A Because he took the footings from the sales book. I found when I figured those up that they corresponded exactly with Mr. Osborne's statement, but then I found that Mr. Diffany's sales and rents were all in with that. So I deducted that and found that Mr. Osborne was in error. 20

Q You did this yourself? A Yes.

Q For instance, take the year 1916. What figures did you find that Mr. Osborne had erroneously included? A In 1916? 30

Q Yes. A Well, there isn't very much of 1916. In fact, I don't think there is anything left of the book of 1916, but judging from the succeeding years he must have done the same thing in 1916, because if he did it in one year in all of those years, he certainly started out that way.

Q Take any year and any figures that you want. Will you tell us in what respect Mr. Osborne's figures were erroneous in any way? 40

Rosa Diffany.

It doesn't make any difference what year you have. A I have just told you.

Q I want you to take any year and show me in what particular they are erroneous? A Let us say 1917.

10 Q Let us take the figures for 1917, if you will, and show me where they are erroneous? A I told you he took the footings from the sales book—

Q (Interrupting.) I want you to demonstrate it, Mrs. Diffany, and show me in what respect they are erroneous? A I do not know what you mean. I just told you. I cannot tell you anything different.

20 Q How do you know how much in bag frames was included in the year 1917? A By deducting—by taking the different items and then deducting from Mr. Osborne's sales.

Q Please show me the different items. You claim to know what they are? A How can I show you. I haven't anything to show you.

Q Here are the books and papers. Take anything that you want? A Give them to me.

Q Does the sales book show the rent as well? A Yes.

30 Q So that except for these items that you deducted and found were erroneous in that year, the footing was correct, was it not? A The footing I found correct. Well, do you mean correctly figured up?

Q Yes. A Well, yes, of course they were correct. There might have been a little error here and there, but that did not amount to a great deal; it might have been a few cents or a dollar or two, but in the footing it was correct.

40 Q If you had the book before you you could go through and do the same thing for the other years? A Yes.

Rosa Diffany.

Q From 1917 right down to date? A Yes.

Q Have you any knowledge as to how long they continued to manufacture bag frames? A To manufacture them—to actually manufacture them?

10 Q Yes. A Well, I don't think they manufactured after 1916—manufactured—but he sold the finished stuff. 10

Q Did you manufacture or make any during 1916? A Very little.

Q Instead of saying "very little" can you give us any idea in dollars and cents? A No; I could not do that.

20 Q And that manufacturing was all done in 1916, before you started to make shaving stands, was it not? A No doubt it was. A little bit might have been manufactured of course, but not to any extent. 20

Q So that the sales of bag frames that were made after 1916 were the sales of bag frames that had been manufactured before? A Yes. Mostly so, you know.

Q The books show, do they not, what sales of bag frames there were, and sales of that nature? A Yes, sir.

30 Q Do you know anything about Mr. Diffany's advances after 1916, that is, moneys that he advanced to this joint business? A Yes. 30

Q And moneys that he withdrew to pay his obligations with? A Yes.

Q Well, now, the only record of those advances is what has been produced, is it not, in evidence? A Yes.

40 Q At the time this business was started, I believe it has been testified that there was a loan at the bank of some \$5,000, was there not? A How much do you say? 40

Rosa Diffany.

Q Somewhere around \$5,000 in round figures.
A What is that?

Q I say, at the time this joint business was started, Mr. Diffany testified something about a loan of some \$5,000? A Did Mr. Diffany testify that? I don't know that he testified it.

10 Q You don't know about that obligation? A I don't know that Mr. Diffany testified to it.

Q Do you know about an obligation that he owed the bank of some \$5,000? A Yes.

Q That was owing previous to the time that this joint business was started, was it not? A Yes.

Q And that was subsequently repaid, was it not? A Yes; it was all paid in the early part of the following year.

20 Q The early part of the following year—what year? A 1917 is the following year to 1916.

Q And where was it paid from? A No doubt with his own moneys.

Q And have you any knowledge of the money that Mr. Diffany withdrew from the business except the record that has been previously offered here? A He didn't draw any money.

Q He didn't draw any? A He only drew— You just put the book in evidence.

30 Q The money that is shown in that little book? A Yes.

Q There were some concerns that he did business with before the joint business was started? A What was that?

Q Bannister & Pollard and a few such concerns as that. A Well, I believe you have them all along. That is a continuous account.

Q Well, there was more than one of them that were continuous accounts, were there? A

40 Surely.

Rosa Diffany.

Q Do you know whether or not Mr. Diffany drew regularly from the business or did he draw odd amounts at odd times? A Very irregular, usually in a bulk sum. The business did not allow it.

(Statement is offered in evidence and 10 marked Exhibit C. 3, May 22, 1925.)

Q Now, you have before you the book that you were talking about. Will you indicate either from that or from any other record that you have the parts wherein you found Mr. Osborne's figures incorrect for any year? A Well, Mr. Osborne took the footings, as I said. When I figured them up I then found that they corresponded with Mr. Osborne's figures, but I found that all these (indicating a book) that are checked off belonged to Mr. Diffany. These are Mr. Diffany's sales, frames, all of this here, and at the end of the month sometimes, not always at the end, Mr. Diffany's rent, \$137.50, appears every month. I think I said that. That was all included in it, because the footings correspond with the sales that Mr. Osborne claimed.

Q You made up, did you not, and submitted to Mr. O'Leary or his concern, a statement of the sum total of these items? A The sum total of these incorrect items? 30

Q The incorrect items? A Yes.

Q Have you that? A I haven't it now.

Q Is it here with your papers? A I don't know. I haven't the papers here.

Q Well, were those papers returned to you by Mr. O'Leary? A Returned to me, why surely, he must have or sent them up.

Q (Showing witness.) Look at this paper and see if you recognize that as a copy of those 40

Rosa Diffany.

items? A Yes, but this is not the statement that was put in. The last statement shows everything in detail. No, this isn't it. It has been discovered since that—

Q (Interrupting.) Look at these two and see if either one of them is what you have in mind?

10 A Well, whose is this?

Q That is a copy of yours. A Did Mr. Beers submit this to you?

Q This is Mr. Beers'. A Yes.

Q Then it is correct? A Yes.

By Mr. Beers.

Q Is this based on Mr. Osborne's figures? A This is based on Mr. Osborne's figures. I do not say Mr. Osborne's figures are correct.

20 *By Mr. Schenck.*

Q You say that that is a correct statement, or embodies a correct statement of those items that you say that Mr. Osborne erroneously included? A Yes.

Q And that shows it for every year, does it not? A Yes.

Q And it also included the sum total of the rents for every year? A Yes.

30 Q That were erroneously included? A Yes.

Q Was there anything else erroneously included that you recall now? A Well, if there is, it is in this.

Q So that, except for those erroneous items about which we have just been talking, the Osborne figures were correct, were they not? A I could not say they were correct.

40 Q So far as you know, they correspond with the books, don't they? A The footings in the sales book. The ledger I know nothing about.

Rosa Diffany.

Q And these are the statements that were prepared by O'Leary & McNeil, your accountants? A Yes.

Q Do you recall, Mrs. Diffany, whether O'Leary & McNeil returned to you the sheets that indicated these totals that you gave them, or whether they kept them or not? A I don't 10 remember that.

Q Have you looked in your papers to see if you have them recently? A Well, I could not tell you, because this work I have had, it is for 1917—

Q It is in your handwriting? A I imagine it must be as far as I can recall.

Q Did you do the additions yourself? A Yes.

Q Now, rather than have you or Mr. Burke 20 check these books or collect these items together to see whether or not the figure that is contained here is correct, can you submit these sheets of yours if you have them? A You would not understand them.

Q Have you a copy of Mr. Osborne's figures which you took as the basis of what you submitted to O'Leary & McNeil? A I don't know whether I have a copy.

Q Did they return to you the copy that you 30 sent them? A Surely.

Q And if you have that, will you turn it over to Mr. O'Byrne? A With Mr. Beers' permission.

Mr. Beers: I will not let any statement go in that is based upon Mr. Osborne's figures.

Q Well, you went through the book, did you 40 not, and found that Mr. Osborne's figures were

Rosa Diffany.

correct, except in these particulars? A Except the erroneously included items.

Q So that we are talking about the mistakes—there were mistakes, but there were correct figures as well, or at least you produced the correct figures through your accountants, did you not? Did they produce the correct figures? A I had only this book to go by.

Q Will you tell me whether or not that (indicating) is a copy of Osborne's figures that you used in that connection? A Well, I could not tell unless I compared it with this.

Mr. Beers: I submit that anything that is based upon Mr. Osborne's figures, that is, figures or a statement made by him, is incompetent.

A Mr. Osborne's figures for 1923 are in error.

Q And your accountants have shown wherein that is erroneous? A Yes.

Mr. Beers: It is understood that I object to all of this testimony concerning Mr. Osborne's figures.

Q These three papers (indicating) are the ones that you have looked at? A Yes.

Mr. Schenck: I offer them in evidence. The witness has testified the figures are correct except in the particulars wherein she has pointed them out to be erroneous.

Mr. Beers: I object to them going in. What she says as to their being erroneous has nothing to do with the relevancy of Osborne's figures or statements. Mrs. Diffany is not a bookkeeper, and her mere examina-

Edward E. Burke, direct.

tion of the books and her reference to this statement, does not make them evidential.

The Master: I will mark them for identification.

(Statements shown witness marked C. 4 for identification, C. 5 for identification and C. 6 for identification.)

EDWARD E. BURKE, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Schenck.

Q What is your business? A Certified public accountant.

Q Where is your office or place of business? A I am a member of the firm of Balzar & McCarthy, Lincoln Trust Company building, Jersey City.

Q Have you made an examination of the books and records submitted in this case? A I have inspected books and records for the years 1923 and 1924.

Q You have also looked at the other statements? A Well, at certain other papers.

Q Exhibits that have been offered in this case? A They are incomplete.

Q Did you notice any discrepancy or variance between the reports as submitted and the books as you found them, and if so, what? A Yes; there were quite a few differences between the books and the accountants' report as submitted. Among them are the following instances: according to the accountants' report, there were

Edward E. Burke, direct.

no sales. According to the books of Diffany & Company there were sales of \$1,751.60.

In December of 1923 there are purchases in the report of \$484.90; whereas on the books the purchases are only \$298.52.

10 In July of 1923, in the report the sales are \$4,803.77, and in the books they are \$4,987.65.

The expenses for 1923 in the report are \$4,488.96. On the books they are \$3,694.24; but Mr. Schroeder has shown certain items which he claims make up the difference, but which do not appear on the ledger.

In October, 1924, the purchases in the report are \$1,921.19. In the book they are \$2,921.29, which Mr. Schroeder says is due to an error in his figures?

20 In December, 1924, according to the report, there are sales discounts of \$1,094.09; in the books \$92.47; which difference Mr. Schroeder states is made by an adjustment of the amounts brought forward at the beginning of 1924, but which I have not checked.

In the report, December 31, 1924, there is no cash shown on hand in the Manufacturers National Bank; but I understand that that difference is due to an error in typewriting and that the balance shown in the Broad and Market National Bank should be the balance in the Manufacturers. With that adjustment made, that would leave no balance in the Broad and Market Bank; whereas, according to the pass book there is \$287.91 as of September 12, but I understand that that has since been withdrawn. There is no entry shown for it anywhere.

30 The report of December 31, 1924, shows accounts payable \$2,107.08, which does not agree with the ledger, but I imagine Mr. Schroeder,
40

Edward E. Burke, direct.

with the data he has here today, can clear up that item for me.

There are numerous instances where the entries made in the cash book are absolutely incorrect. The amounts drawn for pay-roll are drawn in round figures, for instance, \$275 or \$400, whatever the case may be, and the actual pay-roll is shown in the cash book and debited to expense, is less than these amounts. If, on the basis of the figures which Mr. Osborne has evidently prepared, that is included as an instance of such funds disbursed, the unaccounted for balance must represent some personal withdrawals of Mr. Diffany or else some expense for which money was drawn and no record kept of that expense.

20 Mr. Beers: I object to any testimony concerning Osborne's figures. Is it understood that I am objecting to any testimony with reference to Mr. Osborne's figures?

The Master: Yes; that is understood.

Q You may proceed. A That will be either some amount which is unaccounted for or else it is some expense which is not shown on the books. In that particular the cash book does not agree with the actual amount which has been withdrawn; the balance as carried on the cash book does not agree with the accountants' report, nor does it agree with the bank.

30 One thing I would like understood in my testimony here is that the books are kept on a single entry basis and there is no check upon the accuracy of the work and that any errors in the calculations on the books cannot be directly checked unless there is an actual going
40

Edward E. Burke, cross.

back and setting up of accounts. The system does not post everything and does not carry any plant or equipment or inventory or anything of that sort on the books.

Q Did you find anything in relation to insurance premiums having been paid? A Yes; 10
there were insurance premiums which had been paid through the account of Diffany & Company, charged to expense on their books, and evidently was not—there was testimony given by Mr. Diffany that the machinery was his property; if Diffany & Company was not the owner of the machinery, there is no reason for them being charged with the insurance premiums on that machinery.

Q Are there any other discrepancies or variations between the records and the reports that 20
you can point out at this time? A Well, there are several small items, but I have just given—

Q You perhaps can check these with Mr. Schroeder. A Yes.

Q As I understand, you and he are now checking up on these variances? A Yes. A great many of them may be cleared up by the papers which Mr. Schroeder has.

Q You have not made any calculation, have 30
you, as to the difference between checks drawn to cover pay-rolls and the pay-rolls as entered? A I have not. That could be easily done. That is just a question of listing fifty-two checks—fifty-two amounts that are shown for each year.

Cross examination by Mr. Beers.

Q The books of 1923 and 1924 were kept on 40
an accrual basis, were they not? A These are on an accrual basis, although all accruals are

Edward E. Burke, cross.

not strictly taken into consideration, but they are on a cash basis. When they are not on a cash basis, they become an accrual basis.

Q And you volunteered the opinion that if the machinery were not owned by Diffany & Company, then they had no right to pay the insurance premiums out of Diffany & Company 10
money. A They should not have charged them to the expense account if they paid them; it would have been a withdrawal for Mr. Diffany's account personally.

Q You are trying to give an opinion as to what the law is? A No; I am not trying to give any opinion either. I am giving an accounting view of it.

Q You do not understand that Mr. Osborne was not a member of the firm of Diffany & Company? A Well, there is no firm as I understand it. I understand that it is no firm; 20
that it is Mr. Diffany's personal business.

Q May I ask you, Mr. Burke, what profit, if any, did you find for the years 1923 and 1924?

Mr. Schenck: That is not cross examination. I have offered him only to show profit or loss for the other years, but I expect, before we get through, to submit evidence in 30
that connection.

A For the year 1923, the net profit is \$4,438.64.

Q And 1924? A A loss of \$4,748.24 for the entire year of 1924, that is, not taking into consideration the point of the date of death, or anything like that.

(Adjourned to June 12, 1925, 2 P. M.)

Joseph A. Schroeder, further direct.

Met pursuant to adjournment this twelfth day of June, 1925, at two o'clock in the afternoon.

Appearances as heretofore.

10 JOSEPH SCHROEDER, heretofore sworn as a witness on the part of the defendant, recalled.

Further direct examination by Mr. Beers.

Q Did you make an effort to ascertain what stock was on hand at the time of the death of Mr. Osborne, November 25, 1924? A I did.

Q And what is the result of your efforts and examination? A The result was \$1,392.96.

20 Q How did you ascertain that? A Well, we ascertained that on the assumption that they carried approximately about a month's supply, so we divided the total purchases for the year by twelve, which would give us the figure \$1,392.96.

Q When did you make this ascertainment? A I think that was two days ago.

By Mr. Schenck.

30 Q That inventory that you give is not based on an actual inventory of the property on hand at the Diffany plant? A No; not at all.

Q And is really what you might term a book-keeping inventory? A No; an estimated inventory.

Q And really has no relation to the stock on hand except as it is a calculation to that end? A That is correct. You see, it is really impossible to get an inventory at this date.

40

Henry Diffany, further cross.

By Mr. Beers.

Q How nearly do you think these figures \$1,392.96 represent the actual figures? A I think they are in excess of the actual figures.

Q Why do you think that? A Because Mr. Diffany told me from his experience that he carries around \$1,000 or \$1,200. That would be his approximate inventory monthly at any time. 10

Q Were there any records which you examined at the time of making up this statement, which would lead you to the conclusion that the basis on which you made your ascertainment was a fair one? A The only record would be the closing inventory at the end of 1924, which was just a month later than Mr. Osborne's death.

Mr. Schenck: I call upon the other side to produce the statements that we argued so much about in the past, that indicate the sum total of the erroneous amounts Mrs. Diffany has discovered in Mr. Osborne's figures. 20

Mr. Beers: The other side has no statement to offer in evidence based upon any figures of the late Mr. Osborne, because such a statement would be incompetent. 30

HENRY DIFFANY, the defendant, recalled and further examined as follows:

Further cross examination by Mr. Schenck.

Q When did you last make an inventory? A Latter part of the year.

Q You made none at all around the time of Mr. Osborne's death? A No, sir. 40

Henry Diffany, further cross.

Q That is a busy season, is it not? There is a considerable quantity of finished stock on hand, is there not? A No, sir; there is not.

Q You will say there was not at the time of Mr. Osborne's death? A No, sir; not at the end of the year.

10 Q You did not keep a monthly inventory; you only made one at the beginning of the year? A Yes.

Q That was really for the end of the year preceding? A Yes.

Q Did your factory work nights during the Fall of 1924? A Yes; a few, every once in a while.

Q How frequently? A Three days I guess.

Q Three days a week? A About that.

20 Q How long did you work nights? A An hour and a half.

Q Over what period of months? A Well, maybe November.

Q Just in November? A October maybe, but not all the time, just when he had a rush order. I don't think any of us worked night time in December.

30 Q Did you check over the sales book with Mrs. Diffany to determine the figures on bag frames that had been sold that Mr. Osborne has included in his figures? A Yes.

Q You also checked over the amounts of your advances to the business, did you not, in that same connection? A No.

Q I mean you went over, with your wife, the amounts of money that you had advanced to the business? A I had vouchers for that.

40 Q You found that he had not made any allowance in his figures for that? A No; he didn't make allowance.

Rosa Diffany, further cross.

Q Have you found any more of the monthly statements that were prepared by you for Mr. Smith than those you produced here? A No.

Q Have you found anything further in reference to the insurance loss and inventory, than you have produced? A No.

Q You haven't any proofs of loss or any papers in connection with fire loss? A No. 10

Mr. Beers: I might say to the Master that the other side wished to know whether Mr. Smith, who it was said helped to make up the proof of loss, has his working sheets. I wrote to Mr. Smith at Hartford, Connecticut, and received a reply, and this reply I sent to Mr. Schenck. Mr. Smith, as I recall it, stated that he merely assisted in making it up; that he hadn't any working sheets. The matter has passed from his memory. 20

ROSA DIFFANY, a witness heretofore sworn on the part of the defendant, recalled and further examined as follows:

Further cross examination by Mr. Schenck. 30

Mr. Beers: I object to any questions being asked Mrs. Diffany because it has not been proven that she is qualified to testify here. She is not an employee of the business, nor is she an expert accountant.

Q You did go over this sales book, Exhibit C. 1, and this book, Exhibit C. 2, did you not, in connection with ascertaining whether Mr. Os- 40

Rosa Diffany, further cross.

borne had correctly determined the amount of sales? A Yes.

Q For the year 1917 you found, did you not, that he had included the rent received from the tenant in the building owned by Mr. Diffany?

A Yes.

10 Q \$1,611.55? A Yes.

Q You found also that he had included sales from Mr. Diffany's novelty business, of \$1,174.53? A Yes. I imagine he did. I don't know. I imagine those are the correct figures; I cannot tell off-hand.

Q I don't want you to testify to something that is not so. Just look at these figures. A Unfortunately I left my glasses up in Millburn; so I cannot see.

20 Q If that figure appears as being reported by O'Leary and McNeil, that is correct, is it?

A That is correct.

Q You gave them these figures?

30 Mr. Beers: I object. We cannot be bound by any statement made by O'Leary and McNeil or by any testimony on the part of this witness as to what is upon any statement made by O'Leary and McNeil; this is all based on the assumption that the statement which Mr. Osborne got up is a correct one.

Mr. Schenck: I am asking her about the things that Mr. Osborne erroneously included.

Mr. Beers: This witness is not competent to testify now as to anything contained in a paper made by O'Leary and McNeil.

40 Q You went over the books to ascertain the amounts of rents and the amounts of bag frame

Rosa Diffany, further cross.

sales that Mr. Osborne had included, did you not? A Yes.

Mr. Beers: I object. She is not a book-keeper. She is not competent to testify. If she saw fit to go over these books in connection with a statement made by Mr. Osborne, the defendant, Mr. Diffany, cannot be bound thereby. She is not called as an expert. It is only on the ground that she is an expert that she can be qualified as a witness. 10

The Master: Objection overruled.

Q When you found that in the year 1917 Mr. Diffany had erroneously included \$1,174.53 in bag frame sales in his amount of sales, and you had also to deduct from that the discount that he allowed as well, which was two per cent. on eleven hundred dollars, to the amount of \$55.75? 20

Mr. Beers: Is it understood that my objection goes to any testimony on the part of Mrs. Diffany as to the result of her examination of papers in connection with this Osborne statement? She is not an expert. 30

The Master: Yes.

Q You marked on this statement in lead pencil where the rent was included and where the bag frames were included, didn't you? A Yes.

Q You found that Mr. Osborne's totals were correct, except for the fact that he had included these items of rents and bag frames in his totals?

Mr. Beers: Objected to. Mrs. Diffany is not a party. She is not an expert account- 40

Rosa Diffany, further cross.

ant. Mr. Diffany cannot be bound by her answer. If you want Mrs. Diffany to testify that she examined this sales book and that she found entered in the sales book sales of bag frames aggregating \$1,174.33 and rents aggregating \$1,611.65, that is one thing.

10

By Mr. Beers.

Q Whether or not your computation is correct, you don't know? A That I don't know if it is positively correct. I think it is correct.

By Mr. Schenck.

Q You made it for correct? A Yes. I cannot say positively that it is correct, but I think that it is.

20

By Mr. Beers.

Q You began with 1917, as I understand it, Mrs. Diffany. You say that this sales book shows an entry of rents received from J. C. Blevney, the tenant in the building owned by Mr. Diffany, amounting to \$1,611.65, and sales from Diffany bag frames and novelties of \$1,174.33. You say that is so, do you? A Nearly correct, as near as I know.

30

Q And that this sales book shows the sales from Mr. Diffany's business for 1918 amounted to \$1,123.81 and a discount of \$22.48? A Yes. The building was sold in 1918—no rent by way of income but we paid rent but we have not charged up the rent.

Q This sales book shows, does it, that in 1919, there were sales in connection with Mr. Diffany's business amounting to \$667.80; is that right? A As near as I know.

40

Rosa Diffany, further cross.

Q As near as you know, from your examination of the books— A I did this very quickly.

Q 1920, one month's rent, amounting to— A There was rent in 1919 also.

Q You mean entered in the book? A That was not entered, but should have been entered.

Q You mean rents were not entered in this book? A Yes; rents that should have been entered and were not.

10

By Mr. Beers.

Q For 1919 the book shows rent paid out, six months, at \$150, making \$900? A No; that is not included. It was not entered in the book. It has to be deducted.

Q It has to be taken as a charge against profits, this item of \$900? A That is correct.

20

Q 1920, one month's rent at \$150, which also should be charged against any profits? A Yes.

Q 1921, the sales book shows an item of elevator repairs amounting to \$53 and rent for two months at \$150, amounting to \$300. That is to be charged against profits? A Yes.

Q 1922? A There was none.

(TESTIMONY CLOSED.)

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Henry Diffany, direct.

Met on request of Master this thirtieth day of April, 1926, at three o'clock in the afternoon.

Appearances as heretofore.

10 HENRY DIFFANY, the defendant, recalled and further examined as follows:

By Mr. Beers.

Q As to the item of \$665 paid to O'Leary and McNeil, what was that for? A Well, making up a statement.

Q In connection with this account? A Yes.

Q Mr. O'Byrne, the master, desired to ask you some questions about the bank statements? A I have been to the bank, and they said that—

20 Q You have been to the bank to get the statement and they said it would take how long? A It will take three to four weeks.

Q And you have told them to get the statements out for you? A They said they would start when I told them. I will get them.

By the Master.

30 Q Do you mean that the \$665 was paid to O'Leary and McNeil for the accounts that are filed in this case? A Yes. I think he charged something more for over time. He had to work in the morning until three o'clock.

Q \$665 was spent in connection with the preparation of the account in this case? A Yes, sir.

40 Q Do you mind telling me how you came to file an income tax return for the year 1923 when you had filed none before that? A I did not.

Henry Diffany, direct.

Q Are these two reports, the one for 1923 and the one for 1924, the only reports of income that you had filed with the internal revenue department? A Yes.

Q I have gone through the sales book, Exhibit C. 2, and in the margin alongside of each charge there are certain figures such as usually 10 indicate posting notations made by bookkeepers. Do you know who made these notations and what they indicate? A Mr. Smith made them and they indicate posting to the ledger.

Q On many pages are cross marks and notations in red lead pencil. Do you know who made those marks and what they indicate? A I made some and Mrs. Diffany made some. This on page 18 is my handwriting.

Q I understood you to say that this sales 20 book does not show returns. I have found at the end of each month's entries a list of returns and the total of the returns is deducted from the total of sales. A Returns, but not all. Those are in Smith's writing.

Q Pick out the bag frame business or indicate who the bag frame customers were. A They are checked with a red mark.

(TESTIMONY CLOSED.)

30

40

Master's Report on Accounting.

in his business relations with said S. Harvey Osborne or in compliance with the order of reference in this cause; that although he had done a gross business of many thousands of dollars per year, he had never filed an income tax return for any year prior to the year 1923, return for which year was presumably filed in the early part of 1924; that his bookkeeping for the period covered by the accounting was done by a man named Smith, the owner of a department store in Hartford, Connecticut, who came to defendant's place of business in Newark once a month for the purpose of posting defendant's books, and that said Smith was not produced as a witness before me; that according to defendant's testimony, in the adjustment of the fire loss of November 13, 1923, defendant collected \$11,000, the full amount of two policies of insurance, each of which covered machinery and merchandise; that in his proof of loss defendant stated the sound value of machinery to have been \$14,332.91 and his loss \$9,888.61, yet in his testimony on this accounting he says that within a period of two or three months he had salvaged the machinery and had made it as sound as it was before the fire; that a great deal of testimony, throughout the several hearings before me, was given by an accountant in the employ of a firm of accountants who had been engaged by defendant to prepare the income tax returns for the years 1923 and 1924, both of which returns seem to have been prepared for the purpose of showing that defendant's business had been conducted at a loss during said years.

I do further report that throughout the taking of testimony on this accounting defendant was

Master's Report on Accounting.

recalled many times but at no time gave the master any real assistance; that apparently relying on information given him by the accountants who had prepared his income tax returns for 1923 and 1924, he insisted that there was no money due said S. Harvey Osborne, although he admitted that at one time shortly before said S. Harvey Osborne brought suit, he had offered to divide \$15,000 equally between himself and said Osborne.

I do further report that under the circumstances for the purpose of arriving at a statement of account between said S. Harvey Osborne and the said defendant, "I have accepted Exhibit D. 8, of April 3, 1925, as a true statement of the condition of the business of defendant as of January 1, 1924, except as to the valuation of machinery, which in said exhibit is given as \$18,000; that according to the testimony, \$18,000 is the valuation as of March 1, 1913; that for the purpose of this accounting I have deducted from said figure the sum of \$2,575 for depreciation for two years and nine months at 5% per year, giving \$15,425 as the value of said machinery January 1, 1916; and that from the beginning of 1916 to the end of 1923 I have allowed defendant for depreciation on said machinery the sum of \$6,170."

And I do find and report that during the period covered by this accounting the said S. Harvey Osborne drew from the funds of the business the sum of \$19,676.17 and that the said Diffany drew the sum of \$14,624.89; that the said Osborne drew \$5,051.28 in excess of the amount drawn by the said Diffany and that said Diffany is entitled to an allowance of \$5,051.28 by reason of such excess, which allowance I have made him in this account.

Master's Report on Accounting.

And I do further find and report that during the year 1924 the said S. Harvey Osborne drew \$612.32 in excess of the amount to which he was entitled for that year, and that I have charged him with said amount.

10 And I do further find and report that the value of merchandise on hand on the day of the death of said S. Harvey Osborne, November 25, 1924, is the sum of \$1,392.96, and that I have given the complainant credit for one-half of said amount, to wit, \$696.48.

20 And I do further find and report that defendant produced before me seven cancelled checks drawn on his personal account during the years 1918, 1919 and 1920, aggregating \$2,704.01, which he testified represented loans made by him to the business of Diffany & Company and which loans had not been repaid; and I do report that I am not convinced either that said cancelled checks represent loans or if they do represent loans that such loans have not been repaid to the said Diffany, and I have not made him any allowance for said amount of \$2,704.01.

30 And I do further report that defendant made sales of merchandise not within the agreement between defendant and Osborne, in the amount of \$2,966.14 appearing on the sales book, and also that defendant is personally entitled to certain rents in the amount of \$3,000 also appearing on said sales book; and I do find and report that I am not satisfied that these moneys entered into the funds of the business conducted under the agreement between said Diffany and Osborne, and I report that I have not made any allowance to the said Diffany for the said sums of \$2,966.14 for merchandise sales and \$3,000
40 for rents.

Master's Report on Accounting.

And I do further find and report that said Diffany repaid to a bank during the period covered by this accounting a loan of \$5,000 which had been made to him before entering into the agreement with the said S. Harvey Osborne, but I am not satisfied that such repayment was made out of moneys subject to this accounting, 10 and I do report that I have not charged said \$5,000 against said Diffany on this accounting.

And I do further report that I have charged the defendant, in addition to the sum of \$11,000 proceeds of insurance policies as aforesaid, with the following amounts as of January 1, 1924: Cash in Broad and Market National Bank, \$3,983.89; cash in Merchants and Manufacturers National Bank, \$8,318.45; accounts receivable, \$3,239.75, and merchandise inventory, \$834.51; 20 and I do report that, including said sum of \$11,000, I have charged said defendant with a total of \$27,376.60.

And I do further report that I have made to said defendant the following allowances: Accounts payable, \$774.37; depreciation on machinery, \$6,170, and for Osborne's excess drawings, \$5,051.28, being a total of \$11,995.65.

And I do find and report that after deducting said allowances amounting to \$11,995.65 from 30 said \$27,376.60, there is left the sum of \$15,380.95 to be divided equally between the said Diffany and the said Osborne, and that upon such division said Osborne was entitled to the sum of \$7,690.48 as of January 1, 1924; that to this sum I have added \$696.48, being one-half of the value of merchandise on hand November 26, 1924, making a total of \$8,382.96; that I have deducted from said total the sum of \$612.32, Osborne's excess drawings for 1924, which leaves justly 40

Master's Report on Accounting.

due from said Diffany to said Osborne, on this accounting, the sum of \$7,770.64.

10 And I do find and report that there is justly due from defendant to complainant, as administratrix of said S. Harvey Osborne, the sum of \$7,770.64 with interest from the 25th day of November, 1924, at the rate of six per cent.

All of which is respectfully submitted this twentieth day of October, 1926.

EDWARD O'BYRNE,
Special Master.

SCHEDULE.

20

ACCOUNT BETWEEN HENRY DIFFANY AND S. HARVEY OSBORNE AS CONSTRUCTED FROM DEFENDANT'S EXHIBITS D-8 and D-9, April 3, 1925.

Dr.

1924		
Jan. 1,	Proceeds of insurance policies.....	\$11,000.00
	Cash in Broad and Market National Bank.....	3,983.89
	Cash in Merchants and Manufacturers National Bank	8,318.45
	Accounts Receivable	3,239.75
	Merchandise Inventory	834.51
30		<hr/>
		\$27,376.60

Cr.

	Accounts payable	774.37	
	Depreciation on machinery	6,170.00	6,994.37
			<hr/>
			\$20,432.23
	Osborne's drawings	19,676.17	
	Diffany's drawings	14,624.89	
			<hr/>
		5,051.28	
	Diffany is entitled to credit for.....	5,051.28	
40			<hr/>
			\$15,380.95

Master's Report on Accounting.

Jan. 1, 1924,	Osborne is entitled to one-half of \$15,380.95	7,690.48
Nov. 25, 1924,	Osborne is entitled to one-half of value of merchandise on hand.....	696.48
		<hr/>
		8,382.96

Nov. 25, 1924,	Deduct Osborne's excess drawings..	612.32
		<hr/>
	Due from Diffany to Osborne.....	\$ 7,770.64

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MASTER'S FEES.

3 sittings @ \$6.00.....	\$18.00	
Swearing witnesses:		
4 for complt. @ 25¢.....	1.00	
2 for defdt. @ 25¢.....	.50	
Marking exhibits:		
12 for complt. @ 15¢.....	1.80	
10 for defdt. @ 15¢.....	1.50	20
415 folios testimony on part of complt. @ 30¢	124.50	
35 folios testimony on part of defdt. @ 30¢	10.50	
Making report	10.00	
Drawing report; 19 folios @ 40¢.....	7.60	
Schedule20	
	<hr/>	
	\$175.60	

EDWARD O'BYRNE,
Special Master.

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Exceptions by Defendant to Master's Report.

**EXCEPTIONS BY DEFENDANT TO
MASTER'S REPORT.**

Filed November 23, 1926.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>EDNA C. OSBORNE, administra- trix, etc.,</p> <p style="text-align: center;"><i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>HENRY DIFFANY, <i>et al,</i> <i>Defendants.</i></p>	<p><i>On Bill, etc.</i></p> <p><i>Exceptions by</i> <i>Defendant to</i> <i>Master's</i> <i>Report.</i></p>
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20 The defendant, Henry Diffany, hereby excepts to the report filed in this cause by Edward O'Byrne, one of the Masters in this court, bearing date October 20, 1926, for the following reasons:

1. That the said Master failed to allow this defendant five per cent. depreciation per year on the sum of \$18,000 (the accepted valuation of the machinery on March 1, 1913) from January 1, 1916, to the date of the death of complainant on November 25, 1924, and instead allowed depreciation on \$15,425 at the rate of five per cent. from January 1, 1916, to the end of 1923, making a sum of \$6,170.

2. That the said Master failed to allow this defendant a credit for money loans made to Diffany & Co. during the years 1918, 1919 and 1920 aggregating \$2,704.01.

3. That the said Master failed to allow this
40 defendant the sum of \$2,966.14 for sales of

Exceptions by Defendant to Master's Report.

merchandise made by defendant and not within the agreement between defendant and deceased Osborne as appears on the sales book in evidence in this cause and which entered into the funds of the business conducted under the agreement between this defendant and the deceased Osborne.

4. That said Master failed to allow this defendant a credit of \$3,000 for rents appearing on said sales book and which entered into the funds of the business conducted under the agreement between this defendant and the deceased Osborne.

5. That said Master charged this defendant with the sum of \$11,000, the proceeds of insurance policies, etc., which insurance, as to all except \$834 thereof, covered certain machinery which was the sole property of this defendant, and goods, which were the sole property of this defendant.

6. That the said Master charged this defendant with the sum of \$11,000, the proceeds of the insurance policies, etc., whereas he should have charged this defendant with only \$834, being the value of the goods which were the property of this defendant and complainant.

7. That said Master accepted Schedule D. 8 of April 3, 1925, as a true statement of the condition of business of this defendant as of January 1, 1924, instead of accepted said statement and the statement Exhibit D. 9, showing the condition of the business as of December 31, 1924.

8. That the said Master failed to charge
40 against the assets of the defendant and com-

Exceptions by Defendant to Master's Report.

10 pliant, as shown by Exhibit D. 8, any loss from said assets by reason of the business conducted during the year 1924; and failed to charge against said assets the loss for that year, ascertained by complainant's accountant to be \$4,758.24 and by defendant's accountant to be \$6,149.61.

LOUIS J. BEERS,
Solicitor of Defendant.

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Conclusions of Vice-Chancellor.

CONCLUSIONS OF VICE-CHANCELLOR.

Filed February 16, 1927.

(Not to be published in any report.)

February 7, 1927.

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IN CHANCERY OF NEW JERSEY.

55-224.

<i>Between</i> EDNA C. OSBORNE, administra- trix, etc., <p style="text-align: center;"><i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> HENRY DIFFANY, <p style="text-align: center;"><i>Defendant.</i></p>	}	<i>On Bill, etc.</i> <i>On</i> <i>Exceptions to</i> <i>Master's</i> <i>Report.</i> <i>Conclusions.</i>	20
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Messrs. King & Vogt for complainant.

Mr. Louis J. Beers for defendant.

FIELDER, V.-C.

In the bill of complaint filed February 6, 1924, S. Harvey Osborne, complainant, alleged that in the year 1916 he entered into a verbal co-partnership agreement with Henry Diffany, defendant, under which they were to share the profits and losses of a certain business equally, which agreement was still in force and Osborne prayed for an accounting. Diffany answered, denying that a partnership existed and alleging that they entered into an agreement in 1916, which was still in effect, whereby Osborne was employed in the business by Diffany at a salary of \$20 per week and if the net profits of the

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Conclusions of Vice-Chancellor.

business should exceed the sum of \$20 per week, Osborne was to receive one-half of such profits, less said salary, as a commission. Osborne died November 25, 1924 (before final hearing), and his administratrix was substituted as complainant. Upon final hearing this Court found that

10 the agreement was as alleged in Diffany's answer and it was referred to a Special Master to take a mutual account of all dealings and transactions between the parties under said agreement and to ascertain and report what balance appeared to be due from either party to the other. The result of such accounting was that the master reported \$7,770.64 due from Diffany to the complainant and the matter is now before me on exceptions to the report, filed

20 on behalf of Diffany.

Before proceeding to consider the exceptions, it should be observed that Diffany managed the business in question; that its books of accounts and records were kept by him or under his supervision; that all deposits in the business bank accounts were made by him and that he alone signed checks drawn on the bank accounts and he paid all bills for material, labor and other business expenses, including the payments

30 made to Osborne and that he received all money due the business. Osborne appears to have been the salesman of the articles manufactured in the business. In the nine years the business relations continued Diffany settled no account of the business affairs with Osborne, although the latter frequently requested a settlement. Just prior to the commencement of this suit and as a result of a demand made by Osborne, Diffany offered to pay Osborne \$7,500 in settlement of the latter's claim under the agreement, which sum

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Conclusions of Vice-Chancellor.

Osborne refused to accept. Diffany now says that his offer was made at a time when he was unaware that the business had made no profit for the years 1923 and 1924 and that it also was made because he desired to avoid a law suit. He now claims that he owed Osborne nothing; that Osborne was overpaid. A fire in the factory

10 building November 13, 1923, destroyed some books of account and records and Diffany testified that without the destroyed records he can present no financial statement of his dealings with Osborne. He testified at several hearings before the master, at the first of which he produced some books of account and memoranda and as the hearings progressed it appeared that he had other records, books and private memoranda, none of which were produced voluntarily,

20 but only after his examination by counsel disclosed that he had them and production was demanded. He had filed no income tax return for the years 1916 to 1922, inclusive, although it is apparent from the evidence that he had done a gross business annually of many thousands of dollars and that he filed such return for the years 1923 and 1924 for the purpose of showing a loss. During the period covered

30 by the accounting he had employed a bookkeeper who resided in Connecticut, to keep his books, and when he was requested to produce this man as a witness before the master, he declined to do so, although the man was still in his employ and he had produced him at the hearing before this Court. The master reports that Diffany produced his sales book covering the accounting period and a ledger for the years 1922, 1923 and 1924; that Diffany sought to discredit the accuracy of the sales book but offered no aid

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Conclusions of Vice-Chancellor.

in striking therefrom irrelevant or improper items; but after the ledger had been marked in evidence by the master Diffany mutilated it, such mutilation having been done, according to the Diffany's counsel, for the purpose of removing therefrom accounts of business done since
 10 Osborne's death. I have requested Diffany's counsel to produce said ledger before me, but he has failed to do so. The master further reports that Diffany's attitude toward the accounting made it difficult for the master to take an account; that in his opinion Diffany did not act in compliance with the order of this Court that he account and gave no assistance in making up an account. After reading Diffany's testimony before the master I agree with and concur in the
 20 master's criticism of Diffany. While Osborne was alive and was demanding an accounting, Diffany could have prepared one with little difficulty. Osborne, who had access to the sales book, had prepared an account and had submitted it to Diffany. This account was in possession of complainant's counsel at the hearing before the master and he offered to put it in evidence but Diffany's counsel objected and refused to permit Diffany to comment on it. It
 30 seems to me that Osborne's account might have aided the master and if it was incorrect, that Diffany could have shown its inaccuracy without difficulty. Diffany's refusal or neglect to make up an account in Osborne's lifetime and his attitude toward this accounting, does not commend him to me, now that Osborne's lips are sealed.

Exceptions 1, 5 and 6 may be considered together. January 1, 1916, is taken as the date
 40 when the agreement between Osborne and Dif-

Conclusions of Vice-Chancellor.

any went into effect. Prior to that date Diffany had engaged in the manufacture of bag frames and he owned certain machinery which was used after January 1, 1916, for the manufacture of shaving stands, which was the business in which Diffany and Osborne engaged. Diffany discontinued the manufacture of bag frames, but on
 10 January 1, 1916, he had a stock of the manufactured articles on hand, which he proceeded from time to time for his own account and his sales of these frames amounted in 1917 to \$1,174.23; in 1918 to \$1,123.81 and in 1919 to \$667.60. He had no record of bag sales for 1916 nor for any year after 1919. A fire occurred November
 13, 1923, which damaged machinery, manufactured goods and raw material. All were covered
 20 by insurance standing in Diffany's name. In the proofs of loss signed by Diffany he stated his claim on machinery loss to be \$7,000 and \$4,000 on his stock. His claims were settled for the full amount and \$11,000 was paid to him, all of which he deposited in his private account and kept. Because the machinery was owned by
 30 Diffany, I think that the \$7,000 he claimed and received for fire damage thereto belonged to him and that we have therefore no concern with the amount of depreciation to be charged against the machinery. Thereafter he proceeded to salvage the machinery and using his factory employees for that purpose, restored the machinery to such good condition that it was adequate and was used for the purpose of business. In my judgment, the \$7,000 insurance money
 40 Diffany received should have been used by him to salvage the machinery, but the expense of salvage was paid out of the receipts of the business and was charged to operating expenses.

Conclusions of Vice-Chancellor.

This was an improper charge, as against Osborne, but there is no evidence to show how much was paid out on this account and therefore it cannot be made a charge on this accounting against Diffany. The balance of \$4,000 received by Diffany in settlement of the fire loss was claimed by him to cover stock in the factory. He further claims that the value of the stock manufactured and unmanufactured, belonging to the shaving stand business in which he and Osborne were interested, was at the time of the fire but \$835 and that the balance, or \$3,165, covered bag frames which he still had on hand. This claim strikes me as ridiculous. He had ceased manufacturing these frames January 1, 1916, and from his stock on hand he had sold in three years \$2,965.64 worth of frames. We have no record of his sales in 1916 or for any year after 1919. His evidence that nearly eight years after he ceased manufacturing, he still had on hand bag frames to the value of \$3,125, does not appeal to me as credible. If any bag frames were in the factory November 13, 1923, it was because Diffany had found it impossible to sell them and they were shopworn and of no value at the time of the fire. I conclude that the \$4,000 fire loss paid on stock, covered stock manufactured and unmanufactured, purchased with the proceeds of preceding sales of shaving stands and therefore belonged to the shaving stand business. I disagree with the master that Diffany should be charged with \$11,000, proceeds of insurance policies, and credited with \$6,170, depreciation on machinery and I find instead that Diffany should be charged with \$4,000 proceeds of insurance covering stock.

Conclusions of Vice-Chancellor.

Exception 2 is that the master failed to allow Diffany credit for money he claimed to have loaned the business during the years 1918, 1919 and 1920, aggregating \$2,704.01.

Diffany's testimony, accompanied by the production of certain checks, comprises all there was before the master to prove these alleged loans. The checks produced before him totalled \$2,741.01 (not \$2,704.01) of which but \$2,250 were drawn to the order of Diffany & Company, the others being to other payees. He claimed to have loaned \$200 in 1918, \$1,841.01 in 1919 and \$700 in 1920. The check for the \$200 loan in 1918 was to a payee other than Diffany & Company and in that year Diffany & Osborne drew \$2,495.94 from the earnings of the business. In 1919 they drew \$7,090.24 from such earnings; in 1920 they drew \$6,467.05 and in 1921, \$5,171.07. January 1, 1923, the business had a bank balance of \$9,197.42; its bank balance December 31, 1923, was \$14,983.89 and December 31, 1924, it was \$6,589.93. If during the years 1918, 1919 and 1920 it was necessary for Diffany to loan money to the business (it would seem from the drawings that it was not necessary) the business had ample funds thereafter with which to repay such loans. As I have said, Diffany kept these books of account, deposited all money in bank and had sole and unrestricted power to draw against the bank account and upon all the evidence I am not willing to believe he made these loans to the business, or if he did, that he did not repay himself. He gave his testimony concerning these loans March 27, 1925. I do not think he is the type of man who would permit a debt due him to become so stale, especially

Conclusions of Vice-Chancellor.

when he had control of funds out of which he could pay himself. This exception is disallowed.

Exceptions 3 and 4 are that the master failed to allow Diffany credit for two items, one of \$2,966.14 for sales of merchandise made by him, not within the agreement made between him and Osborne, and the other of \$3,000 for rents belonging to Diffany, both of which items appear on the sales book of the business.

These totals are made up from various items appearing on the sales book, being items which Diffany testified did not properly belong in the book, because they had no connection with the business in which he and Osborne were concerned. I find no testimony to show that these totals actually went into the business account and were treated as profits of the business, or that Osborne received any portion thereof. Diffany was the person who received this money as it came in and he kept the books and the bank accounts. He says these moneys belonged to him and not to the business. I cannot assume in the absence of evidence, that he deposited his own money in the business bank account and not in his own account. The record on the books is merely a record that he received the money and is not a record of the disposition made of it. Perhaps the ledger which he mutilated would disclose the truth. The exceptions are disallowed.

Exceptions 7 and 8 need not be here repeated because I find no merit in them. I would observe that Diffany is not entitled to credit for any loss sustained by the business for the year 1924, because under the terms of his agreement with Osborne, the latter was not a partner and was not to share losses; he was to share only in profits. The exceptions are disallowed.

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Conclusions of Vice-Chancellor.

No exception was filed by complainant or defendant to the master's finding with respect to the drawings from the business, by Osborne of \$19,676.17 and by Diffany of \$14,624.89, or to the credit of \$5,051.28 given by the master to Diffany because of Osborne's excess drawings. I would point out that under the agreement between Osborne and Diffany the former was entitled to draw \$20 per week, and thereafter to share equally with Diffany in the profits. The amount charged against Osborne for his drawings include the \$20 per week, and that weekly sum, it seems to me, should have been deducted from his drawings before determining whether or not his drawings were more or less than Diffany's. Further, Osborne's drawings probably include various items of money disbursed by him for expenses. However, no exception having been taken to the master's finding in this respect, the same will stand.

I annex a schedule herewith in the form adopted by the master, to show the result of my findings on the exceptions. It will appear from this schedule that Diffany is indebted to the complainant in \$7,359.64, to which interest from November 25, 1924, should be added.

Account between Henry Diffany and S. Harvey Osborne: 30

Dr.	
1924	
Jany. 1, Proceeds of insurance policies for damage to stock	\$4,000.00
Cash in Broad & Market National Bank..	3,983.89
Cash in Merchants & Manufacturers National Bank	8,318.45
Accounts receivable	3,239.75
Merchandise inventory	834.51
	\$20,376.60

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Conclusions of Vice-Chancellor.

	Cr.		
	Accounts payable	774.37	
			\$19,602.23
	Osborne's drawings	\$19,676.17	
	Diffany's drawings	14,624.89	
			\$ 5,0512.28
10	Diffany is entitled to credit for.....	5,051.28	
			\$14,550.95
	Jany. 1, 1924, Osborne is entitled to one half of \$14,550.95	7,275.48	
	Nov. 25, 1924, Osborne is entitled to one half of value of merchandise on hand	696.48	
			\$ 7,971.26
	Nov. 25, 1924, Deduct Osborne's excess drawings	612.32	
20	Due from Diffany to Osborne.....	\$ 7,359.64	

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Final Decree.

FINAL DECREE.

Filed February 28, 1927.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>EDNA C. OSBORNE, administra- trix of the Estate of S. Harvey Osborne, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>HENRY DIFFANY, <i>Defendant.</i></p>	}	<p>10</p> <p><i>On Bill, etc.</i></p> <p><i>Final Decree.</i></p>
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This matter being opened to the Court by 20
King and Vogt, solicitors for and of counsel
with the complainant, upon notice to and in the
presence of Louis J. Beers, solicitor for and of
counsel with the defendant, and it appearing
that by decree herein, under date of February
19, 1925, it was referred to Edward O'Byrne,
Esq., one of the Special Masters of this Court,
to take a mutual account of the dealings and
transactions between S. Harvey Osborne and the
defendant, under and by virtue of the terms of 30
an agreement between them made in the year
1916, and to report what upon such accounting
appears to be due each party to the other, and
also the balance which upon said account shall
appear to be due from each party to the other,
and to make his report with all convenient speed;
and it appearing that said special master has
taken the evidence of the various witnesses and
received various exhibits produced at frequent
and many hearings before him in said cause, and 40

Final Decree.

after due consideration of the matter has filed his report in said cause, dated October 20, 1926, wherein and whereby it appears that there is due from the defendant to the complainant as administratrix of the estate of said Harvey S. Osborne the sum of \$7,770.64, with interest from 10 November 25, 1924, at the rate of 6% per annum; and it appearing that the order nisi to confirm said master's report, made October 20, 1926, has been duly served on the defendant, Henry Diffany, and the Court having duly considered said report and the exceptions filed thereto by said defendant, Henry Diffany, and having heard and considered the arguments of counsel, and the Court being of the opinion that the defendant should not be charged with \$11,000, proceeds of insurance policies, and credited with 20 \$6,170, depreciation on machinery, as indicated by said master's report, but instead, said defendant should be charged with \$4,000, proceeds of insurance covering stock, and the amount accordingly due from the defendant to the complainant is \$7,359.64 computed as follows:

Dr.

	1924	
	Jany. 1, Proceeds of insurance policies for damage to stock	\$4,000.00
30	Cash in Broad & Market National Bank..	3,983.89
	Cash in Merchants & Manufacturers National Bank	8,318.45
	Accounts receivable	3,239.75
	Merchandise inventory	834.51
		<hr/>
		\$20,376.60

Final Decree.

	Cr.	
	Accounts payable	774.37
		<hr/>
		\$19,602.23
	Osborne's drawings	\$19,676.17
	Diffany's drawings	14,624.89
		<hr/>
		\$ 5,051.28
	Diffany is entitled to credit for.....	5,051.28
		<hr/>
		\$14,550.95
	1924.	
	Jany. 1, Osborne is entitled to one half of \$14,550.95	7,275.48
	1924.	
	Nov. 25, Osborne is entitled to one half of value of merchandise on hand	696.48
		<hr/>
		\$ 7,971.26
	1924.	
	Nov. 25, Deduct Osborne's excess drawings	612.32
		<hr/>
	Due from Diffany to Osborne.....	\$ 7,359.64

and the Court being satisfied that said master's report is in all other things true and correct, and should be ratified and confirmed;

It is, on this 28th day of February, A. D. One Thousand Nine Hundred and Twenty-seven, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that said master's report and all the matters and things therein contained do stand ratified and confirmed; and that it be and is hereby ORDERED, ADJUDGED and DECREED that there is due to the complainant, Edna C. Osborne, administratrix of the estate of S. Harvey Osborne, from the defendant, Henry Diffany, the sum of \$7,359.64, with interest from the 25th day of November, 1924, at the rate of 6% per annum, together with her costs in this suit to be taxed.

Final Decree.

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that for his services in connection with the making of said report, said special master be allowed the sum of \$200 over and above the costs allowed him by law, which said sum shall be included in and taxed with the costs to be paid by the defendant to the complainant; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the sum of \$600 be allowed and paid to the solicitors for the complainant as a counsel fee in said cause, to be likewise included in the taxed bill of costs to be paid by said defendant; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the said defendant, Henry Diffany, within 30 days after service upon him of true, but uncertified, copies of the decree and of said taxed costs, pay to the complainant the sum of \$7,359.64, with interest from November 25, 1924, due as aforesaid, and said taxed costs, and that in default of such payment, execution issue against the goods and chattels, lands, tenements, hereditaments and real estate of said defendant, Henry Diffany, directed to the sheriff of the County of Essex, to make said sum of \$7,359.64, together with interest thereon, as aforesaid, and said taxed costs, according to the rules and practices of this Court.

E. R. WALKER,
C.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

A true copy,

THOMAS BARBER,
Clerk.

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Notice of Appeal.

NOTICE OF APPEAL.

Filed July 23, 1927.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i> EDNA C. OSBORNE, administra- trix of the Estate of S. Harvey Osborne, <i>Complainant,</i> <i>and</i> HENRY DIFFANY, <i>Defendant.</i></p>	<p>} <i>On Bill, etc.</i> } <i>Notice of</i> } <i>Appeal.</i></p>	<p>10</p>
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To KING & VOGT, solicitors of the complainant. 20

SIRS:

Please take notice that the defendant appeals to the New Jersey Court of Errors and Appeals from the final decree entered in the Court of Chancery in the above-entitled cause, by his Honor, Edwin Robert Walker, Chancellor, on the advise of Honorable James F. Fielder, Vice-Chancellor.

Dated May 7, 1927. 30

Respectfully yours,

LOUIS J. BEERS,
Solicitor of the Defendant.

I conceive there is a good cause for appeal in the above-entitled cause.

LOUIS J. BEERS,
Of Counsel with the Defendant.

40

Petition of Appeal.

Service of a copy of the within Notice of Appeal is hereby acknowledged as of this 20th day of June, 1927.

Solicitors of Complainant-Respondent.

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PETITION OF APPEAL.

Filed June 29, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

20 EDNA C. OSBORNE, administratrix of the Estate of S. Harvey Osborne, Complainant-Respondent,

and

HENRY DIFFANY, Defendant-Appellant.

On Bill, etc.

On Appeal from the Court of Chancery.

Petition of Appeal.

30 To the Honorable, the Court of Errors and Appeals in the last resort in all causes:

40 The petition of Henry Diffany, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date February 28, 1927, wherein Edna C. Osborne, administratrix of the Estate of S. Harvey Osborne was complainant and the said Henry Diffany was defendant, in this respect, to wit:

Final Decree.

	Cr.	
Accounts payable	774.37	
	\$19,602.23	
Osborne's drawings	\$19,676.17	
Diffany's drawings	14,624.89	
	\$ 5,051.28	
Diffany is entitled to credit for.....	5,051.28	10
	\$14,550.95	
1924.		
Jany. 1, Osborne is entitled to one half of \$14,550.95	7,275.48	
1924.		
Nov. 25, Osborne is entitled to one half of value of merchandise on hand	696.48	
	\$ 7,971.26	
1924.		
Nov. 25, Deduct Osborne's excess drawings	612.32	
	\$ 7,359.64	20

and the Court being satisfied that said master's report is in all other things true and correct, and should be ratified and confirmed; It is, on this 28th day of February, A. D. One Thousand Nine Hundred and Twenty-seven, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that said master's report and all the matters and things therein contained do stand ratified and confirmed; and that it be and is hereby ORDERED, ADJUDGED and DECREED that there is due to the complainant, Edna C. Osborne, administratrix of the estate of S. Harvey Osborne, from the defendant, Henry Diffany, the sum of \$7,359.64, with interest from the 25th day of November, 1924, at the rate of 6% per annum, together with her costs in this suit to be taxed.

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Final Decree.

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that for his services in connection with the making of said report, said special master be allowed the sum of \$200 over and above the costs allowed him by law, which said sum shall be included in and taxed with the costs to be paid by the defendant to the complainant; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the sum of \$600 be allowed and paid to the solicitors for the complainant as a counsel fee in said cause, to be likewise included in the taxed bill of costs to be paid by said defendant; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the said defendant, Henry Diffany, within 30 days after service upon him of true, but uncertified, copies of the decree and of said taxed costs, pay to the complainant the sum of \$7,359.64, with interest from November 25, 1924, due as aforesaid, and said taxed costs, and that in default of such payment, execution issue against the goods and chattels, lands, tenements, hereditaments and real estate of said defendant, Henry Diffany, directed to the sheriff of the County of Essex, to make said sum of \$7,359.64, together with interest thereon, as aforesaid, and said taxed costs, according to the rules and practices of this Court.

E. R. WALKER,
C.

Respectfully advised,
JAMES F. FIELDER,
V.-C.

A true copy,
THOMAS BARBER,
Clerk.

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Notice of Appeal.

NOTICE OF APPEAL.

Filed July 23, 1927.

IN CHANCERY OF NEW JERSEY.

Between EDNA C. OSBORNE, administra- trix of the Estate of S. Harvey Osborne, Complainant, and HENRY DIFFANY, Defendant.	}	On Bill, etc. Notice of Appeal.	10
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To KING & VOGT, solicitors of the complainant. 20

SIRS:

Please take notice that the defendant appeals to the New Jersey Court of Errors and Appeals from the final decree entered in the Court of Chancery in the above-entitled cause, by his Honor, Edwin Robert Walker, Chancellor, on the advise of Honorable James F. Fielder, Vice-Chancellor.

Dated May 7, 1927. 30

Respectfully yours,
LOUIS J. BEERS,
Solicitor of the Defendant.

I conceive there is a good cause for appeal in the above-entitled cause.

LOUIS J. BEERS,
Of Counsel with the Defendant.

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Petition of Appeal.

Service of a copy of the within Notice of Appeal is hereby acknowledged as of this 20th day of June, 1927.

Solicitors of Complainant-Respondent.

10

PETITION OF APPEAL.

Filed June 29, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

20 EDNA C. OSBORNE, administratrix of the Estate of S. Harvey Osborne, Complainant-Respondent,

and

HENRY DIFFANY, Defendant-Appellant.

On Bill, etc.

On Appeal from the Court of Chancery.

Petition of Appeal.

30 To the Honorable, the Court of Errors and Appeals in the last resort in all causes:

40 The petition of Henry Diffany, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date February 28, 1927, wherein Edna C. Osborne, administratrix of the Estate of S. Harvey Osborne was complainant and the said Henry Diffany was defendant, in this respect, to wit:

Petition of Appeal.

(a) That the decree adjudges that there is due from the defendant to the complainant the sum of \$7,359.64 with interest from November 25, 1924.

(b) That the decree adjudges that the defendant is not entitled to depreciation on machinery, computed by the master at \$6,170. 10

(c) That the decree adjudges that the defendant should be charged with \$4,000 proceeds of the insurance covering stock.

(d) That the Chancellor, in stating the account between the complainant and defendant did not allow the defendant proper depreciation on defendant's machinery.

(e) That the Chancellor, in stating said account did not allow the defendant a credit for loans made amounting to \$2,704.11. 20

(f) That the Chancellor, in stating said account, did not allow defendant credit for \$2,966.14 realized from the sales of defendant's own merchandise.

(g) That the Chancellor, in stating said account, did not allow defendant credit for \$3,000 for rents received from property belonging exclusively to the defendant. 30

(h) That the Chancellor, in stating said account, did not charge the complainant with a share of the losses sustained in the business during the year 1924, amounting to \$6,149.61.

(i) That the said decree charges the defendant with the costs of the suit and counsel fees to the solicitor of the complainant.

40

Petition of Appeal.

And your petitioner humbly appeals from said decree upon the ground that the same is erroneous, in that the said decree should have adjudged that there is nothing due from the defendant to the complainant.

10 Your petitioner therefore prays that the said decree of the Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

LOUIS J. BEERS,
Solicitor for and of Counsel with Appellant.

20 Service of a copy of the within petition of appeal is hereby acknowledged this 20th day of June, 1927.

KING & VOGT,
Solicitors of Complainant-Respondent.

30

40

Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

Filed June 22, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

EDNA C. OSBORNE, administra-
trix of S. Harvey Osborne,
Complainant-Appellee,

and

HENRY DIFFANY,
Defendant-Appellant.

*On Appeal
from
Court of
Chancery.*

*Answer to
Petition of
Appeal.*

10

20

The answer of Edna C. Osborne, administratrix of S. Harvey Osborne, the above-named appellee, to the Petition of Appeal of Henry Diffany, the above-named appellant.

This appellee not admitting the truth of all or any of the matters in said petition on appeal contained, for answer thereto, nevertheless admits that a decree was on February 28, 1927, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned, and as therein set forth; but as to the substance and form of said decree this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and she prays that the same may be affirmed, with costs to be taxed in favor of this appellee.

KING & VOGT,
Solicitors for and of Counsel with Appellee.

30

40

Stipulation.

STIPULATION.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	<p><i>Between</i></p> <p>EDNA C. OSBORNE, administra- trix, etc., <i>Complainant-Respondent,</i></p> <p style="text-align: center;"><i>and</i></p> <p>HENRY DIFFANY, <i>Defendant-Appellant.</i></p>	<p><i>On Appeal from Chancery. Stipulation.</i></p>
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20 It is hereby stipulated by and between Louis J. Beers, solicitor of appellant, and King & Vogt, solicitors of respondent, that the appellant's printed State of Case need not contain a copy of the exhibits hereinafter set forth, but in lieu thereof the original exhibits not so printed may be used on the argument before the New Jersey Court of Errors and Appeals if the Court or Counsel desire to use them.

30 D. 3, D. 4 and D. 5, being books of Diffany & Co.

C. 1 and C. 2, being the sales books of Diffany & Co.

C. 5, C. 6, C. 7, C. 8 and C. 9, being bank deposit books and check books of Diffany & Co.

D. 1 and D. 2, being copies of 1923 and 1924 income tax returns of Henry Diffany.

D. 3, D. 4, D. 5, D. 6 and D. 7, being monthly statements of Smith.

40 C. 1 of May 22, being Diffany's book, the items of which are printed in the testimony.

Exhibits.

C. 1, C. 2 and C. 3, of May 1, being photostatic copies of the proofs of fire loss and letters of Lyon & Lyon.

KING & VOGT,
Solicitors of Complainant.

LOUIS J. BEERS, 10
Solicitors of Defendant.

Exhibit D. 1.

DIFFANY & COMPANY
Profit & Loss Statement
Dec. 31, 1923

Sales		\$41,962.90	
Less Returns	\$707.62		
Less Discounts	901.03		20
		1,608.65	
		\$40,354.25	
Inventory Jan. 1, 1923	\$4,072.41		
Purchases	\$14,829.49		
Less Discounts	\$243.45		
Less Returns	164.86	408.31	14,421.18
		\$18,493.59	
Inventory Dec. 31, 1923	834.51		
Cost of Sales		17,659.08	30
Gross Profit from Sales		\$22,695.17	
Deductions:—			
Office Salary and Commissions	\$ 2,665.02		
General Expense	4,488.96		
Payroll	13,259.63		
H. Diffany	2,686.27		
Rent	1,400.00		
		24,499.88	
Net Loss		\$ 1,804.71	40

Exhibits.

Exhibit D. 2.

DIFFANY & COMPANY
PROFIT AND LOSS STATEMENT
DECEMBER 31, 1924

	Sales		\$38,023.60	
	Less: Returns	\$2,182.71		
10	Discounts	1,727.60	3,910.31	
			<u>34,113.29</u>	
	Inventory, Jan. 1, 1924.....	\$ 834.51		
	Purchases	\$17,077.76		
	Less: Returns	\$188.13		
	Discounts ...	174.05 362.18	16,715.58	
			<u>\$17,550.09</u>	
	Inventory, Dec. 31, 1924.....	1,142.00		
	Cost of Sales		16,408.09	
20	Gross Profit on Sales		\$17,705.20	
	Other Income: Bank Interest		66.92	
			<u>\$17,772.12</u>	
	Total Gross Income		\$17,772.12	
	Expenditures:			
	Payroll	\$14,827.10		
	Office Salary & Commission (Mr. Osborne)	1,652.32		
	Rent	2,950.00		
	Expenses (General)	4,492.31	23,921.73	
			<u>Deficit....</u>	6,149.61
30	Drawn by Mr. Diffany, \$1,958.61.			

Exhibits.

Exhibit C. 12.

Dec. 30, 1924

50 Dz. Pots for Casserole.....	1.50	75.	
33 Gr. #1 Inserts opal	4.00	132.	
24 " #0 " "	3.00	72.	
10 " 2 1/4 Stamp Plate.....	1.00	10.	
50 " Handles .....	.30	15.	10
10 " Small Tube .....	.20	20.	
8 " Large Tube .....	.20	16.	
56 lbs. Inside for Match Boxes.....	.20	11.	
70 " J7 Ash Tray 1355 Brass.....	.35	25.	
26 Gr. Painted Green 2 1/4".....	1.50	39.	
11 " " " 3 1/2	4.00	48.	
25 Dz. Cup Part for 25.....	.50	12.50	
22 " " " " 22.....	.50	11.	
12 " " " " 65.....	.50	6.	
5 " " " " 52.....	.30	1.50	
9 " " " " 60.....	1.00	9.	
125 lbs. Tin Match Holders .....	.20	25.	
2 1/4 Gr. Plated J7 Ash Trays.....	2.00	4.50	
13 1/2 Soap Holder .....	.50	7.	20
477 lbs. Zink Sheets .....	.15 per lb.	71.	
1/4 Box 1.4X Tin Sheet Metal	26.00 per Box	6.25	
1/2 " 1C " " "	15.00 " "	7.50	
4 Boxes 15x15 " " "	15.00 " "	60.	
2 " 10x20 " " "	14.00 " "	28.00	
8 Gr. Soap		32.00	
95 lbs. Ferril for Base Stem Holder...	15.00	15.25	
7 Gr. Raw Basses #D15	2.00	14.	
9 " Clump Bass 185 lbs.....	1.00	9.	
13 " long stems	1.50	19.50	
5 " 52 Small Bass	1.00	5.	
Black Paper		25.	
630 Cor. Paper Boxes 626.....		35.	30
1100 " " " #7.....		45.	
290 " " " 1.....		3.	
1100 " " " 2.....		25.	
		<u>940.</u>	

Exhibits.

	7" Goose Neck Wire		15.
	120 lbs. 6"		16.50
	5 Gr. 6' Plated .....	.50	2.50
	1 " D54	18.00	18.00
	1 1/4 " J7	18.	22.50
	103 Dz. ....	.50	11.50
	2 Gr. D52	8.	16.00
	2 Dz. D63	3.	6.
10	4 " D25 .....	.50	2.
	13 Gr. Brush	7.	91.
			<hr/>
			1142.

Exhibit D. 4.

No. 10460
 Newark, N. J. May 29th 1920
FIDELITY TRUST COMPANY
 20 Pay to the order of Diffany Co. \$500 00/100
 Five Hundred 00/100.....Dollars
 Henry Diffany

Endorsed.

Pay to the Order of
 Manufacturers National Bank
 Newark, N. J., or order
 Diffany Co.

30 No. 1001
 Newark, N. J. March 8th 1920
FIDELITY TRUST COMPANY
 Pay to the order of Diffany Co. \$200 00/100
 Two Hundred 00/100.....Dollars
 Henry Diffany

Endorsed.

Usual bank endorsement.

40 Pay to Order of
 Manufacturers National Bank
 Newark, N. J., or Order
 Diffany Co.

Exhibits.

No. 40168
 Newark, N. J. Sept 18 1919
FIDELITY TRUST COMPANY
 Pay to the order of S. H. Osborn \$22 56/100
 Twenty Two 56/100.....Dollars
 Henry Diffany 10

Endorsed.

S. Harvey Osborn
 Pay to the Order of
 The Fidelity Trust Co.
 Usual bank endorsements.

No. _____
 Newark, N. J. March 29 1919
FIDELITY TRUST COMPANY
 Pay to the order of Diffany Co. \$50 00/100 20
 Fifty 00/100Dollars
 Henry Diffany

Endorsed.

Pay to the Order of
 National Newark and Essex Banking Co.
 Newark, N. J.
 Diffany & Co.
 Usual bank endorsement.

No. _____ 30
 Newark, N. J. May 1st 1918
FIDELITY TRUST COMPANY
 Pay to the order of P. H. Seery Tube Co.
 200 00/100
 Two Hundred 00/100.....Dollars
 Henry Diffany

Endorsed.

P. H. Seery Tube Co.
 Pay to the Order of
 Washington Trust Co. 40
 Newark, N. J.
 Usual bank endorsement.

Exhibits.

No. 41041

Newark, N. J. Sept 18 1919

FIDELITY TRUST COMPANY

Pay to the order of Jacques Kahn \$268 45/100
Two Hundred and Sixty Eight 45/100..Dollars

Henry Diffany

10

Endorsed.

Jacques Kahn
Pay Columbia Bank or Order,
Jacques Kahn, Inc. Louis Kahn, Treas.
Usual bank endorsements.

No. _____

Newark, N. J. Sept 19th 1919

FIDELITY TRUST COMPANY

Pay to the order of Diffany & Co...\$1500 00/100
Fifteen Hundred 00/100.....Dollars

Henry Diffany

20

Endorsed.

Credit Diffany & Co.
Manufacturers Nat. Bank
Newark, N. J.

30

40

Exhibits.

Exhibit D. 8.

DIFFANY & CO.
COMPARATIVE BALANCE SHEET
DECEMBER 31, 1923

	Balance Sheet 12/31/22	Balance Sheet 12/31/23	Increase	Decrease
Broad & Market Nat'l Bank.....	\$ 4,826.60	3,983.89	\$10,157.29	
Manufacturers' Nat'l Bank	4,330.82	8,318.45	3,987.63	
Accounts Receivable	8,387.87	3,239.75		\$ 5,148.12
Merchandise Inventory	4,072.41	834.51		3,237.90
Machinery	18,000.00			18,000.00
	<u>\$39,617.70</u>	<u>\$27,376.60</u>	<u>\$14,144.92</u>	<u>\$26,386.02</u>
Accounts Payable	\$ 132.12	\$ 774.37	\$ 642.25	
Reserve for Depreciation	9,000.00			\$ 9,000.00
Capital (Net Worth)	30,485.58	26,602.23		3,883.35
	<u>\$39,617.70</u>	<u>\$27,376.60</u>	<u>\$ 642.25</u>	<u>\$12,883.35</u>

RECONCILIATION OF INCREASES AND DECREASES OF ASSETS AND LIABILITIES WITH NET LOSS AS PER PROFIT AND LOSS STATEMENT

Total Increase in Assets	\$14,144.92
Plus total decrease in liabilities	9,000.00
	<u>\$23,144.92</u>
Less: Total decrease in assets	\$26,386.02
Total increase in liabilities	642.25
	<u>27,028.27</u>
Less Cash invested	\$ 3,883.35
	241.36
LOSS, AS PER TAX REPORT	<u>\$ 4,124.71</u>

Exhibits.

DIFFANY & CO.
PROFIT & LOSS STATEMENT
DECEMBER 31, 1923

#1. Sales, (as per schedule).....		\$41,962.90
#2. Less: Returns (as per schedule).....	\$ 707.62	
#3. Discounts " " "	901.03	1,608.65
		<hr/>
Net Sales.....		\$40,354.25
Inventory, 1/1/23 (as per schedule with master).....	\$ 4,072.41	
#4. Purchases (as per schedule).....	\$14,829.49	
#5. Less: Discounts " " "	\$243.45	
#6. Returns " " "	164.86	
	<hr/>	408.31
Net purchases	\$14,421.18	
#7. Plus: Factory Payroll (as per schedule)....	13,259.63	27,680.81
		<hr/>
		\$31,753.22
Inventory, 12/31/23, (as per schedule with master).....	834.51	
		<hr/>
Cost of Production		30,918.71
		<hr/>
Manufacturing Profits		\$ 9,435.54
Less: Selling Expense		1,040.00
		<hr/>
Profit on Sales		\$ 8,395.54
General Expense	\$ 4,488.96	
Rent	1,400.00	
Depreciation	770.00	6,658.96
		<hr/>
NET PROFIT		\$ 1,736.58

RECONCILIATION WITH NET LOSS AS SHOWN ON TAX REPORT

Net Profit, as above		\$ 1,736.58
Less: Drawings—Mr. Diffany	\$ 2,686.27	
" Mr. Osborne	1,625.02	
Fire Loss	1,550.00	5,861.29
		<hr/>
LOSS, AS PER TAX REPORT		\$ 4,124.71

Exhibits.

DIFFANY & CO.
SCHEDULE SUPPORTING PROFIT & LOSS STATEMENT
DECEMBER 31, 1923

	#1	#2	#3	#4	#5	#6	#7
	Sales	Returned Sales	Sales Discounts	Purchases	Purchase Discounts	Returned Purchases	Factory Payroll
Jan.	\$ 1,461.19	\$ 57.88	\$ 68.53	\$ 754.89	\$ 14.19	\$ 12.07	\$ 812.42
Feb.	1,224.06	85.62	57.10	829.54	10.87	2.16	745.77
Mch.	2,165.48	47.35	26.29	1,895.05	9.23	.87	973.44
April	1,916.40	41.24	31.82	1,783.35	32.10	41.24	903.19
May	3,275.69	131.99	42.78	2,397.22	3.95	13.82	868.43
June	6,524.67	29.76	79.84	1,755.50	22.45	1.70	1,374.89
July	4,803.77	.22	20.97	1,618.57	21.93	54.90	1,371.80
August	7,026.33	12.20	124.33	2,693.00	37.61	31.01	1,865.08
Sept.	6,059.15	229.57	128.33	2,404.98	26.79	6.29	1,487.66
Oct.	7,506.16	71.79	165.03	1,982.88	32.04	.80	2,130.15
Dec.			110.86	549.61	26.28		726.80
			45.15	484.90	6.01		
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
	\$41,962.90	\$707.62	\$901.03	\$19,149.49	\$243.45	\$164.86	\$13,259.63
				Less: Amount lost in fire,	4,320.00		
					<hr/>		
					\$14,829.49		

Exhibit D. 9.

DIFFANY & CO.
COMPARATIVE BALANCE SHEET
DECEMBER 31, 1924

	Balance Sheet 12/31/23	Balance Sheet 12/31/24	Increase	Decrease
Broad & Market Nat'l Bank	3,983.89	6,589.93	\$2,606.04	
Manufacturers' Nat'l Bank	8,318.45			\$8,318.45
Accounts Receivable	3,239.75	1,960.45		1,279.30
Merchandise Inventory	834.51	1,142.00	307.49	
	<hr/>	<hr/>	<hr/>	<hr/>
	\$27,376.60	\$20,692.38	\$2,913.53	\$9,597.75
Accounts Payable	\$ 774.37	\$ 2,107.08	\$1,332.71	
Capital (Net Worth)	26,602.23	18,585.30		\$8,016.93
	<hr/>	<hr/>	<hr/>	<hr/>
	\$27,376.60	\$20,692.38	\$1,332.71	\$8,016.93

Exhibits.

RECONCILIATION OF INCREASES AND DECREASES OF ASSETS AND LIABILITIES WITH NET LOSS AS PER PROFIT AND LOSS STATEMENT

Total Increase in Assets		\$ 2,913.53
Less: Total decrease in assets	\$9,597.75	
Total increase in liabilities	1,332.71	10,930.46
		<u>\$ 8,016.93</u>
Plus: Advances to Mr. Diffany		91.29
		8,108.22
Less: Drawings—Mr. Diffany		1,958.61
Loss, as per Tax Report		<u>\$ 6,149.61</u>

DIFFANY & CO.
PROFIT & LOSS STATEMENT
DECEMBER 31, 1924

#1. Sales, (as per schedule)		\$38,023.60
#2. Less: Returns (as per schedule).....	\$2,182.71	
#3. Discounts " " "	1,727.60	3,910.31
		<u>Net Sales.....</u>
		\$34,113.29
Inventory, 1/1/24 (as per schedule with master).....	\$ 834.51	
#4. Purchases, (as per schedule).....	\$17,077.76	
#5. Less: Discounts " " "	\$174.05	
#6. Returns " " "	188.13 362.18	
		<u>Net purchases</u>
		\$16,715.58
#7. Plus: Factory Payroll (as per schedule)....	14,827.10	31,542.68
		<u>\$32,377.19</u>
Inventory, 12/31/24 (as per schedule with master).....		1,142.00
		<u>Cost of Production</u>
		31,235.19
		<u>Manufacturing Profits</u>
		\$ 2,278.10
Less: Selling Expense		1,040.00
		<u>Profit on Sales</u>
		\$ 1,838.10
Other Income: Bank Interest		66.92
		<u>\$ 1,905.02</u>
General expense	\$ 4,492.31	
Rent	2,950.00	7,442.31
		<u>Net Loss.....</u>
		5,537.29

Exhibits.

RECONCILIATION WITH NET LOSS AS SHOWN ON TAX REPORT

Net Loss, as above	\$ 5,537.29
Plus: Excess Drawings—Mr. Osborne	612.32
LOSS, AS PER TAX REPORT	<u>\$ 6,149.61</u>

DIFFANY & CO.
SCHEDULE SUPPORTING PROFIT & LOSS STATEMENT
DECEMBER 31, 1924

	#1 Sales	#2 Returned Sales	#3 Sales Discounts	#4 Pur- chases	#5 Purchase Discounts	#6 Returned Purchases	#7 Factory Payroll
Jan.			\$ 23.17	\$ 1,323.59	\$ 1.68		\$ 487.50
Feb.	\$ 564.82	\$ 48.88	32.21	887.97	1.45		916.04
March	1,290.00	119.43	22.22	89.49	5.41		870.76
April	1,291.01	73.25		581.05	8.29	15.90	822.82
May	1,930.43		11.52	1,749.63	9.09		1,127.96
June	1,781.54	4.63	35.35	1,207.48	20.05	5.08	1,208.55
July	4,585.61	6.50	52.38	2,714.00	12.10	38.54	1,234.33
August	4,786.57	93.95	92.13	1,441.36	19.20	95.83	1,894.33
Sept.	5,651.32	339.70	89.55	2,195.48	23.80	.60	1,401.69
October	7,669.41	354.20	127.14	1,921.19	34.18	.80	2,029.04
Nov.	4,876.30	248.91	147.84	1,618.10	13.52	22.40	1,465.58
Dec.	3,596.59	893.26	1,094.09	1,348.42	25.28	8.98	1,368.50
	<u>\$38,023.60</u>	<u>\$2,182.71</u>	<u>\$1,727.60</u>	<u>\$17,077.76</u>	<u>\$174.05</u>	<u>\$188.13</u>	<u>\$14,827.10</u>

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

New Jersey Court of Errors and Appeals*Between*EDNA C. OSBORNE, adminis-
tratrix of the Estate of S.
Harvey Osborne,
*Complainant-Respondent,**and*HENRY DIFFANY,
*Defendant-Appellant.**On Bill, etc.**On Appeal
from
Court of
Chancery.***APPELLANT'S BRIEF.**

This suit was brought by complainant's intestate to establish a partnership between himself and the defendant, and for an accounting. The defendant denied the partnership. After hearing the primary question involved, the Chancellor, on advice of Vice-Chancellor Fielder, entered a decree on February 9, 1925, adjudging that there was no partnership existing between the parties, but that the agreement between them was that Osborne was to procure orders for articles to be manufactured *in defendant's plant*, Osborne to receive \$20 a week as compensation, and if the *net profits* should exceed that amount, Osborne was to receive a one-half of said *net profits* less his salary as commission; that any new machinery or tools or the like purchased and used in said business were to be the sole property of the defendant (see decree, State of Case, pp. 9-10). The findings of the Court and the agreement between the parties was in exact accordance with the defendant's answer; and in direct contradiction of complainant's allegations in his bill that there was a partnership existing between the parties.

By its said decree the Court directed that the matter be referred to a master to determine what, if anything, was due complainant under the agreement found to exist between the parties.

Neither complainant nor defendant is dissatisfied with or appealing from the decree entered on the final hearing. This is defendant's appeal from the final decree based on the master's report. The defendant-appellant contends that the decree on the accounting is in contradiction of the arrangement found to exist between the parties by the decree of February 9, 1925 (State of Case, p. 9).

I again call the attention of this Honorable Court to the fact that the Court found and decreed that Osborne was entitled to one-half of the *net profits* of the business.

The term "net profits" has been definitely and certainly determined by the courts, including the New Jersey Court of Chancery.

In *Lee v. Heppenheimer*, 89 N. J. Eq. 36, V.C. Pitney defined "net profits" as follows:

"In ascertaining the net profit derived from carrying on any ordinary manufacturing business, the gross profit to be derived therefrom is to be divided first into a fair rental for the factory, based on cost of its reproduction; second, interest on working capital; third, cost of operating and administration; and the balance if any is net profit."

In *Conville v. Shook*, 24 N. Y. Supp. 547, the Court held:

"Where a partner in a manufacturing concern is entitled to a certain per cent. of the profits for each year, it is proper, in estimating such profits, to charge off a certain per cent. of the cost of the plant each year for depreciation of the value thereof."

This case was affirmed in 144 N. Y. 686, 29 N. E. 405.

In the Massachusetts case of *Stone v. Wright Wire Co.*, 199 Mass. 306, N. E. 471, the Court had for consideration a contract between a corporation engaged in the manufacture of wire cloth and another for the establishment of the new business of manufacturing and selling wire rope, which contract provided that the corporation should furnish capital of \$50,000 if the sales did not exceed \$100,000 a year, represented by proper buildings with power and machinery and by the amount of capital necessary to purchase and provide the wire necessary for the production of rope to the amount named per annum. The contract further provided that the parties were each to receive one-half of the net profits. In making up the account, the corporation charged against gross earnings of the business, among other items, a sum for depreciation of buildings and machinery. On appeal the Court held that charges for the depreciation of machinery and buildings, for power furnished by the corporation to the wire department for repairs, for insurance and for loss of finished product destroyed while in a warehouse hired, maintained and managed by the wire rope department were proper charges against the gross earnings for the purpose of determining the net profits. The Court said:

"On the right and propriety of making such charges against the gross earnings to ascertain the 'net profits' there can be (in our opinion) no doubt * * * So far as depreciation, repairs and loss of finished product are concerned, they are a proper charge against gross earnings because there can be no 'net profit' in a partnership until the the capital is made good."

In *Buie v. Kennedy* (N. C.), 80 S. E. 444, it was said:

"The principal items in dispute between the parties were as to what constituted profits of the business and whether in estimating the same, depreciation of the capital by its use in the business should be counted as a loss, or whether the profits to be divided should be ascertained simply by deducting the costs and expenses of operation from the gross returns of the business. The referee was of the opinion that no loss or depreciation of capital should be considered in making the computation, * * * While the judge was of the opposite opinion and held * * * the amount by which the capital had been reduced in value by use in the business should be considered and deducted from the gross returns. * * * But whatever view we take, whether the amount contributed to capital is to be considered as a debt of the firm or whether if the capital is impaired, it is to be regard as a loss, the ruling of the judge was correct."

This appellant's appeal is directed to the method adopted by the Master and Court in determining the net profit of said business and maintains that the Master and the Court erred in their mode of determining and allowing of \$7,359.64 as the complainant's half of the net profits of the business.

First.

In determining the net profit the Court did not allow the defendant any depreciation on his (defendant's) machinery and tools.

The Master found (State of Case, p. 157) that Diffany's machinery was, on January 1, 1913, of the value of \$18,000 and was, on January 1, 1916 (the date of the commencement of the relationship between Osborne and Diffany), of the value

of \$15,425. He found as a fact that the machinery depreciated at the rate of five per cent. per year. He then allowed defendant depreciation of five per cent. per year for the eight years during which the relations between the parties existed amounting to \$6,170. On exceptions to the Master's report, this appellant contended and still contends that the five per cent. should have been allowed on \$18,000, the original value of the machinery, and not on the depreciated value as of January 1, 1916, in which event the allowance to this appellant would have been \$7,200 instead of \$6,170. *Without any exception by anyone to the Master's allowance of depreciation, without any testimony to the effect that the machinery had not depreciated, and in the face of positive testimony that the machinery had depreciated and that five per cent. per year was a fair and reasonable amount to be allowed for depreciation on defendant's machinery* (State of Case, pp. 79-80; also p. 81, l. 10, *et seq.*), the Vice-Chancellor concludes that "we have no concern with the amount of depreciation to be charged against the machinery" (State of Case, p. 169) and in settling the accounts between the parties, allowed defendant nothing for depreciation on the machinery although used by the business for eight years.

The Court evidently took the view that because Diffany received \$7,000 from the insurance company for loss by fire in 1923, he should not be allowed depreciation. But the \$7,000 received did not compensate the defendant for \$18,000 worth of machinery which he had at the commencement of the arrangement with Osborne, but only compensated him for the loss he had on the machinery *at its depreciated value*. In other words, unless Diffany received allowance for

both depreciation and the fire loss, he was giving Osborne *his personal capital* for net profit. Under the cases above cited, he was entitled to his *whole* capital investment before there could be any *net profit* to divide.

Osborne was to receive one-half of the net profits of the business. Depreciation of \$7,200 should have been allowed Diffany in the accounting. The failure of the Court to allow it was clearly error.

Second.

The Chancellor charged the appellant, Diffany, with \$4,000, realized from the insurance covering machinery and stock on the theory that the loss on machinery which belonged to Diffany personally was \$7,000 and the loss on the stock on hand was \$4,000.

The proof of loss filed with the insurance company in 1923 (long before any differences arose between the complainant and defendant), set forth the loss to machinery as \$8,230 and the loss of stock at \$4,320, a total loss of \$12,550. The total insurance carried was \$11,000 (see State of Case, p. 80). The defendant denied that the entire stock insured belonged to the business, but claimed that it was in part, his own property not connected with the business. However, assuming that all the stock was the property of the business, Diffany should have been allowed 8230/12550 of the \$11,000 and should have been charged only 4320/12550 of the \$11,000 of \$3,784.32, so that he was overcharged \$215.68.

Third.

Defendant contended that he had loaned the business \$2,704.11 (see Exhibit D. 4—7 checks). The Master refused to allow credit to Diffany

for them (see State of Case, p. 158) and the Court sustained the Master's findings (State of Case, p. 171).

Nowhere in the testimony is there a single word of contradiction to Diffany's statement that he made the loans and that they were not repaid.

In *Baldauf v. Russell*, 88 N. J. Law 303, at page 306, the Court of Errors and Appeals said:

"It is true that the trial judge certifies that after the cross examination of the witness, he concluded that his testimony was unworthy of belief. But the testimony of a competent witness cannot be capriciously rejected. There must appear some good reason for such action, as for example, that his story was inherently improbable, or that it was contradicted by some other testimony, or by some proven fact or circumstance, or by testimony impeaching his truth and veracity."

And in *Day v. Hopping*, 123 Atl. Rep. at page 869, the said Court says:

"We are unable to detect anything inherently improbable in the testimony given by the respondents, and therefore conclude that the learned Vice-Chancellor did not err in refusing to reject their statements in his consideration of the cause before him."

We maintain that Diffany should have been allowed \$2,704.11, for the checks prove the loans and there is no testimony that they were repaid.

Fourth.

The Master found and the Court decreed that Osborne drew from said business \$5,051.28 more than Diffany over a period of eight years. Yet in stating the account between the parties, the

Court failed and neglected to allow the defendant, Diffany, interest on this sum.

Year	Osborne Drew	Diffany Drew	Osborne's Excess	Diffany's Excess
1916	\$1,260.09	None	\$1,260.09	
1917	1,961.35	None	1,961.35	
1918	2,369.90	\$ 126.04	2,243.86	
1919	2,670.23	4,420.01		\$1,749.78
1920	2,505.75	3,961.30		1,455.55
1921	4,076.07	1,095.00	2,981.07	
1922	2,167.85	2,336.27		168.42
1923	2,665.02	2,686.27		21.05

(See pp. 120-121 of State of Case.)

A statement of interest, credits and allowances on these differences figured at six per cent. from the end of each year to November 25, 1924, the date of the termination of the agreement would be:

Year	Amount	Due Diffany for interest	Due Osborne for interest
1916	\$1,260.09	\$522.50	
1917	1,961.35	696.00	
1918	2,243.86	660.00	
1919	1,749.78		\$419.50
1920	1,455.55		254.75
1921	2,981.07	341.75	
1922	168.42		10.05
1923	21.05		1.26
		<hr/> \$2,220.25	<hr/> \$677.56
		677.56	

The difference is \$1,542.69 which amount should have been allowed the defendant, Diffany, as a credit in the accounting.

Fifth.

The decree adjudges that there was due on November 25, 1924, from the defendant, Diffany, to Osborne \$7,359.24

We maintain that Diffany should have been allowed, in addition:

First: Depreciation of \$7,200 in accordance with the views and statement above set forth under "First" \$ 7,200.00

Second: Overcharge on insurance 215.68

Third: Loans to business 2,704.11

Fourth: Interest on overdrawings of Osborne . . . 1,542.69

\$11,662.48

so that the decree of the Chancellor should have been in favor of this appellant and should have adjudged that there was nothing due Osborne.

It would then of course follow that the costs and allowances to counsel for the complainant should not have been made against this appellant.

As to the statement by the Court that Diffany testified reluctantly and did not aid the Master, I respectfully submit that such a conclusion is not borne out by the testimony. It is plain from the reading thereof that the complainant was on a "fishing expedition," and at each hearing before the Master requested further data and books, all of which were furnished, where possible, by the defendant. That he could not produce records which were destroyed by fire was certainly no fault of his. An examination of the record shows that complainant had six

separate and distinct hearings before the Master and that at each of these, Diffany produced each and every article, paper and book which was asked for; that between hearings he had made up by the banks, statements and accounts which were wanted and required by the complainant, and had certain public accountants make up statements, copies of which were furnished complainant from time to time.

Because Diffany's counsel would not consent to permit statements made by Osborne before his death (*which the Court held were inadmissible legal evidence*) to be used at the hearings, should not mitigate against Diffany. He had a right and his counsel insisted for him, and probably without Diffany's request, that complainant prove his case with legal evidence. That Diffany offered to settle with Osborne prior to the institution of the suit was really not evidential and I can see no reason why the Court should consider it an admission of liability. Diffany had the right to "buy his peace." The Court in his conclusions even went far beyond what was necessary to sustain the Master's findings in allowing complainant and charging this defendant with money. I maintain that this is borne out by consideration of the Court's statement (on p. 173 of the State of Case) where he says, "no exception was filed by complainant or defendant to the Master's finding with respect to the drawings from the business, by Osborne of \$19,676.17 and by Diffany of \$14,624.89, or to the credit of \$5,051.28, given by the Master to Diffany because of Osborne's excess drawings. I would point out that under the agreement between Osborne and Diffany, the former was entitled to draw \$20 per week and thereafter to share equally with Diffany in the profits. The amount charged

against Osborne includes the \$20 per week and that weekly sum it seems to me, should have been deducted from his drawings before determining whether or not his drawings were more or less than Diffany's. Further, Osborne's drawings probably include various items of money disbursed by him for expenses. However, no exception having been taken to the Master's finding in this respect, the same will stand."

This point, the Vice-Chancellor is in contradiction of his own findings which he made after hearing Osborne (while still alive) and the defendant, when he found that the agreement alleged by Osborne in his bill of complaint was untrue and that the answer of the defendant set forth the true arrangement between the parties, and when he advised the decree of February 9, 1925, in which he decreed that:

"Said S. Harvey Osborne to receive as compensation for his services in procuring said orders a salary of \$20 per week and if the net profit on the sale of said goods by said S. Harvey Osborne should exceed the sum of \$20 per week, said S. Harvey Osborne was to have a one-half part of said profits as a commission, *less said salary,*" etc.

I cannot understand why the Court should have made a suggestion in his opinion that the differences in drawings of the parties were improperly calculated to the disadvantage of Osborne when even Osborne never contended that they were incorrect and when the Master merely followed the exact method of the Court's own previous decree; neither can I conceive why the Court should engage in the speculation that Osborne's drawings "*probably include various items of money disbursed by him for expenses.*" Not even Osborne in his lifetime, nor his counsel, ever

contended that he had made any such disbursements.

It is respectfully submitted that the decree of the Court of Chancery should be reversed and a decree entered in favor of the appellant.

LOUIS J. BEERS,
Solicitor of Appellant.

New Jersey Court of Errors and Appeals.

Between

EDNA C. OSBORNE, Administratrix of
the Estate of S. HARVEY OSBORNE,
Complainant-Respondent,

and

HENRY DIFFANY,
Defendant-Appellant.

On Bill, &c.

BRIEF FOR RESPONDENT.

By a decree of the Court of Chancery dated February 19th, 1925 (S. of C., p. 9), it was determined that Henry Diffany and S. Harvey Osborne (the deceased complainant) entered into an agreement which continued to the date of death of S. Harvey Osborne, November 25th, 1924, whereby Osborne was to procure orders for shaving stands and kindred articles, said Osborne being paid for his services \$20.00 per week and if the net profits on the sale of said goods by Osborne should exceed that sum, Osborne was to receive one-half said profits as a commission less said salary.

Diffany had previously been in the business of manufacturing bag frames and had a factory in Newark and much of the necessary machinery. Osborne was well known in the trade and had a number of customers who immediately began the purchase of the product of the shaving stand busi-

ness. Osborne had access to the books and papers of the joint business and from time to time demanded an accounting from Diffany.

On or about January 1st, 1924 (33), when there was approximately \$15,000.00 in the bank accounts of the business, Diffany offered to divide this with Osborne, but Osborne from the information he had from the books, etc., thought that he should receive more. He afterwards employed counsel and conferences were then had looking to a settlement of the whole matter. No settlement being reached, the bill of complaint in this cause was filed February 6th, 1924. Before final hearing, Osborne died. His administratrix was substituted and the cause proceeded, resulting in the decree of February 19th, 1925, and an order of reference to Edward O'Byrne, Special Master, to take an account between the parties.

The Master began the taking of testimony, March 20th, 1925, filing his report October 21st, 1926 (S. of C., p. 154).

Seemingly disregarding the decree of the Court of Chancery, to account for the whole period January 1st, 1916 to November 24th, 1925, Diffany filed no account with the Master, contenting himself initially with producing certain books, and profit and loss statements for the years 1923 and 1924 (13-16, 37-38). He pretended this was all he could do. S. Harvey Osborne had died November 25th, 1924, so that his knowledge and testimony were not available for the accounting. It was thus necessary for the Master and complainant to extract from Diffany and such other sources as were available, the necessary information upon which to base an accounting for the whole period. There were numerous examinations of Diffany and his accountant to whom he had paid \$665.00, among other things, for statements intentionally withheld from the Master (pp. 88 and 125, &c.). Complain-

ant was also obliged to employ an accountant for the purpose of investigating and producing before the Master what was really Diffany's job to do (139, &c.). Thus, after many examinations, the forced production of Diffany's Bank statements over the full period, the production of proofs of loss in connection with the fire which occurred in 1923, and other information, all of which Diffany could have produced without trouble if he had been willing so to do, and after much labor by the Master and complainant, the Master was able to state an account and found a balance in favor of the complainant of \$7,770.64 (154).

To this report exceptions were filed by Diffany and the Master in all things sustained, except that the Vice-Chancellor determined that \$7,000.00 received from fire insurance on the Diffany machinery should not have been included as an asset of the joint business and accordingly eliminated this item from his calculation of the amount due, as well as an allowance of \$6,170.00 depreciation thereon, which the Master has charged as a liability of the joint business (165). This reduced the amount determined to be due by the Vice-Chancellor on the exceptions to \$7,359.64 (174). Final Decree (175).

From this decree Diffany appealed, assigning various errors. In the brief filed herein, appellant confines himself to four different phases of the matter, and in this brief the same order will be maintained.

First.

Diffany's accountants, for the purpose of 1923 and 1924 income tax returns, no others having been filed, fixed the value of his machinery as of March 3rd, 1913, at \$18,000.00, and in their calculations allowed a depreciation of 5% per year thereon. This figure of \$18,000.00 and 5% per year depreciation was satisfactory to Diffany. Accordingly, on January 1st, 1916, when the joint business began, machinery then had a value of \$15,425.00 (157). As a result of the fire in 1923, it is undisputed that Diffany received \$7,000.00 for the loss of the machinery and \$4,000.00 for stock (Exs. C-1, 2 and 3 of May 1st, not printed). It is also undisputed that the employees of the joint business, at the expense of the joint business, rehabilitated this machinery after the fire and that it was made practically as good as before the fire (94). The result was that notwithstanding the fire, Diffany had his machinery and had the \$7,000.00 insurance besides. The joint business paid the insurance premiums on this property all through the years, and if it is chargeable with depreciation thereon, it is certainly entitled to the benefit of the insurance moneys received thereon. The Master so concluded but the Vice-Chancellor thought otherwise and of all the exceptions filed to the Master's Report, this was the only point of difference between the two.

The Vice-Chancellor refused to allow depreciation upon Diffany's machinery, or to credit the joint business with the proceeds of \$7,000.00 fire insurance received thereon.

It is insisted that the Vice-Chancellor's determination is correct, but if this Court is of the opinion that depreciation of \$6,170.00 should be allowed

upon this machinery, the Court must then credit the joint business with the amount of fire insurance, \$7,000.00, the effect of which would be to increase the amount due the respondent by one-half this difference, or \$415.00 to \$7,359.64, the amount found due by the Vice-Chancellor.

Second.

The joint business paid all fire insurance premiums, both machinery and stock (142). \$4,000.00 was received for the stock loss in the joint business (Exs. C-1, 2, 3, not printed). The proofs of loss which were in evidence and agreed to by the appellant as being correct, specifically state that the loss of stock was \$4,000.00 and this amount was paid. It is inconceivable how any other sum than \$4,000.00 can properly be used in this connection. The stock destroyed was the property of the joint business and \$4,000.00 was paid as a result of its reported loss in the fire. This amount, Schroeder, the appellant's accountant, testifies is an asset of the joint business (114).

Third.

Certain checks were offered in evidence before the Master, which Diffany claimed represented moneys loaned by him to the joint business, and which had never been repaid. These checks were all dated between May 1st, 1919, and May 29th, 1920, five years prior to the accounting. Diffany signed all of the checks for the joint business, kept the books and paid all of the bills. He also signed the checks as a result of which both he and Osborne drew various sums from the business during the years. The business accounts from time to time

had substantial balances in them, so that there were ample funds of the business available to repay to Diffany any personal loans he might have made in the business. He had a bookkeeper by the name of Smith prepare statements of the Company's accounts once a month, and none of these (few of which were produced in evidence) ever showed any balance in favor of Diffany for personal loans. An inspection of the books indicated that there were other items of like nature when moneys were transferred from the business accounts of Diffany & Co., to the personal accounts of Diffany, subsequent in dates to these particular items, and it is inconceivable that if these items were still due and owing from the joint business to Diffany, that he would not have taken the moneys therefor long since.

"Evidence, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous, and is outside of judicial cognizance. Evidence is generally considered improbable when it imputes to the parties to a transaction, occurring in the ordinary course of business, conduct inconsistent with the principles by which men, similarly situated, are usually governed."

Daggers vs. Van Dyck, 37 N. J. E. 127, at 132, and many subsequent citations.

Both the Vice-Chancellor and the Special Master heard and saw Diffany testify, and have carefully studied the exhibits. They reached the conclusion from all the evidence that these items had been paid. The conduct of Diffany throughout the period of the joint business, as well as all of the other exhibits in the case justify a conclusion that items of this nature were long since balanced and forgotten.

Fourth.

For the first time throughout the whole case appellant claims an allowance of interest on the amount which the account indicates Osborne had drawn in excess of the amount drawn by Diffany. This point is not one of the errors assigned in the petition of appeal, and accordingly should not be considered. However, it may be said that the account and the exhibits in the case indicate that the manner in which moneys were withdrawn either by Diffany or Osborne was not according to any fixed system. The amounts of the withdrawals for any one year, as indicated by the account, were the sum totals of various smaller items drawn at various times during the year. The account was a mutual one and no interest should be charged either party as against the other until the death of S. Harvey Osborne, which occurred on November 25th, 1924. Then as both the final decree and the Master's Report indicate, Diffany was indebted to Osborne or his estate in excess of \$7,000.00. To calculate interest upon any intermediate item would involve a like computation on all the other intermediate items. It is submitted that the Court should disregard entirely Diffany's belated claim for interest.

The fifth item stressed in the defendant's brief is merely a résumé of the preceding points and no additional facts of any merit are therein referred to.

The majority of the exhibits in this case are books of account, check books and bank books, and no real conclusion can be reached as to the correctness of the final decree without a careful and painstaking inspection thereof. They have not been printed as part of the State of the Case; such course would be impracticable. The Vice-Chancellor and Special Master below have examined the exhibits with great care. As the record indicates, every op-

portunity was given Diffany. He gave the Court help only as item by item he was obliged to admit the truth. Unfortunately S. Harvey Osborne was not alive at the time of the accounting to aid the Special Master, or to deny the claims of Diffany. With Osborne's testimony and help it is very probable the amount found due him (now his administratrix), would have been substantially greater.

The defendant has been given the benefit of every doubt to which he is entitled. The account as finally approved by the Vice-Chancellor in his decree is a correct and true statement of the amount due from the defendant-appellant to the complainant-respondent.

The decree below should be affirmed by this Court.

Respectfully submitted,

KING & VOGT,
Solicitors for and of Counsel with
Complainant-Respondent.

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